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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-first session, 17–21 November 2014

No. 40/2014 (Turkmenistan)

Communication addressed to the Government on 16 September 2014

concerning Arslannazar Nazarov and Bairamklich Khadzhorazov

The Government has not replied to the communication.

The State is a party to the International Covenant on Civil and Political Rights, by accession on 1 May 1997.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. 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 the detainee) (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);

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(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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case summarized below was reported to the Working Group on Arbitrary Detention

4. Arslannazar Nazarov worked as Deputy Director, Mitro International Limited, in Turkmenistan.

5. Bairamklich Khadzhiorazov worked as Senior Specialist, Department for Measuring and Recording of Crude Oil, Mitro International Limited, in Turkmenistan.

6. The business activity of Mitro International Limited in Turkmenistan is centered on exploration and production of an oilfield in East Chelecken, under the terms of the Product Sharing Agreement regarding the Khazar contractual area.

7. On 25 July 2012, Messrs. Nazarov and Khadzhiorazov were arrested by the Investigation Department of the Ministry of Internal Affairs of Turkmenistan at the Office of the Investigator. A warrant was produced for their arrest, which was ordered by the Office of the General Prosecutor of Turkmenistan.

8. Messrs. Nazarov and Khadzhiorazov have remained detained since the date of their arrest, first at the Pretrial Detention Facility (SIZO) of the Police Department of Ashgabad, and currently at the high-security corrective labour institution in the city of Bayramaly, Mary province.

9. On 17 August 2012, Messrs. Nazarov and Khadzhiorazov were indicted under articles 229, part 4 (a); 267, part 2; 218, parts 1 and 2, of the Criminal Code of Turkmenistan. They were charged with committing collusive fraud and misappropriating State-owned property (crude oil) on an especially large scale for personal benefit.

10. The source alleges that Messrs. Nazarov and Khadzhiorazov have been detained on fabricated charges. In the source's view, the charges were laid in order to hide the criminal operations of the State company TurkmenNeftj, which artificially increases the volume of extracted oil by falsification of figures and overstatement of process losses.

11. On 24 September 2012, after two days of hearings, the Court of Balkansky province, confirmed the charges against the two men, finding them guilty and sentencing them both to 15 years' imprisonment.

12. It is alleged that Messrs. Nazarov and Khadzhiorazov were denied representation by independent legal counsel of their choice and their legal counsels were not permitted to attend the trial, without any justification being provided. The source states that applications to the Appellate Court, the Higher Court of Turkmenistan, and the Office of the General

Prosecutor to allow independent advocates to participate in the criminal process went unheard.

13. The source further submits that the Court decision was fabricated as it does not reflect the actual evidence presented by the witnesses and the petitioners. That claim was reportedly confirmed by the lawyers of the complainant. Furthermore, oral statements made by the parties do not appear in the Court decision. The Court did not take into account evidence presented by the petitioners nor their witnesses during the court proceedings. The source argues that the guilt of the petitioners was not established as the “stolen” oil was never found, nor was the money that was allegedly received from its sale.

14. The source submits that the deprivation of liberty of Messrs. Nazarov and Khadzhorazov falls under category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it, as their right to a fair trial was violated and they were denied the possibility of seeking an effective remedy, in contravention of articles 8, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.

Response from the Government

15. The Working Group sent a communication to the Government of Turkmenistan on 16 September 2014, requesting detailed information about the current situation of Messrs. Nazarov and Khadzhorazov, and the legal provisions justifying their ongoing detention and their compliance with international law. The Working Group regrets that the Government has not responded to the allegations transmitted to it.

16. Despite the absence of any information from the Government, the Working Group considers that it is in the position to render its opinion on the detention of Messrs. Nazarov and Khadzhorazov.

Discussion

17. As the Government has not rebutted the prima facie reliable allegations submitted by the source, the Working Group accepts the information of the source as reliable.

18. The Working Group notes that non-observance of the international norms relating to the right to a fair trial in the present case took place from the outset of the proceedings. In particular, the detention of Messrs. Nazarov and Khadzhorazov was never brought under judicial control as required by International Covenant on Civil and Political Rights. Pursuant to article 9, paragraph 3, of the Covenant, anyone detained on a criminal charge shall be brought promptly, i.e. within a few days, before a judge or other officer authorized by law to exercise judicial power. A public prosecutor cannot be considered an independent, objective and impartial judicial authority for the purpose of article 9, paragraph 3, of the Covenant.¹ Thus, in violation of that requirement, Messrs. Nazarov and Khadzhorazov were never brought before any judicial authority during several months of the pretrial detention until the commencement of the trial.

19. In violation of article 14, paragraph 3 (b) and (d), of the Covenant, Messrs. Nazarov and Khadzhorazov were deprived of the right to communicate with counsel of their own choosing at the pretrial stage and of the right to defend themselves through legal assistance of their own choosing at the trial. Their numerous requests for assignment of the counsels chosen by them, namely applications to the Appellate Court, to the Higher Court of Turkmenistan, and to the General Prosecutor Office of Turkmenistan, were ignored.

¹ See, for instance, Human Rights Committee communications No. 1547/200, *Torobekov v. Kyrgyzstan*, Views adopted on 27 October 2011, para. 6.2; and No. 1278/2004, *Reshetnikov v. Russian Federation*, Views adopted on 23 March 2009, para. 8.2.

20. The Working Group also notes that, according to the trial judgement, the conviction of Messrs. Nazarov and Khadzhiorazov was based to a material degree on the statements of numerous witnesses who did not testify at the trial.² Instead, the Court merely relied on the statements given by those witnesses to the investigators. Pursuant to article 14, paragraph 3 (e), of the Covenant, everyone shall have the right to examine witnesses against them. In that regard, the Working Group concurs with the assertion that, where witness statements made to investigators serve to a material degree as the basis for a conviction, then, irrespective of whether the statements were made by a witness or by a co-accused, they constitute evidence for the prosecution and, therefore, the accused shall have the right to examine such witnesses.³

21. The Working Group considers that the violations of the right to defence (article 10 of the Universal Declaration of Human Rights and article 14, sub-paragraphs 3 (b) and (d) of the Covenant) and the right to liberty and security (article 9 of the Universal Declaration of Human Rights and paragraphs 3 and 4 of article 9 of the Covenant) in this case are of such gravity as to give the deprivation of liberty of Messrs. Nazarov and Khadzhiorazov an arbitrary character. Thus, the deprivation of liberty of Messrs. Nazarov and Khadzhiorazov falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

22. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Arslannazar Nazarov and Bairamklich Khadzhiorazov is arbitrary, being in contravention articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. It falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

23. Consequent upon the opinion rendered, the Working Group requests the Government of Turkmenistan to take the necessary steps to remedy the situation of Arslannazar Nazarov and Bairamklich Khadzhiorazov and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

24. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be either to immediately release Arslannazar Nazarov and Bairamklich Khadzhiorazov or proceed with a retrial with all the guarantees enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

25. The Working Group also believes that the Government should accord Arslannazar Nazarov and Bairamklich Khadzhiorazov an enforceable right to compensation, in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

[Adopted on 18 November 2014]

² Witnesses S. Ataev, S. Khalbaev, S. Kartyev, N. Ballakov, O. Khadzhimuradov, A. Tuvakova, S. Sokova, S. Veliev, G. Tashliev, M. Gurbanmammedov, A. Pudakov, A. Deriyev, G. Amanova, A. Satlykov.

³ See, for instance, European Court of Human Rights, *Lucà v. Italy*, application No. 33354/96, judgment of 27 February 2001, para. 41.