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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. 22/2017 concerning Sang-gyun Han and Young-joo Lee (Republic of Korea)*

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 21 June 2016 the Working Group transmitted to the Government of the Republic of Korea a communication concerning Sang-gyun Han and Young-joo Lee. The Government replied to the communication on 19 August 2016. The State is 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,

* In accordance with paragraph 5 of the Working Group's methods of work, Seong-Phil Hong did not participate in the discussion of the present case.

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. Sang-gyun Han and Young-joo Lee are the President and Secretary-General, respectively, of the Korean Confederation of Trade Unions (KCTU). KCTU is an organization representing Korean workers and the trade union movement, and is committed to advancing workers' empowerment through economic, social and political reform, and the overall democratization of the Republic of Korea.

5. According to the source, Mr. Han participated in protests that took place in April and May 2015 to commemorate the first anniversary of the sinking of the Sewol Ferry and to call for an independent and transparent investigation into the incident. After the protests, Mr. Han was summoned by the police for questioning, but he refused to appear for fear that he would be arbitrarily arrested.

6. On 23 June 2015, an arrest warrant was issued for Mr. Han, who subsequently went into hiding in the KCTU offices for about five months. He later sought refuge at Jogye Buddhist Temple in Seoul city centre for almost one month. The source reports that Mr. Han began a hunger strike on 30 November 2015 in protest against the arrest warrant issued against him and the proposed labour reforms, which would further limit workers' rights.

7. On 10 December 2015, Mr. Han was arrested by the police while leaving Jogye Temple, after the police had surrounded it and attempted to forcibly enter the building. The source states that Mr. Han was taken to Namdaemun Police Station where he was detained for questioning until 18 December 2015, and then transferred to Seoul Detention Centre. Mr. Han continued his hunger strike while in detention, but ended it in January 2016 after his health deteriorated significantly.

8. According to the information received, on 24 May 2016, Mr. Han faced his third hearing in a trial for charges relating to his participation in demonstrations that took place between April and November 2015. The charges filed against Mr. Han include "special obstruction of public duty", "special obstruction of public duty to injure public officials", "special destruction of public goods", "general obstruction of traffic", "violation of article 16 of the Assembly and Demonstration Act (matters observed by organizers)", "failure of dispersion order", "hosting an assembly at a banned place", "incitement to violence" and "violation of article 11 of the Assembly and Demonstration Act (places prohibited for outdoor assembly and demonstration)".

9. On 13 June 2016, the prosecution sought a sentence of eight years' imprisonment for Mr. Han. The source claims that such a long prison term is unprecedented for charges linked to the organization of an "illegal rally". The source states that the prosecution sought to justify the harsh sentence on the basis that Mr. Han had refused to turn himself in to the police when a warrant was issued for his arrest in June 2015, which was a major crime that could destroy the basis of the rule of law due to his influence as the leader of KCTU. At the time of the source's initial communication to the Working Group, Mr. Han was in custody at Seoul Detention Centre and his sentence was expected to be handed down in July 2016.

10. The source also provided information on the situation of Ms. Lee, who has been in hiding since December 2015 when the authorities issued a warrant for her arrest for participating in the demonstrations between April and November 2015. The Working Group has no further information on Ms. Lee's situation.

11. The source claims that labour activists are facing ongoing repression, intimidation and judicial harassment in the Republic of Korea. In response to the crackdown on labour activists and attempts by the Government to pass labour reforms that would further limit workers' rights, KCTU organized strikes across the country on 16 December 2015. Although there were no reported clashes with the police during the strikes, the authorities declared them "illegal" and announced that they would take strict measures against the

organizers and participants. The Government has reacted in a similar way to strikes in the past, imposing criminal and civil charges against union leaders and strike participants. During the week of 21 to 25 December 2015, KCTU members reportedly organized another strike to denounce the repression of the labour movement in the Republic of Korea.

12. The source also reports that over 540 KCTU officers and members have been questioned by the police in relation to their involvement in demonstrations, many of whom have had to pay fines. Some 20 KCTU members have been arrested by the police in relation to their involvement in a demonstration in November 2015. Twelve of them have been released on bail or given suspended sentences and the other eight are still awaiting the conclusion of their trials.

13. Given those events, the source submits that Mr. Han's detention and the arrest warrant issued against Ms. Lee appear to be solely aimed at sanctioning the peaceful human rights activities of labour unions and workers' rights organizations.

14. On 14 July 2016, the source informed the Working Group that Mr. Han had been sentenced on 4 July 2016 to a five-year prison term. On 8 July 2016, Mr. Han filed an appeal. On 11 July 2016, the prosecution also filed an appeal seeking a longer prison term against Mr. Han. The source reports that both the prosecution and the defence were required to submit formal justification for their respective appeals before 21 July 2016, and that the appeal hearing would be scheduled after their submissions had been received. On 18 July 2016, that update from the source was forwarded to the Government with a request that the Government respond to the additional information as part of its response to the regular communication.

Response from the Government

15. On 21 June 2016, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 21 August 2016 about the current situation of Mr. Han and Ms. Lee, and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying Mr. Han's arrest and continued detention, and to provide details regarding the conformity of the legal proceedings against him with the international human rights treaties to which the Republic of Korea is a party.

16. The Government replied to the regular communication on 19 August 2016, confirming that Mr. Han had been detained and prosecuted for charges including "special obstruction of official duty", "special obstruction of official goods" and "general obstruction of traffic", and had been sentenced to a five-year term of imprisonment on 4 July 2016. The Government also confirmed that both the prosecution and Mr. Han had appealed against the sentence of the first instance court, and that the case had, at that time, been forwarded to the second instance court. Moreover, the Government noted that an arrest warrant against Ms. Lee had been issued by the court, but she had not been arrested.

17. The Government submits that Mr. Han and Ms. Lee participated unlawfully and violently in public assemblies. The Government alleges that Mr. Han violated the Assembly and Demonstration Act of the Republic of Korea by organizing numerous assemblies without notifying the authorities, and that the assemblies deviated from the declared range of assemblies since April 2015. Furthermore, during the assembly of 1 May 2015, Mr. Han and other participants assaulted police officers. As a result, Mr. Han was charged with "special obstruction of official duty". The Government asserts that Mr. Han refused to appear before the police and defied the arrest warrant issued by the court. While hiding in the KCTU building, Mr. Han planned and organized further illegal violent assemblies, such as general strike assemblies held in September 2015 and the rally on 14 November 2015.

18. The Government alleges that, prior to the 14 November rally, at which 108 police officers were assaulted and 43 police buses were destroyed, Mr. Han prepared and distributed dozens of aluminium ladders and ropes to the participants and made statements such as "I will take full responsibility" and "Let's show that we can paralyse Seoul" during the opening address at the demonstration. According to the Government, that resulted in the demonstrators using ropes, iron pipes and bars to collectively assault police officers, and

destroying and setting fire to police buses. The Government alleges that the level of violence during the demonstration was so high that it posed a threat to the lives of police officers who were performing their official duties and almost resulted in great tragedy. As a result of the demonstration, the centre of Seoul was brought to a standstill for many hours. The Government notes that the actions led by Mr. Han were confirmed by evidence and explicitly acknowledged in the first instance judgment in the criminal case against him.

19. The Government also alleges that, on four occasions, Ms. Lee refused requests from the police to be present at the investigation regarding charges relating to her participation in the assembly on 14 November 2015. Ms. Lee is alleged to have prepared tools such as ladders and ropes to be used to assault police officers and destroy police equipment, as well as bringing parts of central Seoul to a standstill by obstructing traffic and exercising violence with other demonstrators. The court therefore issued a warrant for Ms. Lee's arrest in December 2015. The Government states that the arrest warrant was not requested and issued to sanction the legitimate exercise of the right to peaceful assembly guaranteed under international human rights law.

20. The Government notes that the Republic of Korea fully guarantees the right to freedom of peaceful assembly under article 21 of the Constitution and under the Assembly and Demonstration Act. However, the Government asserts that Mr. Han and Ms. Lee engaged in acts of violence during the assemblies and have therefore lost the protection afforded by those guarantees.

21. In addition, the Government submits that Mr. Han's arrest and detention and the issuing of the warrant for Ms. Lee's arrest were carried out in accordance with domestic procedures. Mr. Han failed to appear after the police requested his appearance multiple times. The police therefore requested a warrant for Mr. Han's arrest under the Criminal Procedure Act, and the court issued the warrant after considering whether there was justifiable reason for doing so. Moreover, when Mr. Han was arrested on 10 December 2015, a detention warrant was requested pursuant to the provisions of the Criminal Procedure Act within 48 hours of the time of his arrest. The detention warrant was issued by the court after direct interrogation of Mr. Han, and examination of the necessity, legitimacy and proportionality of his detention. Mr. Han's case was therefore examined by a court without delay, and he was subsequently detained pursuant to a warrant issued by the court. Similarly, Ms. Lee refused four times the request by police to appear and the court issued a warrant for her arrest after examining whether there was justifiable reason for doing so. The Government states that, as of August 2016, Ms. Lee was presumed to be hiding in the KCTU office in order to avoid arrest. The Government concludes that there was no arbitrariness in the arrest and detention of Mr. Han and Ms. Lee and that the procedure established under the Criminal Procedure Act complies with article 9 of the International Covenant on Civil and Political Rights.

22. Furthermore, the Government notes that the eight-year sentence sought by the prosecution against Mr. Han took into consideration the fact that Mr. Han led excessively violent assemblies that involved violence against police officers and police equipment and brought the centre of Seoul to a standstill. According to the Government, Mr. Han had previously been sentenced to imprisonment for a similar crime involving the occupation of factory facilities. During an impartial hearing of the charges and relevant evidence, the court sentenced Mr. Han to five years' imprisonment on 4 July 2016 on the grounds that his use of violence and his instigation of large-scale violence in central Seoul infringed the rule of law and was thus inexcusable.

23. The Government asserts that, throughout the process, Mr. Han received a fair trial, in accordance with article 14 of the Covenant. The hearing was open to the public, Mr. Han was represented by five lawyers of his own designation in his presence, and a court composed of three judges declared him to be guilty. A second instance trial was under way at the time the Government made its submission, as both Mr. Han and the prosecution appealed on the grounds of unreasonable sentencing. The ruling of the second instance court can be appealed before the Supreme Court.

24. The Government states that it has rightfully taken legal action against the perpetrators of illegal violent assemblies and has not punished members of labour unions

and workers' rights organizations for peaceful human rights activities. The issuing of warrants for Mr. Han's and Ms. Lee's arrest, the issuing of a warrant for Mr. Han's detention and the sentence sought by the prosecution were in full compliance with domestic law and were the result of a fair hearing and deliberation by the court. The case involved violent rallies that caused great danger and infringed upon the rights of other residents and the general public, and was dealt with in accordance with law and principle, and thus cannot be viewed as unjust in the light of international human rights law guaranteeing peaceful assembly.

25. On 26 July 2016, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders sent a joint communication to the Government in relation to Mr. Han.[1] In the communication, the Special Rapporteurs noted the five-year prison sentence imposed on Mr. Han, a human rights defender and trade unionist, and expressed concern at his arrest, detention and sentence, which appeared to relate to the exercise of his rights to freedom of expression, of association and of peaceful assembly undertaken in pursuit of his work in defence of labour rights in the Republic of Korea. The reply of the Government to the communication, dated 28 October 2016, contained very similar information to that submitted in its responses to the Working Group's communications.

Additional information from the source

26. The response of the Government to the Working Group's regular communication was sent to the source on 1 September 2016 for comment. The Working Group requested the source to provide a response by 31 October 2016. The source responded on 31 October 2016.

27. The source submits that no satisfactory explanation was given in the response of the Government regarding the arbitrary nature of Mr. Han's detention and the warrant issued for Ms. Lee's arrest. According to the source, the justifications presented by the Government are based on factually incorrect statements or on national laws and policies that contravene international human rights law.

28. The source states that, from April 2015 until his arrest in December 2015, Mr. Han was involved in organizing seven rallies for KCTU, and in each case the authorities were notified beforehand. However, the authorities systematically and severely repressed all those legitimate, peaceful rallies, either authorizing the rally to take place in a small, restricted area only or banning the rally outright under the guise of preventing traffic obstruction. Since mid-2015, the police have prohibited all planned assemblies and demonstrations in central Seoul, and the Seoul Metropolitan, Gyeonggi Provincial and Incheon Metropolitan Police have been put on high alert. The police justified that blanket ban based on article 12 of the Assembly and Demonstration Act, claiming that any assemblies would disrupt the flow of traffic.

29. The source also states that, in October 2015, a Seoul court ordered the ban on assemblies to be lifted, but the order was ignored by police. In his report on his mission to the Republic of Korea in January 2016, the Special Rapporteur on the rights to freedom of peaceful assembly and of association noted that the reasons on which the police relied to ban or find assemblies unlawful, such as obstruction of traffic, did not meet the criteria set out in article 21 of the Covenant to justify limitations on assemblies (see A/HRC/32/36/Add.2, para. 28). The ban was therefore illegitimate under international law, and charging Mr. Han for having organized "illegal assemblies" in September and November 2015 while the ban was in place violated his right to freedom of assembly under the Universal Declaration of Human Rights and Covenant.

30. Furthermore, the source submits that the Government wrongfully claims that Mr. Han, along with other assembly participants, assaulted police officers during the assembly

[1] See https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=3284.

of 1 May 2015. During that assembly, there was a minor confrontation between dozens of police officers wearing protection gear and a small number of unarmed protesters, including Mr. Han, which lasted about ten minutes. No police officers were physically attacked or injured during the confrontation. The incident took place because the police had illegally blocked the street with bus barricades, preventing anyone from leaving the assembly area. The Constitutional Court had ruled that any restrictions on an assembly by installing bus barricades should not prevent individuals and civilians from free passage, and the police were thus always obliged to secure an appropriate space between buses or at the end of the bus barricade. However, on 1 May, there was no space between buses or at the end of the bus barricades, and Mr. Han and some of the other demonstrators confronted the police to demand that they stop the illegal blockade.

31. The source refers to the statements of the Government indicating that Mr. Han made statements inciting violence and prepared and distributed dozens of aluminium ladders and ropes to the participants in the 14 November rally, who then allegedly used them to assault police officers and destroyed and set fire to police buses. The source states that the allegations put forth by the Government and by the prosecution during Mr. Han's trial are untrue. According to the evidence submitted during Mr. Han's trial, there is no proof that Mr. Han himself prepared and distributed the ropes and aluminium ladders, and none of the comments he made prior to the rally incited physical violence.

32. According to the source, demonstrators at the 14 November rally, including Mr. Han, took to the streets with every intention of conducting a peaceful march, but were confronted with a disproportionate and violent reaction from the police. Prior to the rally, the police had mobilized some 20,000 officers from 248 squadrons, 19 water cannons, 679 buses and 580 pepper spray devices. Given the mass mobilization by the police, several demonstrators prepared ropes and aluminium ladders with the aim of removing or climbing over the bus barricades, but not intending to assault police officers.

33. Furthermore, regarding the claim of the Government that the 14 November rally posed a threat to the lives of police officers, the source notes that, according to the written indictment by the prosecution against Mr. Han, in almost all of the 108 cases of alleged police injury, the injuries were minimal and would take a maximum of one to two weeks to heal completely. There was only one police officer who suffered a face injury that would take eight weeks to heal completely. Moreover, it is not clear how the damage to the buses and police officers' injuries occurred; there was no concrete evidence showing that the protesters caused the injuries.

34. In addition, the source states that the Government failed to mention that it was the police who attacked the demonstrators first and used undue force to stop the previously peaceful rally. It was the unarmed demonstrators whose lives were at risk when faced with heavily armed police in riot gear on top of buses, who indiscriminately fired water cannons at the crowd. As a result, during the rally, 29 civilians were so seriously injured that they were rushed to hospital. One demonstrator who was knocked to the ground by a water cannon spent over 10 months in a coma and recently died from his injuries. Notably, the Special Rapporteur on the rights to freedom of peaceful assembly and of association criticized the use of water cannons during demonstrations, also citing that tragic case (see A/HRC/32/36/Add.2, para. 33).

35. The source claims that, despite national outcry and widespread international condemnation of the police's use of undue force against demonstrators during the 14 November rally, law enforcement agencies have refused to launch an official investigation into the civilian injuries that resulted from the police intervention. Instead of investigating allegations of police brutality, the authorities launched an extensive inquiry into the participants and organizers of the rally, questioning over 1,000 witnesses and ultimately indicting 20 KCTU members and officers, including Mr. Han. The source recalls that, with regard to the charges brought against Mr. Han for "special obstruction of public duty to injure public officials" and "incitement to violence", Mr. Han did not plan any violence or encourage violence during any demonstrations, and any violent clashes that occurred were sparked by pre-emptive attacks by the police against peaceful demonstrators. Any tools that were prepared or distributed during the rallies were for the purpose of getting past the

illegal bus barricades or disarming the water cannons that had been disproportionately deployed by police, and were not employed violently against police officers.

36. In addition, the source recalls that, in their 2016 joint report on the proper management of assemblies, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions stated that acts of sporadic violence or offences by some should not be attributed to others whose intentions and behaviour remained peaceful in nature (see A/HRC/31/66, para. 20). Therefore, if any demonstrators did violently assault police officers, Mr. Han cannot be held responsible for their actions. The source argues that the Government has penalized Mr. Han for the violent actions that occurred during the rally because he is the leader of KCTU, one of the organizations that co-hosted the 14 November rally. According to the source, that is based on a principle used in the legal system of the Republic of Korea called the "joint principal through conspiracy without participation". The judiciary of the Republic of Korea adopted a unique form of the legal principle that states that anyone who intended to engage or engaged in conspiracy to commit a crime is liable even if they did not actively commit the crime. However, not only did Mr. Han not intend to conspire or conspire in order for violence to take place during the 14 November rally, but around 100,000 people from various groups, including farmers, students and non-governmental organizations, participated in the rally, and Mr. Han had no influence or control over them.

37. With reference to the Government's claim that Mr. Han refused to appear before the police and defied the arrest warrant duly issued by the court, the source asserts that, prior to the arrest warrant being filed against him, Mr. Han had cooperated and had been in contact with the police through his attorney. However, the police unilaterally suspended that communication and requested a warrant for his arrest. Given the well-documented persecution and repression of labour leaders in the Republic of Korea, Mr. Han's refusal to surrender to the police once the arrest warrant was filed was based on a well-founded fear that he would be arbitrarily detained and subjected to judicial harassment, as has proven to be the case.

38. Similarly, in relation to Ms. Lee, the source claims that the ladders and ropes that were distributed to some participants in the 14 November rally were intended to be used to get past the bus barricades and water cannons that had been deployed by the police ahead of the rally, and were not intended as weapons or to exert bodily harm. Moreover, Ms. Lee's refusal to surrender to the police is based on a well-founded fear of being subjected to arbitrary detention. Mr. Han's arrest, trial and sentencing, along with the indictment of 19 other KCTU members and officers since November 2015 for having exercised their rights to freedom of assembly and of expression, has confirmed that KCTU members and officers are vulnerable to judicial harassment and arbitrary detention.

39. The source maintains that Mr. Han's arrest, detention, prosecution, conviction and imprisonment, as well as the issuing of the warrant for Ms. Lee's arrest, are arbitrary as they are based only on the exercise of their right to freedom of peaceful assembly guaranteed under international law.

Request for further information

40. At its session in November 2016, the Working Group considered the submissions from the source and the Government, and noted the serious factual conflict between the parties as to whether Mr. Han and Ms. Lee had exercised their right to freedom of assembly in a peaceful manner during the demonstrations in 2015. The Working Group therefore decided to seek further submissions from the parties in order to ensure that they both had an equal opportunity to expand upon their respective arguments.

41. On 21 December 2016, the Working Group wrote to the source and to the Government requesting further information on whether Mr. Han and Ms. Lee had peacefully exercised their right to freedom of assembly during the 2015 demonstrations, as well as any further submissions the parties might wish to make regarding Mr. Han and Ms. Lee's rights to freedom of expression and association. Both parties were requested to respond by 20 February 2017. In addition, the Working Group requested further

information from the source on Mr. Han and Ms. Lee's due process rights, the trial and the judgment, including a translation into English of the indictment and the judgment.

42. The source responded in a submission dated 20 February 2017, which included a copy of the final judgment handed down against Mr. Han by Seoul High Court on 13 December 2016 in Korean. The source had been unable to obtain a certified translation into English. However, the source stated that Mr. Han's legal counsel had provided informal translations of key elements of the judgment, which are referenced in the source's response.

43. In its response, the source stated that according to the documentation presented during Mr. Han's trial, the police did not submit any concrete evidence showing that Mr. Han had engaged in or incited violence during the 2015 demonstrations. Nevertheless, the Court found Mr. Han guilty of "incitement to violence" on the basis that he was deemed to be "complicit" with protestors who did engage in non-peaceful actions. In particular, the Court based its reasoning on the following facts:

(a) Mr. Han was the leader of the host organization of the rallies, and was therefore obliged to ensure that all demonstrators remained peaceful;

(b) During the KCTU leadership election in January 2015, at which Mr. Han was elected president, one of his main election pledges was that he would help KCTU stage a "people's mass rally and a strike against the government's labour reform". In addition, Mr. Han held several press conferences on 22 October 2015, during which he announced that a rally would be organized in Gwanghwamun Square under the title of "People's mass rally calling for the resignation of President Park and for an overturn of chaebol-centred society". The January 2015 election pledge and the October 2015 proclamation were deemed by the Court to constitute evidence of Mr. Han's complicity in the violent acts committed by some participants during the rally;

(c) On 14 November 2015, Mr. Han made speeches in front of rally participants at 1 p.m., 3.40 p.m. and 10.30 p.m. The Court found that parts of his speeches were aggressive in nature and thus incited violent action from some of the rally participants. The following excerpts from Mr. Han's speeches were cited by the Court as evidence of his incitement to violence:

(i) "The Government declared the KCTU strike a political strike and it is thus illegal. I am not scared of this. I am ready to be arrested. I will step forward to the people's mass mobilization with 130,000 people with my fists clenched and will take the lead in the second mobilization later";

(ii) "The Saenuri Party Government is suppressing the people and has started a war to reign over the people eternally. It represses us as it regards KCTU as a major obstacle. We are here together to stage a mass mobilization against [President] Park's Government, which is attempting to revive the Yushin military dictatorship by manipulating history. We don't want an isolated and desperate fight. When we fight together we can change the unjust Government. Let's trust in ourselves! Let's be free from the sense of defeat! I believe that the reason why all of you came to Seoul, having an early breakfast and spending every penny to afford the high cost of travel, is that you wanted to see that you really have comrades who would struggle together with you and to express our anger that we cannot stand it anymore. You must be here with resolute determination and not resist a challenge! From now on until late at night, let's make the street ours! Let them know clearly that when workers are full of indignation, we can paralyse all of Seoul or even the whole country. If nothing changes today, we should continue our struggle with a second and third mass mobilization and realize our goal by staging a general strike! … We have to change the society where people cannot demonstrate for fear of a heavy fine. If anyone has a picture taken of him/her at the rally site, he/she will be fined 3 to 5 million won. So far the government has collected 2 trillion won worth of fines from protesters. This may be painful, but let's get ready to be arrested. I am willing to be the first detainee. We can crack the political power with mass action. Today we will get back our self-confidence with the people's mobilization and stage a general strike in December for a final victory! Today, 14 November 2015, is our day to fight back. I, the KCTU president, will take responsibility, so don't be afraid and take the

street to meet citizens and finally move forward to the Presidential House, the heart of the governmental force!".

44. With regard to paragraph 43 (a) above, the source recalls that, according to the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, while organizers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, they should not be held responsible for the unlawful behaviour of others. To do so would violate the principle of individual liability (see A/HRC/31/66, para. 26).

45. With regard to paragraph 43 (b) and (c) above, the source notes that none of the statements cited by the Court as proof of Mr. Han's role in inciting violence explicitly refers to engaging in violent acts, and no other proof was provided to show that participants who engaged in violent acts had been incited by or mobilized as a result of Mr. Han's speeches.

46. Moreover, the source submits that the criminal persecution of Mr. Han and Ms. Lee for having participated in organizing rallies in 2015 is a clear violation of their right to freedom of assembly, as enshrined in article 20 of the Universal Declaration of Human Rights and article 21 of the Covenant. The fact that the Government has deemed those rallies "illegal" and has thus pressed criminal charges against Mr. Han for organizing them is a violation of his right to freedom of assembly. Furthermore, charging Mr. Han and Ms. Lee with incitement to violence for the violent acts committed by other participants in the 2015 rallies is a further violation of Mr. Han and Ms. Lee's right to freedom of assembly and expression, as explained by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, who noted in 2013 that organizers of peaceful assemblies should never be held liable for the unlawful behaviour of others. The principle of individual liability of participants should be upheld, notably due to the presumption of peacefulness of the assembly (see A/HRC/23/39, para. 78).

47. In addition, the source states that, aside from some minor examples of Mr. Han being denied visitation rights while in detention,[2] Mr. Han's due process rights, including the right to access a lawyer and the right to appeal to a higher court, have been respected. Nevertheless, it must be noted that the final judgment handed down by Seoul High Court on 13 December 2016 sentencing Mr. Han to three years in prison and a 500,000 won fine does not provide sound reasoning on the facts and does not justify Mr. Han's indictment based on concrete evidence.

48. The source submits that, although the charges filed against Mr. Han correspond to the national legislation, it is important to note that the laws are themselves in violation of international laws governing the rights to freedom of assembly and of expression. In particular, the Assembly and Demonstration Act and the Criminal Act under which Mr. Han was charged include articles that contradict international standards and have been found to be in violation of the rights to freedom of assembly and of expression, as is well documented in the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea (A/HRC/32/36/Add.2).

49. The Government responded to the Working Group's request for further information on 20 February 2017. It noted that, on 13 December 2016, an appellate had court sentenced Mr. Han to three years' imprisonment and a fine of 500,000 won (approximately US$ 435). The case is currently pending before the Supreme Court. Ms. Lee is still at large.

50. The Government referred to its previous submission, which detailed the acts committed by Mr. Han during the demonstrations in May, September and November 2015,

[2] The source alleges that, on 16 December 2015, the General Secretary of the International Trade Union Confederation for Asia and the Pacific was denied the right to visit Mr. Han at the police station where he was being detained. The source adds that the police stated that the visit was refused due to "worries about the possibility of conspiracy and destruction of evidence", although those allegations were never substantiated.

during which the demonstrations themselves and the acts committed by Mr. Han were clearly violent in nature. Mr. Han was prosecuted for a number of offences committed during a total of 11 violent assemblies from April to November 2015. The offences include one count of inflicting bodily injury by special obstruction of public duty; three counts of special obstruction of public duty; two counts of special obstruction of official goods; seven counts of general obstruction of traffic; five counts of incompliance to order to disperse, and four counts of participation in assemblies conducted in prohibited places.

51. According to the Government, Mr. Han was represented by five defence lawyers of his choosing in the lower court, and by a team of 98 lawyers in the High Court. The trial of his case proceeded in accordance with the Criminal Procedure Act. The defence lawyers freely held press conferences and the media covered the trial proceedings without any interference. Eighteen hearings were held during the first instance trial and four hearings were held for the second instance trial, spanning five months respectively. Mr. Han and his lawyers presented counterarguments, denied the admissibility of evidence collected by the police and conspiracy with other offenders, and called eight witnesses at the first trial and three at the second.

52. The Court found Mr. Han guilty of the charges against him after examining the vast amount of evidence, including pictures and videos taken at the scene, testimonies of the victims and arguments from both sides, and sentenced him under the law. The court of first instance gave its reasons for a five-year sentence in the judgment, including the fact that Mr. Han's criminal behaviour was subject to a period of imprisonment, in accordance with the sentencing guidelines on statutory penalties and multi-count convictions, and the fact that Mr. Han had prepared tools for violence and had incited demonstrators. The Court also took into account the fact that Mr. Han had already been sentenced to three years' imprisonment for special obstruction of public duty. The judges explained that they considered various circumstances such as the details of the crime, the situation after the crime and the fact that some of Mr. Han's criminal actions were subject to aggravated punishment when they were committed within the three-year period of repeated crimes, thus during a period of recidivism.

53. Furthermore, the Government noted that it does not gather information regarding the assemblies in which Mr. Han participated, except for the assemblies referred to in his prosecution. However, there were 47,842 assemblies held in 2015, of which 20,362 were reported by labour organizations, and most were conducted in a peaceful manner. The police ensured that the demonstrations concluded peacefully, even when some participants obstructed the traffic or disobeyed the order to disperse, in violation of the Assembly and Demonstration Act.

54. However, Mr. Han emphasized the struggle against the Government when he ran for the presidency of KCTU. His election pledge was to confront the Government by transforming KCTU into a general strike command and to provide a high-profile voice. He also pledged to go on strike to advance struggles when people are mobilized to protest. Soon after his election as President of KCTU on 26 December 2014, he took the lead in planning numerous violent demonstrations and instigated and engaged in violence himself at the demonstrations.

55. The Government emphasizes that the KCTU executive, including Mr. Han and Ms. Lee, organized a series of anti-government rallies in 2015. However, Mr. Han and Ms. Lee were not prosecuted for anti-government rallying, as there were no violent acts committed during those assemblies. Furthermore, the Government notes that after Mr. Han was arrested, KCTU under acting leadership, as well as other civil and labour organizations, continued to hold large-scale rallies to criticize the Government, but the organizers were not prosecuted as no violent acts were committed during those rallies.

56. The Government states that its prosecution and conviction of Mr. Han cannot be regarded as arbitrary detention. He was punished for committing criminal acts involving severe violence and for violating the law. There is no international norm to guarantee the right to clearly violent assembly. The Government submits that the violence of the assemblies can be easily verified in the mass media and on the Internet, as well as in pictures submitted by the Government as evidence with its response to the Working Group.

57. In addition, the Government recalls that the right to freedom of expression is protected under article 21 of the Constitution, but is subject to the limitation in article 21 (4) that "neither speech nor the press may violate the honour or rights of other persons nor undermine public morals or social ethics". It is also subject to article 37 (2) of the Constitution, which states that "the freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order, or for public welfare". The right to freedom of expression is protected for every worker and individual citizen, and restrictions imposed under the same conditions. A strike is not considered legitimate if it is conducted for political purposes that are irrelevant to improving working conditions. Apart from that, labour unions enjoy extensive freedom regarding political activities or expression of opinions and criticism of employers and the Government.

58. The Government states that it fully guarantees the right to freedom of peaceful assembly and of association for all individuals within its jurisdiction, pursuant to the Constitution and international human rights norms. The right to freedom of assembly is specified in the Assembly and Demonstration Act, which allows anyone to hold an assembly or demonstration by submitting a report to the police in advance. The Act prohibits the obstruction of an assembly and punishes those who interfere with a peaceful assembly, including aggravated punishment for a member of the armed forces, public prosecutor or police officer who interferes with a peaceful assembly or demonstration. Furthermore, a person may request protection from the police if there are reasonable grounds for fear of obstruction of an assembly. The police also guarantee that right by protecting participants from violence by installing police lines and maintaining public order. The Government notes that very few ban notices were issued for assemblies between 2011 and 2015.

59. If the assembly is unreported or poses a direct and clear threat to public order owing to the violence of participants, it may be ordered to disperse. The Government notes that police officers may use equipment according to the Act on the performance of their duties by police officers and its regulations. They also receive training on human rights so as to prevent human rights violations.

60. In addition, the Government asserts that it is well established in the jurisprudence of the Supreme Court that even unreported assemblies are not subject to an immediate dissolution order. Such an order can only be made in relation to assemblies that directly or clearly threaten public order. Assemblies are not immediately dissolved even when some of the participants commit unlawful acts, but only when the assemblies pose a serious threat to public order. It is only persons committing unlawful acts who are subject to judicial procedure.

61. The Government referred to the candlelight vigils that have been held nationwide in the Republic of Korea since the end of 2016, noting that the police have managed and responded to the assemblies in the manner described above. Even when the number of participants in Seoul amounted to over 1 million, no one was arrested and the assembly concluded without the police clashing with participants. That included rallies with conflicting purposes which were held at the same time without restriction on the exercise of freedom of expression. People were free to express their opinions individually and collectively.

62. According to the Government, that may be contrasted with the assembly of 14 November 2015, which was the most violent one in which Mr. Han participated. A total of 68,000 demonstrators refused to comply with police orders to disperse on 15 occasions, and they committed collective assault against police officers with iron pipes and lumber bars, as well as serious damage to police buses. The police deployed 20,000 police officers, 19 water cannons and 580 pepper spray devices. The Court acknowledged in its ruling that a total of 108 police officers were injured, 2 of whom sustained severe injuries, and 43 police buses and 138 pieces of equipment were damaged. It was one of the most violent assemblies in recent years, during which the police were equipped only with helmets and shields, not clubs, which was the minimum necessary defence from the violence used at the scene.

63. In summary, the Government submits that the prosecution and charges against Mr. Han and Ms. Lee do not fall under any categories of arbitrary detention. The exercise of human rights under international human rights instruments may be subject to limitation for the legitimate purposes of national security, public order or protection of the rights of others. Violent assemblies are outside the scope of article 21 of the Covenant. Other rights, including the right to personal liberty and security, the right to humane treatment and the right to a fair trial in articles 9, 10 and 14 of the Covenant, have been fully respected in the course of the judicial procedures regarding Mr. Han and Ms. Lee.

Discussion

64. The Working Group thanks the source and the Government for their submissions and welcomes their extensive engagement with the Working Group. The prompt and concise replies from both parties have allowed the Working Group to consider the present case as expeditiously as possible, with a clearer understanding of the disputed matters.

65. The Working Group notes that Mr. Han's case is currently pending before the Supreme Court in the Republic of Korea. However, that does not prevent the Working Group from considering the case, as there is no requirement that domestic remedies be first exhausted before the Working Group can issue an opinion (see, for example, opinions No. 19/2013 and No. 11/2000).

66. There are serious contradictions between the claims made by the source and the Government. There appear to be two key points that are disputed: firstly, whether restrictions and bans placed by the Government on assemblies violated Mr. Han's rights to freedom of expression and of peaceful assembly, and secondly, whether Mr. Han and Ms. Lee committed or incited any acts of violence during assemblies organized and held in 2015 and have therefore lost the protection of the right to peaceful assembly.

67. On the one hand, the source maintains that bans placed on assemblies were not justified under international law, that charging Mr. Han for organizing illegal assemblies in 2015 violated his right to peaceful assembly, that Mr. Han and Ms. Lee were not engaged in acts of violence, and that the ropes and ladders prepared for the 14 November rally were intended for use in climbing over illegal bus barricades or disarming water cannons and were used in response to the disproportionate use of force by the authorities. In any event, if there was any violence by other demonstrators, Mr. Han and Ms. Lee cannot be held responsible for the actions of others. On the other hand, the Government claims that the exercise of human rights under international human rights instruments may be subject to limitation for the legitimate purposes of national security, public order or protection of the rights of others, that Mr. Han unlawfully violated such restrictions, that Mr. Han and Ms. Lee had organized, prepared for, incited and participated in acts of violence during the assemblies, and that such conduct is outside the scope of the right to peaceful assembly.

68. In order to resolve such conflicts, 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 the international requirements constituting arbitrary detention, the burden of proof should be understood to rest with the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).[3]

69. In the present case, the Working Group considers that the source has established a credible prima facie case that Mr. Han and Ms. Lee have been targeted solely for the exercise of their rights to freedom of expression and of peaceful assembly in defending

[3] See opinion No. 41/2013, in which the Working Group noted that the source of a communication and the Government do not always have equal access to the evidence and frequently the Government alone has the relevant information. In that case, the Working Group recalled that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out" (paras. 27-28).

labour rights in the Republic of Korea. In reaching that conclusion, the Working Group took into account the following factors:

(a) The Government has instituted criminal proceedings against two prominent leaders of KCTU, the President and Secretary-General. In doing so, the authorities demonstrated considerable determination to apprehend Mr. Han, having pursued him for six months prior to his arrest;

(b) The imposition of criminal sanctions on Mr. Han and the issuing of an arrest warrant against Ms. Lee took place against a background of ongoing strikes initiated by KCTU to protest against proposed reforms that would limit the rights of workers. As the source claims and the Government has not denied, similar criminal prosecutions have been brought against 19 other KCTU members since November 2015 in what appears to be a concerted effort to curtail their activism in support of labour rights. The report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea in January 2016 confirms that the police investigated hundreds of KCTU members following the KCTU rally in November 2015 (see A/HRC/32/36/Add.2, para. 41).

(c) The source reports that many of the individuals who have been investigated have been ordered to pay fines, released on bail or given suspended sentences. The prosecution initially sought an unprecedented sentence of eight years' imprisonment for Mr. Han's alleged organization of an "illegal rally", stating that such a sentence was justified "due to the influence he holds as the leader of KCTU". After the court of first instance imposed a sentence of five years' imprisonment on Mr. Han, the prosecution unsuccessfully sought a heavier sentence on appeal. There appears to be a clear pattern of the imposition of serious criminal sanctions on labour activists, including Mr. Han, which is likely to have a significantly chilling effect on their willingness and ability to exercise their rights and defend the rights of others in the future.

70. Furthermore, the Working Group is of the view that the Government has not rebutted the source's prima facie case. The Working Group considers that the charges against Mr. Han for organizing illegal assemblies in violation of the Assembly and Demonstration Act were based on the exercise of his rights to freedom of expression and of peaceful assembly guaranteed under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant. As the source notes, from April 2015 until his arrest in December 2015, Mr. Han was involved in organizing seven KCTU rallies. However, all of the rallies were subject to limitations which either confined the rallies to a small, restricted area or imposed an outright ban on the rallies to prevent obstruction to traffic. The Government does not deny that allegation, stating in its submissions that Mr. Han violated the Assembly and Demonstration Act by organizing numerous assemblies without notifying the authorities, and that the assemblies deviated from the declared range of assemblies since April 2015.

71. It is well established that the failure to notify the authorities of an assembly does not render the assembly unlawful, and the organizers should not be subject to criminal sanctions resulting in fines or imprisonment because of the failure to notify (see A/HRC/31/66, para. 23). Furthermore, as the Special Rapporteur on the rights to freedom of peaceful assembly and of association noted in the report on his visit to the Republic of Korea in 2016, banning or finding assemblies unlawful based on the obstruction of traffic or other disturbance to the daily lives of citizens does not meet the criteria set out in article 21 of the Covenant to justify limitations on assemblies. It is only restrictions that are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedom of others, and are lawful, necessary and proportionate to the aim pursued, that may be applied (see A/HRC/32/36/Add.2, paras. 26-28). Freedom is considered the rule, and its restriction the exception. Therefore, even if Mr. Han's arrest and detention for having organized "illegal assemblies" was in conformity with the Assembly and Demonstration

Act,[4] criminal penalties for failing to notify the authorities and the imposition of blanket bans to prevent traffic obstruction were not legitimate restrictions under international law. Mr. Han was therefore charged in violation of his rights to freedom of expression and of peaceful assembly under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant.

72. In addition, the Government has not presented sufficient evidence in its submissions and accompanying materials to justify a finding by the Working Group that Mr. Han and Ms. Lee were involved in preparing tools for, inciting or committing violence during the 2015 demonstrations, and therefore forfeited the right to freedom of peaceful assembly. As the Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted, the peacefulness of an assembly should be presumed, and regard must be given to the intentions of the organizers and the manner in which the assembly is held (see A/HRC/23/39, para. 49).

73. In the present case, the statements made by Mr. Han to participants at the rally held on 14 November 2015 did not incite or encourage violence by other participants, nor did they show any intention on Mr. Han's part to engage in violence himself. While Mr. Han's statements, such as "I will take full responsibility" and "Let's show that we can paralyse Seoul" were clearly intended to mobilize the demonstrators to protest and were very critical of the Government, they did not refer to any form of violence.

74. Moreover, while the Working Group appreciates that the Government has forwarded a large number of photographs of the demonstrations in 2015, they do not specifically show Mr. Han or Ms. Lee engaging in acts of violence. Most of the photographs show demonstrators destroying buses or the destroyed buses themselves, and in some cases, protestors kicking or clashing with the police. Two of the photographs have a caption of "Mr. Sang-gyun Han assaulting police", but it is not clear which person shown in the photographs is in fact Mr. Han, nor whether the person is actually assaulting police officers. It is not for the Working Group to assess the probative value of photographs. Furthermore, even if there were acts of violence committed at demonstrations organized by Mr. Han and Ms. Lee, it is far from clear who committed those acts and whether they were associated with Mr. Han and Ms. Lee. As the source pointed out, the rally on 14 November 2015 included around 100,000 people from groups including farmers, students and non-governmental organizations, over which Mr. Han and Ms. Lee had no control. In addition, the actions of other demonstrators at a large assembly cannot be attributed to Mr. Han and Ms. Lee. As stated by two United Nations Special Rapporteurs in their recent joint report, while organizers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, they should not be held responsible for the unlawful behaviour of others. To do so would violate the principle of individual liability, weaken trust and cooperation between assembly organizers, participants and the authorities, and discourage potential assembly organizers from exercising their rights (see A/HRC/31/66, paras. 20 and 26).

75. Accordingly, in the view of the Working Group, Mr. Han's deprivation of liberty is arbitrary, as it has resulted from the exercise of his rights to freedom of expression and of peaceful assembly under articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant. The present case falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

76. The Working Group notes that Ms. Lee has not been detained by the authorities and that the only step taken against her to date is the issuing of an arrest warrant. Currently, it is understood that she is still in hiding, but has not been arrested. As the Working Group stated in a previous annual report, its methods of work do not provide for any mechanism to address situations where there is reliable information that the execution of an order of arrest

[4] The Working Group has repeatedly stated in its jurisprudence that, even when the detention of a person is in conformity with national legislation or court decisions, the Working Group must still ensure that the detention is consistent with international human rights law. See, for example, opinions No. 24/2015 and No. 41/2014.

will result in arbitrary deprivation of liberty. In effect, the Working Group currently has to wait until the arrest warrant is executed and the person is arbitrarily detained (see A/HRC/27/48, paras. 61-65). While the Working Group is unable to express an opinion in relation to Ms. Lee's current situation, it cannot help but notice the factual similarities between the cases of Mr. Han and Ms. Lee. The Working Group recalls that the Human Rights Council, in its resolution 25/38, recalled that States have the responsibility, including in the context of peaceful protests, to prevent arbitrary arrest and detention, and called upon States to avoid the abuse of criminal proceedings at all times.

Disposition

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

> The deprivation of liberty of Sang-gyun Han, being in contravention of articles 9, 19 and 20 of the Universal Declaration of Human Rights and articles 9, 19 and 21 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

78. The Working Group requests the Government of the Republic of Korea to take the steps necessary to remedy the situation of Mr. Han without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the Covenant.

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

80. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Han and to take appropriate measures against those responsible for the violation of his rights.

81. As part of its reparations in the present case, especially the guarantee of non-repetition, the Working Group urges the Government to bring its legal framework and practices concerning the right of peaceful assembly, including the Assembly and Demonstration Act, into line with the recommendations made in the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea (A/HRC/32/36/Add.2).

Follow-up procedure

82. 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. Han has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to him;

(c) Whether an investigation has been conducted into the violation of his 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 the Government with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

83. 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.

84. 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.

85. 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.[5]

[*Adopted on 25 April 2017*]

[5] See Human Rights Council resolution 33/30, paras. 3 and 7.