

## HUMAN RIGHTS COMMITTEE

### Kang v. Republic of Korea

Communication No. 878/1999\*\*

15 July 2003

CCPR/C/78/D/878/1999\*

### VIEWS

*Submitted by: Yong-Joo Kang (represented by counsel, Mr. Yong-Whan Cho)*

*Alleged victim: The author*

*State party: Republic of Korea*

*Date of communication: 27 May 1998*

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 2003,

Having concluded its consideration of communication No. 878/1999, submitted to the Human Rights Committee on behalf of Mr. Yong-Joo Kang under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication, dated 27 May 1998, is Mr. Yong-Joo Kang, a Korean citizen, in prison at the time of submission of the communication. He was subsequently released. He claims to be the victim of a violation by the Republic of Korea of articles 10, paragraphs 1 and 3, 18, paragraphs 1 and 2, 19, paragraphs 1 and 2, and 26 of the Covenant. He is represented by

counsel. The Optional Protocol entered into force for the State party on 10 July 1990.

### The facts as presented by the author

2.1 The author, along with other acquaintances, was an opponent of the State party's military regime of the 1980s. In 1984, he distributed pamphlets criticizing the regime and the use of security forces to harass him and others. At that time, he also made an unauthorized (and therefore criminal) visit to North Korea. In January, March and May 1985, he distributed dissident publications covering numerous political, historical, economic and social issues.

2.2 The author was arrested without warrant on 1 July 1985 by the Agency for National Security Planning (ANSP). He was held *incommunicado* and interrogated in ANSP detention, suffering "torture and other mistreatments", over 36 days. Under torture, he confessed to joining the North Korean Labour Party and receiving instructions for espionage from North Korea. Only on 5 August 1985, was a judicial warrant issued for his arrest. Remaining in detention, he was formally indicted on 4 September 1985 for alleged violations of the National Security Law of 31 December 1980.<sup>1</sup> These allegations encompassed meeting with another member of a spy ring, "enemy-benefitting activities" in favour of North Korea, gathering and divulging state or military secrets (espionage), and conspiracy.

2.3 In January 1986, the author was tried before the 10th Panel of the Seoul Criminal District Court for alleged violations of the National Security Law, as part of a spy ring case in which 15 persons were convicted in 1985 and 1986.<sup>2</sup> At trial, he contended that his confessions had been obtained by torture. On 20 January 1986, the court relied on the author's confessions, convicting and sentencing him to life imprisonment. The court found that he had "become a member of an anti-State organization", and that dialogue and meeting with other regime critics constituted a "crime of praising, encouraging or siding with the anti-State organization" and "crime of meeting with a member of the anti-State organization". The distribution of publications was said to amount to "espionage".

2.4 His appeals were successively dismissed by the 4th Criminal Panel of the Seoul High Court on 31 May 1986 and by the 1st Panel of the Supreme Court on 23 September 1986.<sup>3</sup> As he was convicted in 1986, he had no possibility to raise any constitutional issues before the Constitutional Court, which was only introduced by the 1987 Constitution.

2.5 After his conviction, the author was held in solitary confinement. He was classified as a communist "confident criminal"<sup>4</sup> under the "ideology conversion system", a system given legal foundation by the 1980 Penal Administration Law and designed to induce change to a prisoner's political opinion by the provision of favourable benefits and treatment in prison. Due to this classification, he was not eligible for more favourable treatment. On 14 March 1991, the author's detention regime was reclassified by the Regulation on the Classification and Treatment of Convicts ('the 1991 Regulation') to "those who have not shown signs of repentance after having committed crimes aimed at destroying the free and democratic basic order by denying it". Moreover, having been convicted under the National Security Law, the author was subject to an especially rigorous parole process.<sup>5</sup>

2.6 On 17 February 1992, the author and 41 other long-term political prisoners convicted under the National Security Law filed a constitutional petition with the Constitutional Court, seeking adjudication of the unconstitutionality of the "ideology conversion system" and its repeal. On 25 May 1992, the Court found the complaint time-barred. While conceding that the alleged violations had continuing effect, the Court considered that the complaint should have been brought within 180 days of the 1991 Regulation coming into effect on 14 March 1991.

2.7 In 1993, by Presidential Decree, the author's life sentence was commuted to 20 years' imprisonment. On 7 July 1994, the author filed a criminal complaint against eight officials of the ANSP concerning his "illegal arrest" and the mistreatment suffered in July and August 1985. The prosecutor decided not to indict the suspects of the ANSP as the relevant statute of limitation had already expired. This decision was subsequently upheld by the High Prosecutor's Office. On appeal, on 9 January 1995, the Constitutional Court confirmed the High Prosecutor's decision, holding the relevant 7 year time bar of the Code of Criminal Procedure to be applicable.

2.8 Following the inauguration of a new administration in 1998, on 25 February 1999 (after submission of the communication), the author was released under the terms of a general amnesty.<sup>6</sup>

### The complaint

3.1 The author claims a violation of article 19, paragraph 2, in relation to his conviction under the National Security Law for his gathering and divulging of "state or military secrets" (espionage). His conviction was obtained by confessions extracted under torture during an illegal detention, while the information regarded as "secret" was publicly known. Due to the Supreme Court's interpretation of the notion of "secret" (see footnote 3, *supra*), the prosecution did not consider it necessary to establish that release of the information would threaten national security. It could scarcely be necessary for the protection of national security to censor ideas which were publicly known, and therefore the author's conviction and subsequent imprisonment fell outside the legitimate restrictions of article 19, paragraph 3.

3.2 He further claims a violation of articles 10, paragraphs 1 and 3, 18, paragraphs 1 and 2, 19, paragraph 1, and 26 in relation to the "ideology conversion system". The author was regarded as a "communist", a characterization he rejects. He was thus held in solitary confinement for 13 years for his refusal to "convert". The coercion to change his thought and conscience that he had suffered as a result of his classification and the withholding of benefits, as well as the absence of possible parole unless he "converted", amount to violations of his right to hold beliefs of his own choice, without interference. He was thus subjected to systematic discrimination on the basis of political opinion, and to treatment in prison which is neither compatible with his inherent dignity nor aimed at his reformation and social rehabilitation.

3.3 In support of his contention that the "ideology conversion system" violates the Covenant, the author refers to the Committee's concluding observations on the initial report of the Republic of Korea to the effect that:

"... The Committee's main concern relates to the continued operation of the National

Security Law. ... 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 be truly dangerous for State security and responses unauthorized by the Covenant. ... The Committee also considers that the conditions under which prisoners are being re-educated do not constitute rehabilitation in the normal sense of the term and that the amount of coercion utilized in that process could amount to an infringement of the Covenant relating to freedom of conscience. ...”<sup>7</sup>

3.4 The Special Rapporteur of the Commission on Human Rights on the Promotion and Protection of the Right to Freedom of Opinion and Expression has echoed these concerns. His report “strongly encourage[s]” the State party “to repeal the National Security Law and to find other means ... to protect its national security”. It further suggests that the State party cease “the practice of requesting prisoners who allegedly hold political opinions repugnant or unpalatable to the establishment to renounce such opinions”, and recommends that “all prisoners who are held for their exercise of the right to freedom of opinion and expression should be released unconditionally” and that the “cases of prisoners who have been tried under previous Governments should be reviewed”.<sup>8</sup>

3.5 The author further claims (without specifically referring to article 2) that the Constitutional Court’s dismissal of his application concerning the “ideology conversion system” deprived him of an “effective remedy” for what the Court itself found to be a continuing violation of his rights.

3.6 The author seeks (a) declarations that his conviction for “espionage” and subjection to the “ideology conversion system” violate the relevant provisions of the Covenant, (b) immediate and unconditional release,<sup>9</sup> (c) repeal of the “ideology conversion system”, (d) retrial of his case, (e) adequate compensation for the violation of the author’s rights, and (f) official publication of the Committee’s Views.

3.7 As to the admissibility of the communication, the author contends that he has exhausted all available domestic remedies and that he has no other effective remedy under the country's legal system with regard to the alleged violation of his rights. As to the applicability of the time bar (in both his petition to the Constitutional Court and the criminal proceedings initiated), the author argues that in both cases it was impossible under the unconstitutional military regime then in power to have brought a case against torturers of political dissidents within the period of limitations. The Korean legal order itself recognizes that the constitutional order was interrupted until February 1993,<sup>10</sup> and therefore the statute of limitations in his case ought to have run from that date.

3.8 As to the admissibility ratione temporis of the communication, the author states that he suffered continuing effects of his original conviction in violation of the Covenant past the entry into force of the Optional Protocol in the form of his prison term. The violations of the Covenant on account of the “ideology conversion system” are said to have been of an ongoing character and run up to his release.

3.9 The author confirms that the matter has not been submitted for examination under any other

procedure of international investigation or settlement.

#### The State party's submissions on admissibility and merits

4.1 The State party, by submissions of 30 December 1999 and 22 June 2000, disputes the admissibility and merits, respectively, of the communication.

4.2 The State party considers the communication inadmissible on three grounds. Firstly, the author was released on 25 February 1999 pursuant to a general amnesty. Secondly, the "ideology conversion system" was abolished in June 1998, and replaced by a "oath of law-abidance system". This system does not operate by compulsion, but requests an oath from prisoners that they will abide by the law. The oath is not a prerequisite for release, as the release under the 15 August 1999 general amnesty without giving the oath of 49 persons convicted for violations of the National Security Law shows. Thirdly, "crimes of espionage and terrorist activities" for which the author was convicted "can by no means be justified by the right of freedom of expression". The State party argues that the author, a North Korean agent, sought to overthrow its Government, leaked State secrets to North Korea, engaged in "vicious anti-state terrorist activities under the instruction of North Korea" and plotted to destroy the American Cultural Center in Kwang-ju City "in order to fuel anti-American feelings amongst Korean people".

4.3 On the merits, the State party considers the communication unfounded for similar reasons. Firstly, it argues that the author's convictions for espionage and terrorist activities under North Korean instruction followed fair and open trials. Secondly, the State party refers to article 19, paragraph 3(b), of the Covenant for the proposition that freedom of expression cannot justify such crimes. Thirdly, there was no substantiated coercion or cruelty in the prosecutorial interrogation, for the author himself admitted at trial that his confession was voluntarily and freely given.<sup>11</sup> Fourthly, the oath of law-abidance system following abolition of the "ideology conversion system" simply requests an oath of compliance with the law and thus does not restrict any rights to freedom of opinion or conscience. Fifthly, the State party again refers to the fact that the oath is not a pre-requisite for release and that the author's release on 25 February 1999 was part of a general amnesty "aimed at facilitating national reconciliation". Finally, as the proceedings in the author's case were consistent with the Covenant, there is no basis for a retrial or compensation.

#### The author's comments

5.1 By letters of 11 February 2000 and 8 September 2000, the author rejects the State party's submissions on both admissibility and merits.

5.2 The author points out that, in legal terms, the "amnesty" provided to the author was merely a "suspension of execution of punishment" as provided for in article 471 of the Code of Criminal Procedure. Accordingly, the author was only conditionally released and liable to re-detention at any time, particularly if political circumstances change. The author contrasts this situation with the unconditional amnesties provided to former presidents involved in the 1980 military coup d'état and released the same day as the author, and do not face any possibility of future detention.

5.3 The author rejects the State party's suggestion that the "ideology conversion system" is fully abolished, referring to the similar character of the "law-abidance oath system". He cites the Committee's concluding observations on the Republic of Korea to the effect that the "oath requirement is applied, on a discriminatory basis, particularly to persons convicted under the National Security Law, and that in effect it requires persons to make an oath to abide by a law that is incompatible with the Covenant."<sup>12</sup>

5.4 The author invites the State party to substantiate the allegations that he was a North Korean agent, leaked State secrets to North Korea and engaged in "vicious anti-state terrorist activities". The author rejects as libelous the State party's allegation that he was involved in "plotting to blow up the American Cultural Center in Kwang-ju". He notes the issues surrounding his conviction for "terrorist activity" did not form part of his original communication, as he had confined himself to his conviction for "espionage". He therefore rejects the relevancy to the espionage conviction of the State party's submission, but would be prepared to show how he suffered torture and forced extraction of confessions at the hands of the ANSP and prosecutors on the terrorism charge as well, were the State party to advance evidence of his conviction for this crime. The author questions why the State party has not genuinely investigated the author's prolonged detention *incommunicado*, which constituted a serious crime under domestic law, as well as his subsequent detention pre-trial after issuance of the arrest warrant.

5.5 As to improper treatment at the pre-trial stage, the author points out that the prosecutors and judges singularly failed to investigate the prolonged period of unlawful detention and what may have occurred during that period. As to the voluntariness of the confessions and their subsequent use at trial, the author states that he was simply asked if he wished to return to the ANSP when he raised these issues.<sup>13</sup>

5.6 The author accepts as self-evident that espionage is not justified by the right to free expression, but contends that this begs the question of his conduct in the particular case. As outlined in the communication, the "state or military secrets" for which he was convicted were publicly available and did not pose any threat to the life or security of the State party. Accordingly, their dissemination was protected by article 19. It falls on the State party therefore to justify why the information for which he was convicted for gathering and divulging posed such a threat, and it has failed to do so. The author points out that under the National Security Law, the burden of proof falls on the individual to show that he did not pose a threat to State security, rather than on the State to show that he or she did pose such a threat.

5.7 Finally, the author notes that his release was conditional, and he remains a victim because he is under threat of re-detention based on the conviction. Moreover, the "ideology conversion system" continued to apply until his release. The Committee is asked to determine whether his status before and after release is compatible with the Covenant.

## Issues and proceedings before the Committee

### Consideration of admissibility

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

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol. With respect to the exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies that have not been exhausted by the author.

6.3 As to the admissibility ratione temporis of the author's conviction for espionage, and the circumstances of alleged torture and unlawful detention preceding it, the Committee observes that these events occurred before the entry into force of the Optional Protocol for the State party. It recalls its jurisprudence that, in such circumstances, a term of imprisonment, without the involvement of additional factors, does not amount per se to a "continuing effect", in violation of the Covenant, sufficient to bring the original circumstances giving rise to the imprisonment within the Committee's jurisdiction ratione temporis.<sup>14</sup>

6.4 With respect to the remaining claims, the State party argues that the communication is deprived of object as the author has been released. The Committee observes that a communication could only be considered to be deprived of object and inadmissible if the State party had provided a full and effective remedy for the allegations brought before the Committee. In the present case, there is no indication that appropriate compensation for the alleged violations of the Covenant has been granted to the author. Accordingly, the Committee considers that the question whether an effective remedy has been provided can only be determined by addressing the merits of the case.

6.5 As to the State party's remaining objections, the Committee considers that they are in the nature of arguments on the merits which are most appropriately dealt with at that stage of its consideration.

#### Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 As to the author's claim that the "ideology conversion system" violates his rights under articles 18, 19 and 26, the Committee notes the coercive nature of such a system, preserved in this respect in the succeeding "oath of law-abidance system", which is applied in discriminatory fashion with a view to alter the political opinion of an inmate by offering inducements of preferential treatment within prison and improved possibilities of parole.<sup>15</sup> The Committee considers that such a system, which the State party has failed to justify as being necessary for any of the permissible limiting purposes enumerated in articles 18 and 19, restricts freedom of expression and of manifestation of belief on the discriminatory basis of political opinion and thereby violates articles 18, paragraph 1, and 19, paragraph 1, both in conjunction with article 26.

7.3 As to the author's remaining claims under article 10, the Committee considers that his detention in solitary confinement for a period as long as 13 years, of which more than eight were after the entry into force of the Optional Protocol, is a measure of such gravity, and of such fundamental impact on the individual in question, that it requires the most serious and detailed justification. The Committee considers that confinement for such a lengthy period, apparently on the sole basis of his presumed political opinion, fails to meet that such particularly high burden of justification, and constitutes at once a violation of article 10, paragraph 1, protecting the inherent dignity of the author, and of paragraph 3, requiring that the essential aim of detention be reformation and social rehabilitation.

7.4 In the light of these findings, the Committee need not address the further claim under article 2 alleging a failure of the domestic courts to provide him with an effective remedy for the violations in question.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 10, paragraphs 1 and 3, and articles 18, paragraph 1, and 19, paragraph 1, in conjunction with 26, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The Committee notes that, although the author has been released, the State party is under an obligation to provide the author with compensation commensurate with the gravity of the breaches in question. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

\* Made public by decision of the Human Rights Committee.

\*\* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski



and Mr. Maxwell Yalden.

## Notes

1/ The Law was enacted by the "National Security Legislative Council", an unelected body organized as a legislature following the 1980 military coup d'etat. Forming or joining an "anti-State organization", and espionage or other activities under instruction of an anti-State organization are punishable with heavy penalties under articles 3 and 4, respectively.

2/ In 1994, the Working Group on Arbitrary Detention of the Commission on Human Rights found, in the absence of a response from the State party, the imprisonment of two of these other individuals to be of arbitrary character. (E/CN.4/1994/27, at 95 et seq.)

3/ As to the crime of espionage, the Court's earlier jurisprudence had been as follows: "...even though the information is self-evident and natural common sense knowledge in the Republic of Korea, it shall be regarded as state secret [sic] under the National Security law when it might provide benefit to an anti-State organization and might cause damage to us" [emphasis added].

4/ "Confident criminal" is not specifically defined, but appears from the context of the communication to be a prisoner who fails to comply with the ideology conversion system and its renunciation requirements (to which see below).

5/ Under the Parole Administration Law, in such cases, the Parole Examination Committee "shall examine whether the convict has converted the [sic] thought, and, when deemed necessary, shall request the convict to submit an announcement or statement of conversion".

6/ See, however, *infra* para 5.2.

7/ CCPR/C/79/Add.6, 25 September 1992, at paras 6-7.

8/ E/CN.4/1996/39/Add.1, 21 November 1995, at paras 12-26, 46.

9/ In his later submissions after his release, the author confirms that he is liable to re-imprisonment and therefore maintains his claim for "unconditional" release with no such possibility.

10/ The author refers to the Seoul High Court's decision of 16 December 1996, convicting former Presidents Chun Doo-Hwan and Roh Tae-Woo for the coup d'etat and massacre, that the "de facto rebellious situation" lasted until February 1993. Similarly, the 1995 Special Law on the Democratisation Movement of May 18 recognises that the constitutional order was interrupted until 24 February 1993, and accordingly extended the limitation period for coup d'etat crimes.

11/ See, however, *supra* para 2.3.

12/ CCPR/C/79/Add.114, 1 November 1999, para 15.

13/ What the author means with this statement is unclear, however it would appear that it was suggested to the author that he could be returned to the ANSP for new interrogation if he continued to dispute the circumstances of the original one.

14/ See also Baulin v Russian Federation Case No 771/1997, Decision adopted on 31 October 2002.

15/ See the comments of the State party arguing the contrary with regard to the Committee's Concluding Observations on their second periodic report. (CCPR/C/79/Add.122, at para 2).