

OPINION No. 26395 (PEOPLE'S REPUBLIC OF CHINA)

Communication: addressed to the Government on 11 June 2004.

Concerning: Haeng Han Choi, South Korean citizen.

The State has signed but not ratified the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established by Commission on Human Rights resolution 1991/42. The mandate of the Working Group was clarified by resolution 1997/50, and extended by resolution 2003/31. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having submitted information concerning the case.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

- (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act (category I);
- (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
- (iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to render on the deprivation of liberty, of whatever kind, an arbitrary character (category III).

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. It has transmitted the reply provided by the Government to the sources, which provided the Working Group with its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.

5. According to the information received, Mr. Yong Han Choi, born on 9 March 1963, citizen of the Republic of Korea, salesman of heavy equipment in Northern China, was arrested on 18 January 2003 in Yantai City, Shandong Province, by officers of the People's Public Prosecutor Office who did not inform Mr. Choi of the reasons for his arrest. Mr. Choi was accompanying 13 North Koreans in reaching Japan by fishing boats, with the ultimate destination being South Korea. All of them were arrested, as well as Mr. Pae Hyun Seok, a South Korean freelance journalist, Pise Jonggao and Yong Sun Jo. They were taken to the

Detention Office N° 2 of Yantai City and interrogated by Security officers.

6. The arrested North Koreans were taken to Dalian, then to Dandong border guard station, and repatriated to Sinuiju, North Korea, on 23 January 2003. Mr. Choi was accused of assisting the 12 North Koreans in their departure from China to Japan and ultimately to South Korea by fishing boats.

7. According to the source, Mr. Choi was interrogated without legal counsel and advice. He was not informed about his right to obtain counsel and did not have an opportunity to choose a defense attorney for himself. Before his trial, which started on 22 April 2003, he was only given permission to communicate with his wife on three different occasions via telephone. The police officers reportedly requested Mr. Choi to give money to the court to appoint an attorney. On 21 April 2003, his wife hand delivered money to the police, through an interpreter of the Court, to appoint the attorney.

8. On 22 May 2003, Mr. Choi was sentenced by the Intermediate People's Court of Yantai City Development District to five years imprisonment and to pay a fine of CNY (Yuan Renminbi) 30,000, according to Articles 23, 26-14, 27, 35, 64, 68-1, 73 and 318-1 of the Penal Code of the People's Republic of China. The execution of the trial was flawed and prejudicial to the defendants, without regard to internationally recognized standards for due process of law. The defense attorney and the Korean Vice-Consul were not informed on the date of the issue of the sentence.

9. One female Han Chinese interpreter was assigned to interpret both the prosecution and the defense, interpreting Chinese into Korean and vice versa. According to the source, no defendant can rely on an interpreter employed by and working for those seeking to prosecute him. The interpreter misinterpreted important words into Korean, such as "nationality" and "international". She was unable to differentiate between past and present tenses and between passive and active voices of the Korean language. The interpreter was unable to translate the word "Westerner" into Korean, when Mr. Choi was asked whether any Westerners participated in the planning of the incident. The source concludes that Mr. Choi was deprived of understanding and comprehending the accusations against him. This fact impeded him to prepare an adequate defense to the accusations lodged against him.

10. Mr. Choi was not allowed an attorney of his own choosing. His attorney was appointed by the Court on 21 April 2003. He was not approved by either Mr. Choi or his family. They were given no opportunities to consult with the attorney before the trial. Furthermore, the defense attorney did not understand the Korean language, precluding him from identifying misinterpretations and to adequately communicate with Mr. Choi.

11. Mr. Choi requested copies of the transcripts of the trial, but a court official told him that the transcripts had been submitted to the judge. On 2 June 2003, Mr. Choi filed for an appeal. The court has not yet announced the date and time for the appeal. Mr. Choi was finally able to obtain a new defense attorney to represent him, but he has been authorized to meet him only once, since 2 June 2003.

12. The source further reports that Mr. Choi has serious health problems, including hypertension, diabetes and asthma. Additionally, in November 1999, he had a

diverticulotomy surgery with an appendectomy as his decision, after being diagnosed with acute diverticulitis. His diet while in detention has been extremely poor. The guards have refused to give him the medications provided by his wife. During the trial, she made several attempts to give him his medications.

13. In its reply, the Government stated that Park Yong-ho, a co-defendant in the appeal's case, entered China illegally from North Korea, made contact with Mr. Hwang Hui Chai, and tried, through him, to smuggle clandestinely to South Korea. Under Choi's instruction he organized and guided 10 individuals from Yanji to Yantai in Shandong Province in late December 2000, where Choi had assigned Park Yong-ho to meet them and put them up at a residence in Yantai district while they awaited an opportunity to escape. On 13 January 2001, Choi and Seok Joo-byun, another co-defendant in the case, received instruction from an NGO in South Korea and, carrying funds from that NGO, left South Korea and travelled to Yantai, where Choi and his co-defendants made preparations in accordance with the NGO's plans, arranged for illegal Korean illegal immigrants to be smuggled by boat from Yantai to South Korea, photographed the arrangements and made a video of the escapees to report the story abroad. Choi gave the money to buy two fishing boats and pick some fishermen to crew them. On 17-18 January 2001, public security personnel and frontier guards from Yantai seized the five defendants and 25 individuals waiting to be smuggled abroad. Meanwhile, public security personnel were led by Choi to seize Seok and some of the escapees.

14. The Government added that the Yantai Intermediate People's Court found that Mr. Choi was party to the plot and a concrete attempt to smuggle third parties out of China; that his conduct amounted to criminal organized smuggling of third parties out of the country, and that he played an important role as ringleader in the collective offense. As he had performed the meritorious service of assisting the public security organs in arresting his fellow criminals, he could be given a light punishment. On 16 May 2001, the court sentenced him to two years imprisonment for organized people smuggling a fine of RMB81 Yuan, and deportation. Choi appealed his sentence. On 18 November 2001, the Shandong Province People's Court rejected the appeal and upheld the original judgment. The argument by Mr. Choi and his defence counsel that he had no part in the organization could not be sustained.

15. The Government refutes the allegations concerning the violations of a fair trial. It states that the procedure was strictly followed. Mr. Choi was informed of the reasons for his arrest and of the charges held against him, as well as his right to benefit from the assistance of a lawyer and he chose to give up this right during the preliminary phase of the trial. His renunciation is mentioned in the verbatim of his interview bearing his signature. After being charged with the offences, he was notified by the Prosecutor of his right to being assisted by a lawyer of his choice and it is because he did not prevail himself of this opportunity that he was assigned a lawyer from the legal assistance in order to assist him during trial. He was informed of this assignment on 18 April 2001. The Government adds that a Korean interpreter translated the preliminary procedure and that his presence is mentioned in the official documents of the trial. The Government provided a highly competent interpreter who ensured the translation during the trial.

16. The Government states that Mr. Choi was visited at numerous occasions by representatives of his Embassy who were able to assist, with his family, to the trial as well as the hearing before the Court of Appeals. The Government denies the allegations concerning

the poor conditions of detention and is of the opinion that the prison where Mr. Choi has been placed is one of the best in the region. The Government acknowledges that his family was not authorized to provide him with medication, but this stipulation is imposed by the regulations in the interest of the detainees. However, the State ensures a proper follow-up of each detainee's health conditions. Mr. Choi is being treated for his hypertension and is in good health.

11. The source replies in rebutting the response from the Government and argues the following:

(a) The activities of Mr. Choi, contrary to the assertion of the Government, were not illegal and criminal. Mr. Choi acted in a humanitarian role by attempting to help the North Koreans to a safe haven in South Korea through China. The source argues that the North Koreans were duly classifiable as refugees as defined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, as both China is a party. The source claims that Mr. Choi and his co-defendants, when developing the testimonies of the North Koreans, were doing so for the purpose of submitting this information to the UNHCR in support of their application for refugee status.

The source further claims that China refuses to establish proper procedures to process the refugee status of North Koreans who enter China, and that instead, the Government of China goes to great extents to find and forcibly repatriate those persons back to North Korea, where they will certainly be detained, tortured and maybe even executed for having left the country without authorization. These actions by the Government of China violate the refugee Treaty and basic international laws concerning human rights and refugees and force the North Koreans to seek asylum status in a third country.

(b) The source contests the assertion made by the Government which claims that Mr. Choi's detention in the Yantai Municipal Prison No. 2 offers the best conditions in this city. The source reminds that Mr. Choi was diagnosed in 1996 with acute diverticulitis and suffers from hypertension, diabetes and asthma. The source states that Mr. Choi is not being given proper and adequate medical and dietary treatment in the prison and that his wife, when visiting him in August 2004, found him even thinner and more frail, in declining health and low morale. Also, the source reports that Mr. Choi has been transferred to a bigger cell with 20 other inmates, some of them murderers, and that he has been receiving very few of the letters and parcels sent to him.

(c) The source further contends that Mr. Choi benefited from the assistance of a high-ranker interpreter during the proceedings and states that in many occasions during the trial, witnesses reported that the co-defendant and his lawyer had to ask the same interpreter to correct the interpretation because of basic inadequacies. The source adds that Mr. Choi was not able to communicate properly with his Chinese lawyer due to the poor interpretation and that this was prejudicial to him.

(d) The source finally wonders why the Government stated that officials from the North Korean embassy in China would have been going to the prison to visit Mr. Choi and that the Court should instead have had to arrange private meeting for Mr. Choi with officials from the South Korean Consulate, since he is a citizen of this latter State.

18. From the foregoing it is apparent that the source makes several claims, the most pertinent of which in terms of the Working Group's mandate relate to the right of the accused to be informed of the reasons for the arrest and notified of the charges against him, and to various serious infringements of the right to a defence. In particular, these relate to violation of the right to the assistance of counsel during the preliminary investigation, the right to select the court-appointed counsel to present a defence in the hearing, the right to communicate freely with counsel and to have sufficient time for the preparation of a defence, and the right to receive a translated copy of the record of the proceedings in a language that the accused understands. Reservations have also been voiced concerning the competence and independence of the interpreters. The Government having contested the allegations relating to the violation of the right to be informed of the reasons for the arrest and to be notified of the charges, the Working Group is not in a position to give its opinion on these violations. The following arguments relate only to the alleged violations of the right to a defence.

19. The Government has not contested that during the duration of the pre-trial proceedings Mr. Choi did not benefit from the assistance of counsel. According to the Government, he was informed of his right to be assisted by counsel, but replied that it was not necessary. The Working Group considers that for a foreigner unable to understand the language used by the court, deprived of freedom and accused of serious offences - he was convicted to five years' imprisonment, having reportedly benefited from mitigating circumstances - assistance by counsel was necessary from the time charges were brought. The interest of justice so demands.

20. The Working Group has many times emphasized that the right of the accused to receive assistance from counsel of his own choosing, and, where appropriate, from a court-appointed attorney, is a fundamental right for any person accused of a criminal offence, and particularly when the person is deprived of freedom. Respect for the presumption of innocence, and for the principle that both parties should be present when evidence is heard, especially in an inquisitorial system as in this case, can be effectively enjoyed only if assistance by counsel is guaranteed, not only for those who can afford to request such assistance, but on each occasion that the interest of justice so demands.

21. In its reply, the Government has not contested the fact that the attorney appointed to represent Mr. Choi on the day of the proceedings in the court of first instance did not speak Korean, a fact which rendered virtually impossible any communication with counsel without the assistance of an interpreter. The source asserts that Mr. Choi did not meet his attorney until the day before the trial, which seems highly likely, since the Government has said that the prosecutor informed him of the appointment of his counsel on 18 April 2000, while the trial was held on 22 April 2000.

22. With regard to preparation of the defence before the appeal court, the Government does not contest the allegations concerning the refusal of the court to provide a transcript of the proceedings and the restrictions on communication with counsel, an attorney who he had chosen to defend him at the appeal stage.

23. The Working Group considers that there were serious violations of the right to a defence, such that Mr. Choi did not benefit from the norms relating to a fair trial as defined in

the relevant international standards, so that the deprivation of liberty was arbitrary.

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

The deprivation of liberty of Mr. Hang Hui Choi is arbitrary, being in contravention of the provisions of article 18 of the Universal Declaration of Human Rights, and falls within category (II) of the categories applicable to the consideration of cases submitted to the Working Group.

25. The Working Group, having rendered this opinion, requests the Government to take the necessary steps to rectify the situation, in order to bring it into conformity with the norms and principles set forth in the Universal Declaration of Human Rights, and to take the necessary measures to ratify the International Covenant on Civil and Political Rights.

Adopted on 27 May 2000