

**OPINION No. 36/2007 (China)****Communication addressed to the Government on 7 November 2006.****Concerning Mr. Dolma Kyab (also known as Zhou Ma Jia).****The State has signed but not ratified the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 14/2007.)
2. (Same text as paragraph 3 of Opinion No. 15/2007.)
3. The Working Group conveys its appreciation to the Government for having submitted detailed information concerning the allegations of the source. The source made observations on the reply of the Government.
4. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government thereto.
5. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Mr. Dolma Kyab, also known as Zhou Ma Jia, 29 years old, resident of Haibei, Tibetan Autonomous Prefecture in Qinghai, is a writer and a history teacher at a school in Lhasa. He was initially detained in March 2005. On 16 September 2005, he was sentenced to 10 years of imprisonment. While there is no official information publicly available about the charges against him and his trial, it would appear that he was charged with and found guilty of endangering national security by committing an act of espionage and of disclosing State secrets abroad (articles 110 and 111 of the Criminal Code). It would also appear that he may have been refused access to legal assistance prior to his trial.
6. Mr. Kyab appealed against the conviction but the appellate court upheld the sentence on 30 November 2005. According to the source, Mr. Kyab was convicted due to his unpublished book titled "Restless Himalayas", which deals with Tibetan geography, history and religion and might be seen by the authorities of the Government of the People's Republic of China as being connected to the question of Tibetan autonomy.
7. Mr. Kyab has been detained for more than 19 months at Qushui prison in the south-west of Lhasa and has encountered serious health conditions while in detention. He has been suffering from tuberculosis and had to be transferred to Lhasa Military Hospital. Following his transfer to that hospital, he was sent to Lhasa Qushui Prison without having recovered. Lhasa Qushui Prison did not accept him as he was still in a very bad physical condition. A few months later, in March 2006, Mr. Kyab was transferred to Lhasa Qushui Prison to serve his sentence.
8. According to the source, the detention of Mr. Kyab is arbitrary. It is contrary to his rights and freedoms guaranteed by article 19 of the Universal Declaration on Human Rights, more specifically his right to freedom of expression. The source also argues that the secrecy surrounding the trial of Mr. Kyab violates his right to a "fair and public hearing" enshrined in article 10 of the Universal Declaration of Human Rights. Moreover, due to the secrecy, it is not possible to verify whether Mr. Kyab

has enjoyed the right to be effectively assisted by legal counsel during the process and at what stages of the proceedings against him.

9. In its observations on the allegations of the source the Government provided the following information. After the arrest on 27 May 2005 of Dolma Kyab, the competent procuratorate charged him with the offence of illegally crossing the border and with espionage and referred his case to the Lhasa Intermediate People's Court for trial. That court, while hearing the case, fully guaranteed Mr. Kyab's procedural rights. It was established that from November 2003 to June 2004 Dolma Kyab passed forth and back the border at Zhangmukou'an under circumstances that contravenes the law, actions which constitute a crime of crossing the border illegally.

10. After having crossed the border he frequently met with members of the Dalai Lama clique's "Security Department" intelligence units and proposed the establishment of an "environmental protection group" to recruit members to carry out separatist activities and obtain support for the Department. He received a total of 12,400 Indian rupees and 6,500 Nepalese rupees for funding of activities. On several occasions after returning across the border he faxed requests for funds to an office of the Security Department. In addition, at the urging of "the Department", Dolma Kyab added considerable separatist content to the book "The Himalayas in Turmoil", referring, inter alia, to the Tibetan national flag and sovereignty. He copied the book onto a compact disk, and carried it across the border with the intent to disseminating it widely throughout China, acts, which constitute the crime of espionage.

11. The court found the defendant guilty of espionage and sentenced him to 10 years of imprisonment, 5 years of deprivation of political rights and confiscation of all his personal property. He was also found guilty of illegally crossing the border, for which he was given a one-year prison sentence, plus one year of deprivation of his political rights. He was also sentenced to pay a fine of 2,000 yuan.

12. The Government explained that an appeal was lodged against the judgement on behalf of Mr. Kyab. It appears that the court confirmed the conviction, but decided to render a concurrent judgement. As a result Mr. Kyab has to serve 10 years and 6 months in prison, is deprived of his political rights for 5 years, and have his personal properties confiscated. The appellate court set aside the fine arguing that under Chinese law confiscation and fine must not be applied together.

13. In its comments on the observations of the Government the source noted with regard to the espionage charges that although some of Mr. Kyab's writings referred to the number and location of military installations, discussion of military installations was only one component of his writings. According to the source there were no indications that reference to military installations was made with any motive other than to document the impact of such installations on the environment and local population. With regard to the charge of secretly crossing the national border the source pointed out that in November 2003 Mr. Kyab travelled into exile and studied for a period in Dharamsala, seat of the Tibetan Exile Government in India, before returning to Tibet. Thousands of Tibetans, the source adds, go into exile each year crossing the Tibet-Nepal border. Many, like Dolma Kyab, do so secretly and at great risk in order to receive an unrestricted Tibetan education.

14. The Working Group observes that Mr. Kyab has been accused of and sentenced for grave criminal charges, including espionage. However, the Government has not denied that the accusation of espionage relates mainly to his activities as a writer and professor of history and as a member of a group accused of carrying out separatist activities, and thus for writing and disseminating the content of a book, which resulted in his detention and further sentences.

15. In the light of the information available, the Working Group considers that Mr. Kyab's statements and activities supporting separatist opinions cannot be regarded as reprehensible unless it could be established that he had resorted to non-peaceful means. However, since nothing indicates that his book, or the group to which he is a member, advocate violence or any behaviour or practices prohibited by the Universal Declaration of Human Rights, Mr. Kyab was merely exercising his right to freedom of opinion and expression and to freedom of association with others in order to express opinions peacefully. Even though the ideas of the group may be contradicting the official policy of the Government, the exercise of the right to freedom of expression and association cannot be punished as such, if there are no violent acts committed on behalf of the group and there is no factual proof of resort to or advocacy of violence.

16. Similarly, crossing a State border should not be considered as a crime, since article 13, paragraph 2, of the Universal Declaration of Human Rights states that "everyone has the right to leave any country, including his own, and to return to his country".

17. The Working Group finds that these particular activities, although contradictory of the government policy, nonetheless relate mainly to the exercise of the right to freedom of opinion and expression, which includes freedom to search for, receive and disseminate information and ideas of any kind, without restrictions of borders, in oral, written, printed or any other form, and to freedom of peaceful assembly and association. The Working Group concludes that the detention of Mr. Kyab on the ground of these facts is thus incompatible with his rights to freedom of opinion and expression, freedom of movement as well as of the rights to peaceful assembly and association, which are guaranteed by articles 13, 19 and 20 of the Universal Declaration of Human Rights.

18. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Mr. Dolma Kyab is arbitrary, being in contravention of articles 13, 19 and 20 of the Universal Declaration of Human Rights, and falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

19. 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 30 November 2007