



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2939/2017*, **

<i>Communication submitted by:</i>	J.K. et al. (represented by MINBYUN – Lawyers for a Democratic Society)
<i>Alleged victims:</i>	X et al.
<i>State party:</i>	Republic of Korea
<i>Date of communication:</i>	19 January 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee’s rules of procedure, transmitted to the State party on 20 January 2017 (not issued in document form)
<i>Date of adoption of decision:</i>	13 March 2020
<i>Subject matter:</i>	Arbitrary detention
<i>Procedural issues:</i>	Victim status; exhaustion of domestic remedies; another procedure of international investigation or settlement
<i>Substantive issue:</i>	Right to liberty and security of person
<i>Articles of the Covenant:</i>	9 (1) and (4)
<i>Articles of the Optional Protocol:</i>	1 and 5 (2) (a) and (b)

1.1 The 23 authors of the communication are J.K. et al., nationals of the Democratic People’s Republic of Korea who are currently residing in Pyongyang. They submit the communication on behalf of 12 alleged victims, X et al. The alleged victims are the daughters of the authors of the communication, and they are nationals of the Republic of Korea, following their entry into the State party. The authors claim that the State party has violated the rights of their daughters under articles 9 (1) and (4) of the Covenant. The Optional Protocol entered into force for the State party on 10 July 1990. The authors are represented by counsel.

1.2 On 20 January 2017, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided

* Adopted by the Committee at its 128th session (2–27 March 2020).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, H el ene Tigroudja and Gentian Zyberi.



not to grant the authors' request for interim measures, while the communication was under consideration by the Committee.¹

The facts as submitted by the authors

2.1 The authors' daughters were recruited for work in Pyongyang and travelled to China, where they stayed with valid work visas while working as waitresses in two restaurants for a few years. In March 2016, the manager of the restaurants ordered them to be ready to leave immediately to work in a new restaurant that had opened in Malaysia. On 5 April 2016, the manager told them that they were going to travel to the new restaurant and ordered them to get on a mini-bus that was waiting for them. One of the waitresses overheard the manager addressing the person who brought the bus as "the NIS [National Intelligence Service] team leader". She realized that something was wrong and informed the other waitresses. As a result, seven waitresses refused to get on the bus. The authors' daughters, however, did board the bus. They took a flight from Shanghai, China, to Malaysia, after which they continued to Seoul, where they arrived on 7 April 2016. The immigration process at the airport, including visas, had been prepared in advance and they were immediately detained upon arrival at the Settlement Support Centre for North Korean Refugees (the Settlement Support Centre), pursuant to the North Korean Refugees Protection and Settlement Support Act (the Settlement Support Act). Article 7 of the Act provides that any person escaping from the Democratic People's Republic of Korea who requires protection should apply for protection under the Act. The Act further stipulates that it is the responsibility of the Director of the National Intelligence Service to take provisional protective measures or other necessary steps in order to decide on eligibility for protection.

2.2 On 8 April 2016, the Ministry of Unification of the Republic of Korea announced in a press conference that the alleged victims had defected to the Republic of Korea, because they considered that the situation on the Democratic People's Republic of Korea was hopeless, given the sanctions imposed by the international community. However, the authors claim that the reason provided for the alleged defection is incorrect and that the manager of the restaurant was motivated by personal interests, as he had substantial debt in China, which led him to flee and travel to the Republic of Korea, in coordination with the National Intelligence Service. The authors note that the restaurant operated on a strictly hierarchical basis, and that this played a significant role in the decision of their daughters to travel to the Republic of Korea. They also submit that their daughters might have been deceived into travelling to the Republic of Korea.

2.3 The authors note that it normally takes about one month for defectors from the Democratic People's Republic of Korea to enter the Republic of Korea after having applied for protection at one of its embassies. However, in the case of their daughters, it only took two days for them to be able to enter the Republic of Korea, which the authors argue would have been impossible without the prior involvement and arrangements made by the National Intelligence Service. The authors further note that their daughters' alleged collective escape was unusual in nature and that the announcement made by the Ministry of Unification was issued just before the general election, presumably with the intention of affecting its results.

2.4 On 18 April 2016, the authors and the Government of the Democratic People's Republic of Korea accused the Republic of Korea of kidnapping the authors' daughters and called for help in bringing them back in a letter submitted to the Human Rights Council and the Office of the High Commissioner for Human Rights. The authors and the Government demanded the immediate repatriation of the alleged victims.

2.5 On 12 May 2016, two legal counsels representing the authors visited the National Intelligence Service and requested, in writing, an interview with the authors' daughters. The request was rejected by the Service on 16 May 2016. On 24 May 2016, the legal counsels filed a habeas corpus petition before the Seoul Central District Court. On 10 June 2016, the

¹ In the communication of 17 January 2017, the authors requested the Committee to request the State party to: immediately allow the family-appointed legal counsels to interview the victims in a comfortable place without the presence of National Intelligence Service personnel and to immediately allow the authors to meet their daughters face to face or in other alternative manners, such as visual communications and phone calls.

Court ordered the Service to make the alleged victims appear in a hearing before the Court. On 21 June 2016, the hearing was held in a closed session, as the presiding judge held that it was necessary in order to protect the alleged victims. However, the authors note that their daughters did not appear at the hearing, and they submit that there was no valid reason for holding the hearing in a closed session. The authors further claim that the presiding judge did not allow their legal counsels enough time to review the written reply of the Service, which they had received on the day of the hearing, and that the presiding judge failed to comply with article 10 (3) of the Habeas Corpus Act, which requires the judge to summon detainees. Although the presiding judge summoned the alleged victims on 10 June 2016, he stated during the hearing that their presence was no longer necessary as the counsel for the Service had reported to the Court that the authors' daughters had decided not to appear before the Court.

2.6 The authors' daughters were released from detention at the Settlement Support Centre in two groups in the period between 8 and 11 August 2016. According to the Ministry of Unification, they resettled in safe places.

2.7 On 12 August 2016, the authors' legal counsels filed a lawsuit before the Seoul Administrative Court against the decision of the National Intelligence Service to reject their request for an interview with the alleged victims. At the time of the submission of the complaint to the Committee, that proceeding was still pending.

2.8 On 9 September 2016, the Seoul Central District Court dismissed the habeas corpus petition on the grounds that there was insufficient evidence to prove the family relations between the authors and the alleged victims, and because following the release of the alleged victims from the Settlement Support Centre, any interest in the litigation no longer existed.

2.9 On 28 October 2016, the Seoul Central District Court dismissed the authors' application to overturn the National Intelligence Service's decision not to allow the counsels to interview the alleged victims.² On 3 November 2016, the Seoul High Court dismissed the habeas corpus petition. The Court recognized that there was sufficient evidence to prove the family relations between the authors and the alleged victims, except for two persons, copies of whose government-issued IDs had mistakenly been omitted from the submission to the Court. Despite this, the Court dismissed the petition because the interest in the litigation no longer existed following the release of the alleged victims from the Settlement Support Centre.

2.10 The authors note that according to the State party, their daughters have been resettled in the Republic of Korea. The authors claim that it is normally possible to trace the whereabouts of new settlers since their community is very small and tightly networked. However, they have no information as to the whereabouts of their daughters, and therefore believe that they are under the control of the National Intelligence Service.

2.11 The authors claim that all domestic remedies have been exhausted, since the only measure available to detainees at the Settlement Support Centre is to apply for a judicial review based on the Habeas Corpus Act. They also note that, at the time of the submission of the complaint to the Committee, they had appealed the decision of the Seoul High Court in the habeas corpus petition to the Supreme Court. However, they argue that in view of the rejection of their petition by the lower instance courts on the grounds that the alleged victims were no longer being detained, there was no reasonable expectation that the appeal to the Supreme Court would be effective.

The complaint

3.1 The authors claim that the Republic of Korea detained their daughters without justifiable reasons in violation of their rights under article 9 (1) of the Covenant. They note that the legal basis on which the National Intelligence Service relies in order to detain defectors at the Settlement Support Centre is article 12 of the Enforcement Decree of the Settlement Support Act, which allows for provisional protective measures or other necessary

² The authors argue that this process differs from the lawsuit filed before the Seoul Administrative Court on 12 August 2016; however, the subject matter is identical.

steps. These measures are entrusted entirely to the Director General of the National Intelligence Service, and detention at the Centre is therefore made on a legal basis that does not provide any specifications as to the content of such measures. This legal basis therefore lacks predictability and thus amounts to arbitrariness.

3.2 The authors refer to two surveys: one conducted by the National Human Rights Commission of the Republic of Korea in 2009, and the other by the Gyeonggi-do Family and Women's Research Institute in 2012. According to those surveys, 90 per cent of detainees at the Settlement Support Centre stated that they had been held incommunicado for a period of time ranging from a few weeks to six months during the interrogation stage. They were denied correspondence and phone calls with family members and could not have any contact with the outside world without the Centre's approval and monitoring. The authors consider it likely that their daughters were held in similar conditions. They argue that there is no legal basis for holding detainees at the Centre in solitary confinement and that such practices therefore amount to arbitrary detention. They further submit that detainees at the Centre are not given any opportunity to seek legal assistance from independent practitioners of their choice and that, as everything is under the control of the National Intelligence Service, it is almost impossible to raise questions about mistreatment or physical and psychological suffering caused by the detention.

3.3 The authors further note that while detained at the Settlement Support Centre, detainees are subjected to interrogations that do not comply with due process requirements. According to the National Intelligence Service, detention at the Centre is of an administrative nature and is aimed at verifying relevant facts about defectors and deciding whether or not they are qualified for benefits under the Settlement Support Act. According to the State party authorities, it is not a criminal investigation but an administrative assessment. In determining whether or not to provide protection pursuant to the Act, the Centre excludes certain categories of applicants including criminal offenders, suspects of "disguised defection", and persons who have earned a living for more than 10 years in a third country. The authors argue that it is impossible for the Centre to establish disguised defection solely by carrying out an administrative inquiry and that, in effect, a criminal investigation is therefore carried out. The authors further submit that the Service does not disclose the identity of the interrogator during the interrogation and that, according to a 2013 Human Rights Report published by the Bar Association of the Republic of Korea, 50 per cent of the detainees at the Centre were not given any notification or explanation as to the interrogation. They therefore consider that the interrogation at the Centre amounts to a violation of due process of law and is unlawful and arbitrary.

3.4 The authors note that according to information available on the practices of detention, interrogation and solitary confinement at the Settlement Support Centre,³ their daughters were probably subjected to solitary confinement and extensive interrogation during the several months they were held at the Centre. They argue that there were no reasonable grounds to justify imposing such extensive detention measures against their daughters, and that such measures were not necessary and proportionate.

3.5 The authors further claim that their daughters' rights under article 9 (4) of the Covenant have been violated as their right to counsel has been denied. They note that they appointed legal counsels to represent their daughters, but that the National Intelligence Service rejected the counsels' repeated requests for an interview with the daughters. The authors further argue that in the habeas corpus case before the Seoul Central District Court, the Court failed to summon the alleged victims to appear in court and accepted the assertion from the Service that they did not want to appear. The authors argue that the denial of access to the family-appointed legal counsels amounts to arbitrary detention in violation of article 9 (4) of the Covenant. They further argue that access to legal counsel is especially important for persons in the alleged victims' position, who have been raised in a system that does not value the principles of democracy and human rights. They would therefore not have been able to understand their rights during interrogation and at trial, the roles of the legal counsel, relevant laws or the judicial process. To enable them to fully understand the proceedings and

³ The authors refer to the surveys separately conducted by the National Human Rights Commission of the Republic of Korea in 2009 and Gyeonggi-do Family and Women's Research Institute in 2012.

their rights, it would have been crucial for them to have access to legal counsel of their own choosing, not one provided or appointed by the Service. The authors note that the Service argues that the alleged victims were interviewed by their lawyer and decided themselves not to appear before the Seoul Central District Court. The authors note, however, that this lawyer, referred to as a human rights protection officer, was appointed by the Service and can therefore not be considered to represent the alleged victims or to give them unbiased legal advice.

State party's observations on admissibility and the merits

4.1 On 28 August 2017, the State party submitted its observations on the admissibility and the merits of the communication. The State party considers that the communication should be held inadmissible owing to:

- (a) Lack of victim status;
- (b) Failure to exhaust domestic remedies;
- (c) Submission of the same matter to another procedure of international investigation or settlement, namely the Working Group on Arbitrary Detention.

4.2 The State party notes that the communication has been submitted by the parents of the alleged victims, without authorization from the alleged victims themselves. The State party notes that in exceptional circumstances, where it appears that it would be impossible for an alleged victim to submit a communication personally, or to authorize a representative to do so, the alleged victim's immediate family may have standing to submit a communication on his or her behalf. The State party argues that no such circumstances exist in the present communication. If the alleged victims had wished to submit a communication to the Committee, they would have been in position to do so themselves, or through authorized legal representatives. It argues that no efforts have been made by the authors' representatives to seek the consent and opinion of the alleged victims before submitting the communication to the Committee. The State party further notes that the powers of attorney from the authors authorize the legal representatives to represent the alleged victims in the habeas corpus lawsuit specifically. As the individual communications procedure under the Optional Protocol is not a lawsuit, it is not substantiated that the authors have authorized the legal representatives to bring a complaint before the Committee.

4.3 The State party notes that the habeas corpus petition filed on behalf of the alleged victims was dismissed, since there were no interests to protect once the hearing was held, considering the fact that the alleged victims had been released from the Settlement Support Centre prior to the hearing. The State party further argues that, should the authors continue to claim that the alleged victims' liberty is being restrained in any way, they should submit a new petition under the Habeas Corpus Act. By failing to do so, the authors have not exhausted domestic remedies. The State party further notes the authors' claims that the detention at the Centre violated the alleged victims' rights under articles 9 (1) and (4) of the Covenant. It submits that the authors could have challenged the alleged arbitrariness of the detention before the Constitutional Court and argues that, by failing to do so, the authors have failed to exhaust all available domestic remedies. As to the authors' allegation that the rejection of the request by the family-appointed lawyers to interview the alleged victims amounted to a violation of their rights to legal assistance, the State party notes that the authors have challenged this decision in court and that, at the time of submission of the State party's observations, the case was still pending before the Seoul High Court, an appellate court. The State party therefore considers that the authors have also failed to exhaust domestic remedies concerning their claims under article 9 (4) of the Covenant.

4.4 The State party notes that on 10 June 2016, the authors submitted a case to the Working Group on Arbitrary Detention based on the same facts as those of the present communication, namely alleging that their daughters' rights to liberty and to counsel had been violated during their stay at the Settlement Support Centre. On 15 June 2017, after confirming that the alleged victims were living in the Republic of Korea as ordinary citizens without any physical restrictions, the Working Group filed the case but reserved the right to render its opinion on whether the alleged victims had been arbitrarily detained at the Centre,

regardless of their current status.⁴ The State party argues that as the Working Group has reserved the right to render its opinion, the examination is currently ongoing, for which reason the communication should be held inadmissible under article 5 (2) (a) of the Optional Protocol. It notes that the European Court of Human Rights has found that the Working Group on Arbitrary Detention is an international procedure of investigation and settlement.⁵

4.5 Regarding the merits of the communication, the State party notes that the alleged victims entered the Republic of Korea on 7 April 2016 of their own free will. Immediately after entering the country, they voluntarily checked into the Settlement Support Centre where they underwent an assessment on their eligibility for settlement protection and support.

4.6 On 12 May 2016, lawyers from the MINBYUN – Lawyers for a Democratic Society visited the National Intelligence Service and requested an interview with the alleged victims. However, the alleged victims clearly stated that they did not want to be interviewed. On 24 May 2016, the legal counsel of the alleged victims' parents filed a habeas corpus petition before the Seoul District Court. The hearing was held on 21 June 2016 and the court accepted written statements from the alleged victims in lieu of their appearance before the court, by reason of an increased risk of personal danger and identity exposure. Following this decision, lawyers for MINBYUN – Lawyers for a Democratic Society filed a motion for recusal against the presiding judge, arguing that he had failed to provide a fair trial. A panel of three judges heard the motion and found that the decision to hold the hearing without the presence of the alleged victims was justified, considering that their personal security, and that of their families, might be exposed during questioning in court. By the time the District Court resumed its hearing, the alleged victims had already checked out of the Settlement Support Centre. The court therefore dismissed the petition for lack of legal interest. The decision was upheld by the Seoul High Court on 3 November 2016 and the Supreme Court on 8 March 2017.

4.7 The State party argues that the provisional protection measures have been implemented at the Settlement Support Centre to protect defectors from possible reprisals and to help them recover their physical and mental health. The assessment carried out at the Centre is an administrative investigation to verify relevant facts and assess the eligibility of defectors for settlement protection and support. The State party argues that the alleged victims were not held in detention at the Centre and that consequently their rights under article 9 of the Covenant have not been violated. It notes that during the stay, the alleged victims shared rooms on a double occupancy basis and were free to visit each other's rooms. Private rooms were available upon request.

4.8 The State party further submits that even if the Committee should consider that the stay of the alleged victims at the Settlement Support Centre constitutes detention, it does not amount to arbitrary detention. The provisional protection and assessment measures undertaken at the Centre are regulated by article 7 of the Settlement Support Act and article 12 of the Enforcement Decree. Article 12 of the Act stipulates that defectors seeking protection may be placed at the Centre for a maximum period of 180 days from the date of entry to the country. Information is also provided to the defectors on the legal grounds, purpose, method and expected duration of the procedures at the Centre, and on available remedial procedures in the event of human rights violations. The State party argues that during the procedures related to the present case, the alleged victims were not subjected to a criminal investigation or any other treatment that bears the characteristics of a criminal investigation. A criminal investigation will only be initiated when there is a need to further investigate a person's identity.

4.9 The State party further argues that the provisional protection measures undertaken at the Settlement Support Centre are necessary in order to protect defectors' personal security and for their physical and mental recovery. It is also necessary in the interest of national security in order to assess whether persons seeking protection under the Settlement Support Act are genuine defectors. Furthermore, efforts have been made to carry out the provisional protection and assessment as promptly as possible. As concerns the present communication,

⁴ A/HRC/WGAD/2017/13.

⁵ European Court of Human Rights, *Peraldi v. France*, No. 2096/05, 7 April 2009.

the assessment of the alleged victims took only one month. Thereafter, the alleged victims received vocational training and social adaptation education for a period of three months, before they checked out of the Centre in August 2016. The State party argues that taking into account that the alleged victims were highly concerned about identity exposure and personal security, a period of one month for the provisional assessment and protection cannot be considered to be unreasonably prolonged. As a result, the measures undertaken at the Centre were reasonable, necessary and proportionate.

4.10 Regarding the authors' claims under article 9 (4) of the Covenant, the State party notes that they filed a habeas corpus petition under domestic procedures. It notes that the authors were represented by counsel of their own choosing during the proceedings and were thus not denied access to legal assistance. It further argues that as the purpose of a habeas corpus petition is to determine the legality of a detention, and not to rule on a criminal charge, the presence of the alleged detainees in court is not required. It notes that while the Seoul District Court was deliberating on the habeas corpus petition filed by the authors, the alleged victims checked out from the Settlement Support Centre, at which point the court dismissed the petition. The State party claims that the Government of the Democratic People's Republic of Korea is actively and systematically involved in the case and has organized interviews between the Cable News Network and the authors, as well as with former colleagues of the alleged victims, who claimed that the authors' daughters had been abducted by the State party. The alleged victims were therefore afraid of appearing before the court, even in a closed hearing session, and they conveyed to the National Intelligence Service their intention not to do so. The State party argues that it could not force them to appear and that it respected their decision on the matter. It argues that, if the alleged victims had decided to appear, that decision would also have been respected.

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

5.1 On 27 November 2017, the authors submitted their comments on the State party's observations. The authors maintain that the communication is admissible. They note the State party's submission that the communication should be held inadmissible as it was submitted without the alleged victims' authorization, but argue that the alleged victims were not in a situation where they themselves could submit a communication to the Committee because of the following reasons:

- (a) The request made by the counsels appointed by their families to interview them at the Settlement Support Centre was denied;
- (b) According to what is known about the practices at the Centre, the alleged victims would not have been able to contact the outside world during their stay there;
- (c) The mandate of the human rights protection officer appointed by the Government to the Centre was not to act as the alleged victims' legal counsel;
- (d) There are reasonable grounds to believe that the alleged victims might not voluntarily apply to the Government for protection.

5.2 The authors further note the State party's submission that the legal counsel was not given proper delegated authority to submit the communication to the Committee because the powers of attorney submitted to the Committee are limited to matters regarding the habeas corpus lawsuit. The authors refer to the Committee's jurisprudence in *Y. v. Australia*⁶ and note that in the present communication the legal counsel has maintained an attorney-client relationship with the authors from the beginning of the domestic procedures. The authors appointed the legal counsel for the habeas corpus lawsuit, and the legal counsel represented them throughout the legal proceedings in the trial court, the appeal court and the Supreme Court. They further argue that, taking into account that it is illegal for the legal counsel to directly contact the authors without the authority's permission, it would be difficult to receive a delegated authority from the authors at every step of the proceedings. They argue that it is fair to assume that the authors agreed to authorize every possible action that could be taken in order to have the alleged victims released from the Centre.

⁶ CCPR/C/69/D/772/1997.

5.3 The authors note that according to the State party, the authors can refile a new petition under the Habeas Corpus Act, despite the fact that the Supreme Court dismissed the habeas corpus petition they had filed on 15 February 2017. The authors submit that this is not an effective remedy as the Supreme Court dismissed the previous habeas corpus petition they had filed. They further note the State party's submission that they could apply for a constitutional review of the measures undertaken under the Settlement Support Act. In this connection, they submit that while the alleged victims would have standing to submit such a petition regarding the relevant provisions of law that allowed their detention at the Centre, it would be impossible for the authors and their legal representatives to specify the scope and content of the violations of the constitutional rights entitled to the alleged victims, since they have been prevented from having any contact with the alleged victims. As a result, even if their standing were recognized, the authors are not in a position to make any legitimate claim with a specified scope and content, which would likely result in the rejection of a petition by the Constitutional Court. The authors also note the State party's submission that the communication should be held inadmissible for failure to exhaust domestic remedies, since the proceeding regarding the rejection by the National Intelligence Service of the request to interview the alleged victims is pending before the Seoul High Court. The authors argue that this proceeding is different from the habeas corpus lawsuit in the sense that the legal counsels filed the proceeding against the State party authorities on the ground that the right of the legal counsels had been infringed by the Service's denial of an interview with the alleged victims. The legal counsels are thus the plaintiffs in this pending proceeding, which differs from the legal proceeding disputing the legitimacy of the detention of the alleged victims while at the Centre. The authors argue that this pending lawsuit therefore concerns a separate matter and that domestic remedies have thus been exhausted.

5.4 The authors further note the State party's submission that, since a review of the same matter remains open before the Working Group on Arbitrary Detention, the communication submitted to the Committee should be held inadmissible under article 5 (2) (a) of the Optional Protocol. The authors refer to the Committee's jurisprudence in *Chhedulal Tharu et al v. Nepal* in which the Committee noted that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5 (2) (a) of the Optional Protocol.⁷ They further note that in its decision of 20 April 2017, the Working Group made no determination as to whether the alleged victims had been arbitrarily detained at the Centre and whether their right to counsel had been violated during their detention at the Centre. They also argue that, as the Working Group filed the case but reserved the right to render its opinion, the procedure before the Working Group has ended. The Working Group did not raise follow-up questions or request further information, nor did it continue any proceeding known to the authors.

5.5 Regarding the merits of the communication, the authors argue that the State party has failed to provide an explanation regarding the question of whether article 7 of the Settlement Support Act and article 12 of the Enforcement Decree are vague and overbroad in regulating the treatment of detainees at the Settlement Support Centre. They refer to their initial complaint and argue that the regulations lack predictability and are therefore arbitrary. They further note the State party's argument that the alleged victims have not been subjected to a criminal investigation. The authors consider that, since they have not been given access to the alleged victims, they do not have sufficient information to verify this assertion, and that the State party has not submitted any information that would substantiate its claim.

5.6 The authors further argue that the State party has failed to substantiate whether there were compelling reasons for placing the alleged victims in detention at the Settlement Support Centre for more than four months, while denying them access to the family-appointed counsels and placing them in incommunicado detention. The reasons provided by the State party – namely the risk of identity exposure and risks to personal security – have not been substantiated, given that the State party was the one to expose the alleged victims'

⁷ *Chhedulal Tharu et al v. Nepal* (CCPR/C/114/D/2038/2011).

identity to the public. In this connection, the authors recall that the Government held an unusual press conference a few days before the general election in 2016 to announce the alleged victims' arrival in the Republic of Korea, in an apparent political attempt to influence the election in favour of the majority party. They further argue that the State party has failed to indicate any specific threat that could place the alleged victims at risk, and they submit that it has failed to substantiate that the measures taken to protect identity exposure and personal security of the alleged victims were proportionate.

Further observations by the parties

6.1 On 12 April 2018, the State party submitted further observations on the communication. It maintains that the communication is inadmissible for lack of victim status. It reiterates that the alleged victims refused to meet with the family-appointed counsels during their stay at the Settlement Support Centre. It further argues that the alleged victims had unimpeded access to means of communicating with the outside world and to face-to-face counselling with a human rights protection officer of the Centre, whose work duties are carried out independently. The human rights protection officer confirmed that the alleged victims freely expressed their opinions during counselling sessions. The State party notes that, as confirmed by the Working Group on Arbitrary Detention in April 2017,⁸ after being discharged from the Centre in early August 2016, the alleged victims are going about their daily lives as ordinary citizens of the Republic of Korea without any restriction on their personal liberty.

6.2 The State party notes that in September 2017, the Seoul High Court dismissed the lawsuit filed by the family-appointed counsels challenging the National Intelligence Service decision to deny them access to the alleged victims. The subsequent appeal to the Supreme Court was dismissed on 30 January 2018. The State party argues that the issues raised in said lawsuit were the same as the authors' claims under article 9 (4) of the Covenant and that the authors therefore failed to exhaust domestic remedies prior to submitting their communication to the Committee. The State party also reiterates its argument that the communication should be found inadmissible as the same matter is pending before the Working Group on Arbitrary Detention.

6.3 The State party further reiterates its observations on the merits of the communication, arguing that the provisional protection measures applied at the Settlement Support Centre and the assessment conducted there were legitimate measures that were prescribed by law and that were necessary and proportionate.

6.4 On 29 October 2019, the authors submitted a report of the joint fact-finding committee of the International Association of Democratic Lawyers and the Confederation of Lawyers for Asia and the Pacific regarding the alleged victims' case.⁹ The report was prepared on the basis of: a televised interview with the manager of the restaurant and four of the alleged victims; a statement by the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea; and evidence collected by the fact-finding committee in Pyongyang. According to the report, it was concluded that the alleged victims had been "abducted/kidnapped on April 5, 2016 by the manager", in conspiracy with the National Intelligence Service. It was further found that the alleged victims had been illegally detained at the Settlement Support Centre.

⁸ A/HRC/WGAD/2017/13, para. 36.

⁹ "Final report of the Joint Fact Finding Committee of the International Association of Democratic Lawyers and the Confederation of Lawyers for Asia and the Pacific", 30 September 2019. Available at <https://iadllaw.org/2019/10/iadl-colap-fact-finding-commission-releases-final-report-on-waitresses-case/>.

Issues and proceedings before the Committee

Consideration of admissibility

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

7.2 The Committee notes the State party's submission that the communication should be declared inadmissible, since the communication has been submitted by the parents of the alleged victims, without authorization from the alleged victims themselves. The Committee also notes the authors' submission that the alleged victims are not in position to submit a communication to the Committee because of the following reasons: the family-appointed legal counsels have been denied access to the alleged victims; the alleged victims would not have been able to contact the outside world during their stay at the Settlement Support Centre; and there are reasonable grounds to believe that the alleged victims might not voluntarily apply for protection from the State party authorities because the authors believe that the alleged victims may still be under the control of the National Intelligence Service. The Committee further notes the State party's arguments that the alleged victims are living without any restrictions on their personal liberty as ordinary citizens in the State party and that, should they have wished to submit a communication before the Committee, they would have been in a position to do so themselves or through authorized legal representatives. In addition, the Committee notes the State party's argument that no efforts have been made by the authors' representatives to seek the consent and opinion of the alleged victims before submitting the communication under review.

7.3 The Committee notes that under rule 91 of its rules of procedure, a communication submitted on behalf of one or several individuals shall be submitted with their consent, unless the authors of the communication can justify acting on the alleged victim's behalf without such consent. It further notes that under rule 99 (b) of its rules of procedure, a communication submitted on behalf of an alleged victim may be accepted when it appears that he or she is unable to submit the communication personally. The Committee recalls its Views in *Y. v. Australia*,¹⁰ in which it noted that, although it had always taken a wide view of the right of alleged victims to be represented by counsel in submitting communications under the Optional Protocol, counsel acting on behalf of victims of alleged violations had to show that:

(a) They had real authorization from the victims, or their immediate family, to submit the communication on the alleged victims' behalf;

(b) There were circumstances that prevented counsel from receiving such authorization, or that given the close relationship in the past between counsel and the alleged victim, it was fair to assume that the victim did indeed authorize counsel to proceed with a communication to the Committee.

7.4 In the present case, the Committee notes that the legal representatives have been properly authorized by immediate family members to represent the alleged victims only during the habeas corpus proceedings, and have not been explicitly authorized by them to submit the present communication. The Committee notes in this connection that it is not refuted by the authors that the alleged victims left the Settlement Support Centre in August 2016 and that the habeas corpus proceedings have ended. It further notes the findings of the Working Group on Arbitrary Detention that the alleged victims are currently living in the Republic of Korea as ordinary citizens without any physical restrictions. The Committee therefore finds, based on the information on file, that the authors have failed to substantiate that the alleged victims would be unable to submit a communication personally, or through duly authorized representatives, to the Committee. The Committee therefore finds the communication to be inadmissible under article 1 of the Optional Protocol.

7.5 Having thus concluded, the Committee will not separately examine the admissibility grounds under articles 5 (2) (a) and (b) of the Optional Protocol.

¹⁰ CCPR/C/69/D/772/1997, para. 6.3.

8. The Committee therefore decides:
- (a) That the communication is inadmissible under article 1 of the Optional Protocol;
 - (b) That the present decision shall be transmitted to the State party and to the authors.
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