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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-ninth session (22 April–1 May 2014)

No. 3/2014 (China)

Communication addressed to the Government on 6 February 2014

concerning Ilham Tohti

The Government replied to the communication on 19 March 2014.

The State is not a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former 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 2006/102 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. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. 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 the detainee) (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 State concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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(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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:

4. Ilham Tohti is an ethnic Uighur male of Chinese nationality. He resides with his wife and two children in Beijing, where he is a university professor of economics. He also worked as a part-time director, administrator and contributor for the Mandarin-language website, uighurbiz.net, which discussed issues related to the Uighur community.

5. The source reports that Mr. Tohti is an outspoken critic of the Chinese Government's policies towards ethnic Uighurs. He has specifically called for the implementation of regional autonomy laws in Xinjiang Uighur Autonomous Region, and has also critiqued the Government's development policies for allegedly disadvantaging Uighurs in their homeland. A significant portion of Mr. Tohti's academic work delved into the high level of unemployment of young Uighurs unable to compete for jobs with recently arrived Han Chinese migrants.

6. The source reports that as a result of his activities, Mr. Tohti, his family, his students and his associates have been subjected to harassment, intimidation, arbitrary arrests, house arrest, constant surveillance and censorship, from 2008 to the present time. This includes forced removals from his home to a hotel outside Beijing for prolonged periods. It is reported that, in February 2013, the authorities stopped Mr. Tohti at Beijing International Airport as he prepared to travel to take up a visiting scholar position at Indiana University in the United States of America. After eight hours of interrogation Mr. Tohti was released, but the police refused to let him leave the country.

7. The source reports that, between 5 and 7 July 2009, protests took place in Urumqi, the regional capital, which escalated into violence. The authorities blamed the unrest on separatist forces cooperating inside and outside the country. In 2009, censors blocked the uighurbiz.net site after the authorities accused it of contributing to incitement of the rioting and ethnic violence in Urumqi. Since then, several people involved with the website have been given long jail terms, including Gheyret Niyaz, an ethnic Uighur male of Chinese nationality who worked a journalist, editor and manager at uighurbiz.net. On 23 July 2010, the Urumqi Intermediate People's Court sentenced Mr. Niyaz, in a one-day trial, to 15 years' imprisonment for "endangering state security".

8. In July 2013, Mr. Tohti issued an open letter calling on the authorities to show transparency with regard to the 5 July 2009 Urumqi unrest, adding that information must be provided on the human rights violations that allegedly occurred then and in its aftermath, and particularly on the many outstanding cases of enforced disappearance. Mr. Tohti stated that many of the clashes involving Uighurs and the police were rooted in the daily frustrations experienced by Uighurs disenfranchised by repressive policies and uneven economic development.

9. On 15 January 2014, Mr. Tohti was arrested without a warrant by police officers at his Beijing apartment. Mr. Tohti's elderly mother was also detained but was released a few hours later. The source reported that during the raid on his apartment, security agents carted off documents, computers and cell phones. In addition, at least six of his students were taken into custody. The Bureau of Public Security for Urumqi is reported to have denied his family and lawyer any information on his whereabouts following his arrest. The source also stated that members of Mr. Tohti's family were under 24-hour surveillance by police agents.

10. Ten days after his arrest, on 25 January 2014, the Bureau of Public Security for Urumqi published an online statement in which it accused Mr. Tohti of inciting violence against the authorities and recruiting people to join a movement for an independent state of East Turkestan, through his website Uighurbiz.net. The statement said that he had "concocted, distorted and hyped up" acts of ethnic bloodshed. "Ilham Tohti exploited his status as a teacher to recruit, entice and coerce people to form gangs, and to collude with 'East Turkestan' leaders in planning, organizing and assigning people to go abroad to join in separatist activities," the statement read. The source refutes the accusations against Mr. Tohti, stating that he has never advocated for the independence of Uighurs in Xinjiang.

11. The source reports that, on 26 January 2014, Mr. Tohti was officially charged with "[participating] in separatist activities, forming a criminal gang under his lead, [recruiting and manipulating] people to spread rumours, distorting and hyping up issues in a bid to create conflicts, spreading separatist thinking, inciting ethnic hatred, advocating independence for Xinjiang and conducting separatist activities."

12. The source refers to the Working Group's deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the internet, which states that a vague and general reference to the interests of national security or public order, without being properly explained and documented, is insufficient to convince the Working Group that the restrictions on the freedom of expression by way of deprivation of liberty were necessary (para. 43).

13. The source further recalls opinion No. 29/2012 (China), in which the Working Group cited the report on its 2004 official visit to China. In that report, concern had been expressed regarding definitions in criminal law legislation having such vague, imprecise or sweeping elements as "disrupting social order", "endangering national security", "violating the unity and integrity of the State", "subverting public order", "affecting national security" and the like.¹ The Working Group recommended that those crimes be defined in precise terms and that an exception be introduced into the Criminal Code to the effect that peaceful activity in the exercise of the fundamental rights guaranteed by the Universal Declaration of Human Rights is not considered criminal.²

14. The source is concerned that the online statement may indicate that Mr. Tohti could face a long prison term for his advocacy on behalf of the Uighurs. It submits that Mr. Tohti cannot be charged merely for exercising his right to freedom of thought, expression and opinion, which are enjoyed by everyone and which can by no means be regarded as reprehensible if exercised through peaceful means, as they were in this case. In this respect, it argues that the deprivation of liberty of Mr. Tohti is arbitrary, as it contravenes articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the International Covenant on Civil and Political Rights.

¹ E/CN.4/2005/6/Add.4, para. 78 (e).

² Ibid.

15. The source submits that the 10-day period that Mr. Tohti was kept in incommunicado detention without being informed of the charges against him results in the characterization of his detention as arbitrary. He was deprived of any due process, including access to a lawyer, during that time. The source cites violations of articles 3, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.

16. The source further argues that Mr. Tohti's status as a prominent speaker on behalf of the Uighur community, and China's allegedly repressive ethnic and religious policies against that community, have made him a target of the security forces, resulting in the deprivation of his liberty. It submits that this is contrary to articles 7 and 12 of the Universal Declaration of Human Rights and articles 17 and 26 of the International Covenant on Civil and Political Rights.

Response from the Government

17. The Working Group transmitted the above-mentioned allegations to the Government in a communication dated 6 February 2014, requesting detailed information about the current situation of Mr. Tohti and clarification about the legal provisions justifying his continued detention.

18. The Government responded on 19 March 2014 and set out the facts as follows: Following its investigation into the allegations contained in the communication, it was revealed that Mr. Tohti had used his teaching position to provoke his students to hate the State and its Government, and to overthrow the Government. Furthermore, he had influenced persons working on his website, "Uighurbiz", to disseminate rumours, distort facts, sensationalize terrorist incidents, spread a separatist ideology, incite ethnic hatred and advocate for the independence of the region of Xinjiang. The Government reports that Mr. Tohti, together with the core members of the East Turkestan Independence Movement, plotted, organized and dispatched individuals to participate in separatist activities outside of China.

19. The Government reported that strong evidence of Mr. Tohti's separatist plans had been compiled by the national security service. Mr. Tohti was lawfully arrested on 15 January 2014. His arrest was approved by the Public Prosecutor on 20 February 2014. The case remains in process.

Further comments from the source

20. On 31 March 2014, the source submitted comments on the response provided by the Government, stating that the allegations contained in the communication had been inadequately addressed by the Government. Furthermore, it asserts that the Government has not substantiated the allegations that formed the basis for his arrest. The source rejects the claim that Mr. Tohti advocated for the independence of the Xinjiang Uighur Autonomous Region. The source reiterates its concern that Mr. Tohti has been subjected to mistreatment and is being detained thousands of kilometres from his home, away from his family and his lawyer.

21. The source's comments also contain information that cannot be stated here, as those details were not communicated to the Government as part of the initial communication.

Discussion

22. Article 9 of the Universal Declaration of Human Rights prohibits arbitrary arrest and detention, declaring that "no one shall be subjected to arbitrary arrest, detention or exile". The right to an effective remedy and due process rights are protected in articles 8, 10 and 11 of the Universal Declaration of Human Rights.

23. The Working Group recalls its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law.³ In citing the major international and regional instruments for the promotion and protection of human rights in which the prohibition of arbitrary deprivation of liberty is recognized, the Working Group noted that detailed prohibitions of arbitrary arrest and detention were also contained in the domestic legislation of States not party to the International Covenant on Civil and Political Rights.⁴ The Working Group concluded that the prohibition of arbitrary deprivation of liberty was part of treaty law and customary international law, and constituted a *jus cogens* norm.⁵

24. In the present case, it is alleged that Mr. Tohti was arrested as a result of expressing his views on issues facing the ethnic Uighur community. It is alleged that he was arrested without a warrant and was detained incommunicado for 10 days without being informed of the charges against him and without access to a lawyer. Although the Working Group is pleased that the Government responded to its letter, it nonetheless regrets that its response does not provide clarifications or explanations in relation to such allegations, as contained in the communication. Instead, it relies on vague offences, without articulating specific facts warranting the detention of Mr. Tohti. The Working Group is of the view that accusations of criminal acts must be enunciated clearly and precisely by a legislative or regulatory standard.

25. The alleged violations in this case are the subject of abundant jurisprudence of the Working Group, cited in part by the source with regard to detention as a result of the exercise of fundamental rights and with regard to violations of the international standards for a fair trial.

26. The Working Group further recalls the urgent appeals issued jointly with other special procedures mandate holders, in which it expressed concern to the Government regarding allegations of arbitrary detention of ethnic Uighurs from the Xinjiang Uighur Autonomous Region.⁶

27. The Working Group considers that Mr. Tohti has been deprived of his liberty for peacefully exercising his fundamental rights as guaranteed by articles 18, 19, 20 and 21 of the Universal Declaration of Human Rights, namely the right to freedom of thought, conscience and religion; the right to freedom of opinion and expression; the right to freedom of peaceful assembly and association; and the right to take part in the government of his country. The Working Group therefore concludes that the deprivation of liberty of Mr. Tohti is considered to fall within category II of the categories applicable to the consideration of cases submitted to the Working Group.

28. Furthermore, the Working Group determines that Mr. Tohti, as a result of having been detained for more than 10 days without being notified of the charges upon which his arrest was based and having been denied access to a lawyer during that period, has not been accorded the rights to due process and a fair trial as guaranteed by articles 9, 10 and 11 of the Universal Declaration of Human Rights. Thus, the deprivation of liberty of Mr. Tohti falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

³ A/HRC/22/44, paras. 37–75.

⁴ *Ibid.*, para. 46.

⁵ *Ibid.*, para. 51.

⁶ Joint Urgent Appeals CHN 35/2009 and CHN 16/2009 (see A/HRC/13/30, para. 27), and CHN 20/2006 and CHN 21/2006 (see A/HRC/4/40, para. 19).

Disposition

29. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Ilham Tohti is arbitrary, being in contravention of articles 9, 10, 11, 18, 19, 20 and 21 of the Universal Declaration of Human Rights, and falls within categories II and III of the categories referred to by the Working Group when considering the cases submitted to it.

30. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation, which include the immediate release of Mr. Tohti and the granting to him of compensation for the harm he has suffered during the period of his arbitrary detention.

31. The Working Group recalls the Human Rights Council's call for all States to cooperate with the Working Group, 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.⁷ In the spirit of better cooperation, the Working Group requests the Government to provide it with more complete information, where requested to do so, in the future.

32. The Working Group encourages the Government to ratify the International Covenant on Civil and Political Rights, which it signed on 5 October 1998.

[Adopted on 22 April 2014]

⁷ A/HRC/RES/24/7, paras. 3 and 6.