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

## Opinions adopted by the Working Group on Arbitrary Detention at its 78th 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 has later joined the county's police force to work as a trace evidence analyst. He was one of the first four Tibetan candidates, who successfully passed the professional police course in Qinghai Province. Apart from his career in law enforcement, Mr. Gyal also pursued a career in journalism, working for a number years for Qinghai Tibetan News and Qinghai Legal Daily media outlets. He received numerous awards for his journalistic works. Mr. Gyal's usual place of residence is Gangcha County, Haibei Tibetan Autonomous Prefecture, Qinghai Province, China.

5. The source also 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 further notes that he was one of several thousands of Tibetan political prisoners.

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

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

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

9. The source informs that since his arrest, Mr. Gyal is held incommunicado and his family has not been allowed to meet him. Furthermore, the source sustains that authorities deny Mr. Gyal any access to legal representation. Mr. Gyal is 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 concerns that the incommunicado nature of Mr. Gyal's detention may allow state security agents to undertake acts of torture in order to extract confessions 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, and, in particular, with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. According to the source, Mr. Gyal has launched 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 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 further sustains 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 the article 14.3 (g) of 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 sustains that Tibetans living in China find it impossible to seek legal remedy or to exercise basic human rights due to the non-transparent nature of the Chinese legal system and the absence of independent judiciary. Moreover, the source notes that the 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 also 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 under 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 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 of the basis of the conviction.

19. The Working Group on Arbitrary Detention was convinced that Mr. Gyal from a family of nomads in Kangtsa region in the Tibetan province of Amdo had a career in law enforcement and in journalism. 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 also was convinced that Mr. Gyal is a prominent former Tibetan political prisoner. He had served long prison terms on charges of 'endangering state security'.

21. On 9 December 2016, Mr. Gyal was arrested by officers from the State Security Bureau of Haibei Tibetan Autonomous Prefecture, who did not provide reasons for his arrest. After holding Mr. Gyal in detention for more than two weeks, on 24 December 2016, authorities have 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 justifying the initial arrest of Mr. Gyal. The detention of Mr. Gyal therefore falls within category I of arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

22. Mr. Gyal was 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. Further, the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to the violations of the UN

Convention against Torture[1]; while the UN Special Rapporteur on Torture has consistently argued that use of incommunicado detention is unlawful.[2] The Working Group in its practice has consistently argued that holding persons incommunicado breaches the right to challenge the lawfulness of the detention before a judge.[3]

23. The Working Group has previously recognized that "any persons deprived of their liberty shall 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 and means, modes or format 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 was convinced that Mr. Gyal was held incommunicado, was not informed of the reasons of his arrest, was not warranted access to a lawyer immediately after the moment of apprehension and was not able to bring procedures before a court to challenge the lawfulness of the detention. In present case, the Working Group is therefore 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 the deprivation of liberty of Mr. Gyal an arbitrary character. The detention of Mr. Gyal therefore falls within category III of arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

25. The Working Group also notes that Mr. Gyal is a former political prisoner and his detention took place in context of the detention of Tibetan political prisoners by Chinese authorities. The Working Group would like to recall that the Committee against Torture "[…] received numerous reports from credible sources that document in detail cases of torture, deaths in custody, arbitrary detention and disappearances of Tibetans […]" and 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[…] are promptly, impartially and effectively investigated by an independent mechanism".[5]

26. In this regard, the Working Group is of the view that the deprivation of liberty of Mr. Gyal is discriminatory due to his political opinion and therefore results in ignoring the equality of human beings. The detention of Mr. Gyal thus falls within category V of arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

**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

[1] See, for example, A/54/44, para 182 (a).
[2] See for example, A/54/426 at para 42; A/HRC/13/39/Add.5 at para 156.
[3] See, for example, Opinions 56/2016 and 53/2016.
[4] See Principles 7 and 9 of the United Nations Basic Principles and Guidelines on the right of anyone deprived of their liberty to bring proceedings before a court.
[5] CAT/C/CHN/CO/5paras. 40 and 41.

an enforceable right to compensation and other reparations, in accordance with international law.

**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 Mr. 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.