

Opinion No. 18/2009 (Ukraine)

Communication addressed to the Government on 30 April 2009

Concerning: Mr. Olexander Oshchepkov

The State is a Party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights. Its mandate was clarified and extended by Commission's resolution 1997/50. The Human Rights Council assumed the Working Group's mandate by its decision 2006/102 and extended it for a further three-year period by resolution 6/4 of 28 September 2007. Acting in accordance with its methods of work, the Working Group forwarded the above-mentioned communication to the Government.

2. The Working Group conveys its appreciation to the Government for having provided the requested information.

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 sentence or despite an amnesty law applicable to him) (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 International Covenant on Civil and Political Rights (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).

4. The case summarized hereafter has been reported to the Working Group on Arbitrary Detention as set out below.

5. Mr. Olexander Oshchepkov was arrested on 22 July 1998 at 4.00 a.m. and taken to a detention facility at the Minsk District in Kiev and charged with a crime. He was interrogated without a lawyer being present before his detention was documented. During the interrogation he was beaten and plastic packaging material was put over his head. He was tortured with electric current applied to his genitals. Both earlobes were cut off. As a result of the torture sustained, he fell unconscious and had blood in his urine for about a month. On 23 July 1998, he was forced to write a statement that the investigator had dictated to him in which he confessed guilty to the crime of murder he was charged with.

6. During two days at the Police Department three statements of confession were signed by Mr. Olexander Oshchepkov which, despite the many contradictions and lack of further investigations into the crime, formed the basis of his indictment before the court.

7. On 17 February 1999, the Kiev City Court sentenced Mr. Oshchepkov to death for murder. The sentence was later commuted to life imprisonment. Neither the court nor the prosecution took into account that Mr. Oshchepkov revoked his confessions as having been obtained under threats and intimidation. A medical certificate establishing that he had been tortured and pictures of him taken on 23 July 1998 were ignored by the court. His defence

lawyer argued that the investigation into the crime had not been properly conducted, in violation of article 22 of the Ukrainian Criminal Procedure Code (CPC).

8. Upon appeal, the Supreme Court upheld the sentence. Repeated requests by his mother addressed to various Government authorities for a revision of Mr. Oshchepkov's criminal case have been turned down, inter alia, on the grounds that "there was no torture in Ukraine".

9. The source argues that the arrest, detention and imprisonment of Mr. Oshchepkov is arbitrary as he did not enjoy his right of defence, which is in violation of articles 21, 43, and 46 of the Criminal Procedure Code, and because his confessions were obtained illegally, in violation of article 65 of the CPC.

10. The Working Group transmitted the communication to the Government on 30 April 2009 with the request to render the reply providing with detailed information about the current situation of Mr. Olexander Oshchepkov and the legal provisions justifying his continued detention.

11. The Working Group, by a note verbal dated 21 August 2009, reminded the Permanent Mission of Ukraine to the United Nations Office and other International Organizations at Geneva for response from the Government to its communication. The Permanent Mission of Ukraine transmitted the reply of the Government (in Russian). The reply confirms that Mr. Oshchepkov was arrested on 22 July 1998 under order of the Prosecutor's Office of the Minsk District in Kiev and was charged with a crime under art. 93 (g) of the Penal Code of Ukraine. On 4 September 1998, he was taken to the Kiev Investigating Detention Ward by the decision of the Prosecutor's Office of the Minsk District in Kiev. The Prosecutor's Office of the Minsk District in Kiev prolonged the term of detention twice till 22 December 1998. The pre-trial investigation was over on 16 December 1998 and the materials of the case were brought before Mr. Oshchepkov and his lawyer for study. The case was brought before the Kiev's City Court on 6 January 1999.

12. On 17 February 1999, the Kiev City Court sentenced Mr. Oshchepkov to death under Articles 93 (g) (e), 140 (2) and 42 of the Ukrainian Penal Code. Upon appeal dated 10 March 1999, the Supreme Court of Ukraine upheld the sentence by the decision of 24 June 1999. By the decision of the Kiev City Court dated 21 August 2000, Mr. Oshchepkov was sentenced to life imprisonment under articles 93 (g) (e), 140 (2) and 42 of the Ukrainian Penal Code. From 17 January 2001, Mr. Oshchepkov has been serving his sentence in the Vinnitsky penal facility. The Government states that the findings of the investigation do not cover any violation committed by persons working for the internal affairs authorities.

13. On 24 August 2009, the Working Group asked the source to inform it of its comments or observations to the Government's reply at its earliest convenience. Additionally, on 22 October 2009, the Working Group requested the source to submit the following information before 16 November 2009:

- (a) When Mr. Oleksander Oshchepkov did get legal assistance?
- (b) What happened during the period 22 July 1998 to 4 September 1998?
- (c) Had he adequate facilities for his defence?
- (d) A copy of the medical certificate establishing that Mr. Oshchepkov was victim of ill-treatment and torture;
- (e) Copies of the pictures which would demonstrate that he was victim of acts of ill-treatment and torture;

(f) What was the conduct of the police officers who arrested and held Mr. Oshchepkov in pre-trial detention between June and December 1998?

14. The Working Group also requested to be provided with more detailed information on this case and copies of legal documents about the allegations contained in the source's letter received of November 2008.

15. The reply from the source has not been received.

16. The Working Group is in position to adopt an Opinion on the case, taking into consideration the following:

(a) The source has not informed when Mr. Oshchepkov got legal assistance or if he had adequate facilities for his defence;

(b) The source also has not produced a medical certificate establishing that Mr. Oshchepkov had been tortured nor pictures which could confirm the acts of torture and ill-treatment;

(c) The source has not brought any concrete proof for the allegations contained in its communication of November 2008.

17. In the light of the foregoing, the Working Group decides to file provisionally the case attending further information from the source, according to paragraph 17 (d) of its Methods of Work.

Adopted on 19 November 2009