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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 81/2017 concerning Mi Sook Kang and Ho Seok Kim (Democratic People's Republic of Korea and China)*

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 the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 14 September 2017 the Working Group transmitted to the Government of the Democratic People's Republic of Korea and to the Government of China a communication concerning Mi Sook Kang and Ho Seok Kim. The Government of the Democratic People's Republic of Korea has not replied to the communication, while the Government of China replied to it on 6 November 2017. The Democratic People's Republic of Korea is a party to the International Covenant on Civil and Political Rights, while China is not.

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,

* In accordance with rule 5 of the Working Group's methods of work, Seong-Phil Hong did not participate in the discussion of the present case.

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. Mi Sook Kang, who was unemployed and 35 years of age at the time of her detention, is a national of the Democratic People's Republic of Korea and usually resides in Pongsan County, North Hwanghae Province. According to the source, Mi Sook Kang fled to Yanji, China. However, in November 1999, she was arrested in Yanji by Chinese police officials, who did not show any arrest warrant or a copy of any other decision issued by a public authority. She was then repatriated to the Democratic People's Republic of Korea.

5. Ho Seok Kim, who was 37 years of age at the time of his detention, is a national of the Democratic People's Republic of Korea and usually resides in Yonsa County, North Hamgyong Province. Prior to his detention, Ho Seok Kim had worked as a labourer at the Sangha coal mine, located in Onsong County. The source reports that, in May 2001, Ho Seok Kim travelled to a region on the border between Mongolia and China in an attempt to seek asylum in the Republic of Korea, only to be arrested by Chinese police officials. The source notes that the officials did not show an arrest warrant or a copy of any other decision issued by a public authority. Ho Seok Kim was then repatriated to the Democratic People's Republic of Korea.

6. The source submits that, based on a mutual agreement between China and the Democratic People's Republic of Korea, defectors from the Democratic People's Republic of Korea present in China are regarded as illegal aliens. Therefore, when found by Chinese police officials, they are arrested and repatriated to the Democratic People's Republic of Korea. In this context, the source cites several laws applied to individuals who fled from the Democratic People's Republic of Korea to China, notably: the Mutual Cooperation Agreement for the Extradition of Defectors and Criminals of 1966; the Mutual Cooperation Protocol for the Work of Maintaining National Security and Social Order in the Border Areas of 1986; the Bilateral Agreement on Mutual Cooperation for the Maintenance of State Safety and Social Order of 1988; and the Democratic People's Republic of Korea-China Civil and Criminal Law Cooperation Treaty of 2003.

7. The source reports that, during the investigation, Mi Sook Kang confessed that she had met with a citizen of the Republic of Korea while she was in China. The source specifies that contacting a citizen of the Republic of Korea is regarded as a political crime in the Democratic People's Republic of Korea. Mi Sook Kang was thus suspected of espionage, detained and placed under surveillance: she received additional punishment for having fled the Democratic People's Republic of Korea.

8. The source observes that the authorities of the Democratic People's Republic of Korea do not usually inform suspects about applicable laws when arresting them, nor do they officially state the reasons for detention. However, in this case it is assumed that the following laws would be applied to Mi Sook Kang and Ho Seok Kim:

(a) Article 62 (Treason against the "fatherland") of the Criminal Law, which stipulates that a citizen of the Democratic People's Republic of Korea who commits treason against the "fatherland" in the form of defection, surrender, betrayal or disclosure of secrets, is to be sentenced to more than five years' reform through labour. Where the person concerned has committed a grave offence, he or she is to be sentenced to 5 to 10 years' reform through labour;

(b) The "10 principles" that are the foundation of the State's ideology.

9. The source explains that attempted defection from the Democratic People's Republic of Korea is considered to be an act of treason against the "fatherland".

10. The source submits that there is no official mechanism for filing complaints with the Government of the Democratic People's Republic of Korea on behalf of victims of arbitrary detention, as there are no warrants, trials, appeal procedures or legal remedies. Furthermore,

if a family member or a friend of a detainee attempts to search for or to rescue the detainee using unofficial means, he or she will be convicted of guilt by association. The source argues that this renders it impossible for family members or friends of detainees to employ even unofficial means to search for or to assist them.

11. The source also reports that individuals who are repatriated from China fall under the custody of the national security agency of the Democratic People's Republic of Korea. Therefore, it was national security agency officials who sent Mi Sook Kang and Ho Seok Kim to Camp 15 (Yodok Political Prison Camp), located in Yodok, South Hamgyong Province.

12. The source specifies that, given that Ho Seok Kim not only fled to China, but also attempted to defect to the Republic of Korea, he was considered as a political criminal and detained in a political prison camp.

13. The source concludes that, given the absence of an arrest warrant, legal procedures and legal representation, the arrests and detention of Mi Sook Kang and Ho Seok Kim are arbitrary and illegal.

Responses from the Governments

14. On 14 September 2017, the Working Group transmitted the allegations made by the source to the Government of the Democratic People's Republic of Korea and the Government of China under its regular communications procedure. The Working Group requested both Governments to provide, by 13 November 2017, detailed information about the current situation of Mi Sook Kang and Ho Seok Kim and any comments on the source's allegations.

15. The Working Group regrets that it did not receive a response from the Government of the Democratic People's Republic of Korea, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

16. The Government of China responded on 6 November 2017, stating that it did not have any information concerning Mi Sook Kang and Ho Seok Kim.

Discussion

17. This case involves two States and the Working Group will discuss the issues related to each of them separately. However, at the outset, it is worth noting that both Governments have failed to refute the prima facie credible allegations made by the source, despite the fact that the burden of proof rests with them to do so, as has been well-established in the Working Group's jurisprudence on evidentiary issues.[1]

Allegations against China

18. Both Mi Sook Kang and Ho Seok Kim were arrested in China and then returned to the Democratic People's Republic of Korea. Although grateful for the timely response submitted by China, the Working Group regrets that, in its response, China failed to address the substance of the allegations. The Working Group is therefore left with no other option than to consider the facts as established by the source. The Working Group is of the view that arrest without a warrant leads to arbitrary deprivation of liberty within category I.

19. Following the arrests of Mi Sook Kang and Ho Seok Kim, Chinese officials proceeded to forcibly repatriate them to the Democratic People's Republic of Korea, in violation of the principle of non-refoulement of aliens who would be at risk if returned to the country from which they had fled. Although customary in nature, this principle is enshrined in article 33 of the Convention relating to the Status of Refugees, to which China became a party on 24 September 1982. In 2015, the Committee against Torture reminded China of its obligation in that regard, stating that the practice of forcible repatriation of nationals of the Democratic People's Republic of Korea should immediately cease (see CAT/C/CHN/CO/5, paras. 46 and 47).

[1] See, for example A/HRC/19/57, para. 68.

20. The Working Group thus considers the arrests and detention of Mi Sook Kang and Ho Seok Kim, who were merely attempting to exercise their right to seek asylum as established in article 14 (1) of the Universal Declaration of Human Rights, to be arbitrary. As a result, their arrests and detention fall within category II.

Allegations against the Democratic People's Republic of Korea

21. The Working Group regrets that the Democratic People's Republic of Korea did not respond to the communication. As stated above (para. 17), the State bears the burden of proof with regard to refuting the prima facie credible allegations brought against it: failure to refute such allegations could lead to negative inference.

22. The allegations put forward by the source can be summarized as follows: arrests without warrants, incommunicado detention, detention based on political considerations, including contact with materials produced abroad or foreign nationals, or on vague offences that are general and imprecise; and the complete absence of judicial mechanisms for challenging the legality of detention or for appealing against potentially indefinite detention at a political prison camp.

23. There is a wealth of information concerning the allegations made in the present case. First, the Working Group recalls paragraph 38 of its opinion No. 35/2013, in which it was presented with similar facts and concluded that the detention had been arbitrary. The Working Group also recalls the 2014 report of the commission of inquiry on human rights in the Democratic People's Republic of Korea,[2] which pointed to the continued existence of political prison camps, where a considerable number of nationals of the Democratic People's Republic of Korea suspected of committing major political crimes were held in dire circumstances. Lastly, it is worth recalling the concerns of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea in relation to the widespread practices of arbitrary detention and forced disappearances.[3] For all those reasons, the Working Group is of the view that the information provided by the source has been corroborated and the credibility of the source has been established.

24. The source has alleged that Mi Sook Kang and Ho Seok Kim have been subjected to an arbitrary detention.

25. Mi Sook Kang is being held as a result of her attempts to seek asylum in China. Similarly, Ho Seok Kim is being detained as a result of his attempt to seek asylum in the Republic of Korea and he was arrested while he was taking refuge at the border between China and Mongolia. The Working Group recalls that the right to seek asylum is a fundamental right protected by article 14 (1) of the Universal Declaration of Human Rights and cannot be treated as a criminal offence. As a result, article 62 of the Criminal Law, on the grave offence of treason against the "fatherland", cannot be applied in this situation.

26. The Working Group thus finds that the arrests and subsequent detention of Mi Sook Kang and Ho Seok Kim did not have any legal basis, in violation of articles 7 and 9 of the Universal Declaration of Human Rights and article 9 (1) of Covenant. The Working Group concludes that the arrests of Mi Sook Kang and Ho Seok Kim and their continued detention constitute arbitrary detention, falling within category I. In addition, their arrests and continued detention are also arbitrary, falling within category II, as they are the result of the attempts of these victims to exercise rights provided for in the Universal Declaration of Human Rights.

27. Moreover, since their arrest, Mi Sook Kang and Ho Seok Kim have never been brought before any judicial authority and they have thus been unable to challenge the lawfulness of their continued detention. The right to challenge the lawfulness of detention before a court is a self-standing human right and a judicial remedy that is essential to preserve legality in a democratic society (see A/HRC/30/37, paras. 2–3). The situation of Mi Sook Kang and Ho Seok Kim in this regard also constitutes a violation of articles 10 and 11 of the Universal Declaration of Human Rights.

[2] See A/HRC/25/63, paras. 59–61.

[3] See A/70/362, paras. 8–18.

28. Furthermore, Mi Sook Kang and Ho Seok Kim have been held in detention for lengthy periods of time: 18 years and 16 years respectively. The Working Group refers to the right to a fair trial, as enshrined in articles 9 and 10 of the Universal Declaration of Human Rights and in articles 9 and 14 of the Covenant. These articles state that any individual detained for a criminal offence has the right to a fair trial without undue delay.

29. Lastly, the denial of legal assistance constitutes a violation of articles 7 and 10 of the Universal Declaration of Human Rights, article 14 of the Covenant, as well as principle 17 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

30. The Working Group considers that the cumulated violation of these international norms relating to the right to a fair trial is of such gravity as to give the detention of Mi Sook Kang and Ho Seok Kim an arbitrary character, falling within category III.

31. Finally, and as per its well-established practice, the Working Group will refer the situation of Mi Sook Kang and Ho Seok Kim to the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea for appropriate action.

Considerations relevant to both States

32. The Working Group wishes to emphasize that the prohibition of arbitrary detention bears an absolute character: it is indeed a peremptory norm of international law. The International Court of Justice has stated that wrongfully to deprive human beings of their freedom is in itself manifestly incompatible with the principles enunciated in the Universal Declaration of Human Rights.[4] It is in that regard that the role of China also gives cause for concern, as Chinese police officials arrested and repatriated Mi Sook Kang and Ho Seok Kim in violation of the Convention relating to the Status of Refugees and of its Protocol. It is worth recalling that China is a party to both of those international instruments.

33. The Working Group notes with concern the consistent pattern of systematic deportation by China of nationals of the Democratic People's Republic of Korea arrested at the border, to their country of origin (see CAT/C/CHN/CO/5, para. 46).

Disposition

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

> With regard to China, the deprivation of liberty of Mi Sook Kang and Ho Seok Kim being in contravention of articles 7, 9 and 14 (1) of the Universal Declaration of Human Rights, is arbitrary and falls within categories I and II.
>
> With regard to the Democratic People's Republic of Korea, the deprivation of liberty of Mi Sook Kang and Ho Seok Kim being in contravention of articles 7, 9, 10, 11 and 14 (1) of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

35. The Working Group requests the Government of the Democratic People's Republic of Korea and the Government of China to take the steps necessary to remedy the situation of Mi Sook Kang and Ho Seok Kim without delay and bring it into conformity with the standards and principles set forth in the relevant international norms on detention, including the Universal Declaration of Human Rights and, in the case of the Democratic People's Republic of Korea, the International Covenant on Civil and Political Rights.

36. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mi Sook Kang and Ho Seok Kim

[4] See *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980,* p. 3, at p. 42, para. 91.

immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

37. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the situation of Mi Sook Kang and Ho Seok Kim to the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea for appropriate action.

Follow-up procedure

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

(a) Whether Mi Sook Kang and Ho Seok Kim have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mi Sook Kang and Ho Seok Kim;

(c) Whether an investigation has been conducted into the violation of Mi Sook Kang and Ho Seok Kim'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 the Democratic People's Republic of Korea and of China with their international obligations in line with the present opinion;

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

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

40. The Working Group requests the source and the Governments 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.

41. 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.[5]

[*Adopted on 22 November 2017*]

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