인권이사회
제63차 회기
1998년 10월 6일 - 1998년 11월 6일

견 해

통보번호 628-1995

통보자 : 박태훈 (대리인 조용환, 서울 덕수 합동 법률사무소)
피해자 : 통보자
당사국가 : 대한민국
통보일 : 1994년 8월 11일 (최초 재출일)
주요결정사항 : CCPR/C/57/D/628/1995, 허용결정, 1996년 7월 5일자
견해 채택일 ; 1998년 10월 20일

1998년 19월 20일, 인권이사회는 통보번호 제 628/1995에 대하여 선택의정서 제 5조 4항에 따라 그 견해를 채택하였다. 견해의 결정문은 이 문서에 첨부되어 있다.

[별 지]

* 인권이사회 결정에 따라 일반에 공개함.

인권정보자료실
NSL1.65

[별 지]

시민적 및 정치적 권리에 관한 국제규약 선택의정서 제5조 4항에 따른 인권이사회 견해
-제64차 회기-

통보번호 628/1995

관 련

통보자 : 박태훈 (대리인 조용환, 서울 덕수합동법률사무소)
피해자 : 통보자
당사국 : 대한민국
제소일 : 1994년 8월 11일
허용 결정인 : 1996년 7월 5일

시민적 및 정치적 권리에 관한 국제규약 제28조에 따라 설치된 인권이사회는
1998년 10월 20일에 열린 회의에서
박태훈씨가 시민적 및 정치적 권리에 관한 국제규약 선택의정서에 따라 인권이사회에 제출한 통보번호 628/1995호에 대한 심의를 종결하고
통보의 제출자, 그의 대리인 및 당사국이 이사회에 제공한 모든 문서 자료들을 심의하여
다음과 같은 견해를 채택하였다.

* 이 통보의 신사에 참가항 이사회 의원은 다음과 같다: 프라플라칸드라 바그와티(남), 버겐탈(남), 크리스틴 샤넷(여), 로드 콜빌, 옴란 엘 샤페이(남), 엘리자벳 에바트(여), 필라 가이탄 드 폼보(여), 엑카드 클라인(남), 데이빗 크렛츠머(남), 라쥬머 랄라(남), 쎄실리아 메디나 퀴로가(여), 홀리오 프라도 발레호(남), 멕스웰 얄든(남), 압달라 자키아(남)

선택의정서 제5조 4항에 따른 견해

1. 이 사건의 통보자는 한국인 박태훈(남)으로, 1962년 11월 3일생이다. 그는 자신이 대한민국에 의한 규약 제18조 1,2항 및 제26조 위반의 피해자라고 주장한다. 대리인은 서울에 있는 덕수합동 사무소의 조용환씨이다. 대한민국은 규약 및 선택의 정서에 1990년 7월 10일 가입했다.

동보자가 제출한 사실관계

2.1 1989년 12월 22일, 서울 형사지방법원은 통보자가 1980년 국가보안법 제7조 1항 및 3항[1]을 위반했다고 인정하여, 1년 징역형의 집행유예 및 자격정지를 선고했다. 통보자는 서울 고등법원에 항소했으나 재판기간중 병역법에 따라 대한민국 육군에 입대하였고, 이에 서울 고등법원은 사건을 육군 고등군사법원으로 이송하였다. 1993년 5월 11일, 고등 군사법원은 통보자의 항소를 기각했다. 이에 통보자는 대법원에 상고하였고, 1993년 12월 24일, 대법원은 원심대로 형을 확정했다. 이를 통해 통보자는 국내에서 가능한 모든 구제조치를 완료하였다고 주장한다. 통ㅂㅎ자는 비록 헌법재판소가 제7조 3항에 대해서는 언급하지 않았으나 이 조항의 내용이 본질적으로 1항과 5항의 짜집기이므로 3항 역시 합헌 결정을 한 것이나 마찬가지라고 주장하고 있다.

2.2 통보자에 대한 유죄판결내용은 그가 1983년부터 1989뇬까지 미국 시카고 소재 일리노이 주립대학에서 유학중 재미한국청년연합(이하, 한청련 또는 YKU)에 가입하여 활동했다는 데 있다. YKU는 미국 단체로, 미국에 거주하는 한국청년들로 구성되어 있으며, 남한과 북한의 평화와 통일에 관한 문제들을 논의하는 것을 목적으로 하고 있다. 이 단체는 당시 재한민국의 군사정부와 그 정부를 지지하는 미국에 대해 매우 비관적이었다. 통보자는 한청련의 모든 활동을 평화적인 것이었으며, 미국법을 따랐다는 점을 강조하고 있다.

2.3 재판부는 YKU가 북한 정부의 활동에 동조하고 고무하는 범죄를 저지를 목적을 가지고 있었으며, 따라서 "이적단체"라고 인정하였다. 따라서 이 단체가 가입한 통보자의 혐의는 국가보안법 제7조 3항 위반에 해당되었다. 나아가 통보자가 미국 내에서 벌어진 시위에 참석하여 미국의 내정간섭 중단을 주장한 사실은 북한에 동조한 것으로 국가보안법 제7조 1항 위반이 되었다. 통보자는 자신에게 내려진 판결대로라면 한청련 회원은 모두가 "이적단체"가입혐의로 재판에 회부될 수 있다는 점을 지적하고 있다.

2.4 대리인이 제출한 통보자 사건의 판결문 번역에 따르면 통보자가 미국에서 몇몇 평화적 시위와 기타 집회에 참석하여 특정한 정치적 구호 및 견해에 대한 자신의 지지 또는 동의를 표했다는 사실에 근거하여 구형과 선고가 내려진 것으로 보인다.

2.5 통보자는 자신에 대한 유죄판결이 강요된 자백에 근거하였다고 주장하고 있다. 통보자는 영장없이 1989년 8월말 체포되어 국가안전기획부에서 재판의 공정성 문제를 제기하고 싶지는 않으나 한국의 재판부가 자신의 사건을 심리하는 데 신의를 가지고 있지 않았다는 점을 지적해야 한다고 기술하고 있다.

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1. 국가보안법은 1991년 5월 31일 개정되었다. 그러나 통보자에게 적용된 것은 1980년 제정된 법으로, 제7조의 내용은 다음과 같다.(작성자의 영문번역):

-(1항) 생략

-(3항) 생략

-(5항) 생략

2.6 대리인은 통보자에 대한 유죄판결의 범죄사실이 대한민국의 규약가입 이전에 일어난 일이라 하더라도, 고등군사법원과 대법원은 규약 가입 이후에 이 사건을 심리하였다는 점을 지적하고 있다. 따라서 규약을 적용하였어야 하며, 해당 법원은 규약의 관련 조항들을 고려했어야 한다고 지적하고 있다. 이와 관련하여 통보자는 재법원에 제출한 상고 이유서에서 규약 제40조에 따라 대한민국 정부가 제출했던 최초보고서 심의 후에 발표한 인권이사회의 권고문 내용을 지적한 바 있다고 지적하고 있는데, 권고문에서 이사회는 국가보안법이 계속 적용되고 있는데 대하여 우려하였다.(CCPR/C/79/Add.6); 그는 또 대법원이 인권이사회가 지적한 권고내용에 따라서 국가보안법을 적용하고 해석해야 한다고 주장한다. 그러나 대법원은 1993년 12월 24일 판결문에서 다음과 같이 판시하였다:

> "시민적 및 정치적 권리에 관한 규약에 따라 설치된 인권이사회에서 소론과 같이 국가보안법의 문제점을 지적한 바 있다고 하더라도 그것만으로 국가보안법의 효력이 당연히 상실되는 것은 아니라 할 것이며... 따라서 피고인을 국가보안법 위반죄로 처벌하는 것이 소론 주장과 같이 국제 인권규약에 위배된다거나 형평을 잃고 모순되는 법적용이라고 할 수는 없다 할 것이다."(통보자의 영문번역)

통보내용

3.1 통보자는 자신의 사상의 자유, 의견 및 표현의 자유, 그리고 결사의 자유를 실현하는제 법 앞에 평등하게 대우받을 권리 등을 대한민국에 의해 침해당했다는 사실을 근거하여 북한에 동좌는 목적을 가진 것으로 남한 당국이 간주해 왔다는 것이다. 이에 통보자는 이러한 추정이 잘못된 것이며 남한 당국이 정부 정책에 대한 비판의 자유를 제한한 것이라고 주장하고 있다.

3.2 통보자는 자신에 대한 욧하선고가 규약 제18조 1항, 제19조 1,2항 및 제26조의 위반이라고 주장하고 있다. 그는 비록 특정한 단체에 가입한 것을 이유로 유죄판결을 받았으나 유죄판결의 진정한 이유는 자신과 다른 YKU회원들이 남한 정부의 정책에 대해 비판적인 견해를 표현했기 때문이라고 주장하고 있다. 또한 그는 결사의 자유가 헌법에 보장되어 있음에도 불구하고 국가보안법이 정부의 정책과 다른 견해를 갖고 있는 지단에 대하여 걸사의 자유를 제한하고 있다고 주장하고 있는 이는 규약 제26조를 위반한 차별에 해당한다는 것이다. 통보자는 대한민국의 유보때문에 규약 제22조의 문제는 제기하지 않았다.

3.3 통보자는 자신의 사상의 자유, 의견 및 표현의 자유, 길고 결사의 자유를 실현하는 데 법 앞에 평등하게 대우받을 권리 등을 대한민국에 의해 침해당했다는 사실을 이사회가 선언해 줄 것을 요구하고 있다. 또한 그는 대한민국이 국가보안법 제7조 1항, 3항 및 5항을 철폐하고, 이들 조항에 대한 폐지안이 국회에 상정될 때까지 이들 조항의 적용을 중지하도록 이사회가 요구할 것을 청구하고 있다. 그리고 재심을 통해 무죄 판결을 받기를 요청하여, 겪었던 고통에 대한 보상이 이루어지기를 바라고 있다.

당사국의 견해 및 대리인의 의견

4.1 1995년 8월 8일 제출한 내용을 통해 당사국은 통보자에 대한 사건의 범죄사실들의, 특히, 다른 반정부적인 견해와 마찬가지로, 미국이 군사독재를 통해 남한을 조종하고 있다는 견해에 동조했다는 사실을 상기시키고 있다.

4.2 당사국은 이 통보가 국내의 모든 구제조치들을 완료하지 못했으므로 허용할 수 없다고 주장하고 있다. 따라서 당사국은 통보자가 영장없이 체포되어 자의적으로 구금되었다 고 주장하는 문제는 긴급 구제절차를 통하거나 또는 헌법재판소에 제소하여 조치를 취할 수 있었다고 지적하고 있다. 또 당사국은 만일 통보자가 지신의 무죄를 증명할 수 있는 명백한 증거가 있거나, 또는 그를 기소하는 과정에 관여한 사람들이 범죄를 저질렀을 경우 재심을 청구할 수 있다고 주장한다.

4.3 끝으로, 당사국은 1992년 1월 11일 국가보안법 제7조 1항과 3항의 합헌여부를 가리기 위한 제소가 제3자에 의해 헌법재판소에 제출되었음을 지적하고 있다. 헌법재판소는 현재 그 사건을 심리하고 있다.

5.1 당사국이 제출한 내용에 대한 의견에서 통보자의 대리인은 당사국이 통보자의 주장을 오해하고 있다고 지적하고 있다. 대리인은 검찰조사와 재판과정에서 발생한 통보자의 권리침해는 이 사건의 쟁점이 아니라는 점을 강조하고 있다. 따라서 대리인은 재심에 관한 문제는 통보자의 주장과는 관련이 없다고 지적한다. 대리인은 통보자에 대하여 적용된 증거들에 대하여 다투는 것이 아니라 그 증거들에 따라서 인정된 사실관계에 대하여 유죄 판결르을 받고 처벌받아서는 안된다고 주장하고 있다. 왜냐하면 통보자의 활동은 사상, 의견 및 표현의 자유를 평화적으로 실현하기 위한 범위내에서 이루어졌기 때문이라는 것이다.

5.2 이 통보가 시간적 요건으로 인해 허용될 수 없다는 당사국의 주장에 대해 대리인은 비록 통보자의 사건이 규약 및 선택의정서에 가입하기 이전에 시작되었지만, 고등군사법원과 대법원은 가입한 시점 이후에 판결을 선고했다는 점을 지적하고 있다. 그러므로 규약이 적용되어, 이 통보는 허용된다는 것이다.

5.3 국가보안법 제7조 1항 및 3항의 합헌 여부가 현재 헌법재판소에서 다시 심리 중이라는 당사국의 주장에 대해 대리인은 헌법재판소가 이미 국가보안법 조항들이 합헌이라는 결정을 1990년 4월 2일에 내린 바 있다는 점은 지적하고 있다. 그 후 같은 사안에 대한 제소는 헌법재판소에 의하여 모두 기각되었다. 헌법재판소는 당연히 선례를 따를 것으로 예상되기 때문에 헌법재판소에 의한 더 이상의 재심은 무의미하다고 대리인은 주장한다.

이사회의 허용여부 결정

6.1 이사회는 제57차 회의에서 이 통보의 허용여부를 심의하였다.

6.2 이사회는 이 통보가 주장하고 있는 사건이 규약 및 선택의정서에 당사국이 가입하기 이전에 발생하였기 때문에 허용될 수 없다는 당사국의 주장을 주목했다. 그러나 이사회는 통보자에 대한 1심 판결이 규약 및 선택의정서에 한국이 가입하기 이전인 1989년 12월 22일에 있었다 하더라도, 그에 대한 항소심과 상고심은 규약에 가입한 날 이후에 이루어졌다는 사실을 주목했다. 이러한 상황에서, 이사회는 통보사가 주장하는 규약위반이 당사국의 규약 및 선택의정서 가입 이후까지 계속되었다고 판단하며, 따라서 이 통보에 대한 심사는 시간적 요건에 의하여 배제되지 않는다고 판단하였다.

6.3 이사회는 또 통보자가 당시 가능했던 국내의 모든 구제조치들을 완료하지 않았다는 당사국의 주장에 주목했다. 이사회는 당사국이 제안한 일부 구제조치들이 이사회에 제출된 통보내용에 포함되지 않은, 통보자에 대한 재판의 쟁점과 관련된 것에 주목했다. 이사회는 국가보안법 제7조의 합헌성 여부가 헌법재판소에서 여전히 심리중이라는 당사국의 주장에도 주목하였다. 이사회는 또한 헌법재판소가 이미 1990년 4월 2일에 처음으로 위 조항에서 헌법재판소에 제소하는 것이 무

의미하다는 통보자의 주장에도 주목했다. 이사회에 제시된 자료들을 근거로 볼 때, 이사회는 선택의정서 제5조 2(b)항이 의미하는 범위안에서 통보자가 이용할 수 있는 효과적인 구제조치가 남아 있다고 판단하지 않았다.

6.4 이사회는 선택의정서 제5조 2(a)항의 규정에 따라 동일한 사건이 다른 국제적인 조사 떠는 조정절차에 따라 심의되지 않고 있음을 확인했다.

6.5 이사회는 통보자가 제출한 사실들이 규약 제18,19 및 26조에 따라 본안의 심리를 받을 필요가 있는 문제들을 제기하고 있다고 판단했다.

7. 이에 따라 1996년 7월 5일, 인권이사회는 이 통보를 허용하기로 결정했다.

본안에 대한 당사국의 견해와 이에 대한 대리인의 의견

8.1 당사국은 의문의 여지가 없게 사실관계를 밝힌 적절한 조사를 거쳐 국내법을 위반한 범죄로 통보자가 유죄를 선고받았다고 주장하고 있다. 당사국은 안보가 불확실한 상황임에도 불구하고 개인의 사상과 견해를 표현하는 자유를 포함하여 모든 기본 인권을 전적으로 보장하기 위해 노력해 왔다고 주장하고 있다. 당사국은 그러나 민주제도의 틀을 보존하는 우월한 요구를 보호할 필요가 있다고 주장한다.

8.2 한국 헌법은 "국민의 모든 자유와 권리는 국가안전보장, 질서유지 또는 공공복리를 위하여 필요한 경우에 한하여 법률로써 제한할 수 있다"고 명문화한 조항이 있다.(제37조 2항). 국가보안법은 헌법에 따라 개인의 자유 또는 권리를 부분적으로 제한할 수 있는 조항들을 포함하고 있다. 당사국에 따르면 북한 공산주의자들로부터 나라를 지키기 위해 국가보안법이 불가결하다는 여론이 있다. 이러한 맥락에서 당사국은 폭력성을 띤 사건들을 언급하고 있다. 당사국에 따르면 북한 공산주의자들의 정책에 동조하는 이적단체인 YKU 회원으로서 통보자가 한 활동이 대한민국의 민주주의 제도를 지키는 데 위협적인 요소임은 의심할 여지가 없다는 것이다.

8.3 재판부가 자신의 사건에 규약의 조항을 적용했어야 한다는 통보자의 주장에 대해 당사국은 "통보자는 재판부가 의도적으로 규약의 적용을 배제했기 때문에 유죄 판결을 받은 것이 아니라, 한국의 안보상황을 고려할 때 규약에서 인정한 개인의 특정한 권리보다 국가보안법 조항이 우선적으로 적용되어야 할 필요가 있었기 때문"이라고 설명하고 있다.

9.1 당사국의 견해에 대한 의견에서 대리인은 당사국의 불확실한 안보상황과 통보자가 자신의 사상, 견해, 표현 및 집회의 자유를 평화적으로 실현하는 것 사이에는 아무런 관계가 없다고 주장한다. 대리인은 북한 공산주의자들과 YKU 또는 통보자 사이에 어떠한 관계가 있는지 당사국이 증명하지 못했으며, YKU 또는 통보자가 북한 공산주의자들의 어떤 정책에 동조했는지에 대해서도 아무런 구체적인 설명을 제시하지 못했다고 주장하고 있다. 마찬가지로 당사국은 YKU 또는 통보자의 활동이 국가안보에 어떠한 내용의 위협을 주었는지에 대하여도 증명하지 못했다고 대리인은 주장하였다.

9.2 통보자는 자신이 나라의 민주주의와 평화적 통일을 염원한는 마음은 가지고 학생 신분으로 YKU에 동참했다고 진술하고 있다. 그는 활동을 하면서 북한을 이롭게 하거나 또는 자기 나라의 안보를 위험에 빠뜨릴 어떠한 의도도 가지고 있지 않았다는 것이다. 대리인에 따르면 통보자가 표현한 견해에 대해서는 토론과 논쟁을 통해 반박할 수 있으나, 그러한 표현이 평화적인 방법을 통해 표출되는 한 결코 형사처벌에 의하여 억압되어서는 안된다. 이런 맥락에서 대리인은, 정

부가 진실과 거짓, 선과 악을 판단하는 심판자의 역할을 해서는 안 된다고 주장한다.

9.3 대리인은 통보자가 자신의 정치적인 견해, 사상 및 평화적 표현 등으로 인해처벌받았다고 주장한다. 그는 또한 규약 제26조에서 규정하고 있는 법 앞에 평등하게 보장보호받을, 권리를 침해당했다고 주장한다. 이런 맥락에서 대리인은 그렇게 된 이유가 모든 시민들이 헌법 제21조에 의해 결사의 자유를 누릴 권리를 보장받고 있는 가운데, 통보자는 대한민국 정부당국자들과는 다르다고 추정되는 정치적 견해를 가진 YKU에 가입했다는 이유로 처벌을 받고 그로 인한 차별을 받았기 때문이라고 설명하고 있다.

9.4 통보자는 의견과 표현의 자유에 관한 특별보고관이 한국의 상황에 관하여 제출한 보고서[2]를 인용하고 있다. 통보자는 이사회가 정부에 대해 이 통보에 대한 이사회의 견해와 그 한국어 번역문을 관보에 개재토록 권고할 것을 요청하고 있다.

이사회가 심의한 장점과 진행절차

10.1 인권이사회는 선택의정서 제5조 1항에 따라 당사자들이 제출한 모든 자료를 토대로 이 통보 내용을 심리하였다.

10.2 이사회는 통보자가 결사의 자유와 관련된 규약 제22조를 제기하지 않았다는 사실을 지저간다. 이 조항의 위반문제를 제기하지 않은 이유에 대해 대리인은 규약 제22조가 헌법을 포함한 한국법에 일치하는 것으로 간주한다는 대한민국은 유보 또는 선언을 지적하고 있다. 통보자의 통보내용과 주장이 규약의 다른 조항에 근거하여 해결될 수 있기 때문에, 이사회는 그 유보 또는 선언의 효과에 대해 직권으로 판단할 필요가 없다. 따라서 이사회가 판단해야 할 쟁점은 국가보안법에 의하여 통보자가 받은 유죄판결이 규약 제 18, 19 및 26조에서 규정한 권리를 침해했는지를 가리는 것이다.

10.3 이사회는 규약 제19조가 의견과 표현의 자유를 보장하고 다음과 같이 필요한 경우에 한해 법률에 의한 제한을 허용하고 있음을 확인한다. (가) 타인의 권리와 명예를 보호하기 위한 경우, (나) 국가안보 또는 공공질서, 공공의 건강 또는 도덕을 보호할 필요가 있는 경우. 표현의 자유를 누릴 권리는 모든 민주적인 사회에서 가장 중요한 것이며, 이 권리의 실현을 제한하는 어떠한 조치도 엄격한 기준에 의해 그 정당성을 심사받아야 한다. 당사국은 그와 같은 제한조치가 국가안보를 지키기 위한 것으로 정당하며, 국가보안법 제7조에 따라 법률로 정하고 있다고 주장하고 있으나, 이사회는 여전히 통보자에세 가해진 조치들이 규약에서 말하는 목족에 필요한 것이었는지를 결정해야 한다. 이사회는 장사국이 나라의 일반적인 상황과 "북한 공산주의자들"이 제게하는 위협을 언급하면서 국가안보문제를 제기하고 있다는 점을 주목한다. 이사회는 통보자에 의한 표현의 자유행사로 인하여 일어났다는 위협의 정확한 성격을 당사국이 구체적으로 제시하는 데 실패했으며 당사국이 내세운 어떠한 주장도 제19조 3항에 따라서 통보자가 표현의 자유를 누릴 권리를 제한하는 데충분하지 않다고 판단한다. 이사회는 통보자에게 유죄를 선고한 법원의 판결문들을 세밀히 검토하였으나, 이들 판결문 및 당사국의 주장 어느 것도 통보자에 대한 유죄판결이 제19조 (3)항에서 말하는 정당한 목족들 가운데 하나를 보호하기 위해 필요한 것이었음을 증명하지 못했음을 확인한다. 따라서 표현행위와 관련된 통보자에 대한 유죄판결은 규약 제19조에 따라 통보자의 권리에 대한 침해로 간주해야 한다. (밑줄은 번역자가 붙인 것임. 이하 모두 같음.)

10.4 이런 맥락에서 이사회는 "통보자는 재판부가 의도적으로 규약의 적용을 배제했기 때문에

2. E/CN.4/1996/39/Add.1

유죄 판결을 받은 것이 아니라, 한국의 안보상황을 고려할 때 규약에서 인정한 개인의 특정한 권리보다 국가보안법 조항이 우선적으로 적용되어야 할 필요가 있었기 때문"이라는 당사국의 주장을 검토한다. 이사회는 당사국이 규약의 당사자가 됨으로써 규약 제2조의 규정에 따라 규약이 인정하는 모든 권리를 존중하고 보장하는 조치를 취해야 함을 지적한다. 당사국은 또한 이들 권리를 유효하게 하기 위하여 필요한 법적 또는 그 밖의 조치들을 강구했어야 한다. 이사회는 당사국이 규약에 따른 의무도다 국내법의 적용을 우선하는 것은 규약과 합치하지 않음을 확인한다. 이런 맥락에서 이사회는 당사국이 규약 제4조 (3)항에 따라 비상사태가 존재하며 그에 따라 규약의 일부 권리를 이행하지 않는다고 선언한 일이 없음을 지적한다.

10.5 이상에서 인정한 내용에 비추어 볼 때, 통보자에 대한 유죄판경이 규약 제18조 및 제26조를 위반했는가 하는 문제에 대하여는 이사회가 굳이 판단할 필요가 없다.

11. 인권이사회는 시민적 및 정치적 권리에 관한 국제규약 선택의정서 제5조 4항에 따라 이사회에 제출된 사실관계가 규약 제19조에 위반한 사실을 인정한다.

12. 규약 제2조 3(b)항에 따라 당사국은 박태훈씨에게 표현의 자유를 행사한 이유로 유죄판결을 선고한 데 대한 적절한 배상을 포함하여, 효과적인 구제를 제공할 의무가 있다.

13. 선택의정서의 당사국이 됨으로써 당사국은 규약의 위반이 일어났는가를 결정하는 이 사회의 권한을 승인하고 규약 제2조에 따라 당사국은 자국 영토안에서 관할권아래 있는 모든 개인들에 규약이 인정하는 권리를 보장하며 또한 규약위반이 일어났다고 인정될 경우 효과적으로 집행할 수 있는 구제조치를 제공할 책임이 있음을 상기하여, 이사회는 당시국으로부터 90일 이내에 이사회의 견해를 실현하기 위하여 어떠한 조치를 하였는지에 관한 정보를 제공받고자 한다. 또한 당사국이 이사회늬 견해를 실현하기 위하여 어떠한 조치를 하였는지에 관한 정보를 제공받고자 한다. 또한 당사국이 이사회의 견해를 번역하여 공개하고, 특히 사법부에 이사회의 견해를 통보할 것을 요구한다.

[영어, 불어, 스페인어로 채택되었으며, 원본은 영어임. 또한 추후에 유엔 총회에 대한 연차보고서의 일부로 아랍어, 중국어 및 러시아어로도 발행할 것임.]

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수 신 : 이 창 조 귀하(서울시 종로구 명륜동2가 8-29(4층) 인권운동 사랑방 인권하루소식 기자)

※ 접수일자	'99. 3. 29		※접수번호	99-9
청구정보내용	박태훈, 김근태의 국가보안법제7조 위반사건에 대한 유엔 인권이사회결정 관련, ①한국정부가 유엔인권이사회에 통보한 내용(문서) ②유엔인권이사회 결정문			
공 개 내 용	위와 같음			
비공개(전부 또는 일부)사유				
공 개 방 법	직접공개	□열람 □시청 ■사본·출력물 □복제물 □인화물 □ 기타( )		
	우송공개	□사본·출력물 □복제물 □인화물 □기타 ( )		
공 개 일 시	'99. 4. 9		공개장소	법무부 인권과
수수료(A)	우편요금(B)		수수료감면액(C)	계 (A+B+C)
1,700원	원		원	1,700원

귀하의 정보공개 청구에 대한 결정내용을 공공기관의 정보공개에 관한 법률 제11조 제1항 및 제3항의 규정에 의하여 위와 같이 통지합니다.

1999년 4월 2일

법 무 부 장 관 인

법무부 보도자료

1999. 3. 13(토)

자료문의	담당부서	부서명	인권과
		전화번호	503-7045
		주책임자	인권과장
		담당자	이성욱검사
	공보관실		503-7011~2 FAX:504-5723

제목 : UN 인권이사회의 국가보안법 위반사건 관련 견해(view) 번역 전문

○ UN인권이사회는 1993. 12. 24일과 1991. 4. 26. 각 진정인 박태훈, 김근태에 대한 국가보안법위반사건에서 유죄판결이 선고된 것이 「시민적·정치적 권리에 관한 국제규약」(B규약)에 위반되었다는 견해를 '98.12.14 및 '99.1.5 우리정부에 통보해 왔음

○ 위 UN인권이사회의 견해 내용은

- 위 진정인들의 행위에 대하여 국가보안법 제7조를 적용하여 처벌한 것은 위 「시민적·정치적 권리에 관한 국제규약」에 위반되었다는 것이며
- 따라서 위 진정인들에게 적절한 보상을 포함한 효과적인 구제와 향후 유사사례가 발생하지 않도록 조치를 취하라는 것임

첨부 : UN 인권이사회 견해 2부(박태훈, 김근태).

인권이사회 진정 심의결과에 대한 조치내용

<'99.3.6 외교통상부송부>

1. 인권이사회 견해중 요구사항

가. 진정인들에 대한 손해배상 등의 효과적 구제조치(진정인 박태훈, 김근태)

나. 향후 동종사례의 재발방지 조치(진정인 박태훈)

다. 인권이사회 견해의 번역·공표 (진정인 박태훈 건은 법원에 통보할 것도 요구)

2. 조치내용

가. 진정인들에 대한 손해배상 등의 구제조치 여부

○ 대한민국의 법률상 유죄의 확정판결을 받은 자가 그 판결의 위법·부당성을 주장하여 피해배상을 요구하는 절차로서는, ①재심절차에 의하여 무죄의 재판을 받은 경우에 형사보상법에 따라 구금이나 형의 집행에 관하여 보상을 받을 수 있고, ②당해 사건의 수사나 재판에 관여한 공무원이 직무집행 과정에 고의 또는 과실로 법령에 위반하여 손해를 가한 사실이 인정되는 경우에 국가배상법에 의하여 국가로부터 손해배상을 받을 수 있는 방법이 있음

○ 따라서, 인권이사회가 한국 법원이 박태훈, 김근태 양인에 대하여 국가보안법을 적용하여 유죄를 인정한 것이 B규약 위반에 해당한다는 견해를 채택하였더라도, 진정인들이 형사보상이나 국가배상을 받으려면 대한민국의 국내법에 따라 재심이나 국가배상청구절차를 통하여 법원의 판결을 받아야 함

○ 진정인 박태훈은 1995. 10. 10. 서울민사지방법원에 국가배상청구의 소를 제기하여 1996. 6. 7.의 1심판결과;1996. 11. 15.의 항소심판결에서 각 패소함에 따라 1996. 12. 9. 대법원에 상고하여 1999. 2. 현재 대법원에서 심리중에 있으므로 대법원의 판결에 따라 국가배상 여부가 결정될 것임

○ 진정인 김근태는 본건에 관하여 현재까지 재심이나 국가배상을 청구한 바 없으며, 향후 소송절차가 개시되면 법원의 판결여하에 따라 배상여부가 결정될 것임

○ 진정인 박태훈과 김근태는 '95. 8. 15. 모두 복권되어 공민권이 회복되었음

나. 향후 동종사례의 재발방지 조치

○ 한반도의 남북분단 상황하에서 북한이 무력도발을 통한 한반도 적화통일 노선을 포기했다는 징후가 없는 한 대한민국의 자유민주적 기본질서를 수호하기 위하여 국가보안법과 같은 법률이 반드시 필요하다고 인정하지만 현재의 국가보안법은 표현의 자유를 지나치게 제한할 가능성이 있는 포괄적인 개념 규정이 포함되어 문제점이 있으므로 그 개정 또는 대체입법을 적절한 시기에 할 것을 적극적으로 검토하고 있음

○ 따라서, 정부는 국가보안법 대체입법 또는 일부 규정에 대한 개정이 이루어질 때 까지의 과도기적 조치로서 전국 수사기관에 국가보안법의 확대해석금지를 강력히 지시('98.4.13, '98.5.6)함으로써 국민의 표현의 자유가 부당하게 침해되는 일이 없도록 하고 있으며, 그 결과 1997년에 비하여 1998년중 국가보안법위반 입건자 수는 12%, 구속자 수는 28%가량이 감소하였음

다. 인권이사회 견해의 번역·공표

○ 박태훈, 김근태 양인에 대한 인권이사회의 견해요지는 기히 언론에 보도되었으며, 1999. 3.중에 법무부에서 인권이사회의 견해전문을 번역하여 언론에 배포할 예정임

※ 진정인 박태훈 건에 관하여 인권이사회의 결정내용을 법원에 통보토록 하라는 점은, 기히 외교통상부에서 법원에 그 내용을 통보하였음

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HIGH COMMISSIONER FOR HUMAN RIGHTS

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REFERENCE: G/SO 215/51 KOREA (3)
ce/xb 574/1994

The Secretary General of the United Nations presents his compliments to the Permanent Representative of the Republic of Korea to the United Nations Office at Geneva and has the honour to transmit herewith the text of the Views, adopted by the Human Rights Committee on 3 November 1998, concerning communication No. 574/1994, submitted to the Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights on behalf of Mr. Keun-Tae Kim.

In accordance with established practice, the text of the Views will be made public.

지시	
일자	5/1 99 - 27

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30 December 1998

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International Covenant on Civil and Political Rights

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20 November 1998

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HUMAN RIGHTS COMMITTEE
Sixty-fourth session
19 October - 6 November 1998

VIEWS

Communication N° 574/1994

Submitted by:	Keun-Tae Kim (represented by Mr. Yong Whan Cho, Duksu Law Offices, in Seoul)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	27 September 1993 (initial submission)
Prior decisions:	- CCPR/C/56/D/574/1994 (decision on admissibility, dated 14 March 1996).
Date of adoption of Views:	3 November 1998

On 3 November 1998, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 574/1994. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX*

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
- Sixty-fourth session -

concerning

Communication N° 574/1994**

Submitted by:	Keun-Tae Kim (represented by Mr. Yong Whan Cho, Duksu Law Offices, in Seoul)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	27 September 1993
Date of decision of admissibility:	14 March 1996

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

Meeting on 3 November 1998

Having concluded its consideration of communication No.574/1994 submitted to the Human Rights Committee by Mr. Keun-Tae Kim, 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, his counsel and the State party,

Adopts the following:

---

*The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdalla Zakhia.

**The text of an individual opinion by Committee member Nisuke Ando is appended to the present document.

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

1. The author of the communication is Mr. Keun-Tae Kim, a Korean citizen residing in Dobong-Ku, Seoul, Republic of Korea. He claims to be a victim of violations 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 NCDM 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 The author has provided English translations of the relevant parts of the Courts' judgements, which show that the first instance trial court found that North Korea is an anti-State organization, with the object of violently changing the situation in South Korea. According to the Court, the author, despite knowledge of these aims, produced written material which reflected the views of North Korea and the Court concluded therefore that the author produced and distributed the written material with the object of aiding with and benefiting the 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 regime 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 regime;

- the prohibited acts and the concepts spelled out in paragraphs 1 and 5 of 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 does 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 The appellate court upheld the conviction on the basis that the evidence showed that the author's written materials, which he read out at a large convention, argued that the Republic of Korea was under influence of foreign powers, defined the Government as a military dictatorship and contained other views which corresponded to North Korean propaganda. According to the Court the materials therefore advocated the policy of North Korea, and the first instance court had thus sufficient grounds to acknowledge that the author was siding with and benefiting an anti-State organization.

2.7 On 26 April 1991, the Supreme Court held that the relevant provisions of the National Security Law did not violate the Constitution so long as they were applied to a case where an activity puts national survival and security at stake or endangers basic liberal democratic order. Thus under article 7 (1) "activity which sides with ... and benefits" an anti-State organization means that if such activity could be beneficial to that organization objectively, the prohibition applies. The prohibition is applicable, if a person with normal mentality, intelligence and common sense acknowledges that the activity in question could be beneficial to the anti-state organization, or if there is wilful recognition that it could be beneficial. According to the Supreme Court, this implies that it is not necessary for the person concerned to have intentional acknowledgement or motivation to be "beneficial". The court went on to hold that the author and his colleagues had produced material which can be recognised, as a whole and objectively, to side with North Korean propaganda and that the author, who has normal intelligence and common sense, read it out and supported it, thereby objectively acknowledging that his activities could be beneficial to North Korea.

2.8 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.

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 regime 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-A-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 regime.

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.[1] 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

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

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, [1] which are said to support the 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 reasonable 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 has 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".

The Committee's admissibility decision:

6.1 At its 56th session, the Committee considered the admissibility of the communication.

6.2 The Committee took note of the State party's argument that as the present case was based on events which occurred prior to the entry into force of the

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

Covenant and the Optional Protocol for the Republic of Korea, it should be deemed inadmissible rationa temporis. In the instant case the Committee did not have to refer to its jurisprudence under which the effects of a violation that continued after the Covenant entered into force for the State party might themselves constitute a violation of the Covenant, since 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 was not precluded rationa temporis from considering the author's communication.

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

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

7. On 14 March 1996, the Human Rights Committee therefore decided that the communication was admissible inasmuch as it appeared to raise issues under article 19 of the Covenant.

State party's submission on the merits and counsel's comments

8.1 In its submission, dated 21 February 1997, the State party explains that its Constitution guarantees its citizens fundamental rights and freedoms, including the right to freedom of conscience, freedom of speech and the press and freedom of assembly and association. These freedoms and rights may be restricted by law only when necessary for national security, the maintenance of law and order or for public welfare. The Constitution stipulates further that even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

8.2 The State party submits that it maintains the National Security Law as a minimal legal means of safeguarding its democratic system which is under a constant security threat from North Korea. The law contains some provisions

which partially restrict freedoms or rights for the protection of national security, in accordance with the Constitution'.

8.3 According to the State party, the author overstepped the limits of the right to freedom of expression. In this context, the State party refers to the reasoning by the Appeals Section of the Seoul Criminal District Court in its judgement of 11 January 1991, that there was enough evidence to conclude that the author was engaged in anti-State activities for the benefit of North Korea, and that the materials which he distributed and the demonstrations which he sponsored and which resulted in serious public disorder, posed a clear danger to the existence of the State and its free-democratic public order. In this connection, the State party argues that the exercise of freedom of expression should not only be conducted in a peaceful manner but also be directed towards a peaceful aim. The State party points out that the author produced and disseminated materials to the public by which he encouraged and propagandized the North Korean ideology of making the Korean Peninsula communist by force. Furthermore, the author organized illegal demonstrations with massive violence against the police. The State party submits that these acts caused a serious threat to the public order and security and resulted in a number of casualties.

8.4 In conclusion, the State party submits that it is firmly of the view that the Covenant does not condone any acts of violence or violence-provoking acts committed in the name of the exercise of the right to freedom of expression.

9.1 In his comments on the State party's submission, counsel reiterates that the author's conviction under the Law on Demonstration and Assembly and the Law on Punishment of Violent Activities is not the issue in this communication. Counsel argues that the author's conviction under those laws cannot justify his conviction under the National Security Law for his allegedly enemy-benefiting expressions. Counsel therefore submits that if the expressions in question did not put the security of the country in danger, the author should not have been punished under the NSL.

9.2 Counsel notes that the author's electoral rights have been restored by the State party, and that the author was elected as a member of the National Assembly in the general election in April 1996. Because of this, counsel questions the grounds of the author's conviction for allegedly encouraging and propagandizing the North Korean ideology of making the Korean Peninsula communist by force.

'Article 1 of the National Security Law reads: "The purpose of this law is to control anti-State activities which endanger the national security, so that the safety of the State as well as the existence and freedom of the citizens may be secured." Article 7, paragraph 1, reads "Any person who has praised or has encouraged or sided with the activities of an anti-State organization or its members or a person who has been under instruction form such an organization, or who has benefited an anti-State organization by other means shall be punished by penal servitude for a term not exceeding seven years." Paragraph 5 of article 7 reads: "Any person who has, for the purpose of committing the actions as stipulated in the above paragraphs, produced, imported, duplicated, kept in custody, transported, disseminated, sold or acquired documents, drawings or other similar means of expression shall be punished by the same penalty as set forth in each paragraph."

9.3 According to counsel, the State party, through the NSL, has been stifling democracy under the banner of protecting it. In this connection, counsel argues that the essence of a democratic system is the guarantee of peaceful exercise of freedom of expression.

9.4 Counsel submits that the State party has not proved beyond reasonable doubt that the author had put the security of the country in danger by disseminating documents. According to counsel, the State party has failed to establish any relation between North Korea and the author and has failed to show what kind of threat the author's expressions had posed to the security of the country. Counsel submits that the author's use of his freedom of expression was not only peaceful but also directed towards a peaceful aim.

9.5 Finally, counsel refers to the ongoing process towards democracy in Korea, and claims that the present democratization is due to sacrifices of many people like the author. He points out that many of the country's activists who had been convicted as communists under the NSL are now playing important roles as members of the National Assembly.

10.1 In a further submission, dated 21 February 1997, the State party reiterates that the author was also convicted for organizing violent demonstrations, and emphasizes that the reasons for convicting him under the NSL were that he had aligned himself with the unification strategy of North Korea by arguing for unification in printed materials which were disseminated to about 4000 participants at the Founding Convention of the National Democratic Movement Coalition and that activities such as helping to implement North Korea's strategy constitute subversive acts against the State. In this connection, the State party notes that it has technically been at war with North Korea since 1953 and that North Korea continues to try to destabilize the country. The State party therefore argues that defensive measures designed to safeguard democracy are necessary, and maintains that the NSL is the absolute minimal legal means necessary to protect liberal democracy in the country.

10.2 The State party explains that the author's electoral rights were restored because he did not commit a second offence for a given period of time after having completed his prison term, and to facilitate national reconciliation. The State party submits that the fact that the author's rights were restored does not negate his past criminal activities.

10.3 The State party agrees with counsel that freedom of expression is one of the essential elements of a free and democratic system. It emphasizes, however, that this freedom of expression cannot be guaranteed unconditionally to people who wish to destroy and subvert the free and democratic system itself. The State party explains that the simple expression of ideologies, or academic research on ideologies, is not punishable under the NSL, even if these ideologies are incompatible with the liberal democratic system. However, acts committed under the name of freedom of speech but undermining the basic order of the liberal democratic system of the country are punishable for reasons of national security.

10.4 With regard to counsel's argument that the State party has failed to establish that a relation between the author and North Korea existed and that his actions were a serious threat to national security, the State party points

out that North Korea has attempted to destabilize the country by calling for the overthrow of South Korea's "military-fascist regime" in favour of a "people's democratic government", which would bring about "unification of the fatherland" and "liberation of the people". In the documents, distributed by the author, it was argued that the Government of South Korea was seeking the continuation of the country's division and dictatorial regime; that the Korean people had been struggling for the last half century against US and Japanese neo-colonial influence, which aims at the continued division of the Korean peninsula and the oppression of the people; that nuclear weapons and American soldiers should be withdrawn from South Korea, since their presence posed a great threat to national survival and to the people; and that joint military exercises between South Korea and the USA should be stopped.

10.5 The State party submits that it is seeking peaceful unification, and not the continuation of the division as argued by the author. The State party further takes issue with the author's subjective conviction about the presence of US forces and US and Japanese influence. It points out that the presence of US forces has been an effective deterrent to prevent North Korea from making the peninsula communist through military force.

10.6 According to the State party, it is obvious that the author's arguments are the same as that of North Korea, and that his activities thus both helped North Korea and followed its strategy and tactics. The State party agrees that democracy means allowing different voices to be heard but argues that there should be a limit to certain actions so as not to cause damage to the basic order necessary for national survival. The State party submits that it is illegal to produce and distribute printed materials that praise and promote North Korean ideology and further its strategic objective to destroy the free and democratic system of the Republic of Korea. It argues that such activities, directed at furthering these violent aims, cannot be construed as peaceful.

11. Counsel for the author, by letter of 1 June 1998, informs the Committee that he has no further comments to make.

Issues and proceedings before the Committee

12.1 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.

12.2 The Committee observes that, in accordance with article 19 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.

12.3 The restriction of the author's right to freedom of expression was indeed provided by law, namely the National Security Law as it is then stood; it is clear from the courts' decisions that in this case the author would also be likely to have been convicted if he had been tried under the law as it was amended in 1991, although this is not an issue in this case. The only question before the Committee is whether the restriction on freedom of expression, as

invoked against the author, was necessary for one of the purposes set out in article 19, paragraph 3. The need for careful scrutiny by the Committee is emphasised by the broad and unspecific terms in which the offence under the National Security Law is formulated.

12.4 The Committee notes that the author was convicted for having read out and distributed printed material which were seen as coinciding with the policy statements of the DPRK (North Korea), with which country the State party was in a state of war. He was convicted by the courts on the basis of a finding that he had done this with the intention of siding with the activities of the DPRK. The Supreme Court held that the mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt. Even taking that matter into account, the Committee has to consider whether the author's political speech and his distribution of political documents were of a nature to attract the restriction allowed by article 19 (3) namely the protection of national security. It is plain that North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) "benefit" that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary.

12.5 The Committee considers, therefore, that the State party has failed to specify the precise nature of the threat allegedly posed by the author's exercise of freedom of expression, and that the State party has not provided specific justifications as to why over and above prosecuting the author for contraventions of the Law on Assembly and Demonstration and the Law on Punishment of Violent Activities (which forms no part of the author's complaint), it was necessary for national security, also to prosecute the author for the exercise of his freedom of expression. The Committee considers therefore that the restriction of the author's right to freedom of expression was not compatible with the requirements of article 19, paragraph 3, of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 19 of the International Covenant on Civil and Political Rights.

14. Under article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy.

15. Bearing in mind that, by becoming a State party to the Optional Protocol, the Republic of Korea has recognized 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 recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken

to give effect to the Committee's Views. The State party is also requested to translate and 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.]

Individual opinion by member Nisuke Ando (dissenting)

I am unable to agree with the Committee's views in this case that "the restriction of the author's right to freedom of expression was not compatible with the requirements of article 19, paragraph 3, of the Covenant". (para. 12.5)

According to the Committee, "there is no indication that the courts .... considered whether the contents of the speech (by the author) or the documents (distributed by him) had any additional effect upon the audience or readers such as to threaten public security" (para.12.4) and "the State party has not provided specific justifications as to why over and above prosecuting the author for contraventions of the Law on Assembly and Demonstration and the Law on Punishment of Violent Activities (which forms no part of the author's complaint), it was necessary for national security, also to prosecute the author for the exercise of his freedom of expression". (para. 12.5)

However, as noted by the State party, the author was "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 ... participants "threw thousands of Molotov cocktails and rocks at police stations, and other government offices. They also set vehicles on fire and injured 134 policemen"." (para.4.2) In this connection the Committee itself "notes that the author was convicted for having read out and distributed printed material which expressed opinions ... coinciding with the policy statements of DPRK (North Korea), with which country the State party was formally in a state of war". (para.12.4. See also the explanation of the State party in paras. 10.4 and 10.5)

The author's counsel argues that "the author's conviction under the Law on Demonstration and Assembly and the Law on Punishment of Violent Activities is not the issue in this communication" and that "the author's conviction under those laws cannot justify his conviction under the National Security Law for his allegedly enemy-benefiting expressions". (para.9.1)

Nevertheless, the Author's reading out and distributing the printed material in question, for which he was convicted under these laws, were the very acts for which he was convicted under the National Security law and which lead to the breach of public order as described by the State party. In fact, counsel fails to refute that the author's reading out and distributing the printed material in question did lead to the breach of public order, which might have been perceived by the State party as threatening national security.

I do share the concern of counsel that some provisions of the National Security Law are too broadly worded to prevent their abusive application and interpretation. Unfortunately, however, the fact remains that South Korea was invaded by North Korea in 1950's and the East-West détente has not fully blossomed on the Korean Peninsula yet. In any event the Committee has no information to prove that the afore-mentioned acts of the author did not entail the breach of public order, and under article 19, paragraph 3, of the Covenant the protection of "public order" as well as the protection of "national

security" is a legitimate ground to restrict the exercise of the right to freedom of expression.

Nisuke Ando (signed)

1-15 (끝)

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REFERENCE: G/SO 215/51 KOREA (4)
cc/xb 628/1995

The Secretary-General of the United Nations presents his compliments to the Permanent Representative of the Republic of Korea and has the honour to transmit herewith the text of the Views, adopted by the Human Rights Committee on 20 October 1998, concerning communication No. 628/1995, submitted to the Committee for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights on behalf of Mr. Tae Hoon Park.

In accordance with established practice, the text of the Views will be made public.

4 December 1998

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HUMAN RIGHTS COMMITTEE
Sixty-fourth session
19 October - 6 November 1998

VIEWS

Communication N°628/1995

Submitted by:	Tae Hoon Park (represented by Mr. Yong-Whan Cho of Duksu Law Offices in Seoul)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	11 August 1994 (initial submission)
Prior decisions:	- CCPR/C/57/D/628/1995, decision on admissibility, dated 5 July 1996
Date of adoption of views	20 October 1998

On 20 October 1998, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No.628/1995. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

A/C.3

ANNEX*

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
- Sixty-fourth session -

concerning

Communication N° 628/1995

Submitted by:	Tae Hoon Park (represented by Mr. Yong-Whan Cho of Duksu Law Offices in Seoul)
Victim:	The author
State party:	Republic of Korea
Date of communication:	11 August 1994
Date of decision on admissibility:	5 July 1996

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

Meeting on 20 October 1998,

Having concluded its consideration of communication No.628/1995 submitted to the Human Rights Committee by Tae Hoon Park, 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, his counsel and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Th. Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zahkia.

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

1. The author of the communication is Mr. Tae-Hoon Park, a Korean citizen, born on 3 November 1963. He claims to be a victim of a violation by the Republic of Korea of articles 18, paragraph 1, 19, paragraphs 1 and 2, and 26 of the Covenant. He is represented by Mr. Yong-Whan Cho of Dukso Law Offices in Seoul. The Covenant and the Optional Protocol thereto entered into force for the Republic of Korea on 10 July 1990.

The facts as submitted by the author

2.1 On 22 December 1989, the Seoul Criminal District Court found the author guilty of breaching paragraphs 1 and 3 of article 7 of the 1980 National Security Law[1] and sentenced him to one year's suspended imprisonment and one year's suspension of exercising his profession. The author appealed to the Seoul High Court, but in the meantime was conscripted into the Korean Army under the Military Service Act, following which the Seoul High Court transferred the case to the High Military Court of Army. The High Military Court, on 11 May 1993, dismissed the author's appeal. The author then appealed to the Supreme Court, which, on 24 December 1993, confirmed the author's conviction. With this, it is argued, all available domestic remedies have been exhausted. In this context, it is stated that the Constitutional Court, on 2 April 1990, declared that paragraphs 1 and 5 of article 7 of the National Security Law were constitutional. The author argues that, although the Court did not mention paragraph 3 of article 7, it follows from its decision that paragraph 3 is likewise constitutional, since this paragraph is intrinsically woven with paragraphs 1 and 5 of the article.

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[1] The National Security Law was amended on 31 May 1991. The law applied to the author, however, was the 1980 law, article 7 of which reads (translation provided by the author):

"(1) Any person who has benefited the anti-State organization by way of praising, encouraging, or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organisation, shall be punished by imprisonment for not more than 7 years.

...

"(3) Any person who has formed or joined the organisation which aims at committing the actions as stipulated in paragraph 1 of this article shall be punished by imprisonment for more than one year.

...

"(5) Any person who has, for the purpose of committing the actions as stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, possessed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph."

2.2 The author's conviction was based on his membership and participation in the activities of the Young Koreans United (YKU), during his study at the University of Illinois in Chicago, USA, in the period 1983 to 1989. The YKU is an American organization, composed of young Koreans, and has as its aim to discuss issues of peace and unification between North and South Korea. The organization was highly critical of the then military government of the Republic of Korea and of the US support for that government. The author emphasizes that all YKU's activities were peaceful and in accordance with the US laws.

2.3 The Court found that the YKU was an organization which had as its purpose the commission of the crimes of siding with and furthering the activities of the North Korean Government and thus an "enemy-benefiting organization". The author's membership in this organization constituted therefore a crime under article 7, paragraph 3, of the National Security Law. Moreover, the author's participation in demonstrations in the USA calling for the end of US' intervention constituted siding with North Korea, in violation of article 7, paragraph 1, of the National Security Law. The author points out that on the basis of the judgment against him, any member of the YKU can be brought to trial for belonging to an "enemy-benefiting organization".

2.4 From the translations of the court judgments in the author's case, submitted by counsel, it appears that the conviction and sentence were based on the fact that the author had, by participating in certain peaceful demonstrations and other gatherings in the United States, expressed his support or sympathy to certain political slogans and positions.

2.5 It is stated that the author's conviction was based on his forced confession. The author was arrested at the end of August 1989 without a warrant and was interrogated during 20 days by the Agency for National Security Planning and then kept in detention for another 30 days before the indictment. The author states that, although he does not wish to raise the issue of fair trial in his communication, it should be noted that the Korean courts showed bad faith in considering his case.

2.6 Counsel submits that, although the activities for which the author was convicted took place before the entry into force of the Covenant for the Republic of Korea, the High Military Court and the Supreme Court considered the case after the entry into force. It is therefore argued that the Covenant did apply and that the Courts should have taken the relevant articles of the Covenant into account. In this connection, the author states that, in his appeal to the Supreme Court, he referred to the Human Rights Committee's Comments after consideration of the initial report submitted by the Republic of Korea under article 40 of the Covenant (CCPR/C/79/Add.6), in which the Committee voiced concern about the continued operation of the National Security Law; he argued that the Supreme Court should apply and interpret the National Security Law in accordance with the recommendations made by the Committee. However, the Supreme Court, in its judgment of 24 December 1993, stated:

> "Even though the Human Rights Committee established by the International Covenant on Civil and Political Rights has pointed out problems in the National Security Law as mentioned, it should be said that NSL does not lose its validity simply due to that. ... Therefore, it can not be said that punishment against the defendant for violating of NSL

violates international human rights regulation or is contradictory application of law without equity." (translation by author)

The complaint

3.1 The author states that he has been convicted for having opinions critical of the situation in and the policy of South Korea, which are deemed by the South Korean authorities to have been for the purpose of siding with North Korea only on the basis of the fact that North Korea is also critical of South Korean policies. The author argues that these presumptions are absurd and that they prevent any freedom of expression critical of government policy.

3.2 The author claims that his conviction and sentence constitute a violation of articles 18, paragraph 1, 19, paragraphs 1 and 2, and 26, of the Covenant. He argues that although he was convicted for joining an organization, the real reason for his conviction was that the opinions expressed by himself and other YKU members were critical of the official policy of the South Korean Government. He further contends that, although freedom of association is guaranteed under the Constitution, the National Security Law restricts the freedom of association of those whose opinions differ from the official government policy. This is said to amount to discrimination in violation of article 26 of the Covenant. Because of the reservation made by the Republic of Korea, the author does not invoke article 22 of the Covenant.

3.3 The author requests the Committee to declare that his freedom of thought, his freedom of opinion and expression and his right to equal treatment before the law in exercising freedom of association have been violated by the Republic of Korea. He further requests the Committee to instruct the Republic of Korea to repeal paragraphs 1, 3 and 5, of article 7 of the National Security Law, and to suspend the application of the said articles while their repeal is before the National Assembly. He further asks to be granted a retrial and to be pronounced innocent, and to be granted compensation for the violations suffered.

State party's observations and counsel's comments

4.1 By submission of 8 August 1995, the State party recalls that the facts of crime in the author's case were, inter alia, that he sympathized with the view that the United States is controlling South Korea through the military dictatorship in Korea, along with other anti-state views.

4.2 The State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party notes that the author has claimed that he was arrested without a warrant and arbitrarily detained, matters for which he could have sought remedy through an emergency relief procedure or through an appeal to the Constitutional Court. Further, the State party argues that the author could demand a retrial if he has clear evidence proving him innocent or if those involved in his prosecution committed crimes while handling the case.

4.3 The State party further argues that the communication is inadmissible since it deals with events that took place before the entry into force of the Covenant and the Optional Protocol.

4.4 Finally, the State party notes that on 11 January 1992 an application was made by a third party to the Constitutional Court concerning the constitutionality of article 7, paragraphs 1 and 3, of the National Security Law. The Constitutional Court is at present reviewing the matter.

5.1 In his comments on the State party's submission, counsel for the author notes that the State party has misunderstood the author's claims. He emphasizes that the possible violations of the author's rights during the investigation and the trial are not at issue in the present case. In this context, counsel notes that the matter of a retrial has no relevance to the author's claims. He does not challenge the evidence against him, rather he contends that he should not have been convicted and punished for these established facts, since his activities were well within the boundaries of peaceful exercise of his freedom of thought, opinion and expression.

5.2 As regards the State party's argument that the communication is inadmissible ratione temporis, counsel notes that, although the case against the author was initiated before the entry into force of the Covenant and the Optional Protocol, the High Military Court and the Supreme Court confirmed the sentences against him after the date of entry into force. The Covenant is therefore said to apply and the communication to be admissible.

5.3 As regards the State party's statement that the constitutionality of article 7, paragraphs 1 and 3, of the National Security Law, is at present being reviewed by the Constitutional Court, counsel notes that the Court on 2 April 1990 already decided that the articles of the National Security Law were constitutional. Later applications concerning the same question were equally dismissed by the Court. He therefore argues that a further review by the Constitutional Court is devoid of chance, since the Court is naturally expected to confirm its prior jurisprudence.

The Committee's admissibility decision

6.1 At its 57th session, the committee considered the admissibility of the communication.

6.2 The Committee noted the State party's argument that the communication was inadmissible since the events complained of occurred before the entry into force of the Covenant and its Optional Protocol. The Committee noted, however, that, although the author was convicted in first instance on 22 December 1989, that was before the entry into force of the Covenant and the Optional Protocol thereto for Korea, both his appeals were heard after the date of entry into force. In the circumstances, the Committee considered that the alleged violations had continued after the entry into force of the Covenant and the Optional Protocol thereto and that the Committee was thus not precluded ratione temporis from examining the communication.

6.3 The Committee also noted the State party's arguments that the author had not exhausted all domestic remedies available to him. The Committee noted that some of the remedies suggested by the State party related to aspects of the author's trial which did not form part of his communication to the Committee. The Committee further noted that the State party had argued that the issue of the constitutionality of article 7 of the National Security Law was still pending before the Constitutional Court. The Committee also noted that the author had argued that the application to the Constitutional Court was futile, since the Court had already decided, for the first time on 2 April 1990, and several times since, that the article was compatible with the Korean Constitution. On the basis of the information before it, the Committee did not consider that any effective remedies were still available to the author within the meaning of article 5, paragraph 2(b), of the Optional Protocol.

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6.4 The Committee ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.5 The Committee considered that the facts as submitted by the author might raise issues under articles 18, 19 and 26 of the Covenant that need to be examined on the merits.

7. Accordingly, on 5 July 1996 the Human Rights Committee decided that the communication was admissible.

State party's observations concerning the merits and counsel's comments thereon

8.1 In its observations, the State party notes that the author has been convicted for a transgression of national laws, after a proper investigation bringing to light the undisputed facts of the case. The State party submits that in spite of the precarious security situation it has done its utmost to guarantee fully all basic human rights, including the freedom to express one's thoughts and opinions. The State party notes, however, that the overriding necessity of preserving the fabric of its democratic system requires protective measures.

8.2 The Korean Constitution contains a provision (article 37, paragraph 2) stipulating that "the freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order and for public welfare." Pursuant to the Constitution, the National Security Law contains some provisions which may partially restrict individuals' freedoms or rights. According to the State party, a national consensus exists that the NSL is indispensable to defend the country against the North Korean communists. In this connection, the State party refers to incidents of a violent nature. According to the State party, it is beyond doubt that the author's activities as a member of YKU, an enemy benefitting organization that endorses the policies of the North Korean communists, constituted a threat to the preservation of the democratic system in the Republic of Korea.

8.3 In respect to the author's argument that the Court should have applied the provisions of the Covenant to his case, the State party submits that the "author was convicted not because the Court intentionally precluded the application of the Covenant but because it was a matter of necessity to give the NSL's provisions priority over certain rights of individuals as embodied in the Covenant in view of Korea's security situation."

9.1 In his comments on the State party's submission, counsel argues that the fact that the State party is in a precarious security situation has no relation with the author's peaceful exercise of his right to freedom of thought, opinion, expression and assembly. Counsel argues that the State party has failed to establish any relation between the North Korean communists and the YKU or the author, and has not provided any sound explanation about which policies of the North Korean communists the YKU or the author endorsed. According to counsel, the State party has likewise failed to show what kind of threat the YKU or the author's activities posed to the security of the country.

9.2 It is submitted that the author joined the YKU as a student with aspiration for democracy and peaceful unification of his country. In his activities, he never had any intention to give benefit to North Korea or put the security of his country in danger. According to counsel, the kind of opinion expressed by

the author can be rebutted by discussion and debate, but, as far as such expression is discharged in a peaceful manner, it should never be suppressed by criminal prosecution. In this context, counsel submits that it is not for the State to assume the role of divine judge about what is the truth or the false and the good or the evil.

9.3 Counsel maintains that the author was punished for his political opinion, thought and peaceful expression thereof. He also claims that his right to equal protection before the law under article 26 of the Covenant was denied. In this connection, he explains that this is so because, while every citizen is guaranteed to enjoy the right to freedom of association under article 21 of the Constitution, the author was punished and thereby subjected to discrimination for joining the YKU which had allegedly different political opinions than those of the Government of the Republic of Korea.

9.4 The author refers to the report on the mission to the Republic of Korea by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression[1]. The author requests the Committee to recommend to the Government to publish its views on the communication and its translation into Korean in the Official Gazette.

Issues and proceedings before the Committee

10.1 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.

10.2 The Committee takes note of the fact that the author has not invoked article 22 of the Covenant, related to freedom of association. As a reason for not invoking the provision, counsel has referred to a reservation or declaration by the Republic of Korea according to which article 22 shall be so applied as to be in conformity with Korean laws including the Constitution. As the author's complaints and arguments can be addressed under other provisions of the Covenant, the Committee need not on its own initiative take a position to the possible effect of the reservation or declaration. Consequently, the issue before the Committee is whether the author's conviction under the National Security Law violated his rights under articles 18, 19 and 26 of the Covenant.

10.3 The Committee observes that article 19 guarantees freedom of opinion and expression and allows restrictions only as provided by law and necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification. While the State party has stated that the restrictions were justified in order to protect national security and that they were provided for by law, under article 7 of the National Security Law, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considers that the State party has failed to specify the precise nature of the threat which it

[1] E/CN.4/1996/39/Add.1

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contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19. The Committee has carefully studied the judicial decisions by which the author was convicted and finds that neither those decisions nor the submissions by the State party show that the author's conviction was necessary for the protection of one of the legitimate purposes set forth by article 19 (3). The author's conviction for acts of expression must therefore be regarded as a violation of the author's right under article 19 of the Covenant.

10.4 In this context, the Committee takes issue with the State party's statement that the "author was convicted not because the Court intentionally precluded the application of the Covenant but because it was a matter of necessity to give the NSL's provisions priority over certain rights of individuals as embodied in the Covenant in view of Korea's security situation." The Committee observes that the State party by becoming a party to the Covenant, has undertaken pursuant to article 2, to respect and to ensure all rights recognized therein. It has also undertaken to adopt such legislative or other measures as may be necessary to give effect to these rights. The Committee finds it incompatible with the Covenant that the State party has given priority to the application of its national law over its obligations under the Covenant. In this context, the Committee notes that the State party has not made the declaration under article 4(3) of the Covenant that a public emergency existed and that it derogated certain Covenant rights on this basis.

10.5 In the light of the above findings, the Committee need not address the question of whether the author's conviction was in violation of articles 18 and 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 19 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Tae-Hoon Park with an effective remedy, including appropriate compensation for having been convicted for exercising his right to freedom of expression. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized 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 recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is requested to translate and publish the Committee's Views and in particular to inform the judiciary of the Committee's Views.

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[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.]

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