



General Assembly

Distr.: General
25 September 2017

Original: English

Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Opinion No. 4/2017 concerning Tsegon Gyal (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/33/66), on 3 February 2017 the Working Group transmitted to the Government of China a communication concerning Tsegon Gyal. The Government has not replied to the communication. 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 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, 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. Tsegon Gyal (or Kangshong Atse) was born on 12 August 1963 to a family of nomads in Kangtsa region in the Tibetan province of Amdo. After successfully completing high school, Mr. Gyal worked as a teacher and later joined the county's police force to work as a trace evidence analyst. He was one of the first four Tibetan candidates to successfully pass the professional police course in Qinghai Province. In addition to his career in law enforcement, Mr. Gyal also pursued a career in journalism, working for a number of years for Qinghai Tibetan News and Qinghai Legal Daily media outlets. He received numerous awards for his journalistic work. Mr. Gyal's usual place of residence is Gangcha County, Haibei Tibetan Autonomous Prefecture, Qinghai Province, China.

5. The source notes that Mr. Gyal is a prominent former Tibetan political prisoner. He had served long prison terms on charges of "endangering State security". The source also notes that Mr. Gyal was one of several thousands of Tibetan political prisoners.

6. The source states that, on 9 December 2016, Mr. Gyal was arrested by officers of the State Security Bureau of Haibei Tibetan Autonomous Prefecture. At the time, the authorities did not provide the reasons for his arrest.

7. According to the source, on 24 December 2016, after holding Mr. Gyal for more than two weeks, the authorities charged him with "inciting to split the country". A copy of his arrest warrant was sent to his family on that same date.

8. The source states that, if proven, the charge of "inciting to split the country" is punished as the crime of "endangering State security" and could result in the imposition of a 15-year prison sentence. The source also states that, although the exact reasons for Mr. Gyal's arrest are not known, it is common for Tibetan activists and critics of the Chinese Government to be subjected to arrest, torture, surveillance and imprisonment on fabricated charges of endangering State security, which refers to a specific set of crimes under articles 102-113 of the Chinese Criminal Law.

9. The source states that, since his arrest, Mr. Gyal has been held incommunicado and his family has not been allowed to meet him. The source also states that the authorities have denied Mr. Gyal any access to legal representation. He is being held at Gangcha County Detention Centre in Haibei Tibetan Autonomous Prefecture, Qinghai Province, located in the Tibetan province of Amdo. There has not yet been a court hearing.

10. The source expresses concern that the incommunicado nature of Mr. Gyal's detention may allow State security agents to carry out acts of torture in order to extract a confession from him. The source is therefore concerned about the security and safety of Mr. Gyal and notes that Chinese authorities have an obligation to guarantee his physical and psychological integrity at all times, in accordance with international human rights law, in particular the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. According to the source, Mr. Gyal has launched a silent protest and is refusing to respond to interrogations by officers of the State Security Bureau. It is alleged that the interrogation process is a tool for the State security officers to extract a forced confession from Mr. Gyal and that an honest response would not help him to prove his innocence. It is further alleged that the investigation and charges imposed on Mr. Gyal are fabricated.

12. The source notes that, given that Mr. Gyal is declining to speak, it is difficult to understand on what basis the authorities have charged him. The source states that, by exercising his right to silence, Mr. Gyal is also protesting against the denial of his right to legal representation. The source claims that the Chinese Criminal Procedure Law contains weak protection against self-incrimination or the right to be presumed innocent. The source notes that article 14 (3) (g) of the International Covenant on Civil and Political Rights asserts the right not to be compelled to testify against oneself as well as the right not to confess guilt. The source argues that this right becomes even more crucial when a person is detained incommunicado and is therefore vulnerable to torture and coercive interrogations.

13. The source maintains that Tibetans living in China find it impossible to seek legal remedy or to exercise basic human rights owing to the non-transparent nature of the Chinese legal system and the absence of an independent judiciary. Moreover, the source notes that Chinese law allows discretionary powers to the law enforcement agencies, particularly the police and State security officers. Law enforcement agencies may therefore hold suspects in undisclosed locations for as long as six months without informing family members or holding a trial. The source claims that Tibetan suspects receive harsher treatment in custody than Chinese suspects.

Response from the Government

14. On 3 February 2017, the Working Group transmitted the allegations from the source to the Government through its regular communications procedure. The Working Group requested the Government to provide, by 5 April 2017, detailed information about the current situation of Mr. Gyal and any comments on the source's allegations.

15. The Working Group regrets that it did not receive a response from the Government to the communication, 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.

Discussion

16. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

17. The Working Group has, in its jurisprudence, established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

18. The Working Group considers that, in cases where there is *prima facie* reliable information that a person deprived of his or her liberty for a regular crime was, in fact, punished for the exercise of his or her fundamental rights, the burden lies on the Government to provide the Working Group with at least some specific evidence for the basis of the conviction.

19. The Working Group accepts that Mr. Gyal was from a family of nomads in Kangtsa region in the Tibetan province of Amdo and that he had a career in law enforcement and in journalism. It also accepts that he worked for the Qinghai Tibetan News and Qinghai Legal Daily media outlets and has received numerous awards for his journalistic work.

20. The Working Group further accepts that Mr. Gyal was a prominent former Tibetan political prisoner, who had served long prison terms on charges of "endangering State security".

21. On 9 December 2016, Mr. Gyal was arrested by officers of the State Security Bureau of Haibei Tibetan Autonomous Prefecture, who did not provide any reasons for his arrest. After holding Mr. Gyal in detention for more than two weeks, on 24 December 2016, the authorities charged him with "inciting to split the country". The Working Group is of the view that the Government of China did not invoke any legal basis to justify the initial arrest of Mr. Gyal. The detention of Mr. Gyal therefore falls within category I.

22. Mr. Gyal has been held incommunicado and deprived of his right to legal representation. Articles 10 and 11 of the Universal Declaration of Human Rights confirm the prohibition of incommunicado detention. The Committee against Torture has made it clear that incommunicado detention creates conditions that may lead to violations of the Convention against Torture;¹ while the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has consistently argued that the use of

¹ See, for example, A/54/44, para. 182 (a).

incommunicado detention is unlawful.² Furthermore, the Working Group has consistently argued that holding a person incommunicado breaches the right to challenge the lawfulness of the detention before a judge.³

23. The Working Group recognizes that persons deprived of their liberty should be informed about their rights and obligations under law through appropriate and accessible means. Among other procedural safeguards, this includes the right to be informed, in a language, means, modes or format that the detainee understands, of the reasons justifying the deprivation of liberty, the possible judicial avenue to challenge the arbitrariness and lawfulness of the deprivation of liberty and the right to bring proceedings before the court and to obtain without delay appropriate remedies.⁴

24. The Working Group accepts that Mr. Gyal was held incommunicado, was not informed of the reasons for his arrest, was not given access to a lawyer immediately after the moment of apprehension and was not able to bring proceedings before a court to challenge the lawfulness of his detention. In the present case, the Working Group is of the view that the partial non-observance of the international norms relating to the right to a fair trial, as spelled out in the Universal Declaration on Human Rights, is of such gravity as to give Mr. Gyal's deprivation of liberty an arbitrary character. Mr. Gyal's detention therefore falls within category III.

25. The Working Group notes that Mr. Gyal is a former political prisoner, who was detained in the context of the detention of Tibetan political prisoners by Chinese authorities. The Working Group recalls that the Committee against Torture had received numerous reports from credible sources documenting in detail cases of torture, deaths in custody, arbitrary detention and disappearances of Tibetans. The Committee had urged the Government of China to ensure that all custodial deaths, disappearances, allegations of torture and ill-treatment and reported use of excessive force against persons in the autonomous region of Tibet and neighbouring Tibetan prefectures and counties were promptly, impartially and effectively investigated by an independent mechanism.⁵

26. In that regard, the Working Group is of the view that Mr. Gyal's deprivation of liberty is discriminatory owing to his political opinion and that it ignores the equality of human beings. Mr. Gyal's detention thus falls within category V.

Disposition

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

The deprivation of liberty of Tsegon Gyal, being in contravention of articles 2, 9, 10 and 11 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, III and V.

28. The Working Group requests the Government of China to take the steps necessary to remedy the situation of Tsegon Gyal without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights.

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

² See for example, A/54/426, para. 42; and A/HRC/13/39/Add.5, para. 156.

³ See, for example, opinions No. 56/2016, para. 43, and No. 53/2016, para. 47.

⁴ See the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, principles 7 and 9 (A/HRC/30/37, annex).

⁵ See CAT/C/CHN/CO/5, paras. 40-41.

Follow-up procedure

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

31. 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.

32. The Working Group requests the source and the Government 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.

33. 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.⁶

[Adopted on 19 April 2017]

⁶ See Human Rights Council resolution 33/30, paras. 3 and 7.