**HUMAN RIGHTS COMMITTEE**

**Kim v. Republic of Korea**

**Communication No. 574/1994**

**14 March 1996**

**CCPR/C/56/D/574/1994*/**

**ADMISSIBILITY**

*Submitted by: Keun-Tae Kim (represented by counsel)*

*Alleged victim: The author*

*State party: Republic of Korea*

*Date of communication: 27 September 1993 (initial submission)*

*Documentation references: Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 9 February 1994 (not issued in document form)*

*Date of present decision: 14 March 1996*

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

## Decision on admissibility

1. The author of the communication is Mr. Keun-Tae, a Korean citizen residing in Dobong-Ku, Seoul, Republic of Korea. He claims to be a victim of violation by the Republic of Korea of article 19, paragraph 2, of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author is a founding member of the National Coalition for Democratic Movement (Chunminryum; hereinafter NCDM). He was the Chief of the Policy Planning Committee and Chairman of the Executive Committee of that organization. Together with other NCM members, he prepared documents which criticized the Government of the Republic of Korea and its foreign

allies, and appealed for national reunification. At the inaugural meeting of the NCDM on 21 January 1989, these documents were distributed and read out to approximately 4,000 participants; the author was arrested at the conclusion of the meeting.

2.2 On 24 August 1990, a single judge on the Criminal District Court of Seoul found the author guilty of offences against article 7, paragraphs 1 and 5, of the National Security Law, the Law on Assembly and Demonstrations and the Law on Repression of violent Activities, and sentenced him to three years' imprisonment and one year of suspension of eligibility. The Appeal Section of the same tribunal dismissed Mr. Kim's appeal on 11 January 1991, but reduced the sentence to two years' imprisonment. On 26 April 1991, the Supreme Court dismissed a further appeal. It is submitted that as the Constitutional Court had held, on 2 April 1990, that article 7, paragraphs 1 and 5, of the National Security Law, are not inconsistent with the Constitution, the author has exhausted all available domestic remedies.

2.3 The present complaint only relates to the author's conviction under article 7, paragraphs 1 and 5, of the National Security Law. Paragraph 1 provides that "any person who assists an anti-State organization by praising or encouraging the activities of this organization, shall be punished". Paragraph 5 stipulates that "any person who produces or distributes documents, drawings or any other material(s) to the benefit of an anti-State organization, shall be punished". On 2 April 1990, the Constitutional Court held that these provisions are compatible with the Constitution as they are applied [only] when the security of the State is endangered, or when the incriminated activities undermine the basic democratic order.

2.4 Upon considering the author's previous presumed anti-State activities of which he had been convicted, 1/ the District Court judge came to the following conclusions:

- The communist régime of North Korea is an anti-State organization, which was formed with the purpose of overturning the State, and purports to be a government. It has heaped slander on the reality of our country . . .";

- Despite being aware of all [of the above], the defendant [. . .] directed members from other organizations, such as the Seoul Council of National Democratic Movement, to produce leaflets containing [. . . ], and distributed said leaflets . . .";

- The defendant produced and distributed said material with the object and purpose of siding with the activities of the communist régime of the North and thus benefiting (abetting) this anti-State organization";

2.5 The author appealed the judgement of 24 August 1990 on the following grounds;

- although the documents produced and distributed by him contain ideas resembling those which the régime of North Korea advocates, the judge misinterpreted the facts, as the overall message in the documents was "the accomplishment of reunification through independence and democratization". It thus cannot be said that the author either praised or encouraged the activities of North Korea, or that the contents of the documents were of direct benefit to the North Korean régime;

- the prohibited acts and the concepts spelled out in paragraphs 1 and 5 of the article 7 of the National Security Law are defined in such broad and ambiguous terms that these provisions violated the principle of legality, that is, article 21, paragraph 1, of the Constitution, which provides that freedoms and rights of citizens may be restricted by law only when absolutely necessary for national security, maintenance of law and order, public welfare, and that such restrictions may not violate essential aspects of fundamental rights; and

- in light of the findings of the Constitutional Court, the application of these provisions should be suspended for activities which carry no obvious danger for national security or the survival of democratic order. Since the incriminated material was not produced and distributed with the purpose of praising North Korea, and further do not contain any information which would obviously endanger either survival or security of the Republic of Korea, or its democratic order, the author should not be punished.

2.6 As noted above, the Appeal Section of the District Court dismissed the author's appeal. His further appeal to the Supreme Court was based on the issue of whether he had in fact had the intent to support the activities of an anti-State organization. On 26 April 1991, the Supreme Court held that the mere knowledge [i.e. that such activities could be of benefit to North Koreal] was sufficient to establish the author's guilt.

2.7 On 10 May 1991, the National Assembly passed a number of amendments to the National Security Law; paragraphs 1 and 5 of article 7 were amended by the addition of the words "with the knowledge that it will endanger national security or survival, or the free and democratic order" to the previous provisions. This amended National Security Law was promulgated on 31 May 1991. The previous text of the law was however applied to the author's case.

The complaint:

3.1 Counsel contends that although article 21, paragraph 1, of the Korean Constitution provides that "all citizens shall enjoy freedom of speech, press, assembly and association", article 7 of the National Security Law has often been applied to restrict freedom of thought, conscience or expression through speech or publication, by acts, association, etc. Under this provision, anyone who supports or thinks in positive terms about socialism, communism or the political system of North Korea is liable to punishment. It is further argued that there have been numerous cases in which this provision was applied to punish those who criticized government policies, because their criticism happened to be similar to that proffered by the North Korean régime against South Korea. In counsel's view, the author's case is a model of such abusive application of the National Security Law, in violation of article 19, paragraph 2, of the Covenant.

3.2 It is further argued that the courts' reasoning clearly shows how the National Security Law is manipulated to restrict freedom of expression, on the basis of the following considerations contrary to article 19 of the Covenant. First, the courts found that the author held opinions which were critical of the policies of the Government of the Republic of Korea; secondly, North Korea has criticized the Government of South Korea in that it distorts South Korean reality; thirdly, North Korea is characterized as an anti-State organization, which has been formed for the purpose of upstaging the government of South Korea (article 2 of the National Security Law); fourthly, the

author wrote and published material containing criticism similar to that voiced by North Korea vis-à-vis South Korea; fifthly, the author must have known about that criticism; and, finally, the author's activities must have been undertaken for the benefit of North Korea and therefore amount to praise and encouragement of that country's régime.

3.3 Counsel refers to the Comments of the Human Rights Committee which were adopted after consideration of the initial report of the Republic of Korea under article 40 of the Covenant. 2/ Here, the Committee observed that:

> [Its] main concern relates to the continued operation of the National Security Law. Although the particular situation in which the Republic of Korea finds itself has implications on public order in the country, its influence ought not to be overestimated. The Committee believes that ordinary laws and specifically applicable criminal laws should be sufficient to deal with offences against national security. Furthermore, some issues addressed by the National Security Law are defined in somewhat vague terms, allowing for broad interpretation that may result in sanctioning acts that may not truly be dangerous for State security [...] [T]he Committee recommends that the State party intensify its efforts to bring its legislation more into line with the provisions of the Covenant. To that end, a serious attempt ought to be made to phase out the National Security Law which the Committee perceives as a major obstacle to the full realization of the rights enshrined in the Covenant and, in the meantime, not to derogate from certain basic rights [. . .]."

3.4 Finally, it is contended that although the events for which the author was convicted and sentenced occurred before the entry into force of the Covenant for the Republic of Korea on 10 July 1990, the courts delivered their decisions in the case after that date and therefore should have applied article 19, paragraph 2, of the Covenant in the case.

State party's information and observations on admissibility and author's comments thereon:

4.1 In its submission under rule 91 of the rules of procedure, the State party argues that as the communication is based on events which occurred prior to the entry into force of the Covenant for the Republic of Korea, the complaint is inadmissible ratione temporis inasmuch as it is based on these events.

4.2 The State party acknowledges that the author was found guilty on charges of violating the National Security Law from January 1989 to May 1990. It adds, however, that the complaint fails to mention that Mr. Kim was also convicted for organizing illegal demonstrations and instigating acts of violence on several occasions during the period from January 1989 to May 1990. During these demonstrations, according to the State party, participants "threw thousands of Molotov cocktails and rocks at police stations, and other government offices. They also set 13 vehicles on fire and injured 134 policemen". These events all took place before 10 July 1990, date of entry into force of the Covenant for the State party: they are thus said to be outside the Committee's competence ratione temporis.

4.3 For events occurring after 10 July 1990, the question is whether the rights protected under the Covenant were guaranteed to Mr. Kim. The State party contends that all rights of Mr. Kim under

the Covenant, in particular his rights under article 14, were observed between the date of his arrest (13 May 1990) and that of his release (12 August 1992).

4.4 Concerning the alleged violation of article 19, paragraph 2, of the Covenant, the State party argues that the author has failed to identify clearly the basis of his claim and that he has merely based it on the assumption that certain provisions of the National Security Law are incompatible with the Covenant, and that criminal charges based on these provisions of the National Security Law violate article 19, paragraph 2. The State party submits that such a claim is outside the Committee's scope of jurisdiction; it argues that under the Covenant and the Optional Protocol, the Committee cannot consider the (abstract) compatibility of a particular law, or the provisions of a State party's law, with the Covenant. Reference is made to the Views of the Human Rights Committee on communication No. 55/1979, 3/ which are said to support he State party's conclusions.

4.5 On the basis of the above, the State party requests the Committee to declare the communication inadmissible both ratione temporis, inasmuch as events prior to 10 July 1990 are concerned, and because of the author's failure to substantiate a violation of his rights under the Covenant for events which occurred after that date.

5.1 In his comments, the author notes that what is at issue in his case are not the events (i.e. before 10 July 1990) which initiated the violations of his rights, but the subsequent judicial procedures which led to his conviction by the courts. Thus, he was punished, after the entry into force of the Covenant for the Republic of Korea for having contravened the National Security Law. He notes that as his activities were only the peaceful expression of his opinions and thoughts within the meaning of article 19, paragraph 2, of the Covenant, the State party had a duty to protect the peaceful exercise of this right. In this context, the State authorities and in particular the courts were duty-bound to apply the relevant provisions of the Covenant according to their ordinary meaning. In the instant case, the courts did not consider article 19, paragraph 2, of the Covenant when trying and convicting the author. In short, to punish the author for exercising his right to freedom of expression after the Covenant became effective for the Republic of Korea entailed a violation of his right under article 19, paragraph 2.

5.2 Counsel observes that the so-called illegal demonstrations and acts of violence referred to by the State party are irrelevant to the instant case; what he raises before the Committee does not concern the occasions on which he was punished for having organized demonstrations. This does not mean, counsel adds, that his client's conviction under the Law on Demonstrations and Assembly were reasonably and proper: it is said to be common that leaders of opposition groups in the Republic of Korea are convicted for each and every demonstration staged anywhere in the country, under an "implied conspiracy theory".

5.3 The author reiterates that he was not raised the issue of the National Security Law's compatibility with the Covenant. He does indeed express his view that, as the Committee acknowledged in its Concluding comments on the State party's initial report, the said law remains a serious obstacle to the full realization of Covenant rights. However, he stresses that his communication concerns "solely the fact that he was punished for his peaceful exercise of the right to freedom of expression, in violation of article 19, paragraph 2, of the Covenant".

Admissibility considerations:

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has taken note of the State party's argument that as the present case is based on events which occurred prior to the entry into force of the Covenant and the Optional Protocol for the Republic of Korea, it should be deemed inadmissible ratione temporis. In the present case the Committee does not have to refer to its jurisprudence under which the effects of a violation that continue after the Covenant entered into force for the State party may themselves constitute a violation of the Covenant. The reason here is that the violation alleged by the author was his conviction under the National Security Law. As this conviction took place after the entry into force of the Covenant on 10 July 1990 (24 August 1990 for conviction; 11 January 1991 for the appeal, and 26 April 1991 for the Supreme Court's judgement), the Committee is not precluded ratione temporis from considering the author's communication.

6.3 The State party has argued that the author's rights were fully protected during the judicial procedures against him, and that he is challenging in general terms the compatibility of the National Security Law with the Covenant. The Committee does not share this assessment. The author claims that he was convicted under article 7, paragraphs 1 and 5, of the National Security Law, for mere acts of expression. He further claims, and has substantiated these claims by forwarding the judgements of the courts that convicted him and heard his appeals, that no proof was presented either of specific intention to endanger state security, or of any actual harm caused thereto. These claims do not amount to an abstract challenge of the compatibility of the National Security Law with the Covenant, but to an argument that the author has been the victim of a violation by the State party of his right to freedom of expression under article 19 of the Covenant. This argument has been sufficiently substantiated to require an answer by the State party on the merits.

6.4 The Committee is satisfied, on the basis of the material before it, that the author has exhausted all available domestic remedies within the meaning of article 5, paragraph 2, of the Optional Protocol; it notes in this context that the State party has not objected to the admissibility of the case on this ground.

7. The Human Rights Committee therefore decides:

(a) That the communication is admissible inasmuch as it appears to raise issues under article 19 of the Covenant;

(b) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of the transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) That any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the Committee's rules of procedure, to the

author and to his counsel, with the request that any comments that they may wish to submit thereon should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within six months of the date of the transmittal;

(d) That this decision shall be communicated to the State party, to the author and to his counsel.

[Done in English, French, and Spanish, the English text being the original version.]

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*/ All persons handling this document are requested to respect and observe its confidential nature.

1/ The author had once before, in July 1986, been sentenced for having violated the National Security Law. On 30 June 1988, he was released on parole; he was later amnestied.

2/ CCPR/C/79/Add.6, adopted during the Committee's 45th session (Oct.-Nov. 1992), paragraphs 6 and 9.

3/ Case No. 55/1979 (Alexander MacIsaac v. Canada), Views adopted on 14 October 1982, paragraphs 10 to 12.