



General Assembly

Distr.: General
17 September 2019

Original: English

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fifth session, 12–16 August 2019

Opinion No. 52/2019 concerning Eun Sil Kang (Democratic People's Republic of Korea)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 17 May 2019, the Working Group transmitted to the Government of the Democratic People's Republic of Korea a communication concerning Eun Sil Kang. The Government replied to the communication on 7 June 2019. 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);

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



(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. Eun Sil Kang, born on 20 June 1968, is a national of the Democratic People's Republic of Korea and usually resides in Hyesan City, Ryanggang Province, the Democratic People's Republic of Korea.

5. It is reported that Ms. Kang was a broker who, for approximately 3 years, carried foreign currency (United States dollars and Chinese yen) between defectors from the Democratic People's Republic of Korea living in China or the Republic of Korea and persons residing in the Democratic People's Republic of Korea. The source notes that, although it was against the law to trade foreign currency in a private market without the permission of the authorities, the authorities overlooked the offence, often facilitating such trading for their own financial gain.

6. The source reports that, during one evening in April 2012, agents of the 7th Department of the Defence Security Command suddenly entered the house of Ms. Kang and arrested her and other members of her family. It is reported that, at the time of the incident, the agents broke the door, put everyone on the floor and handcuffed them. They did not explain the reasons for doing so. The source also alleges that the agents threatened Ms. Kang and her family members by pointing guns at their heads.

7. According to the source, the agents put black cloths on the heads of Ms. Kang and her family members and took them, handcuffed, to the 7th Department of the Defence Security Command in Hyesan City. At that time, Ms. Kang and her family members did not know where they were being taken.

8. The source states that Ms. Kang and her family members were placed in solitary confinement at the 7th Department of the Defence Security Command in Hyesan City. They were unable to meet each other in the facility. While some family members were released after three months of investigations, Ms. Kang's detention lasted six months. She was released after this period in detention.

9. The source reports that, in about May 2014, Ms. Kang was rearrested by agents of the State Security Department of Ryanggang Province while staying at a house of a relative in Unhung County, Ryanggang Province. The agents did not inform Ms. Kang or her relatives of the reasons for her arrest. The source states that, since that arrest, Ms. Kang is believed to have been imprisoned in one of the country's prison camps.

10. The source submits that it is likely that Ms. Kang was arrested based on one or more of the following articles of the Criminal Law: article 63 (espionage), article 106 (illegal trade of equipment and supplies in foreign currency), article 111 (unfair commercial activity of an individual) and article 234 (assisting an illegal crossing of the border).

11. The source alleges that, once a period of detention commences, it is impossible for family members to seek official information about a detainee from the authorities. Moreover, if someone is detained in a prison camp, his or her address automatically changes to that of the camp and the detainee's occupation also changes to that of a worker affiliated to National Security Agency Bureau No. 7, the Bureau of Farm Instruction. It is thus difficult to identify which prison an individual has been sent to.

12. Furthermore, the source alleges that there are no legal procedures for remedies in the Democratic People's Republic of Korea and although there are lawyers in the country, their existence is formal. According to the source, if anyone is detained in a prison camp, the authorities normally imprison him or her without trial. There are therefore no terms of imprisonment or possibilities for an appeal. Citizens are not aware of an appeal system in the Democratic People's Republic of Korea.

13. The source alleges that no domestic remedies have been pursued on behalf of Ms. Kang, as raising complaints or taking actions to challenge detention carried out by the authorities is considered anti-government activity and is therefore punishable.

Response from the Government

14. On 17 May 2019, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 16 July 2019, detailed information about the current situation of Ms. Kang and to clarify the legal provisions justifying her continued detention, as well as its compatibility with the obligations of the Democratic People's Republic of Korea under international human rights law and, in particular, with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure her physical and mental integrity.

15. On 7 June 2019, the Government submitted its response, which was transmitted to the source for further comments on the same date.

16. In its reply, the Government stated that, after having reviewed the communication regarding Ms. Kang, it had concluded that the case had no relevance for the Democratic People's Republic of Korea. The Government argued that, as in previous cases, such communications represented part of a stereotypical political plot against the Democratic People's Republic of Korea by hostile forces, which resorted to "human rights" rhetoric against the country. Therefore, the Government, once again, categorically rejected the present case as part of a plot against the country for political purposes, under the guise of upholding human rights. The Government recommended that the Working Group see through the ulterior motive behind such communications and take a fair and critical attitude towards the ill-minded attempts by hostile forces to recklessly link any issues with the Democratic People's Republic of Korea on the basis of false information and conjecture.

Discussion

17. The Working Group thanks the source and the Government for their submissions and appreciates the cooperation and engagement of both parties in this matter, as brief as it may have been.

18. The Working Group regrets the repeated unwillingness of the Government of the Democratic People's Republic of Korea to engage with it constructively over the allegations raised.¹ The Working Group reiterates that it always seeks the constructive engagement of Governments during its regular communications procedure. However, in those instances in which the Governments chose not to engage with the Working Group or limit such engagement to summary dismissal of the allegations raised, the Working Group has no choice but to examine the allegations in the light of all the information at its disposal, including the information from other United Nations bodies, especially other special procedures and treaty bodies, as well as the relevant regional organizations.

19. In the present case, the Working Group notes the 2018 and 2019 reports of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (see A/73/386 and A/HRC/40/66). In the latter report, the Special Rapporteur noted that, although information regarding the current and recent situation of the system of political prison camps was very limited, he continued to receive reports about people who had been accused of committing crimes against the State being sent to such camps, without any legal or procedural guarantees, in a manner that amounted to enforced disappearance, with their families not knowing their whereabouts and with little to no chance of them returning to society (A/HRC/40/66, para. 26).

20. This appears to mirror the allegations that the Working Group has received in relation to the situation of Ms. Kang. Therefore, the Working Group accepts these allegations as credible, especially noting that the Government chose not to address them.

¹ See opinions No. 54/2018 and No. 54/2017.

21. The Working Group recalls that it considers a detention to be arbitrary and falling within category I if such detention lacks a legal basis. In this regard, as the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorize the arrest of an individual. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.²

22. In the present case, Ms. Kang was arrested twice, in April 2012 and May 2014. On both of those occasions, no arrest warrant was presented nor was she informed of the reasons for those arrests. This means that the authorities of the Democratic People's Republic of Korea failed to duly invoke the legal basis for the arrest of Ms. Kang on both of those occasions in violation of article 9 (1) of the Covenant. Moreover, as prescribed by article 9 (2) of the Covenant, Ms. Kang was entitled to have the reasons for her arrest explained to her. The Working Group notes that, on both occasions, the authorities violated this provision.

23. Furthermore, as the Working Group has consistently argued, holding persons incommunicado violates their right to challenge the lawfulness of detention before a court under article 9 (4) of the Covenant.³ The Working Group considers that judicial oversight of detention is a fundamental safeguard of personal liberty⁴ and is essential in ensuring that detention has a legal basis. The Working Group considers that the detention of Ms. Kang for six months following her arrest in April 2012 amounted to incommunicado detention as she was denied any contact with the outside world. This violated her right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant.

24. Thereafter, following her arrest in April 2014, it appears that Ms. Kang was sent to a prison camp, although no charges had been brought against her, there was no indictment, no trial and no sentence pronounced that would legitimize her deprivation of liberty for over five years now. This is a blatant and absolute denial of her rights under articles 9, 14 and 16 of the Covenant.

25. The Working Group therefore concludes that the arrest and detention of Ms. Kang in April 2012, as well as her arrest and detention since May 2014, are arbitrary as they lack a legal basis and thus fall within category I.

26. The Working Group is extremely concerned that there has been no information about the place of detention of Ms. Kang or indeed about her well-being. In the light of this and in accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, for appropriate action.

Disposition

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

The deprivation of liberty of Eun Sil Kang, being in contravention of articles 3, 6, 8, 9 and 10 of the Universal Declaration of Human Rights and articles 2 (3), 9, 14 and 16 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category I.

28. The Working Group requests the Government of the Democratic People's Republic of Korea to take the steps necessary to remedy the situation of Ms. Kang without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

² See opinions No. 35/2018, No. 75/2017, No. 66/2017 and No. 46/2017.

³ See opinions No. 79/2017 and No. 28/2016.

⁴ See 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.

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

30. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Kang and to take appropriate measures against those responsible for the violation of her rights.

31. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, for appropriate action.

32. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

33. 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 Ms. Kang has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Kang;
- (c) Whether an investigation has been conducted into the violation of Ms. Kang'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 with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

34. 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.

35. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of 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.

36. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has 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 16 August 2019]

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