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Working Group on Arbitrary Detention

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Opinion No. 80/2017 concerning Il Joo, Cheol Yong Kim, Eun Ho Kim, Kwang Ho Kim and Seong Min Yoon (Democratic People's 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/36/38), on 14 September 2017 the Working Group transmitted to the Government of the Democratic People's Republic of Korea a communication concerning Il Joo, Cheol Yong Kim, Eun Ho Kim, Kwang Ho Kim and Seong Min Yoon. The Government replied to the communication on 25 September 2017. 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 rule 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. The source specifies that, when carrying out an arrest, the authorities of the Democratic People's Republic of Korea do not usually show the individual concerned an arrest warrant or inform him or her of the applicable legislation at the time of arrest. The source also submits that there is no official mechanism for filing complaints with the Government of the Democratic People's Republic of Korea on behalf of victims of arbitrary detention, as there are no warrants, trials, appeal procedures or legal remedies. Furthermore, if a family member or a friend of a detainee attempts to search for or rescue the detainee using unofficial means, he or she will be convicted of guilt by association. The source argues that this renders it impossible for family members or friends of detainees to employ even unofficial means to search for or assist them.

5. Il Joo is the first alleged victim of arbitrary detention. He was 50 years of age at the time of his detention, is a national of the Democratic People's Republic of Korea and usually resides in South Hamgyong Province. Prior to his detention, Il Joo was a violinist with the choir of the Ministry of the People's Armed Forces of the Democratic People's Republic of Korea.

6. It is reported that Il Joo was arrested in May 2001 in Sambong District, Onsong County (a region located on the border with China), by officials of the national security agency of the Democratic People's Republic of Korea, who did not show an arrest warrant or a copy of any other decision issued by a public authority.

7. In this case, the applicable legislation can be assumed to be article 63 (Espionage) of the Criminal Law of the Democratic People's Republic of Korea, which stipulates that a non-citizen of the Republic who detects, collects or transmits secret information with the intention of conducting espionage against the Democratic People's Republic of Korea is to be sentenced to 5 to 10 years' reform through labour. In cases where the person concerned commits a grave offence, he or she is to be sentenced to 10 or more years' reform through labour.

8. The source reports that Il Joo regularly contacted his sister, who sought asylum in the Republic of Korea and became a citizen of that country. Il Joo has also regularly received money from her. The source adds that contact with citizens of the Republic of Korea is illegal under the Criminal Law.

9. The source also notes that seeking asylum in the Republic of Korea is considered by the authorities of the Democratic People's Republic of Korea to be a criminal act involving betrayal of the "fatherland". Il Joo was therefore considered to be a relative of a criminal.

10. The source reports that, in May 2001, the detainee went to Sambong District, Onsong County, in order to receive money sent by his sister through a broker. However, he was arrested by national security agency officials.

11. The source submits that the authorities did not provide Il Joo with an opportunity to obtain legal defence, nor did they inform his family of his whereabouts following his arrest.

12. Cheol Yong Kim, the second alleged victim, was 38 years of age at the time of his detention, is a national of the Democratic People's Republic of Korea and usually resides in Ryanggang Province. Prior to his detention, Cheol Yong Kim was an interpreter working for the Foreign Trade Department of Ryanggang Province.

13. The source reports that, while studying in China, Cheol Yong Kim read a magazine from the Republic of Korea. Officials from the national security agency established that fact and, in November 2000, arrested Cheol Yong Kim in Ryanggang Province. The source further states that the national security agency officials who arrested Cheol Yong Kim did not show an arrest warrant or a copy of any other decision issued by a public authority.

14. The source asserts that, in the Democratic People's Republic of Korea, materials produced in the Republic of Korea, such as television and radio programmes, books and magazines, are considered to be enemy propaganda and anyone who watches, listens to or reads such materials is regarded as a political criminal. Cheol Yong Kim was suspected not only of reading a magazine from the Republic of Korea, but also of meeting with a national of the Republic of Korea when he was in China, an act considered to constitute a crime of espionage in the Democratic People's Republic of Korea.

15. In this case, it is assumed that the following laws would be applied to Cheol Yong Kim: article 63 (Espionage) and article 195 (Listening to hostile broadcasting and collection, keeping and distribution of enemy propaganda) of the Criminal Law. Article 195 states that any person who, without anti-state motives, listens to a broadcast that is hostile to the Democratic People's Republic of Korea, or collects, keeps or distributes enemy propaganda, is to be sentenced to up to two years' reform through labour. In cases where the person has committed a grave offence, he or she is to be sentenced to up to five years' reform through labour. Moreover, Cheol Yong Kim's conduct would be considered to be a violation of the "10 principles" that are the foundation of the State's ideology and that take precedence over the Criminal Law and the Constitution.

16. Eun Ho Kim, the third alleged victim of arbitrary detention, was 52 years of age at the time of his detention, is a national of the Democratic People's Republic of Korea and usually resides in South Pyongnam Province. Prior to his detention, Eun Ho Kim was the head of a section of the Ministry of Foreign Trade.

17. The source reports that Eun Ho Kim had a private conversation about the disadvantages of the food-rationing system that was subsequently reported to the national security agency.

18. The source reports that, in March 2000, Eun Ho Kim was arrested by officials of the national security agency. The source further reports that the arresting officials did not show an arrest warrant or a copy of any other decision issued by a public authority.

19. The source submits that, in the Democratic People's Republic of Korea, Eun Ho Kim's acts constitute anti-State propaganda and agitation disdainful of the leader or critical of the regime. It is therefore possible that article 61 (Anti-State propaganda and agitation) of the Criminal Law was applied. This provision states that any person who, with a view to harming the State, disseminates propaganda and engages in agitation, is to be sentenced to up to five years' reform through labour. In cases where the person commits a grave offence, he or she is to be sentenced to 5 to 10 years' reform through labour. Moreover, the act of criticizing or complaining about the nation, the leader or the Workers' Party of Korea constitutes a violation of the "10 principles" that are the foundation of the State's ideology.

20. The fourth alleged victim is Kwang Ho Kim. He was 44 years of age at the time of his detention, is a national of the Democratic People's Republic of Korea and usually resides in South Hamgyong Province. Prior to his detention, Kwang Ho Kim worked as an agent in two departments of the People's Safety Agency (formerly known as the Social Safety Agency).

21. The source reports that Kwang Ho Kim watched a video from the Republic of Korea and his wife reported that fact to the national security agency.

22. The source also reports that, in November 1999, Kwang Ho Kim was arrested in Hamheung, South Hamgyong Province. The source states that the officials from the national security agency who arrested Kwang Ho Kim did not show any arrest warrant or a copy of any other decision issued by a public authority.

23. The source submits that it can be assumed that Kwang Ho Kim's act was regarded as contrary to articles 63 (Espionage) and 195 (Listening to hostile broadcasting and collection, keeping and distribution of enemy propaganda) of the Criminal Law. It would also be considered to be a violation of the "10 principles" that are the foundation of the State's ideology because it undermines the leader's dignity and the superiority of socialism over capitalism. The source adds that, given that Kwang Ho Kim was a public official, his actions were considered to have undermined the dignity of the authorities and the agency for which he worked.

24. Lastly, Seong Min Yoon, the fifth alleged victim, was 40 years of age at the time of his detention. He is a national of the Democratic People's Republic of Korea and usually resides in Pyongyang. Prior to his detention, Seong Min Yoon was deputy-director of the Buheung Trade Company, a part of the Second Economic Commission of the Democratic People's Republic of Korea. In that capacity, Seong Min Yoon worked in the arms-export sector.

25. The source reports that Seong Min Yoon told a friend that he sold military equipment abroad. National security agency officials established that fact and, in September 2001, Seong Min Yoon was arrested. The source further states that the national security agency officials who arrested Seong Min Yoon did not show any arrest warrant or a copy of any other decision issued by a public authority.

26. The source submits that it can be assumed that Seong Min Yoon's actions were considered to be a breach of State secrecy, therefore falling under article 63 (Espionage) of the Criminal Law.

27. According to the source, the five individuals were sent to Yodok Political Prison Camp (Camp 15), located in Yodok, South Hamgyong Province, where, according to reports, they remain in detention to date.

28. In each of these cases, the source concludes that, given the absence of an arrest warrant, legal procedures, legal defence and the fact that Il Joo, Cheol Yong Kim, Eun Ho Kim, Kwang Ho Kim and Seong Min Yoon's families were not informed of their whereabouts when they were taken into custody, their arrests and continued detention are arbitrary and illegal.

Response from the Government

29. On 14 September 2017, the Working Group transmitted the allegations made by the source to the Government of the Democratic People's Republic of Korea under its regular communications procedure. The Working Group requested the Government to provide, by 13 November 2017, detailed information about the current situation of the five individuals concerned and any comments on the source's allegations.

30. In its response dated 25 September 2017, the Government stated that, from its point of view, the cases of Il Joo, Cheol Yong Kim, Eun Ho Kim, Kwang Ho Kim and Seong Min Yoon were irrelevant. The Government further stated that such communications were part of a "heinous" plot by forces hostile to the Democratic People's Republic of Korea, including the Republic of Korea, which used every means available to attack the Democratic People's Republic of Korea through the human rights "racket". Consequently, the Government categorically rejected the cases mentioned in the communication as attempts by those hostile forces to link the Democratic People's Republic of Korea to human rights violations on the basis of false information and conjecture. The response of the Government was transmitted to the source for further comments.

Discussion

31. The Working Group is grateful to the Government for submitting its response in a timely manner. However, the Working Group considers that the submission of the Government did not address the substance of the serious allegations made against it. The Working Group also notes that the Government did not request an extension in order to provide a substantial rebuttal to the claims.

32. Consequently, the Government has failed to refute the prima facie credible allegations made by the source. According to the jurisprudence of the Working Group relating to evidentiary issues,[1] it is for the Government to provide the necessary proof in that regard.

33. The allegations in this case can be summarized as follows: arrests without warrants; incommunicado detention; detention based on political considerations, including contact with materials produced abroad or foreign nationals, or on vague offences that are general

[1] See, for example, A/HRC/19/57, para. 68.

and imprecise; and the complete absence of judicial mechanisms for challenging the legality of detention or for appealing against potentially indefinite detention at a political prison camp. Although the cases are materially different, the Working Group notes that the five petitioners are being held in the same camp for similar offences.

34. There is a wealth of information concerning the allegations made by the source. First, the Working Group recalls its opinion No. 35/2013,[2] in which it was presented with similar facts and concluded that the detention in question was arbitrary. The Working Group also recalls the 2014 report of the commission of inquiry on human rights in the Democratic People's Republic of Korea,[3] which pointed to the continued existence of political prison camps where a considerable number of nationals of the Democratic People's Republic of Korea suspected of committing major political crimes were held in dire circumstances.

35. Finally, it is worth recalling the concerns of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea in relation to the widespread practices of arbitrary detention and enforced disappearances.[4] For all those reasons, the Working Group is of the view that the information from the source has been corroborated and the credibility of the source has been established.

36. The source has alleged that the five individuals concerned have been subjected to arbitrary detention.

37. Il Joo appears to have been detained for having received financial support from his sister, who is a citizen of the Republic of Korea. This situation constitutes detention as a result of the enjoyment of the right to family life, outlined in article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights. In addition, he is being held because of his status as the sibling of an alleged criminal, his sister, despite the longstanding and widely accepted legal principle that one cannot be charged or convicted for a crime committed by another person.

38. Cheol Yong Kim is being detained for having allegedly read materials prohibited by the Democratic People's Republic of Korea and for having potentially interacted with a national of the Republic of Korea. Both those acts are protected by the freedoms of opinion and expression, as provided for in article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, and cannot lawfully be criminalized.

39. Eun Ho Kim is being held at Yodok Political Prison Camp simply for having expressed a disparaging opinion regarding the food rationing system established by his Government. Again, this conduct constitutes the clear and reasonable exercise of the freedoms of opinion and expression and cannot be criminalized without violating the international norms protecting those freedoms.

40. Similarly, Kwang Ho Kim is being detained for having watched a television programme produced in the Republic of Korea. This act constitutes enjoyment of the freedom to access information and its criminalization in this case violates the legal norm protecting that freedom.

41. Seong Min Yoon is being detained for having revealed that he worked for the Government in the arms-export sector. Such a statement does not contain any information that could be objectively considered as sensitive for reasons of national security. Furthermore, the Working Group has not received any evidence that such a statement jeopardized national security. Seong Min Yoon's freedom of expression should therefore be protected under both the Universal Declaration of Human Rights and the Covenant.

42. In all five of these cases, the concerned individuals are being held on the basis of unreasonable grounds, in violation of international norms, both customary and conventional, bearing in mind that the Democratic People's Republic of Korea is a party to the Covenant.

43. Moreover, as highlighted by the source, there is no information available on the national legal framework justifying the continuation of the prolonged detention of these five

[2] See para. 38.
[3] See A/HRC/25/63, paras. 59–61.
[4] See A/70/362, paras. 8–18.

individuals. In the view of the Working Group, this situation is especially alarming given the exceptional length of the periods of detention in question, namely over a decade, as well as the probable lack of trial proceedings, in violation of rights regarding due procedure. The unlawfulness of the detention in each of the cases concerned is aggravated by the length of the periods of detention involved and the lack of a clear legal framework.

44. The Working Group thus finds that there was no legal basis justifying the arrest and detention of these five individuals. In its response, the Government failed to even attempt to provide the Working Group with any relevant information regarding the legal framework surrounding these detentions. The Working Group must therefore conclude that the deprivation of liberty, in the present cases, falls within category I.

45. Additionally, as detailed above, the arrests and prolonged detention are based on the exercise, by each of the petitioners, of their basic freedoms of opinion and expression as protected by the Covenant and the Universal Declaration of Human Rights. Therefore, the Working Group concludes that the violations give the deprivation of liberty of the five individuals an arbitrary character, falling within category II.

46. Finally, and as per its well-established practice, the Working Group will refer the situation of the five victims to the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea for appropriate action.

Disposition

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

> The deprivation of liberty of Il Joo, Cheol Yong Kim, Eun Ho Kim, Kwang Ho Kim and Seong Min Yoon, being in contravention of articles 17 and 19 of the Universal Declaration of Human Rights and of articles 12 and 19 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and II.

48. The Working Group requests the Government of the Democratic People's Republic of Korea to take the steps necessary to remedy the situation of Il Joo, Cheol Yong Kim, Eun Ho Kim, Kwang Ho Kim and Seong Min Yoon 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 International Covenant on Civil and Political Rights.

49. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Il Joo, Cheol Yong Kim, Eun Ho Kim, Kwang Ho Kim and Seong Min Yoon immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

50. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the situation of these five individuals to the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea for appropriate action.

Follow-up procedure

51. 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 Il Joo, Cheol Yong Kim, Eun Ho Kim, Kwang Ho Kim and Seong Min Yoon have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to these five individuals;

(c) Whether an investigation has been conducted into the violation of the rights of the five individuals 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 Democratic People's Republic of Korea with its international obligations in line with the present opinion;

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

52. 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.

53. 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.

54. 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 22 November 2017*]

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