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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 November 2019

Opinion No. 57/2019 concerning Lee Hak Su (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. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 21 May 2019, the Working Group transmitted to the Government of the Democratic People's Republic of Korea a communication concerning Lee Hak Su. The Government replied to the communication on 7 June 2019. The Democratic People's Republic of Korea 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, religion, economic condition, political or other opinion, gender, sexual orientation,

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

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. Lee Hak Su is a 40-year-old national of the Democratic People's Republic of Korea who previously resided in Taehongdan County, Ryanggang Province.

5. The source reports that Mr. Lee was the head of the Foreign Currency Exchange Department of Kim Il Sung University, within the Social Sciences College. His primary activity was to import and export goods to China. In this context, he had access to large amounts of Chinese currency and travelled to China and met with Chinese nationals. The source states that in the Democratic People's Republic of Korea, individuals are not allowed to run businesses; running a business with foreign countries is assumed to be an act of espionage. As a result, Mr. Lee was under intense scrutiny by the State Security Department.

6. According to the information received, Mr. Lee was arrested on 23 January 2009 at his home by military officials from the Security Bureau. The source alleges that the arrest was carried out without a judicial warrant being shown, and that Mr. Lee, his family and his lawyers were not informed of the reasons for his deprivation of liberty. Mr. Lee was subsequently transferred to the offices of the Security Bureau until September 2009, when he was sent to Yodok prison camp, where he is believed to remain at present.

7. According to the source, the charges against Mr. Lee remain unknown, as his trial was confidential. The source submits that it is likely that Mr. Lee was charged under several provisions of the Criminal Law, namely: treason against the fatherland (art. 63), illegal trade of equipment and supplies in foreign currency (art. 107), unfair commercial activity of institutions or trade and foreign currency earning agency or organization (art. 111) and illegally crossing the border (art. 221).

8. In addition, the source alleges that military officers from the Security Bureau visited Mr. Lee's house in September 2009 and stated that he had been transferred to Yodok prison camp. According to the source, the officers took Mr. Lee's personal belongings, including spoons, chopsticks and dishes for him to use in the prison camp. The military officers came to Mr. Lee's house several times after September 2009 and took away the books about politics that Mr. Lee had received from Kim Il Sung University. The source considers that it is likely that possession of these books resulted in Mr. Lee being suspected of espionage.

9. The source states that there is a complete absence of information about Mr. Lee, his detention, trial and conviction. To date, there has been no official communication from State officials to Mr. Lee's family or other representatives. His family has received only unofficial information that he is detained in Yodok prison camp and that his status is highly confidential. The source alleges that military officers have not produced evidence suggesting that Mr. Lee was involved in any form of espionage. The source does not know if Mr. Lee is still alive.

10. According to the source, it has not been possible to establish the legal grounds for Mr. Lee's detention. The source reports that if anyone takes any action against the authorities to protect the rights of a political prisoner in the Democratic People's Republic of Korea, he or she will also be detained. The source explains that there is no official avenue to file a complaint on behalf of victims of arbitrary detention. There are no warrants, trials, appeal processes or other legal procedures for obtaining relief or due process. If a family member or a friend attempts to search for a detainee using unofficial means, he or she would immediately be punished, detained and convicted through guilt by association. While there are lawyers in the Democratic People's Republic of Korea, their work is merely formal.

11. Furthermore, the source reports that when someone is sent to a prison camp, no official notification procedure exists. As a result, the unofficial route for seeking information about a detainee's location is through an agent of the State Security

Department who will trade basic information about a detainee in return for an expensive meal and beverage. However, after providing information about a detainee, such agents often warn the family that if they attempt to find out more, they will be prosecuted. The source argues that this has rendered it impossible to protect Mr. Lee or to make enquiries about his detention.

12. The source notes that the lack of due process when someone is detained in a prison camp means that there are no terms of imprisonment and no possibility of an appeal, and detainees are therefore held indefinitely. It is now nearly 11 years since Mr. Lee was arrested in January 2009, when he was 29 years of age.

Response from the Government

13. On 21 May 2019, 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 22 July 2019 about the current situation of Mr. Lee. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention, and its compatibility with the obligations of the Democratic People's Republic of Korea under international human rights law. Moreover, the Working Group called upon the Government to ensure Mr. Lee's physical and mental integrity.

14. On 7 June 2019, the Government submitted its response. The Government states that, after having reviewed the communication regarding Mr. Lee, it has concluded that the case has no relevance to the Democratic People's Republic of Korea. In addition, the Government states that, as in previous cases, such communications represent part of a stereotypical political plot against the Democratic People's Republic of Korea by hostile forces, which resort to "human rights" rhetoric against the country. Therefore, the Government once again categorically rejects the present case as part of a plot against the country for political purposes under the guise of upholding human rights. The Government recommended that the Working Group see through the ulterior motive behind such communications and take a fair and critical attitude towards the ill-minded attempts by hostile forces to recklessly link any issues with the Democratic People's Republic of Korea on the basis of false information and conjecture. The response from the Government was transmitted to the source for further comment.

Discussion

15. The Working Group thanks the source and the Government for their submissions.

16. In determining whether the deprivation of liberty of Mr. Lee is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case of breach of the international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to present any arguments directly addressing the source's allegations.

17. The Working Group regrets the repeated unwillingness of the Government to engage constructively with it and to provide a substantive response to the Working Group's communications under its regular procedure.¹ The Working Group makes every attempt to seek information from governments in relation to each individual case. However, when governments do not respond or limit their response to a summary dismissal of the allegations raised, the Working Group has no choice but to examine the source's submissions in the light of all the information at its disposal, in accordance with paragraph 16 of its methods of work. Accordingly, the Working Group has taken into account the

¹ See, for example, opinions No. 52/2019, para. 16; No. 54/2018, para. 37; No. 80/2017, para. 30; No. 29/2015, para. 19; No. 36/2013, para. 20; No. 35/2013, para. 21; No. 34/2013, para. 19; and No. 47/2012, para. 10.

findings of relevant United Nations human rights mechanisms in considering the present case.

18. In this regard, the Working Group notes that, in his most recent report to the Human Rights Council, the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea stated that he continued to receive reports about people who had been accused of committing crimes against the State being sent to political prison camps, without any legal or procedural guarantees, in a manner that amounted to enforced disappearance, with their families not knowing their whereabouts and with little to no chance of them returning to society. Fear of being sent to a political prison camp was very real and deeply embedded in the consciousness of ordinary citizens. Although the Democratic People's Republic of Korea continued to deny the existence of such camps, the Government had an obligation under international human rights law to address those extremely serious allegations (A/HRC/40/66, para. 26).²

19. In addition, during the most recent universal periodic review of the Democratic People's Republic of Korea in May 2019, a series of recommendations were made by States in relation to the closure of political prison camps, with serious concerns expressed about the arbitrary deprivation of liberty of people in such camps (A/HRC/42/10, paras. 127.25–127.26, 127.29, 127.32–127.34 and 127.36–127.41).

20. Similar findings were made by the commission of inquiry on human rights in the Democratic People's Republic of Korea in its report of 2014 (A/HRC/25/63), in which it noted that persons who were found to have engaged in major political crimes were “disappeared”, without trial or judicial order, to political prison camps (*kwanliso*). There, they were incarcerated and held incommunicado. Their families were not even informed of their fate if they died (para. 59). The commission of inquiry recommended that the Democratic People's Republic of Korea acknowledge the existence of human rights violations, including the political prison camps; provide international humanitarian organizations and human rights monitors with immediate access to the camps and their surviving victims; dismantle all political prison camps and release all political prisoners; and clarify with full detail the fate of any disappeared persons who could not be readily traced (para. 89 (b)).

21. Lastly, the Working Group recalls that there is a wealth of information in its jurisprudence relating to the allegations made by the source. In recent years, the Working Group has been presented with similar facts and has concluded that the detention in question was arbitrary, including in cases involving arrest without a warrant; enforced disappearance; incommunicado detention; detention based on vague offences that are general and imprecise; and the complete absence of judicial mechanisms for challenging the legality of detention or for appealing against potentially indefinite detention in political prison camps in the Democratic People's Republic of Korea.³ Having reviewed all of the above information, the Working Group is of the view that the information provided by the source is credible.

22. In the present case, the source alleges that Mr. Lee was arrested on 23 January 2009 without a warrant and without being informed of the reasons for his arrest. The Government did not address either of these allegations. In the absence of any rebuttal from the Government, the Working Group is convinced by the information provided by the source.

23. The Working Group recalls that, according to article 9 (1) of the Covenant, no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Moreover, article 9 (2) provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest. In the present case,

² See also A/74/275/Rev.1, paras. 30–37 and 40, on detention and enforced disappearance in political prison camps, and General Assembly resolution 73/180 on the situation of human rights in the Democratic People's Republic of Korea, in which the General Assembly expressed very serious concern at the existence of an extensive system of political prison camps, and strongly urged the Government to immediately close them and to release all political prisoners.

³ See, for example, opinions No. 52/2019, No. 54/2018, No. 81/2017, No. 80/2017, No. 32/2015, No. 29/2015, No. 36/2013, No. 35/2013, No. 34/2013, No. 47/2012 and No. 4/2012.

Mr. Lee was arrested without a warrant, in violation of article 9 (1) of the Covenant. As the Working Group has stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.⁴ Furthermore, Mr. Lee was not informed of the reasons for his arrest, in violation of article 9 (2) of the Covenant.

24. In addition, it appears from the information submitted by the source that Mr. Lee has been held incommunicado at Yodok prison camp since September 2009. There has been no official communication from the Government to Mr. Lee's family or his representatives about his situation, and it was only revealed that Mr. Lee had been transferred to Yodok prison camp when military officers from the Security Bureau visited his house in September 2009. The source reports that his status is "highly confidential". These factors suggest that Mr. Lee has had no contact with the outside world, particularly his family and lawyers. The Government has not provided any alternative explanation.

25. As the Working Group has consistently argued, holding persons incommunicado violates their right to challenge the lawfulness of detention before a court under article 9 (4) of the Covenant.⁵ In the present case, the situation is made worse by the fact that there appears to be no means of challenging the legality of detention in the Democratic People's Republic of Korea. The Working Group considers that judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty⁶ and is essential in ensuring that detention has a legal basis. Given that there is no indication that Mr. Lee was able to challenge his detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was violated. Moreover, being held in incommunicado detention placed Mr. Lee outside the protection of the law, in violation of his right to be recognized as a person before the law under article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

26. According to the source, Mr. Lee was sent to Yodok prison camp in September 2009, but there is no information as to whether any charges were brought against him, whether there were any trial proceedings (the source reports that he had a "confidential trial"), whether he has been convicted of any offence and if so, the sentence imposed, or indeed whether he is still alive. In summary, there is no information that would legitimize Mr. Lee's deprivation of liberty for nearly 11 years, in denial of his rights under articles 9 and 14 of the Covenant.

27. The Working Group concludes that the Government did not take the necessary steps to establish a legal basis for Mr. Lee's arrest, and has not disclosed to the Working Group any information regarding the legal framework justifying his detention at Yodok prison camp. As a result, Mr. Lee's deprivation of liberty is arbitrary under category I.

28. The Working Group is extremely concerned that the Government has provided no information about Mr. Lee, particularly as to his location and current status. The Working Group has decided to refer the present case to the Working Group on Enforced or Involuntary Disappearances. The Working Group will also refer the present case to the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea.

29. The Working Group considers that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity. The present case makes it necessary to reaffirm this. The duty to comply with international human rights that are

⁴ See, for example, opinions No. 52/2019, No. 9/2019 and No. 46/2018.

⁵ See, for example, opinions No. 52/2019, No. 79/2017 and No. 45/2017.

⁶ See the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), principle 3.

peremptory and *erga omnes* norms, such as the prohibition of arbitrary detention, rests with all bodies and representatives of the State, and with all individuals.⁷

30. The Working Group would welcome the opportunity to work constructively with the Government to address its concerns surrounding the arbitrary deprivation of liberty by conducting a country visit to the Democratic People's Republic of Korea. The Working Group awaits a positive response to its previous request of 17 April 2015 to undertake a country visit.

Disposition

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

The deprivation of liberty of Lee Hak Su, being in contravention of articles 3, 6, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 2 (3), 9, 14 and 16 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category I.

32. The Working Group requests the Government of the Democratic People's Republic of Korea to take the steps necessary to remedy the situation of Mr. Lee 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.

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

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

35. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea for appropriate action.

36. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

37. 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. Lee has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Lee;
- (c) Whether an investigation has been conducted into the violation of Mr. Lee's 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 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.

38. 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

⁷ See opinion No. 54/2018, para. 57.

whether further technical assistance is required, for example through a visit by the Working Group.

39. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of 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.

40. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has 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.⁸

[Adopted on 18 November 2019]

⁸ See Human Rights Council resolution 42/22, paras. 3 and 7.