

**OPINION No. 20/2005 (CHINA)**

**Communication addressed to the Government on 11 June 2004.**

**Concerning Mr. Yong Hun Choi.**

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

1. (Same text as paragraph 1 of opinion No. 20/2004.)
2. The Working Group conveys its appreciation to the Government for having submitted information concerning the case.
3. (Same text as paragraph 3 of opinion No. 20/2004.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. It has transmitted the reply provided by the Government to the source, which provided the Working Group with its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.
5. According to the information received, Mr. Yong Hun Choi, born on 9 March 1963, a citizen of the Republic of Korea and a salesman of heavy equipment in northern China, was arrested on 18 January 2003 in Yantai City, Shandong Province, by officers of the People's Public Prosecutor's Office, who did not inform Mr. Choi of the reasons for his arrest. Mr. Choi was accompanying 15 nationals of the Democratic People's Republic of Korea who were seeking to reach Japan by fishing boat, with the ultimate destination being the Republic of Korea. All of them were arrested, including Mr. Jae Hyun Seok, a freelance journalist from the Republic of Korea, Mr. Piao Longgao and Mr. Yong Sun Jo. They were taken to Detention Office No. 2 of Yantai City and interrogated by security officers.
6. The arrested nationals of the Republic of Korea were taken to Dalian, then to Dandong border guard station, and repatriated to Sinuiju, Republic of Korea, on 25 January 2003. Mr. Choi was accused of assisting the 15 persons from the Democratic People's Republic of Korea in departing from China for Japan and ultimately the Republic of Korea by fishing boat.
7. According to the source, Mr. Choi was interrogated without legal counsel and advice. He was not informed about his right to obtain counsel and did not have an opportunity to choose a defence attorney for himself. Before his trial, which started on 22 April 2003, he was only given permission to communicate with his wife on three different occasions via telephone. The police officers reportedly requested Mr. Choi to give money to the court to appoint an attorney. On 21 April 2003, his wife hand-delivered money to the police, through an interpreter of the court, to appoint the attorney.
8. On 22 May 2003, Mr. Choi was sentenced by the Intermediate People's Court of Yantai City Development District to five years' imprisonment and to pay a fine of 30,000 yuan renminbi in accordance with articles 25, 26-14, 27, 35, 64, 68-1, 72 and 318-1 of

the Penal Code of the People's Republic of China. The execution of the trial was flawed and prejudicial to the defendants, without regard to internationally recognized standards for due process of law. The defence attorney and the Vice-Consul of the Republic of Korea were not informed of the date of the issuance of the sentence.

9. One female Han Chinese interpreter was assigned to interpret both the prosecution and the defence, interpreting Chinese into Korean and vice versa. According to the source, no defendant can rely on an interpreter employed by and working for those seeking to prosecute him. The interpreter misinterpreted important words into Korean, such as "nationality" and "international". She was unable to differentiate between past and present tenses and between passive and active voices of the Korean language. The interpreter was unable to translate the word "Westerner" into Korean, when Mr. Choi was asked whether any Westerners participated in the planning of the incident. The source concludes that Mr. Choi was deprived of the right to understand the accusations against him. This fact impeded him in preparing an adequate defence against the accusations lodged against him.

10. Mr. Choi was not allowed an attorney of his own choosing. His attorney was appointed by the court on 21 April 2003. He was not approved by either Mr. Choi or his family, who were given no opportunities to consult with the attorney before the trial. Furthermore, the defence attorney did not understand the Korean language, precluding him from identifying misinterpretations and to communicate adequately with Mr. Choi.

11. Mr. Choi requested copies of the transcripts of the trial, but a court official told him that the transcripts had been submitted to the judge. On 2 June 2003, Mr. Choi filed an appeal. The court has not yet announced the date and time of the appeal hearing. Mr. Choi was finally able to obtain a new defence attorney to represent him, but he has been authorized to meet him only once since 2 June 2003.

12. The source further reports that Mr. Choi has serious health problems, including hypertension, diabetes and asthma. Additionally, in November 1999, he had diverticulectomy surgery after being diagnosed with acute diverticulitis. His diet while in detention has been extremely poor. The guards have refused to give him the medications provided by his wife. During the trial, she made several attempts to give him his medications.

13. In its reply, the Government stated that Mr. Park Yong-chol, a co-defendant in the applicant's case, entered China illegally from the Democratic People's Republic of Korea, made contact with Yong Hun Choi and tried, through him, to escape clandestinely to the Republic of Korea. Under Mr. Choi's instruction he organized and guided 10 individuals from Yanji to Yantai in Shandong Province in late December 2002, where Mr. Choi had told Mr. Park to meet him, and put them up at a residence in Yantai District while they awaited an opportunity to escape. On 13 January 2003, Mr. Choi and Mr. Seok Jae-hyun, another co-defendant in the case, received instruction from an NGO in the Republic of Korea and, carrying funds from that NGO, left the Republic and travelled to Yantai, where Mr. Choi and his co-defendants made preparations, in accordance with the NGO's plans, for the illegal Korean immigrants to be smuggled by boat from Yantai to the Republic of Korea; they photographed the arrangements and made a video of the escapees to report the story abroad. Mr. Choi gave the money to buy two fishing boats and pick some fishermen to crew them. On 17/18 January 2003, public

security personnel and frontier guards from Yantai seized the five defendants and 23 individuals waiting to be smuggled abroad. Meanwhile, public security personnel were led by Mr. Choi to Mr. Seok and some of the escapees.

14. The Government added that the Yantai Intermediate People's Court found that Mr. Choi was party to the plot and to a concrete attempt to smuggle third parties out of China; that his conduct amounted to criminal organized smuggling of third parties out of the country; and that he played an important role - as ringleader - in the collective offence. As he had performed the meritorious service of assisting the public security organs in arresting his fellow criminals, he could be given a light punishment. On 16 May 2003, the court sentenced him to five years' imprisonment for organized people-smuggling, a fine of 30,000 yuan, and deportation. Mr. Choi appealed his sentence. On 28 November 2003, the Shandong Province People's Court rejected the appeal and upheld the original judgement. The argument by Mr. Choi and his defence counsel that he had had no part in the plot could not be sustained.

15. The Government refutes the allegations concerning the violations of a fair trial. It states that the procedure was strictly followed. Mr. Choi was informed of the reasons for his arrest and of the charges held against him, as well as his right to benefit from the assistance of a lawyer, and he chose to give up this right during the preliminary phase of the trial. His renunciation is mentioned in the verbatim of his interview bearing his signature. After being charged with the offences, he was notified by the prosecutor of his right to be assisted by a lawyer of his choice, and it was because he did not avail himself of this opportunity that he was assigned a lawyer from legal aid to assist him during the trial. He was informed of this assignment on 18 April 2003. The Government adds that a Korean interpreter translated the preliminary procedure and that his presence is mentioned in the official documents of the trial. The Government provided a highly competent interpreter who performed the translations during the trial.

16. The Government states that Mr. Choi was visited on numerous occasions by representatives of his embassy, who were able to attend, with his family, the trial as well as the hearing before the Court of Appeal. The Government denies the allegations concerning the poor conditions of detention and is of the opinion that the prison where Mr. Choi has been placed is one of the best in the region. The Government acknowledges that his family was not authorized to provide him with medication, but this stipulation is imposed by the regulations in the interest of the detainees. However, the State ensures a proper follow-up of each detainee's health condition. Mr. Choi is being treated for his hypertension and is in good health.

17. The source, rebutting the response from the Government, argues the following:

(a) The activities of Mr. Choi, contrary to the assertion of the Government, were not illegal and criminal. Mr. Choi acted in a humanitarian role by attempting to help the persons from the Democratic People's Republic of Korea to a safe haven in the Republic of Korea through China. The source argues that these persons were duly classifiable as refugees as defined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, to both of which China is a party. The source claims that Mr. Choi and his co-defendants videotaped the testimonies of the persons concerned for the purpose of submitting this information to UNHCR in support of their application for refugee status. The source further claims that China refuses to establish proper procedures to process the refugee status of persons from the Democratic

People's Republic of Korea who enter China, and that instead, the Government of China goes to great lengths to find and forcibly repatriate these persons back to their country of origin, where they will certainly be detained, tortured, and perhaps even executed for having left the country without authorization. These actions by the Government of China violate the refugee convention and basic international laws concerning human rights and refugees and force persons from the Democratic People's Republic of Korea to seek asylum in a third country;

(b) The assertion made by the Government that Mr. Choi's detention in Yantai Municipal Prison No. 2 offers the best conditions in the city is false. The source recalls that Mr. Choi was diagnosed in 1999 with acute diverticulitis and suffers from hypertension, diabetes and asthma. The source states that Mr. Choi is not being given proper and adequate medical and dietary treatment in the prison and that his wife, when she visited him in August 2004, found him even thinner and more frail, in declining health and with low morale. Also, the source reports that Mr. Choi has been transferred to a bigger cell with 20 other inmates, some of them murderers, and that he has been receiving very few of the letters and postcards sent to him;

(c) Mr. Choi did not benefit from the assistance of a high-calibre interpreter during the proceedings and on many occasions during the trial, witnesses reported that the co-defendant and his lawyer had to ask the same interpreter to correct the interpretation because of basic errors. Mr. Choi was not able to communicate properly with his Chinese lawyer because of the poor interpretation and this was prejudicial to him.

18. From the foregoing, it is apparent that the source makes several claims, the most pertinent of which, in terms of the Working Group's mandate, relate to the right of the accused to be informed of the reasons for the arrest and notified of the charges against him, and to various serious infringements of the right to a defence. In particular, these relate to violation of the right to the assistance of counsel during the preliminary investigation, the right to select the court-appointed counsel to present a defence in the hearing, the right to communicate freely with counsel and to have sufficient time for the preparation of a defence, and the right to receive a translated copy of the record of the proceedings in a language that the accused understands. Reservations have also been voiced concerning the competence and independence of the interpreters. The Government having contested the allegations relating to the violation of the right to be informed of the reasons for the arrest and to be notified of the charges, the Working Group is not in a position to give its opinion on these violations. The following arguments relate only to the alleged violations of the right to a defence.

19. The Government has not contested that during the duration of the pretrial proceedings Mr. Choi did not benefit from the assistance of counsel. According to the Government, he was informed of his right to be assisted by counsel, but replied that it was not necessary. The Working Group considers that for a foreigner unable to understand the language used by the court, deprived of freedom and accused of serious offences - he was sentenced to five years' imprisonment, having reportedly benefited from mitigating circumstances - the interest of justice demands that the assistance of counsel be provided from the time charges were brought.

20. The Working Group has many times emphasized that the right of the accused to receive assistance from counsel of his own choosing and, where appropriate, from a court-appointed attorney is a fundamental right of any person accused of a criminal offence, and particularly when the person is deprived of liberty. The presumption of innocence and the principle that both

parties should be present when evidence is heard, especially in an inquisitorial system as in this case, can be effectively respected only if assistance by counsel is guaranteed not only for those who can afford or request such assistance, but on every occasion when the interest of justice so demands.

21. In its reply, the Government has not contested the fact that the attorney appointed to represent Mr. Choi on the day of the proceedings in the court of first instance did not speak Korean, a fact which rendered virtually impossible any communication with counsel without the assistance of an interpreter. The source asserts that Mr. Choi did not meet his attorney until the day before the trial, which seems highly likely, since the Government has said that the prosecutor informed him of the appointment of his counsel on 18 April 2003, while the trial was held on 22 April 2003.

22. With regard to preparation of the defence before the appeal court, the Government does not contest the allegations concerning the refusal of the court to provide a transcript of the proceedings and the restrictions on communication with counsel, an attorney whom Mr. Choi had chosen to defend him at the appeal stage.

23. The Working Group considers that there were serious violations of the right to a defence such that Mr. Choi did not benefit from the norms relating to a fair trial as defined in the relevant international standards, so that the deprivation of liberty was arbitrary.

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

The deprivation of liberty of Mr. Yong Hun Choi is arbitrary, being in contravention of the provisions of article 10 of the Universal Declaration of Human Rights, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

25. The Working Group, having rendered this opinion, requests the Government to take the necessary steps to rectify the situation, in order to bring it into conformity with the norms and principles set forth in the Universal Declaration of Human Rights, and to take the necessary measures to ratify the International Covenant on Civil and Political Rights.

Adopted on 27 May 2005