

OPINION No. 8/2000 (CHINA)

Communication addressed to the Government on 19 March 1999

Concerning Jigme Gyatso

The State has signed but not yet ratified the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50, and reconfirmed by resolution 2000/36. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.
2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
  - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
  - (iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source. To date, the latter has not provided the Working Group with its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.
5. According to the information submitted to the Group, Jigme Gyatso, a monk residing in Vartha village, Kansu province, was arrested on 30 March 1996 at the Tsongla Yangzom restaurant in Lhasa, apparently by Public Security Bureau officials. Upon arrest, he was taken to the anti-riot department in Lhasa, where he was detained for one day and one night. The

following day, he was transferred to Gutsa Detention Centre, where he was kept until March 1997. He was tried in May 1997 before the Intermediate People's Court in Lhasa and subsequently sentenced to 15 years' imprisonment, having been convicted of disseminating counter-revolutionary propaganda, incitement and having illegally formed an association, the Association of Tibetan Freedom Movement.

6. Three months after his conviction, Jigme Gyatso was transferred to Drapchi Prison, where visiting rights are said to have been entirely suspended. According to the source, who was able to visit the prison, the head of Jigme Gyatso was covered with a bandage and he was said to be suffering from jaundice. After protests occurred at Drapchi Prison in May 1998, he is said to have been placed in solitary confinement.

7. Jigme Gyatso had joined Gaden monastery in 1987 where he became involved in pro-independence activities. He distributed leaflets and pasted wall posters around the monastery and in nearby Lhasa. On an unspecified date in 1988 or 1989, he formed, together with friends, an organization called the Association of Tibetan Freedom Movement. In 1992, he led a major demonstration in Lhasa, in the course of which many of the demonstrators were arrested by the Public Security Bureau and anti-riot department officers. Jigme Gyatso was not arrested at that time, although officials suspected him of involvement in the demonstration and kept him under close surveillance.

8. After the arrest of a fellow member of the Association on 2 July 1993, an arrest warrant was issued for Jigme Gyatso. The authorities continued to search for him until he was apprehended on 30 March 1996.

9. In its reply, the Government explains that Jigme Gyatso, from Xiahe in Gansu province, made plans to establish an illegal organization and engage in activities with a view to dividing the country and damaging its unity in January 1992. His actions were contrary to Chinese law and amounted to a criminal offence. On 30 March 1996 he was taken in for questioning by the Tibetan public security authorities, in accordance with the law, and was subsequently arrested with the approval of the Lhasa Municipal People's Procuratorate. On 25 November 1996 the Lhasa Municipal Intermediate People's Court found him guilty under articles 98, 102, 51, 52, 22, 23 and 24 of the Penal Code and sentenced him to 15 years' imprisonment and deprivation of political rights for five years. He is currently serving his sentence in the Tibet Autonomous Region Prison (referred to in the communication as Drapchi) and is in normal health. Since his committal to prison, Jigme Gyatso has always been confined with other inmates: he has never been placed in solitary confinement and enjoys normal visiting rights.

10. The Government notes that China fully guarantees people's lawful freedom of speech and association. Its Constitution and laws clearly state that citizens have the right to freedom of speech, the press, assembly and association and that the exercise of those rights is guaranteed by law. But the Constitution also stipulates that citizens of the People's Republic of China, in exercising their freedoms and rights, may not infringe upon the interests of the State, of society or of the collective, or upon the lawful freedoms and rights of other citizens. This is consistent with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other relevant international human rights instruments. Article 20 of the Universal Declaration and articles 19 and 22 of the International Covenant state that in

exercising their rights and freedoms, including those of speech and association, individuals are subject to necessary restrictions imposed by law and must not infringe national security, public safety, public order or the rights and freedoms of others.

11. Jigme Gyatso planned to found an illegal organization and sought to divide the country and damage its unity. This was not merely a breach of Chinese law and a crime, but also a breach of the provisions of international human rights instruments which ought to be punished anywhere.

12. The question is whether, in expressing opinions in favour of the independence of Tibet and in founding the Association of Tibetan Freedom Movement, Jigme Gyatso was acting within the limits of the rights recognized and guaranteed by article 20 of the Universal Declaration of Human Rights, whereby “everyone has the right to freedom of peaceful assembly and association”, that is, to associate, assemble and demonstrate peacefully.

13. The Government does not deny those rights in principle and points out that under the Constitution of the People’s Republic of China, Chinese citizens fully enjoy the rights to freedom of speech, the press, assembly and association, and that the exercise of those rights is guaranteed by law. It points out, on the other hand, that the exercise of those rights must not - as it maintains has occurred in the present case - infringe upon the interests of the State or of society, or upon the rights and freedoms of other citizens.

14. In order to justify the decision taken with respect to Jigme Gyatso, the Government refers to the provisions of articles 19 and 22 of the International Covenant on Civil and Political Rights, whereby the exercise of the rights to freedom of opinion, expression and assembly may be subject to restrictions, provided that the latter are prescribed by law and are in the interests of national security or public safety, public order, or the rights and freedoms of others. In this regard, the Working Group appreciates that the Government, in its reply, refers to the provisions of the International Covenant on Civil and Political Rights, which it has signed.

15. The Working Group points out, however, that paragraph 2 of article 22 of the Covenant, referred to by the Government, specifies that no restrictions may be placed on the exercise of those rights “other than those which are prescribed by law and which are necessary in a democratic society”. In other words, such restrictions are admissible only if they respect all three criteria of “lawfulness”, “legitimacy” and “democratic society”. They should therefore:

(a) Be prescribed by law. This condition is respected in this case, since the Government in its reply referred to articles 22, 23, 24, 51, 52, 98 and 102 of the Penal Code and since the Covenant requires only a reference to the law;

(b) Be legitimate, that is to say that, in order to be admissible under the terms of the Covenant, restrictions should fulfil the legitimate concern of ensuring that the exercise of the rights guaranteed under the Covenant, in this case freedom of opinion, expression, assembly and peaceful demonstration, is not abused for purposes incompatible with a democratic society. Such incompatibility may arise, regardless of the nature of the constitutional system concerned, inter alia from:

- (i) The non-peaceful exercise of freedom of opinion, expression, assembly or demonstration, i.e. resorting to violence (Universal Declaration of Human Rights, art. 20 and International Covenant on Civil and Political Rights, art. 22);
- (ii) The advocacy of national, racial or religious hatred (Covenant, art. 20 (2));
- (iii) Incitement to commit crimes recognized under international law, such as genocide, apartheid, the practice of slavery and serious violations of the Geneva Conventions, of 12 August 1949, on the protection of victims of war;
- (iv) The requirements of a democratic society, implying firstly that the normal steps under the rule of law have been taken to preserve national security and public order and secondly, that the principle of proportionality between legitimate restrictions and the protection of national security or public order is respected.

16. In the light of the information it has available, the Working Group finds that there is nothing to indicate that the “illegal organization” to which the Government refers, which according to the source is the Association of Tibetan Freedom Movement founded by Jigme Gyatso, ever advocated violence, war, national, racial or religious hatred, or any behaviour or practices prohibited by the Covenant and that therefore Jigme Gyatso was merely exercising the right to freedom of peaceful assembly with others in order to express opinions, a right guaranteed under articles 19 and 20 of the Universal Declaration.

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

The deprivation of liberty of Jigme Gyatso is arbitrary, being in contravention of articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 22 of the International Covenant on Civil and Political Rights, and falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

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

Adopted on 17 May 2000