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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. 69/2019 concerning Hwang Won (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 17 July 2019 the Working Group transmitted to the Government of the Democratic People's Republic of Korea a communication concerning Hwang Won. The Government replied to the communication on 26 August 2019. 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, 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).

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

Submissions

Communication from the source

4. The source submits that Hwang Won is a citizen of the Republic of Korea who, according to the source, has been continuously deprived of his personal liberty since the hijacking of Korean Air Lines YS-11 by a State agent of the Democratic People's Republic of Korea on 11 December 1969. Prior to being deprived of his liberty, Mr. Hwang Won was a producer for the television broadcaster MBC in the Republic of Korea.
5. According to the source, on 11 December 1969 Mr. Hwang Won boarded Korean Air Lines YS-11, a domestic flight from Gangneung Airport on the east coast of the Republic of Korea to Gimpo Airport, Seoul. The aeroplane took off at 12.25 p.m. and within 10 minutes of take-off an agent from the Democratic People's Republic of Korea entered the cockpit and forced the pilots to divert the aeroplane. After crossing the Military Demarcation Line, fighter aeroplanes from the Democratic People's Republic of Korea accompanied the aeroplane, which reportedly landed at Yonpo airbase near Hamheung City, South Hamgyeong Province, Democratic People's Republic of Korea.
6. It is submitted that the 50 crew members and passengers aboard Korean Air Lines YS-11, including Mr. Hwang Won, were taken into custody by soldiers of the Democratic People's Republic of Korea, who greeted the hijacker and escorted him into a black sedan, in which he left the airbase. A man in the uniform of a General identified himself as a guide, had the passengers blindfolded, then boarded onto two different buses and transported to a waiting room. After several hours, at around 8 p.m., an officer wearing a three-star epaulet entered the room and welcomed them to the Democratic People's Republic of Korea.
7. The source further submits that on 13 December 1969 the official news agency of the Democratic People's Republic of Korea stated that the two pilots of flight YS-11 willingly flew their aeroplane to the Democratic People's Republic of Korea in protest at the policies of the Government of the Republic of Korea.
8. On 14 December 1969, the crew members and passengers were transported to Pyongyang, separated into three groups and detained in three different hotels: the Pyongyang, the Daedong and the Duyeo.
9. The source reports that from 16 December 1969 onwards, the crew members and passengers of flight YS-11 were interrogated and forced to accept ideological indoctrination, including visits to a revolutionary museum, revolutionary galleries and a tractor factory.
10. According to the source, those who questioned or resisted the ideology were taken to a different room for torture and ill-treatment in retaliation. The source specifies that, for instance, one of the 39 individuals who was later allowed to return to the Republic of Korea, was taken to a separate room after making a negative comment. He was allegedly drugged and electrocuted, which left him with permanent physical and mental disabilities, impairing his capacity to communicate with other people.
11. The source reports that Mr. Hwang Won also expressed dissenting views during the indoctrination sessions. He was taken to an unknown place for two weeks and reportedly tortured.
12. The source also submits that on 6 February 1970, which is a lunar New Year's Day and a traditional holiday for family gatherings, Mr. Hwang Won began to sing a popular South Korean song, "I want to go [home]" and soon other individuals in the room joined him in singing the song. Soldiers then dragged Mr. Hwang Won out of the room.
13. According to the source, on 4 February 1970, the Red Cross in the Democratic People's Republic of Korea sent a cable to the International Committee of the Red Cross, stating that the Democratic People's Republic of Korea would unilaterally deport the crew members and passengers "if they so desired".
14. The source reports that on 14 February 1970 the Democratic People's Republic of Korea returned 39 individuals to the Republic of Korea at the Joint Security Area in Panmunjom. However, the authorities of the Democratic People's Republic of Korea allegedly kept 11 other individuals in detention (4 crew members and 7 passengers), including Mr. Hwang Won. The authorities of the Democratic People's Republic of Korea

claimed that the 11 remaining crew members and passengers were staying in the country of their own free will.

15. The source reports that on 15 February 1970 10 of the returnees provided first-hand accounts at a press conference of the mid-air seizure of Korean Air Lines YS-11 on 11 December 1969 and their 66 days in the Democratic People's Republic of Korea.

16. On 20 March 1970, delegates of the United Nations Command and the Democratic People's Republic of Korea held the 373rd meeting of the United Nations Command Military Armistice Commission. During the meeting, the Secretary of the Commission proposed that a third party be asked to verify the true intentions of the 11 individuals remaining in the Democratic People's Republic of Korea, but the authorities of the Democratic People's Republic of Korea allegedly rejected the proposal.

17. The source notes that at its 17th (Extraordinary) Assembly the International Civil Aviation Organization (ICAO) adopted resolution A17-8, in which it urged "that all unlawfully seized aircraft and their cargoes be returned to the persons lawfully entitled to possession and all their passengers and crews be permitted to continue their journey as soon as practicable". In resolution 286 (1970), the Security Council appealed to all parties concerned for the immediate release of all passengers and crews without exception, held as a result of hijackings and other interference in international travel. On 25 November 1970, the General Assembly adopted resolution 2645 (XXV), in which it condemned, without exception whatsoever, all acts of aerial hijacking and all acts of violence which may be directed against passengers, crew and aircraft engaged in civil air transport.

18. The source further notes that despite diplomatic efforts, since their initial abduction Mr. Hwang Won and 10 other citizens of the Republic of Korea have remained in the Democratic People's Republic of Korea.

19. It is reported that after the first inter-Korean summit meeting, held on 15 June 2000, reunion events for separated families took place in the Democratic People's Republic of Korea. The family of Mr. Hwang Won submitted a request for a reunion with him, but did not receive a reply from the authorities.

20. The source notes that in 2010 the case of Mr. Hwang Won was referred to the Working Group on Enforced or Involuntary Disappearances, which transmitted a communication to the Government of the Democratic People's Republic of Korea. In response, the Government stated that there were "no persons in [the] country who ha[d] been enforcedly or involuntarily disappeared or detained against his or her will". The source claims that the Government presented no evidence or conducted a follow-up investigation.

21. The source submits that over recent years, Mr. Hwang Won has been residing near Sariwon, 100 kilometres south of Pyongyang. He is reportedly confined at home with heavy security and restriction of movement and is under de facto house arrest.

22. The source therefore submits that Mr. Hwang Won has been deprived of his personal liberty. In that regard, the source recalls the deliberation of the Working Group on Arbitrary Detention in which it stipulates that without prejudging the arbitrary character or otherwise of the measure, house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises that the person is not allowed to leave.

23. The source also points out that the Working Group on Arbitrary Detention has confirmed that interpretation of deprivation of liberty under international law in its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44), as well as in its jurisprudence.

24. The source submits that the continued deprivation of liberty of Mr. Hwang Won is arbitrary and falls within categories I, II and V.

25. In relation to category I, the source argues that Mr. Hwang Won was initially deprived of his liberty by the hijacking of Korean Air Lines YS-11, a civilian aeroplane, by a State agent of the Democratic People's Republic of Korea, for which there can never be any legal basis or justification.

26. The source recalls the Working Group's jurisprudence stipulating that respect for the territorial sovereignty of States is a basic principle of international law and international

relations which, in addition to prohibiting the use of force and intervention by one State in the affairs of another, includes refraining from committing acts of sovereignty in the territory of another State, particularly acts of coercion or judicial investigation.

27. The source further argues that there can be no normative excuses for the hijacking of a civilian airliner at home or abroad.

28. The source notes the international obligations of the Democratic People's Republic of Korea as a State party to the Convention on Offences and Certain Other Acts Committed on Board Aircraft, the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the International Convention against the Taking of Hostages.

29. The source concludes that Mr. Hwang Won's continued deprivation of liberty constitutes a manifest violation of the letter and spirit of those international treaties, which do not require domestic implementing legislation, and his detention must accordingly be considered as lacking any legal basis. The failure of the Democratic People's Republic of Korea to investigate the hijacking incident and punish the perpetrators further constitutes a violation of its obligation to respect, protect and fulfil the right to liberty and security of person.

30. In relation to category II, the source submits that Mr. Hwang Won's continued deprivation of liberty was partly the result of his exercise of the right to freedom of movement, freedom of thought and freedom of expression, guaranteed by articles 13, 18 and 19 of the Universal Declaration of Human Rights and articles 12, 18 and 19 of the International Covenant on Civil and Political Rights.

31. The source specifies that according to the testimonies by the returnees, during the 66-day period between the hijacking of Korean Air Lines YS-11 on 11 December 1969 and the partial return of 39 crew members and passengers on 14 February 1970, Mr. Hwang Won exercised his right to freedom of thought and freedom of expression by openly expressing his personal conviction against communist ideology. The source therefore considers it probable that Mr. Hwang Won's exercise of his universal human rights may have contributed to the decision by the Democratic People's Republic of Korea to hold him indefinitely in retaliation.

32. The source also notes that Mr. Hwang Won was taken away by soldiers on lunar New Year's Day for singing a South Korean song, "I want to go [home]", which clearly expressed his desire to leave the Democratic People's Republic of Korea and return to the Republic of Korea, along with other individuals. In the opinion of the source, the authorities of the Democratic People's Republic of Korea responded to his expression and exercise of the right to freedom of movement by holding him indefinitely.

33. Lastly, in relation to category V, the source submits that Mr. Hwang Won's abduction and continued deprivation of liberty resulted from his status as a citizen of the Republic of Korea. The source points to the pattern of abducting and detaining foreign nationals over the past few decades by the authorities of the Democratic People's Republic of Korea. The source argues that the abduction of 50 South Korean nationals, including Mr. Hwang Won, fits that historical pattern.

34. In addition, the source submits that the authorities of the Democratic People's Republic of Korea failed to release and return Mr. Hwang Won and 10 other nationals of the Republic of Korea and never provided a satisfactory explanation for their actions, other than claiming that the 11 individuals chose to stay in the Democratic People's Republic of Korea, while categorically rejecting the demand for an individualized assessment of their free will by a third party. The source believes that Mr. Hwang Won's continued deprivation of liberty may have been due to his views and opinions, as expressed in his criticism of ideological indoctrination, and demands that he and the other individuals be returned to the Republic of Korea.

Response from the Government

35. On 17 July 2019, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. It requested the Government to provide detailed information about the current situation of Mr. Hwang Won and to clarify the legal provisions justifying his continued detention, as well as its compatibility

with the obligations of the Democratic People's Republic of Korea under international human rights law, in particular with regard to the treaties ratified by the State. The Working Group called upon the Government of the Democratic People's Republic of Korea to ensure Mr. Hwang Won's physical and mental integrity.

36. On 26 August 2019, the Government submitted its response, in which it stated that there was no one in the Democratic People's Republic of Korea who had been forcibly detained against his or her will. The Government further argued that as in previous cases, such communications represented part of the stereotyped political plot against the Democratic People's Republic of Korea by hostile forces that resort to "human rights rackets" using every conceivable means.

37. The Democratic People's Republic of Korea therefore categorically rejected the case of Mr. Hwang Won, viewing it as a scheme devised against the Democratic People's Republic of Korea for political purposes under the disguise of 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.

Further comments from the source

38. The reply of the Government was sent to the source for further comments on 26 August 2019, which the source submitted on 9 September 2019. In further comments, the source expresses disappointment at the government response that the communication concerning Mr. Hwang Won represents part of the stereotyped political plot against the Democratic People's Republic of Korea pursued by hostile forces that resort to vicious human rights rackets using every conceivable means and that the Working Group "is recommend [sic] to see through the ulterior motive behind such communication". The source underlines that it is not interested in a "political plot", nor does it harbour any "ulterior motive" other than to reunite Mr. Hwang Won with his family.

39. The source further submits that the government response contains no substance. For instance, it notes that there is no proof to back up its claim that "there is no person in [the Democratic People's Republic of Korea] who has been forcibly detained against his or her will", while it is beyond reasonable doubt that Korean Air Lines YS-11 was hijacked and taken to the Democratic People's Republic of Korea by its agents on 11 December 1969 and that 11 of the 50 captives have never returned home.

40. The source requests the Working Group to find that the kidnapping and continued detention of Mr. Hwang Won has no legal basis as they constitute manifest violations of the provisions of international treaties to which the Democratic People's Republic of Korea is a party, inter alia: article 11 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft; article 9 of the Convention for the Suppression of Unlawful Seizure of Aircraft; article 10 (2) of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; and article 3 (1) of the 1979 International Convention against the Taking of Hostages.

41. The source further requests the Working Group to reaffirm that national law and courts cannot erect barriers such as immunities, jurisdictional limitations, procedural hurdles or defences based on an "act of State doctrine" in any form that would limit the effectiveness of international law for the violation of peremptory (*jus cogens*) and *erga omnes* norms of customary and conventional international law, such as the prohibition of arbitrary deprivation of liberty.

42. The source further notes the explicit reference to the 1969 hijacking of Korean Air Lines YS-11 in the report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea (A/HRC/25/CRP.1, paras. 897–899), in which the commission concluded that despite "calls from the international community, no adequate response to this international crime has ever been received".

43. The source concludes by stating 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, as the Working Group has repeatedly reminded the Democratic People's Republic of Korea.

Discussion

44. The Working Group thanks the source and the Government for their submissions. It regrets the repeated unwillingness of the Government to engage with it constructively over the allegations raised.¹ The Working Group reiterates that it always seeks the constructive engagement of Governments during its regular communications procedure. However, in those instances when Governments choose not to engage with the Working Group or limit such engagement to a summary dismissal of the allegations raised, the Working Group must limit itself to assessing the credibility and reliability of the source solely on the basis of the information at its disposal. In that regard, the Working Group notes that the source's account is consistent and presents no contradictions.

45. The Working Group recalls that it considers a detention to be arbitrary and falling under category I if such detention lacks a legal basis. As the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis it is not sufficient that there is a law which may authorize the arrest of an individual. The authorities must invoke the legal basis and apply it to the circumstances of the case through an arrest warrant.²

46. The Working Group is convinced that Mr. Hwang Won is a citizen of the Republic of Korea and has been continuously deprived of his personal liberty since 11 December 1969, after the hijacking of Korean Air Lines YS-11. The Working Group is also convinced that Mr. Hwang Won is not in the Democratic People's Republic of Korea of his own free will, despite the general response by the Government. For the Working Group, such a lack of willingness is also evidenced by the fact that on 20 March 1970, during a meeting of the Military Armistice Commission, a proposal to request a third party to verify the true intentions of the 11 individuals in regard to their remaining in the Democratic People's Republic of Korea was refused by the authorities. The Working Group would also like to recall that in the report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, it was noted that the commission did not receive an adequate response from the Democratic People's Republic of Korea regarding the 1969 hijacking of Korean Air Lines YS-11 (A/HRC/25/CRP.1, paras. 897–899).

47. From the credible information received, the Working Group is aware that 50 crew members and passengers aboard Korean Air Lines YS-11 were taken into custody by State agents of the Democratic People's Republic of Korea and that 39 of them were released, but not Mr. Hwang Won. In that regard, the Working Group has not received any information from the Government of the Democratic People's Republic of Korea providing evidence that Mr. Hwang Won was informed of the reasons for his arrest or was detained immediately after committing a crime.

48. The Working Group received information from the source, which was not challenged by the Government of the Democratic People's Republic of Korea, that in recent years Mr. Hwang Won has reportedly been confined at home with heavy security and restriction of movement, and is under house arrest. As already stated in its jurisprudence, the Working Group considers that house arrest could be regarded as deprivation of liberty.³ In its deliberation No. 1, the Working Group also mentions that without prejudging the arbitrary character or otherwise of the measure, house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises that the person is not allowed to leave (E/CN.4/1993/24, para. 20).

49. On the basis of the above, the Working Group is therefore convinced that Mr. Hwang Won was initially deprived of his liberty during the hijacking of Korean Air Lines YS-11, a civilian aeroplane, by a State agent of the Democratic People's Republic of Korea, for which there can never be any legal basis or justification. He was afterwards deprived of his liberty and placed under house arrest, without any justification provided by the Government of the Democratic People's Republic of Korea.

50. In that regard, the Working Group would like to emphasize that the authorities of the Democratic People's Republic of Korea have failed to invoke a legal basis for the arrest and

¹ See opinions No. 52/2019, No. 54/2018 and No. 54/2017.

² See opinions No. 35/2018, No. 75/2017, No. 66/2017 and No. 46/2017.

³ See opinion No. 54/2015, para. 80.

continuous detention of Mr. Hwang Won since 1969, in violation of article 9 (1) of the Covenant.

51. The Working Group received credible information, which was not disputed by the Government, that Mr. Hwang Won had exercised his right to freedom of thought and freedom of expression by openly expressing his personal conviction against communist ideology. The Working Group is convinced that Mr. Hwang Won was taken away by soldiers for singing a South Korean song, “I want to go [home]”, which clearly expressed his desire to leave the Democratic People’s Republic of Korea and to return to the Republic of Korea, along with other individuals. In the opinion of the source, the authorities of the Democratic People’s Republic of Korea responded to his expression and exercise of the right to freedom of movement by holding him indefinitely.

52. The Working Group therefore considers that the continued detention of Mr. Hwang Won by the authorities of the Democratic People’s Republic of Korea is a result of his exercise of his rights of freedom of thought and expression. It concludes that being in contravention of article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, the detention of Mr. Hwang Won is arbitrary and falling within category II.

53. The Working Group is concerned that there has been no information on Mr. Hwang Won provided by the authorities. In the light of this and in accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea, for appropriate action.

Disposition

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

The deprivation of liberty of Hwang Won, being in contravention of articles 9 and 19 of the Universal Declaration of Human Rights and articles 9 and 19 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and II.

55. 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. Hwang Won 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.

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

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

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

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

Follow-up procedure

60. 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. Hwang Won has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Hwang Won;

(c) Whether an investigation has been conducted into the violation of Mr. Hwang Won'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.

61. 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.

62. 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.

63. 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.⁴

[Adopted on 20 November 2019]

⁴ See Human Rights Council resolution 42/22, paras. 3 and 7.