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**Human Rights Council
Working Group on Arbitrary Detention**

**Opinions adopted by the Working Group on Arbitrary
Detention at its seventy-fifth session, 18-27 April 2016**

**Opinion No. 12/2016 concerning Phan (Sandy) Phan-Gillis
(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. The Human Rights Council assumed the mandate in its decision 1/102 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.

2. In accordance with its methods of work (A/HRC/30/69), on 27 January 2016 the Working Group transmitted a communication to the Government of China concerning Phan (Sandy) Phan-Gillis. The reply was received on 13 April 2016 while the deadline had expired on 28 March 2016. The State is not 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 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);



(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. Phan (Sandy) Phan-Gillis, born on 8 April 1960, is a national of the United States of America. She is an international business consultant and the president of the Houston Shenzhen Sister City Association at the Mayor's International Trade and Development Council, located in Houston, Texas, United States, which is also her usual place of residence.

5. According to the source, on 19 March 2015, Ms. Phan-Gillis was stopped for questioning in Zhuhai, Guangdong Province, China, at the international border crossing into Macao, China. The forces carrying out the arrest claimed to be the Nanning branch of the Public Security Bureau in Guangxi Zhuang Autonomous Region, under the authority of the Ministry of State Security.

6. The source alleges that, contrary to the procedure provided for under the Criminal Procedure Law of the People's Republic of China, Ms. Phan-Gillis' family never received notice of her detention from the authorities, and were only informed of her arrest 12 days later by the United States consulate in Guangzhou. It is alleged that the arrest warrant for Ms. Phan-Gillis' initial detention was never provided to her family, despite repeated requests. It is therefore not known whether an arrest warrant was ever produced.

7. The source informs the Working Group that Ms. Phan-Gillis was held under "residential surveillance" at an undisclosed location from 20 March 2015 until 20 September 2015, when she was moved to Nanning District Detention Centre No. 2. According to the source, in Nanning Detention Centre No. 2, Ms. Phan-Gillis was initially placed in solitary confinement, but currently has a cellmate.

8. The source indicates that the reasons for Ms. Phan-Gillis' detention, as imputed by the authorities, were "spying" and "stealing state secrets". No further grounds have been disclosed. It is alleged that the authorities have conceded that they do not possess sufficient evidence to file formal charges against Ms. Phan-Gillis. Consequently, the authorities have not specified which of her actions violated which domestic legal provisions, and the prosecution has not filed any specific charges against Ms. Phan-Gillis. Concerns have been raised that she could remain in detention for up to 13 and a half months, this being the maximum legal time limit for the Chinese authorities to file charges.

9. It is further alleged that Ms. Phan-Gillis has not been granted access to a lawyer, nor had any communication with her family since September 2015. Since her arrest, Ms. Phan-Gillis has been allowed only one 30-minute visit per month from an official from the United States consulate. However, these meetings have never taken place at the actual location of her detention. The source further informs the Working Group that Ms. Phan-Gillis recently suffered a heart attack and was taken to hospital. The United States Department of State has been aware of the situation of Ms. Phan-Gillis since March 2015 and has been working with the Chinese authorities on her behalf.

10. The source submits that a number of violations of domestic law have taken place. Firstly, given that the authorities placed Ms. Phan-Gillis under residential surveillance between 20 March 2015 and 20 September 2015 without providing any legal basis for that deprivation of liberty, they have violated article 72 of the Criminal Procedure Law requiring the authorities to clarify the legal basis for arrest before applying residential surveillance measures. Secondly, the source claims that the authorities also violated article 77 of the Criminal Procedure Law, which states that suspects shall be released after six months in residential surveillance. However, Ms. Phan-Gillis has been deprived of her liberty since 20 September 2015, and is being held in a detention centre inaccessible to United States consular officials, her lawyers or family. The source also submits that the authorities' failure to notify Ms. Phan-Gillis' family of her detention violates article 83 of the Criminal Procedure Law, which provides that authorities must inform family members within 24 hours of placing an individual in detention.

11. Moreover, the source alleges that Ms. Phan-Gillis has been arbitrarily detained in violation of articles 9 and 10 of the Universal Declaration of Human Rights, which provide safeguards against arbitrary arrest and detention and guarantee that a person is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him or her. The source therefore submits that the detention of Ms. Phan-Gillis falls within category III of the arbitrary detention categories employed by the Working Group.

Response from the Government

12. The Working Group regrets that the Government did not reply to the allegations within the 60-day time limit provided for in paragraph 15 of the Working Group's methods of work. The reply was received on 13 April 2016 while the deadline had expired on 28 March 2016.

Discussion

13. Pursuant to paragraph 16 of its methods of work, even if no reply has been received upon expiry of the time limit set, the Working Group may render an opinion on the basis of all the information it has obtained. At the time of its consideration of the case the Working Group only had access to an unofficial translation of the belated reply sent by the Government into one of the working languages of the WGAD.

14. In the unofficial translation, the Government informs the Working Group that Ms. Phan-Gillis was suspected of stealing State intelligence and, in line with the provisions of the Constitution and the Criminal Procedure Law, was placed under residential surveillance on 20 March 2015.

15. Ms. Phan-Gillis was placed in detention on 20 September 2015. Her arrest was approved by the People's Procuratorate on 26 October 2015. The Government states that Ms. Phan-Gillis was charged with "assisting external parties to steal national intelligence".

16. The Government informs the Working Group that the investigation is ongoing. Ms. Phan-Gillis remains in detention at the detention facility in Guanxi. Between the date of her arrest and 25 March 2016, the Chinese authorities facilitated 12 consular visits by United States diplomats. Her physical and psychological condition is good. She is cooperating with the relevant authorities, who are acting in accordance with the law.

17. The Government indicated in its reply that, during the time that Ms. Phan-Gillis has been held in detention, all her rights have been legally protected. Within the limits prescribed by law, the Chinese authorities have provided her with sufficient humanitarian care.

18. The Government, however, does not refute the allegations concerning the violation of Ms. Phan-Gillis' right to legal assistance. Under the provisions of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, a detained person shall be entitled to have the assistance of a legal counsel.¹ Moreover, a detained person shall be entitled to communicate and consult with his or her legal counsel and shall be allowed adequate time for consultations with the legal counsel.²

19. Furthermore, the Government has indicated that the detention of Ms. Phan-Gillis has not been authorized by a judicial or other impartial and independent authority. The Working Group recalls that the Body of Principles requires that any form of detention shall be ordered by, or be subject to the effective control of, a judicial or other authority.³ Furthermore, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.⁴ Furthermore, a person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his or her arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention.⁵ It is emphasized in the Body of Principles, that the words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of impartiality and independence.⁶

20. Contrary to these requirements, the detention of Ms. Phan-Gillis was authorized by the district People's Procuratorate, as confirmed by the Government in its reply. Indeed, the Procuratorate, which is responsible for prosecutions, cannot be considered to be an independent and impartial authority. Since her arrest by the Procuratorate, Ms. Phan-Gillis has not been brought before a judicial or other impartial and independent authority.

21. The Working Group considers that the non-observance of the international norms relating to the right to a fair trial and to liberty and security, established in articles 9 and 10 of the Universal Declaration of Human Rights and principles 4, 11, 17, 18 and 37 of the Body of Principles in this case is of such gravity as to give the deprivation of liberty of Ms. Phan-Gillis an arbitrary character.

Disposition

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

The deprivation of liberty of Ms. Phan-Gillis has been arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and principles 4, 11, 17, 18, and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; it falls within categories I and 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 to take the necessary steps to remedy the situation of Ms. Phan-Gillis and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the Body of Principles.

¹ Principle 17.

² Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 18.

³ Ibid., principle 4.

⁴ Ibid., principle 11.

⁵ Ibid., principle 37.

⁶ Ibid., "Use of terms", para. f.

24. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Ms. Phan-Gillis or, alternatively, to ensure the effective assistance of legal counsel. If the case is to go to trial, the State should allow her adequate time and facilities to prepare her defence and should ensure that the trial is conducted without delay and in conformity with all the guarantees of a fair trial.

25. In accordance with article 33 (a) of its methods of work, the Working Group considers it appropriate to refer the allegations of torture and inhuman treatment to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

[Adopted on 20 April 2016]
