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**Human Rights Committee**

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2809/2016[[1]](#footnote-2)\*,[[2]](#footnote-3)\*\*,[[3]](#footnote-4)\*\*\*

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| *Communication submitted by:* | Seok-ki Lee, Hong-yeol Kim, Sang-ho Lee, Soon-seog Hong, Dong-kun Han, Yang-won Cho and Keun-rae Kim (represented by  Kinam Kim and others) |
| *Alleged victim:* | The authors |
| *State party:* | Republic of Korea |
| *Date of communication:* | 15 December 2015 (initial submission) |
| *Document references:* | Decision taken pursuant to rule 92 of the Committee’s rules of procedure, transmitted to the State party on 14 September 2016 (not issued in document form) |
| *Date of adoption of Views:* | … 30 October 2020 |
| *Subject matter:* | Freedom of expression |
| *Procedural issue:* | None |
| *Substantive issue:* | Permissibility of restrictions on freedom of expression |
| *Article of the Covenant:* | 19 |
| *Article of the Optional Protocol:* | None |

1. The authors of the communication are Mr. Seok-ki Lee, Mr. Hong-yeol Kim, Mr. Sang-ho Lee, Mr. Soon-seog Hong, Mr. Dong-kun Han, Mr. Yang-won Cho and Mr. Keun-rae Kim, all nationals of the Republic of Korea. They claim that the State party has violated their rights under article 19 of the International Covenant on Civil and Political Rights (“the Covenant”). The State party acceded to the Covenant and the Optional Protocol on 10 April 1990. The authors are represented by counsels.

The facts as presented by the authors

2.1 The authors were active for the Unified Progressive Party (“U.P.P.”/“Party”).[[4]](#footnote-5) They were detained and indicted between 30 August 2013 and 24 October 2013. All were indicted for conspiracy to an insurrection and for violating article 7 of the National Security Act (“N.S.A.”), which criminalises, inter alia, praising, inciting or propagating the activities of an anti-state organisation with the knowledge that this may endanger the existence and security of the State or the fundamental democratic order,[[5]](#footnote-6) in relation to several different facts. It was claimed that Mr. Hong and Mr. Han had met to study books in praise of the D.P.R.K and that Mr. Sang-ho Lee had made speeches on 11 December 2011 and 30 July 2013 that according to the authors concerned the differences between revolutionaries and activists and the importance of comradery and of increasing support. It was claimed that all authors except for Mr. Hong-yeol Kim had acquired, possessed and distributed anti-state materials. It was also claimed that all authors except for Mr. Han had sung a song called “Comrades in the Revolution” on 8 March 2012, 3 May 2012, 21 June 2012 and 10 August 2012.

2.2 Additionally, the charges referred to two meetings in May 2013 in which all authors were involved. According to the authors, given increased tensions between the State party and the Democratic People’s Republic of Korea (“D.P.R.K.”) since the end of 2012, Mr. Hong-yeol Kim decided to organise a meeting to improve understanding of the political situation, limiting attendance to executives of the U.P.P.’s Gyeonggi Provincial Committee. The meeting was attended by 130 participants and took place on 10 May 2013 with both Mr. Hong-yeol Kim and Mr. Seok-ki Lee speaking, but was stopped after ten minutes because of security concerns.

2.3 On 12 May 2013, a second meeting took place with the same number of participants. Mr. Seok-ki Lee made remarks, followed by a discussion on the military situation and the importance of preparing for a possible war. Mr. Hong-yeol Kim then invited the sub-group discussions to explore how to make political and military preparations. Mr. Sang-ho Lee suggested attacking communications and oil supply lines and establishing guidelines in this regard. He discussed ways of producing guns and bombs and sabotaging the railway system. Mr. Han mentioned that the most important weapon would be to protect the organisation, that a decision should be made on stealing weapons and that organisational capabilities to respond to a war should be improved. The youth division had not considered the possibility of a war, but participants in other sub-groups discussed the need of making physical and technical preparations for a revolutionary war, procuring guns, attacking telecommunications, developing good relationships with infrastructure institutions and having guidelines on preventive custody. Mr. Seok-ki Lee then asked the participants if they were not familiar with such preparations and told them that they should be proactive and that there are many ways to prepare physically and technically. He stated that simple methods could be used to destroy a steel tower. He also referred to websites on homemade bombs and discussed information warfare, propaganda warfare and military warfare. The authors note that the meetings were not followed by subsequent activities.

2.4 In addition to the charges concerning all authors, Mr. Seok-ki Lee and Mr. Hong-yeol Kim were charged with inciting to an insurrection in relation to their roles in the May meetings. The prosecution claimed that Mr. Seok-ki Lee led the “Revolutionary Organisation” (“R.O.”), allegedly aimed to overthrow the Government and establish the ideology of the D.P.R.K., and that he instigated the R.O. members at the May meetings to prepare for a war physically and militarily by planning to destroy infrastructure. The authors contested the charges.

2.5 On 17 February 2014, the Suwon District Court found the authors guilty of all charges and sentenced Mr. Seok-ki Lee to twelve years of imprisonment and the rest to four to seven years. Both the authors and the prosecution appealed.

2.6 On 11 August 2014, the Seoul High Court acquitted the authors of conspiring to an insurrection but upheld their conviction under article 7 of the N.S.A. and that of Mr. Seok-ki Lee and Mr. Hong-yeol Kim for incitement to an insurrection. The High Court lowered Mr. Seok-ki Lee’s sentence to nine years and that of the others to two to five years.

2.7 On 22 February 2015, the Supreme Court upheld the High Court’s decision

The complaint

3.1 The authors claim that the State party has breached their right to freedom of expression as their criminal punishment interfered with this freedom, and it was not necessary under article 19 (3) of the Covenant, because the statements made by Mr. Seok-ki Lee and Mr. Hong-yeol Kim during the May meetings did not threaten national security.

3.2 First, the nature of the speaker-audience relationship did not allow for such a conclusion; Mr. Seok-ki Lee and Mr. Hong-yeol Kim were not able to influence the participants given that they were democratic activists resistant to manipulation due to their experiences of hardships and because of the U.P.P.’s democratic nature. Mr. Seok-ki Lee had no close relationship with most participants.

3.3 Second, the context of the May meetings did not show a need to restrict the authors’ freedom of expression. They were organised to enhance understanding of the political tensions on the Korean peninsula. Tensions have existed since the end of the Korean War and the D.P.R.K. has repeatedly declared its abrogation of the Armistice Agreement. Even though security concerns had increased, an armed conflict was not imminent.

3.4 Third, the authors’ intent behind the meetings did not justify a restriction. Mr. Seok-ki Lee and Mr. Hong-yeol Kim did not intend to incite the participants to engage in violence but rather shared their opinion on how to deal with the situation. The meetings were open to a specific audience belonging to the same party. Moreover, even though words used including “fight”, “war”, “revolution”, “battle”, “local and unconventional warfare” and “destroy” sound radical, persons with left-wing views commonly use them, and they should be explained contextually. It is unclear what Mr. Seok-ki Lee recommended that the participants do, he did not participate in the sub-group discussions where targets were discussed, he shared his personal opinion and did not clarify himself when he asked whether the participants were unfamiliar with the topics discussed. Further, the meetings were a one-time event and the remarks were not repeated.

3.5 Fourth, no need for a restriction appeared from the content of the discussions. Mr. Seok-ki Lee and Mr. Hong-yeol Kim did not directly call for violence. Mr. Seok-ki Lee’s references to physical and technical readiness remained abstract. Likewise, his statements about the need to “destroy the physical foundation established by the ruling faction in the past 60 years” and “destroy the regime under which the two Koreas exist” are vague and refer only to the political status quo. Given his other remarks, his references to “fight” and “battle” refer to endeavours to overcome American imperialism. Through his advice not to carry guns, he clarified that the participants should not kill. His reference to the destruction of a steel tower signalled the importance of finding creative solutions rather than encouraging the destruction of infrastructure. He and Mr. Hong-yeol Kim never directly mentioned what specific actions should be taken or who or what should be targeted. Their tone was calm. In opening and closing the meetings, Mr. Hong-yeol Kim further only expressed the rhetoric typical of the U.P.P.

3.6 Fifth, the restriction was not justified with respect to the form of the dissemination, as the meetings were directed at a specific audience of 130 people in a closed space and were not followed by subsequent events.

3.7 Sixth, there was no likelihood or imminence of violence. Mr. Seok-ki Lee’s question whether participants were unfamiliar with the topics showed his dissatisfaction with the outcome of the discussions. His remark that there is a “myriad of ideas for physical and technical readiness based on the premise mentioned before. Is it too many? Too abstract? It is definitely huge. You can find it in your own workplace” cannot be easily understood. His statements that “If an order for all-out attacks is issued, I will trust your creative ideas” and “Are you fully prepared to assume combat readiness once you are ordered?” are conditional; it is not clear who would give the order or whom should be targeted.

3.8 The authors also dispute that any of their activities justified a restriction on their freedom of speech under the N.S.A. The Supreme Court did not explain how Mr. Seok-ki Lee’s remarks constituted such a threat, instead simply concluding that he propagated the D.P.R.K.’s revolutionary strategy towards the State party. Mr. Hong-yeol Kim only expressed rhetoric typical of the U.P.P. and stated that to win battles against the U.S.A., they must use the people’s sovereign capability to their advantage. Mr. Sang-ho Lee’s remarks about attacking infrastructure and fabricating guns and bombs are disturbing but he did not go beyond making verbal expressions. Mr. Han only mentioned that the organisation must be protected and that a decision should be made on stealing weapons and taking military actions. Mr. Hong, Mr. Keun-rae Kim and Mr. Cho only summarised their respective sub-group discussions, which can thus not be attributed to them personally. The authors conclude that the meetings presented no possibility of putting the discussions into practice.

3.9 The authors submit that the Supreme Court did not explain what threat was presented by singing “Comrades in the Revolution” or by studying and discussing juche. Likewise, Mr. Sang-ho Lee’s remarks and the materials seized were of an anti-governmental nature but did not call for violence, and the Supreme Court did not explain how they threatened national security.

3.10 The authors also claim that their prison sentences were not proportionate given that the public did not have access to the May meetings and the discussions did not threaten national security. Moreover, less restrictive measures were available, given that Mr. Seok-ki Lee was deprived of his National Assembly seat, and the Government could have requested the U.P.P. to apply its internal discipline mechanisms. It could also have sought a political solution such as asking the authors to apologise publicly. Moreover, no measures were taken with respect to publicly accessible online comments inciting a war between the Koreas. The U.P.P. became the target of the pro-government N.I.S., through which the Government sanctioned it.

3.11 The authors claim to have exhausted all available domestic remedies as the Supreme Court is the highest competent court. They did not file a petition with the Constitutional Court on the constitutionality of the application of the N.S.A., as the Court had already answered this question in another case, leaving no prospect of success.

3.12 The authors request the Committee to invite the State party to provide them with appropriate remedies in accordance with article 2 (3) of the Covenant, including nullification of the Supreme Court decision, a retrial in keeping with the standards in the Covenant, the issuance of a pardon and monetary reparations.

State party’s observations on admissibility and merits

4.1 By note verbale of 11 April 2017, the State party submitted its observations on the admissibility and merits, claiming that the authors’ expressions had threatened national security and that all measures taken against them were proportional.

4.2 The State party submits that the May meetings took part in the context of a brink of a war, given that three days prior to the first meeting, the D.P.R.K. had threatened to turn “the five West Sea Islands into a sea of fire”, and that on 18-20 May 2013, it launched five rockets.

4.3 The State party recalls the remarks made by Mr. Seok-ki Lee and Mr. Hong-yeol Kim at the May meetings, including that they were now at war. The State party observes that Mr. Seok-ki Lee and Mr. Hong-yeol Kim as speakers were at the top of a hierarchical relationship whereby they directed the participants, who were aware of the tendency of the U.P.P.’s leadership to follow the D.P.R.K.’s violent strategy. Following Mr. Seok-ki Lee’s remarks, the participants including the six other authors discussed concrete measures for material and technical preparations through the manufacturing of bombs and guns and the commission of violence, including the destruction of infrastructure at specific spots such as communications, oil pipelines and railways. The State party submits that this demonstrates that the remarks made by Mr. Seok-ki Lee and Mr. Hong-yeol Kim posed a real threat in that they could generate and bolster a resolution among the participants to commit an insurrection. The State party observes that the covert nature of the meetings shows that the participants knew that these were illegal. The courts ruled that the purpose had been to induce the participants, in case a war would break out, to destroy infrastructure and to engage in propaganda and information wars. These acts would disrupt railway transport, communications and fuel supplies and thus affect the State party’s ability to counter a war. Given the authors’ experience, criminal records and roles in the meetings, the attitude and response of the participants and the political context, the courts ruled that the authors’ statements may have a practical influence on the participants’ behaviour.

4.4 On the N.S.A. violation, the State party argues that the authors’ expressions threatened national security and that their restriction was thus necessary. It submits that by way of their remarks at the May meetings and their singing of “Comrades in the Revolution”, they glorified the D.P.R.K.’s ideology, leadership, nuclear tests, military and plan to attack the State party, and thus praised, propagated and acted in concert with an anti-state organisation. Given the situation in the D.P.R.K. and the meaning of the authors’ expressions, these threatened the existence and security of the State or the fundamental democratic order. Additionally, by glorifying the D.P.R.K.’s leadership and ideology, Mr. Lee indoctrinated the other authors at the May meetings, who blindly accepted this. Further, the materials held by the authors identified the State party as a colony of the U.S.A., propagated violent struggles against it and incited people to follow juche. These actions, as well as Mr. Lee’s call to immediately put into practice everything that had been prepared, threatened national security. The courts accordingly found a violation of the N.S.A.

4.5 The State party adds that it is permanently subject to the D.P.R.K.’s military provocations and that certain expressions constitute a threat of inflicting harm on its existence and security and the fundamental democratic order. Amid aggravated military provocations, the authors emphasised that it was wartime. The State party submits that therefore, article 7 of the N.S.A. should be maintained.

4.6 The State party also submits that the measures taken by the authorities were proportional, as the authors’ acts were criminally punishable and thus no other measures were available. The present individual communications procedure cannot replicate the authors’ domestic criminal trial, which was conducted in accordance with due process and impartiality standards. The length of the prison sentences shows that the proportionality principle was respected in light of the authors’ criminal records, behavioural patterns and the extent of the illegality.

Authors’ comments on the State party’s observations on admissibility and merits

5.1 On 20 June 2017, the authors submitted their comments on the State party’s observations. They dispute that the Koreas were on the brink of a war at the time of the May lectures, as the D.P.R.K. had revoked its “top combat-ready posture” and had retreated its missiles from the border. Moreover, two university professors interpreted the D.P.R.K.’s hostile words as not showing an intention to attack. The reactions of the Government and the media did not reflect such an understanding either.

5.2 The authors further submit that during the criminal proceedings, the trial court ruled that the unintelligible parts of the audio recordings of the May meeting should be filled based on each party’s claims, but that the Government deliberately misinterpreted certain parts. Moreover, the State party attributes certain phrases to Mr. Seok-ki Lee[[6]](#footnote-7) who never uttered these phrases in the order presented. The participants’ awareness at the May meetings that the U.P.P.’s leadership followed the D.P.R.K.’s violent strategy does not mean that they agreed with it. Their applause for Mr. Seok-ki Lee and their affirmative answers to his questions do not show that they were in a hierarchical order. The State party has not proven the authors’ mind-set concerning the content of the discussions; but even if they accepted Mr. Seok-ki’s remarks, this would still not show a national security threat. Further, no one subsequently engaged in any corresponding action. The discussions on military preparations were not concrete and would remain meaningless if a war did not break out. Even though the State party attributes the expressions of one or two individuals to all participants, the authors only summarised the sub-group discussions, whose content therefore cannot be attributed to them. The atmosphere with repeated laughs and the organisation of the meetings as a lecture programme with 130 participants are not characteristic of an intent to plan a violent insurrection. The covert nature of the meetings was due to the State party’s crackdown on those with left-wing views. The authors reiterate that no threat to national security resulted from the May meetings.

5.3 As for the N.S.A. violation, the authors refer to the Committee’s jurisprudence where it found that the State party’s invocation of security threats posed by the D.P.R.K. was insufficient to specify the precise nature of threats allegedly posed by certain expressions.[[7]](#footnote-8) They submit that the restrictions in the present case were likewise not necessary. On “Comrades in the Revolution”, they note that its writer has stated that the song recalls endeavours against the Japanese colonial regime and criticises American imperialism. The authors submit that even if the State party’s interpretation of the song is correct, then it still does not result that the singing threatened national security. Likewise, they dispute that the content of the May meetings showed their sympathy with the D.P.R.K. and that the materials in their possession propagated struggling against the Government, submitting that even if the State party’s interpretation is correct, mere verbal expressions and the possession of materials do not amount to a threat to national security.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must, in accordance with rule 97 of its rules of procedure, decide whether it is admissible under the Optional Protocol.

6.2 The Committee notes, as required by article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee takes note that the State party has not contested the authors’ contention that they have exhausted all available domestic remedies. Accordingly, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the present communication.

6.4 The Committee considers that the authors have sufficiently substantiated their claims, for the purposes of admissibility. Accordingly, it declares the communication admissible and proceeds with its consideration on the merits.

Consideration of the merits

7.1 The Committee has examined the present communication in the light of all the information provided by the parties. It notes that the issue before it is whether the restriction on the freedom of expression of the authors in the form of criminal punishment was necessary for the protection of national security for the purposes of article 19 (3) (b) of the Covenant.

7.2 The Committee recalls that restrictions on the right to freedom of expression must not be overbroad.[[8]](#footnote-9) Restrictions must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those that might achieve their protective function; and they must be proportionate to the interest to be protected.[[9]](#footnote-10) The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination.[[10]](#footnote-11)

7.3 The Committee also recalls that extreme care must be taken by States parties to ensure that provisions relating to national security are crafted and applied in a manner that conform to the strict requirements of paragraph 3 of article 19 of the Covenant.[[11]](#footnote-12) When a State party invokes a legitimate ground to restrict freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[[12]](#footnote-13)

7.4 The Committee notes that, in the present case, the courts of the State party convicted the authors under article 7 of the N.S.A. on the ground that their conduct threatened national security and additionally convicted Mr. Seok-ki Lee and Mr. Hong-yeol Kim for incitement to an insurrection, based on a variety of facts (paragraphs 2.1-2.3). The Committee notes the submission of the State party that the authors’ convictions were based, inter alia, on the facts that they held materials and made utterances that advocated violent struggle and glorified the D.P.R.K.’s ideology, leadership, nuclear tests, military and plan to attack the State party, including at defining moments of assemblies with the intention of instilling the spirit of revolution in the attendees’ hearts. The Committee further notes the State party’s argument that it is permanently subject to the D.P.R.K.’s military provocations and that certain expressions constitute a threat of inflicting harm on its existence and security and the fundamental democratic order.

7.5 In this regard, the Committee notes in particular that the courts of the State party also referred to the transcripts of the May meetings. The Committee notes that the authors claim that the authorities deliberately misinterpreted unintelligible parts of the audio recording, but that they do not point to specific examples. According to the summary of the transcript, Mr. Seok-ki Lee in his introductory remarks stated that the meeting was intended to face the tumultuous situation on the Korean peninsula and that they, as revolutionaries, must proactively end the invasion attempts and military system of American imperialists. He stated that the situation would be solved militarily and urged those present to make political, military, physical and technical preparations for a war. Mr. Hong-yeol Kim, as a moderator, then invited the participants to discuss in sub-groups “how to prepare in the political and military aspects under the current situation”. The sub-groups discussed various ways of attacking infrastructure, including the fabrication of guns and bombs and the sabotaging of telecommunications, railway systems and oil storage facilities, including with reference to specific places. Following these discussions, Mr. Seok-ki Lee emphasised that the participants should be proactive with regard to physical and technical preparations. He referred to websites on homemade bombs, stating that “both a manual and a formula for a homemade pressure cooker bomb used in the Boston Marathon bombings are available on the Internet. If you take interest, you will start seeing things”. He also referred to “simple methods” of destroying a steel tower. In addition to the aforementioned remarks by Mr. Seok-ki Lee and Mr. Hong-yeol Kim, all other authors participated in or reported on the discussions on making military preparations and similarly engaged in discussing the procuring of weapons and the destruction of infrastructure.

7.6 In this regard, the Committee notes the authors’ contention that certain passages in the authors’ remarks were vague, that Mr. Seok-ki Lee told participants not to carry a gun and that the authors cannot be held responsible for remarks made by others. The Committee finds that the claimed ambiguity of certain passages does not affect the clear bearing of the aforementioned discussions on national security. While not all comments on the destruction of infrastructure were made by the authors, Mr. Seok-ki Lee’s subsequent remarks on the fabrication of bombs and the destruction of steel towers can only be taken as endorsing such comments. Nor can such comments be seen separately from Mr. Hong-yeol Kim’s invitation to discuss military preparations. Given that Mr. Seok-ki Lee was a lawmaker in the National Assembly for the U.P.P. and that Mr. Hong-yeol Kim was chairperson of the U.P.P.’s Gyeonggi Provincial Committee, it is furthermore difficult to conclude that they were not in a position of authority over the participants, all of whom were members of the same Provincial Committee.

7.7 The Committee notes that even though the authors argue that the remarks were conditional on the outbreak of a war, Mr. Seok-ki Lee acknowledged during the meetings that the D.P.R.K.’s conduct had rendered the situation on the Korean peninsula highly tumultuous. In this regard, the Committee notes the State party’s observation that three days prior to the first meeting, the D.P.R.K. had threatened to turn “the five West Sea Islands into a sea of fire”, and that on 18-20 May 2013, it launched five rockets. The modalities of the meetings and the size of the audience suggest that the dissemination of the discussions was intended to be limited to the 130 participants. Nevertheless, the combination of the authors’ respective roles in the organisation and development of the meetings and their remarks, including in particular their discussions of the necessity of making military preparations and ways of procuring weapons and destroying infrastructure, together with the positions of authority held by Mr. Seok-ki Lee and Mr. Hong-yeol Kim and the overall context, support the Supreme Court’s conclusion that these remarks were capable of substantially affecting the behaviour of the participants, and of justifying a restriction of freedom of expression to protect national security.

7.8 Noting the authors’ argument that the State party could have requested the U.P.P. to apply its internal discipline mechanisms, the Committee is not convinced that such measures would have had the same protective effect as a criminal prosecution and sanction relating to the specific and serious facts in this case, which affect national security and the fundamental democratic order of the State, as they involved incitement to an insurrection, existence of materials and speeches advocating for violent struggle and attack on sensitive infrastructures like railway transport, communications and fuel supplies. Recalling its concern about prosecutions under article 7 of the N.S.A.,[[13]](#footnote-14) the Committee is nonetheless mindful of the specific circumstances of the case, including the particularly serious nature of the authors’ utterances on different occasions, their leadership role, the specific context in which the State party found itself at the time of the various events and the State party’s obligations under article 20 of the Covenant relating to suppression of propaganda for war. In light of the information before it, the Committee cannot conclude that the State party has not demonstrated sufficiently that the authors’ convictions were necessary in the circumstances of the case, adequate to achieve their protective function, and proportionate to the interest to be protected, and accordingly finds no breach of the authors’ rights under article 19 (2) of the Covenant.

8 The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not disclose a violation of article 19 of the Covenant.

Annex.1

Joint Individual Opinion by Committee members Shuichi Furuya, Andreas Zimmermann and Gentian Zyberi (Partially Dissenting).

1. We are generally in agreement with the View’s conclusion that as authors’ convictions were necessary in the circumstances of the case and proportionate to the interest to be protected, they do not constitute a violation of the authors’ rights under article 19 (2). However, we are unable to concur with it on the authors’ convictions under article 7 of the National Security Act for having sung a song called “Comrades in the Revolution”.

2. According to the facts presented by the authors, they were tried and convicted not only for their conduct and utterances in two meetings held on 10 and 12 May 2013, but also for singing the song on 8 March 2012, 3 May 2012, 21 June 2012 and 10 August 2012. As the View points out in paragraph 7.3, when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[[14]](#footnote-15) Nevertheless, the View adopted by the Committee does not provide an individualized assessment on whether the State party has satisfied the necessity and proportionality tests concerning the specific events of singing the song in 2012.

3. While the tensions between the State party and the D.P.R.K. have been existing since the end of the Korean War, the seriousness of such tensions has been different depending on the time. We agree with the State party’s submission that the May 2013 meetings took place in the context of a brink of a war in light of the fact that the D.P.R.K. had threatened to turn “the five West Sea Islands into a sea of fire” three days before the meeting of 10 May 2013 and then it launched five rockets on 18-20 May 2013. In light of this particular context, we support the conclusion of the View that the criminal punishment of the authors was necessary and proportionate to the interest to be protected. However, in our view, the tension between both States in 2012 was less serious than in May 2013, and the threat to the national security of the State party was less imminent. In this regard, the Committee should have examined the compatibility of the criminal prosecution and punishment of the authors with the Covenant in this specific context of 2012 separately from the May meetings in 2013.

4. In light of the overall situation existing in the State party in 2012, it seems that the prosecution and punishment of the authors for having sung the specific song was not necessary for maintaining the security of the State party nor proportionate to this purpose. In any event, as the State party did not provide the Committee with any particular information to justify its prosecution and punishment of the authors for having sung the song in 2012,[[15]](#footnote-16) this leads us to the conclusion that the State party has failed to demonstrate sufficiently that the measures taken were within the scope of permissible restrictions under article 19 (3). For this reason, we have to conclude that the prosecution and punishment of the authors for these specific events that took place in 2012 constitutes a violation of article 19 (2).

Annex 2.

Opinión individual de Hernán Quezada (parcialmente disidente)

1. Respecto a la Comunicación 2809/2016 (Seok-ki Lee, Hong-yeol Kim, Sang-ho Lee, Soon-seog Hong, Dong-kun Han, Yang-won Cho y Keun-rae Kim y otros vs República de Corea), lamento no poder unirme a la mayoría del Comité, la cual concluyó que los hechos examinados no revelan una violación del Artículo 19 del Pacto, decisión que no consideró uno de los elementos en que se había basado – salvo en un caso- la condena judicial impuesta a los autores.

2. En tal sentido, aun cuando la conclusión del Comité de no encontrar una violación al Artículo 19 del Pacto pudiera ser adecuada en relación exclusivamente a los hechos que tuvo en cuenta, el haber omitido en su análisis otro de los hechos en examen impidió revelar una violación concreta al párrafo 2 del mismo Artículo 19. Mi opinión individual es, entonces, parcialmente disidente, como expondré a continuación.

3. La condena de todos los autores, salvo el Sr. Dong-kun Han, en virtud del artículo 7 de la Ley de Seguridad Nacional se basó, entre otros elementos, en el hecho de que entonaran la canción “Camaradas en la revolución” el 8 de marzo, el 3 de mayo, el 21 de junio y el 10 de agosto de 2012 en reuniones del comité provincial del partido en que militaban. Según el Estado parte, la canción glorifica la ideología, el líder, los ensayos nucleares, las fuerzas armadas y el plan de ataque de la República Popular Democrática de Corea al Estado parte, por lo que, al entonarla, los autores habrían incurrido en los delitos consistentes en enaltecer a una organización antiestatal, difundir sus ideas y actuar de concierto con ella. Además, el Estado parte argumenta que entonar la canción equivale a actuar de concierto con una organización antiestatal.

4. A mi juicio, no se ha demostrado que en la canción se propugne conducta alguna que constituya una amenaza para la seguridad nacional, de acuerdo con la traducción de la letra proporcionada por los autores; tampoco está claro qué tipo de riesgo plantearon los autores entonándola o cuán grande era éste, o si las autoridades judiciales del Estado parte definieron efectivamente estos elementos más allá de referirse en general al hecho de que la canción tenía por objeto infundir el espíritu de la revolución, glorificar a la República Popular Democrática de Corea y criticar a los Estados Unidos. Aparte de señalar que la canción se entonó en momentos decisivos de las reuniones y que su objeto sería infundir el espíritu de la revolución en el ánimo de los asistentes, el Estado parte tampoco ha demostrado que en las cuatro ocasiones en que se entonó la canción el contexto fuera tal que existiera una relación directa e inmediata entre el hecho de cantarla y la presunta amenaza. Al respecto, en su Observación general núm. 34, el Comité ha manifestado explícitamente: “Cuando un Estado parte haga valer una razón legítima para restringir la libertad de expresión, deberá demostrar en forma concreta e individualizada la naturaleza precisa de la amenaza y la necesidad y la proporcionalidad de la medida concreta que se haya adoptado, en particular estableciendo una conexión directa e inmediata entre la expresión y la amenaza (párr. 35).

5. Examinados todos los antecedentes del caso, considero que el Estado parte no ha demostrado que esta restricción de la libertad de expresión de los autores fuera necesaria por alguna de las razones expuestas en el artículo 19, párrafo 3, del Pacto.

6. En consecuencia, es posible concluir que se han vulnerado los derechos que asisten a los Sres. Seok-ki Lee, Hong-yeol Kim, Sang-ho Lee, Soon-seog Hong, Yang-won Cho y Keun-rae Kim en virtud del artículo 19, párrafo 2, del Pacto, en la medida en que la condena que se les impuso en virtud del artículo 7 de la Ley de Seguridad Nacional se debió, entre otros elementos, al hecho de haber cantado “Camaradas en la revolución” en las oportunidades señaladas.

1. \* Adopted by the Committee at its 130th session (12 October – 6 November 2020). [↑](#footnote-ref-2)
2. \*\* The following members of the Committee participated in the examination of the communication:

   Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Shuichi Furuya, Duncan Laki Muhumuza, David Moore ,Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi [↑](#footnote-ref-3)
3. \*\*\* Joint opinion (partially pissenting) by Committee members Shuichi Furuya, Andreas Zimmermann and Gentian Zyberi and an individualopinion (partially dissenting) by committee member Hernán Quezada Cabrera are annexed to the present Views. [↑](#footnote-ref-4)
4. Mr. Seok-ki Lee was lawmaker for the U.P.P. in the National Assembly. Mr. Hong-yeol Kim was chairperson of the U.P.P.’s Gyeonggi Provincial Committee and Mr. Hong was its vice-chairperson until their respective arrests. More information on the authors’ activities is available on file. [↑](#footnote-ref-5)
5. The text of article 7 (“Praise, Incitement, etc.”):

   (1) Any person who praises, incites or propagates the activities of an anti-government organization, a member thereof or of the person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for not more than seven years.

   (2) Deleted.

   (3) Any person who constitutes or joins an organization aiming at the act as referred to in paragraph (1) shall be punished by imprisonment for a definite term of one or more years.

   (4) Any person who is a member of the organization as referred to in paragraph (3), and fabricates or circulates any falsies (sic) fact as to the matters which threaten to provoke any confusion of social order, shall be punished by imprisonment for a definite term of two or more years.

   (5) Any person who manufactures, imports, reproduces, holds, carries, distributes, sells or acquires any documents, drawings or other expression materials, with the intention of committing the act as referred to in paragraph (1), (3) or (4), shall be punished by the penalty as referred to in the respective paragraph.

   (6) Any person who has attempted the crime as referred to in paragraph (1) or (3) through (5), shall be punished.

   (7) Any person who prepares for or plots the crime as referred to in paragraph (3) with the intention of committing it shall be punished by imprisonment for not more than five years. [↑](#footnote-ref-6)
6. “We can win the war if only we engage in a new type of war that goes on nationwide in multiple places simultaneously, which can be very powerful even though the substance is not obvious. The matter is eventually bound to be settled by military means. We should come up with specific measures and immediately put them in practice all that’s been prepared, as soon as the order reaches us.” (sic). [↑](#footnote-ref-7)
7. *Tae Hoon Park v. Republic of Korea* (CCPR/C/64/D/628/1995), para. 10.3; *Jeong-Eun Lee v. Republic of Korea* (CCPR/C/84/D/1119/2002), para. 7.3. [↑](#footnote-ref-8)
8. General comment No. 34 (CCPR/C/GC/34) para. 34. [↑](#footnote-ref-9)
9. Ibid; General comment No. 27 (CCPR/C/21/Rev.1/Add.9), para. 14. [↑](#footnote-ref-10)
10. General comment No. 34, para. 34. [↑](#footnote-ref-11)
11. Ibid., para. 30. [↑](#footnote-ref-12)
12. Ibid., para. 35. [↑](#footnote-ref-13)
13. Concluding observations on the fourth periodic report of the Republic of Korea (CCPR/C/KOR/CO/4), para. 48. [↑](#footnote-ref-14)
14. General Comment No. 34, para. 35. [↑](#footnote-ref-15)
15. See also Jong-Kyu Sohn v. Republic of Korea, Communication No. 518/1992, para. 10.4; Hak-Chul Shin v. Republic of Korea, Communication No. 926/2000, para. 7.3. [↑](#footnote-ref-16)