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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-ninth session, 21-25 August 2017

Opinion No. 43/2017 concerning Daniil Islamov (Tajikistan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed that mandate and most recently extended it for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 9 June 2017 the Working Group transmitted to the Government of Tajikistan a communication concerning Daniil Islamov. The Government replied to the communication on 26 July 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Daniil Islamov, born in 1999, is a citizen of Tajikistan.

5. According to the source, Mr. Islamov has been studying the Bible with Jehovah's Witness groups since 2014. His grandmother is a Jehovah's Witness, and his mother also studies the Bible with the same religious group.

Arrest and detention

6. The source reports that, on 21 April 2017, Mr. Islamov was summonsed to the military enlistment office of the Ferdavsi district, Dushanbe, Tajikistan. In compliance with the summons, he appeared on 22 April 2017. He reportedly explained to the military officials in charge that his religious conscience did not permit him to accept military service. He also stated that he was willing to perform alternative civilian service.

7. The military officials reportedly rejected Mr. Islamov's request, stating that he was obliged to perform the military service since no alternative service was available in Tajikistan. On the same day, 22 April 2017, he was reportedly arrested and sent against his will to Military Unit No. 45989 in the Vakhsh region of Tajikistan.

8. The source reports that the officials assigned Mr. Islamov to undergo a medical check-up in the hospital. On 12 May 2017, the medical examination confirmed that he was fit for military service. As a result, and against his will, he was transferred back to Military Unit No. 45989, where he was placed in detention for refusing military service.

9. According to the source, Mr. Islamov remains detained at military training camp without a court hearing or court trial.

10. The source underlines that article 1 (3) of Law No. 30 of Tajikistan on military duties and military service, dated 29 November 2000, permits a citizen to perform alternative service. However, despite that legislative provision, Tajikistan does not in practice provide for alternative civilian service.

11. The source refers to the 2013 concluding observations of the Human Rights Committee (CCPR/C/TJK/CO/2, para. 21), in which the Committee reiterated its previous concern about the State party's lack of recognition of the right to conscientious objection to compulsory military service, and at the absence of alternatives to military service. The Committee called upon Tajikistan to take necessary measures to ensure that the law recognized the right of individuals to exercise conscientious objection to compulsory military service and to establish, if it so wished, non-punitive alternatives to military service.

12. According to the source, the lawyer of Mr. Islamov filed two complaints on 28 April 2017: one with the Military Commissariat of Dushanbe; and one with the Office of the Military Prosecutor of Dushanbe. On 12 May 2017, the Office of the Military Prosecutor reportedly replied to the lawyer, confirming that Mr. Islamov had been deprived of his liberty and transferred to Military Unit No. 45989. It also stated that alternative service could not be provided in Tajikistan. On 16 May 2017, the Military Commissariat reportedly informed the lawyer that the law on alternative service had not yet been adopted in Tajikistan and therefore that option was not yet available.

13. In addition, on 16 May 2017, Mr. Islamov reportedly filed a statement with the Director of Military Unit No. 45989 to explain his firm conviction based on the Holy Scriptures not to perform military service, and requesting that he be allowed to perform alternative service. He had not received a reply at the time of the submission by the source.

14. The source reports that, on 25 May 2017, Mr. Islamov's mother filed a complaint with the Presidential Administration. She had not received a reply at the time of the submission by the source.

15. According to the source, there are no further remedies available to Mr. Islamov.

16. The source submits that the detention of Mr. Islamov is arbitrary under categories I, II, III and V of the categories applicable to the cases under consideration by the Working Group.

Category I

17. According to the source, there is no legal basis for the deprivation of liberty of Mr. Islamov. The source reports that the military service law of Tajikistan permits a person to substitute compulsory military service with alternative civilian service. The law does not authorize a person who requests alternative civilian service to be detained for refusing military service.

18. However, despite that provision of domestic law, the Tajik authorities have reportedly failed to provide for alternative civilian service, as recognized by the Human Rights Committee in its 2013 concluding observations.

19. The source submits that the deprivation of liberty of Mr. Islamov also violates the international commitments of Tajikistan. Article 10 of the Constitution stipulates that international treaties take priority over domestic law. Tajikistan has ratified both the International Covenant on Civil and Political Rights and its Optional Protocol.

Category II

20. The source underlines that the right to conscientious objection to military service is universally recognized as a fundamental human right, particularly under article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant.

21. In that respect, the source notes that the Human Rights Committee has repeatedly recognized this right in decisions rendered against the Republic of Korea, Turkey and Turkmenistan, which had imprisoned and prosecuted Jehovah's Witnesses for refusing military service. In that respect, the source highlights the case of *Abdullayev v. Turkmenistan*.[1]

Category III

22. The source reports that Mr. Islamov has been detained without any trial. The source further notes that if a trial were to be held (which it has not) it should be before the civilian and not the military authorities.

23. The source refers to its deliberation No. 9 of the Working Group (A/HRC/22/44, para. 64) concerning the definition and scope of arbitrary deprivation of liberty under customary international law, in which the Working Group concluded that:

> Legislation allowing military recruitment by means of arrest and detention by the armed forces or repeated imprisonment of conscientious objectors to military service may be deemed arbitrary if no guarantee of judicial oversight is available. The Working Group has on occasion found the detention of conscientious objectors in violation of, inter alia, article 9 of the Universal Declaration of Human Rights and articles 9 and 18 of the International Covenant on Civil and Political Rights.

24. The source further refers to opinions No. 8/2008 and No. 16/2008 of the Working Group, and to the case of *Yoon and Choi v. Republic of Korea*[2] of the Human Rights Committee, which are similar to the present case.

25. For the above reasons, the source submits that the deprivation of liberty of Mr. Islamov violates article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant.

[1] See communication No. 2218/2012, *Abdullayev v. Turkmenistan*, Views adopted on 25 March 2015, para. 7.7.

[2] Communications Nos. 1321-1322/2004, *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Views adopted on 3 November 2006.

Category V

26. According to the source, the sole reason Mr. Islamov is being detained is because of his religious objection to military service. By doing so, the military authorities are attempting to coerce him into abandoning his religion. The source thus submits that he is the victim of religious discrimination.

Response from the Government

27. On 9 June 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure, requesting the Government to provide detailed information by 8 August 2017 about the current situation of Mr. Islamov and any comment on the source's allegations. The Government replied to the communication on 26 July 2017.

28. In its response, the Government confirms that Mr. Islamov came to the Military Commissariat and has not left the army since then, having undergone medical examinations that confirmed he was healthy and fit for service. The Government states that Mr. Islamov has been charged with evading military service. The Working Group notes that the Government portrays the situation of Mr. Islamov as one of a service member resisting military service without stating whether he was detained within the military camp or elsewhere.

Further comments from the source

29. On 27 July 2017, the response from the Government was sent to the source for its further comments. The source provided such comments on 9 August 2017. According to the source, the response from the Government did not dispute the facts of Mr. Islamov's case as set out in the original complaint filed by the source. The source recalls that Mr. Islamov has repeatedly requested the opportunity to substitute compulsory military service with alternative civilian service that is not under military control or supervision. The source also reports that, on 31 July 2017, the criminal investigator of the Military Prosecutor's Office issued a decision to indict Mr. Islamov under article 376 (1) of the Criminal Code of Tajikistan for evading military service. However, according to the source, no date has yet been set for the start of the criminal trial against Mr. Islamov, who remains in detention at Military Unit No. 45989 without court order or court authorization.

Discussion

30. Having heard both parties, the Working Group has decided that it was sufficiently informed and will now render its opinion.

31. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen to corroborate the prima facie credible allegations made by the source, even though the Government did not state that Mr. Islamov had been detained.

32. However, the mandate of the Working Group is broader than one of detention: it has jurisdiction on any deprivation of liberty that is not in accordance with the law and which is therefore arbitrary within the five-category framework (see A/HRC/30/36, paras. 47-50). In the present case, there is no doubt that Mr. Islamov is being held against his will at the military camp and the response from the Government has made that clear. Hence, it does not matter whether the Government referred to the situation as one of detention or not because, for the Working Group, Mr. Islamov has been deprived of his liberty and it does have jurisdiction on the case. That being said, it remains to determine whether that deprivation of liberty is arbitrary or not.

33. The source has quoted previous opinions of the Working Group and Views of the Human Rights Committee (see paras. 21 and 24 above) that make the reasoning in the present case straightforward.

34. The right to conscientious objection is well established in international law and derives from article 18 of the Covenant. The Government of Tajikistan has already been made fully aware of this by the Human Rights Committee, which has specifically recommended that Tajikistan provide for alternatives to military service in such cases (see CCPR/C/TJK/CO/2, para. 21). In the present case, it is also without doubt that Mr. Islamov's fate derives directly from his religious expression as a Jehovah's Witness. The Working Group thus concludes that the deprivation of liberty of Mr. Islamov is arbitrary within category II but also within category I as it lacks legal basis.

35. The Working Group recalls its deliberation No. 9 and notes that, in the present case, while Mr. Islamov has been deprived of his liberty within a military facility, there has been no measure taken to ensure any judicial oversight, in violation of both conventional (article 9 of the Covenant) and customary norms. The Working Group consequently finds that the non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments ratified by Tajikistan, is of such gravity as to give the deprivation of liberty of Mr. Islamov an arbitrary character, falling within category III.

36. Finally, the Working Group notes that Mr. Islamov has been a victim of discrimination on the basis of his religious belief, in violation of international law, especially article 26 of the Covenant. The Working Group thus concludes that his deprivation of liberty also falls within category V.

37. As per its practice, the Working Group is of the view that the present case should be referred to the Special Rapporteur on freedom of religion or belief.

Disposition

38. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Daniil Islamov, being in contravention of articles 9, 18 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

39. Consequent upon the opinion rendered, the Working Group requests the Government of Tajikistan to take the steps necessary to remedy the situation of Mr. Islamov without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the International Covenant on Civil and Political Rights.

40. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Islamov immediately and to accord him an enforceable right to compensation and other reparations, in accordance with international law.

41. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on freedom of religion or belief.

Follow-up procedure

42. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Islamov has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Islamov;

(c) Whether an investigation has been conducted into the violation of Mr. Islamov's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Tajikistan with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

43. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

44. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

45. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[3]

[*Adopted on 21 August 2017*]

[3] See Human Rights Council resolution 33/30, paras. 3 and 7.