Democratic People's Republic of Korea and the ICCPR: Denunciation as an exercise of the right of self-defence?

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In August 1997, the Democratic People's Republic of Korea (DPRK) took the unprecedented step of tendering its withdrawal from the *International Covenant on Civil and Political Rights* (ICCPR). This was the first such notification of withdrawal since the ICCPR came into force in 1976; it has now been ratified or acceded to by 140 states. As the ICCPR does not make express provision for denunciation, the Human Rights Committee (HRC) had to consider the legal effect of the action taken by the DPRK and in particular the question whether denunciation or withdrawal from the ICCPR is possible. The history of the events leading to the action taken by the DPRK contrasts the way in which human rights issues are dealt with in the charter bodies of the United Nations with the way they are dealt with by the independent treaty bodies.

Why did DPRK denounce? The Resolution of the Sub-Commission

The DPRK ratified the ICCPR without reservations with effect from 14 December 1981. Its initial report was considered by the HRC in 1984. The second report, due on 13 December 1987, has not yet been received by the HRC, despite 17 reminders. During the 49th Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities[1] in August 1997, under the agenda item relating to human rights violations, a draft resolution was tabled criticising the human rights situation in DPRK and calling on the DPRK to respect its obligations under the ICCPR. The Government of the DPRK opposed the resolution, claiming that it was politically motivated by forces hostile to the DPRK and that human rights instruments were being abused for political aims. The DPRK said that if the resolution were adopted, they would be forced to withdraw from the ICCPR.[2]

Despite the objections of the DPRK, the Resolution on the Situation of Human Rights in the Democratic People's Republic of Korea (the Resolution) was adopted on

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* Please insert personal details

1 The 26 members of the Sub-Commission are elected by states parties and serve in their personal capacities. There is no member from the DPRK.

2 E/CN 4/Sub 2/1997/43, letter dated 18 Aug 1997 from Charge d'affaires of the Permanent Mission of DPRK to UN at Geneva.

21 August 1997.[3] The preamble referred to 'persistent and concordant allegations that grave violations are being committed in that country', including mass internments and serious restrictions on the right to leave any country and to return to one's own country. The preamble expressed deep concern that it was virtually impossible to visit the country or to ascertain whether there were grounds for the allegations and to obtain information concerning the legislation in force. The resolution urgently called on the Government of DPRK to ensure full respect for Article 13 of the Universal Declaration of Human Rights (UDHR) and Article 12 of the ICCPR concerning the right to leave any country and to return to one's own country (§1). It requested the Government to fulfil its obligations and 'delay no longer the submission of its periodic report to the Human Rights Committee and to extend its cooperation with the procedures and services established by the United Nations with the aim of ensuring promotion and protection of human rights' (§2). It invited the international community to devote greater attention to the situation of human rights in the DPRK and thus assist the population of that country in emerging from the isolation in which it is maintained (§3).

How did the DPRK notify its withdrawal?

On 25 August 1997, a few days after the adoption of the resolution, the Secretary-General of the UN received from the DPRK a notification of their withdrawal from the ICCPR, dated 23 August 1997. The letter refers to the Resolution and to the dangerous and hostile acts at the 49th session of the Sub-Commission which were said to encroach on the sovereignty and dignity of the DPRK. Dishonest elements participating in the Sub-Commission's session were said to have abused the ICCPR and adopted the unjust Resolution of 21 August. The letter claimed that the DPRK was under military threat as a result of joint military exercises by the United States and South Korea at the time of the Resolution and that the circumstances justified the DPRK in exercising its right of self-defence. It also asserted the that the DPRK had provided its people with fundamental freedoms and basic rights on a level far higher than required by the ICCPR and that it will do so in future.

The DPRK issued a statement of 28 August 1997, announcing its withdrawal from the ICCPR and taking up the themes already mentioned. The statement claimed that there had been political trickery by forces hostile to the DPRK which had politicised the human rights issue. The DPRK claimed that the periodic report under the ICCPR, (which had been due since 1987) was to be soon submitted and that the DPRK was not the only country whose report was overdue; there were 50 others, some even

3 1997/3, E/CN 4/Sub 2/1997/L11. The resolution was adopted by 13 to 9, with 3 abstentions. For a summary of the discussion, see *Human Rights Monitor*, 1997, No 38, p 57.

more overdue than the DPRK.[4] But only the DPRK had been selected by the sponsors of the Resolution. As a result of the abuse by others of the DPRK's status as a state party, they saw no reason to be bound any longer by the ICCPR. The DPRK would also postpone the consideration of their report on implementation of the Convention on the Rights of the Child, due for consideration on 30 September 1997.[5] The statement asserted that 'Although the Government of the DPRK has been compelled to withdraw from the ICCPR, it will, as ever, fully guarantee its citizens all the rights enshrined in the Covenant'.

Reactions by the Committee

The HRC was not in session when the above events occurred. The Chairperson of the HRC, Mme Christine Chanet,[6] made an attempt on behalf of the HRC to deflect the DPRK from their course of action. In a press statement of 29 August she expressed deep concern about the steps taken by the DPRK, observing that the DPRK had ceased all cooperation with the HRC since 1984,

> ... and that it had refused all efforts by the Chair to resume a dialogue. The very regrettable attempt of the DPRK to breach its obligations under the Covenant constitutes a further step in a process aimed at denying its population the international protection of the rights guaranteed by the Covenant . . . This is unprecedented in international human rights law; in effect, this is the first time since the entry into force of the Covenant on 23 March 1976 that a State has tried to renounce commitments undertaken of its own full accord.

The Chairperson said that the HRC would analyse the situation at its October 1997 session, and expressed the hope that the Korean authorities would reconsider their unfortunate action.

The DPRK's angry response was contained in a letter of 8 September from their permanent representative to the UN at Geneva addressed to the Chairperson. The Government of the DPRK claimed that the Chairperson's statement of 29 August was a distortion of the facts and an infringement upon their sovereignty and dignity. In particular the DPRK rejected as irresponsible the claim that they had ceased co-operation with the HRC since 1984. The Chairperson's violent denunciation was, they said, a

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4 Of 22 states named by the HRC in its report for 1997 as being unacceptably overdue, five were 'worse' than the DPRK: Syrian Arab Republic (13 years), Gambia, Suriname (12 years), Kenya, Mail (11 years) and Guyana (10 years).

5 The report of the DPRK was considered by the CROC in May 1998 (CRC/C/3/Add 41).

6 Mme Chanet is a Judge of the French Cour de Cassation.

renunciation of the impartiality of the Chair. The DPRK repeated its claim that the resolution of 21 August was a political intrigue. They insisted, however, that their withdrawal did not mean opposition to the ICCPR itself or a denial of its provisions. They would as ever 'fully guarantee all the rights enshrined in the Covenant'.

Another letter from the Charge d'affaires of the DPRK to the HRC's Chairperson on 23 October 1997 explained that there was no problem with the ICCPR itself. The DPRK had acted because some ill-minded persons had abused the ICCPR by making it the tool of political confrontation. The letter made it clear that the DPRK would not reconsider the position unless the Resolution was withdrawn. A similar letter of the same date from the DPRK Charge d'affaires at the UN in New York to the Under Secretary-General for Legal Affairs, called for the Resolution to be declared null and void.

Legal effect of action taken by the DPRK

Although this was the first attempt to withdraw from the ICCPR it was not the first time that a state has actively considered the possibility of withdrawal. The Netherlands had considered denunciation of the ICCPR after two decisions by the HRC.[7] The HRC had decided that Article 26 of the ICCPR creates a free standing right to protection from discrimination in any field regulated and protected by public authorities, not just a right to non-discrimination in the enjoyment of ICCPR rights. The Netherlands would have been required to make considerable adjustments to its social security laws to give effect to the HRC's views relating to discrimination. The special status of treaties in Dutch law could have been a factor in the situation.[8] However, a legal opinion was provided to the Dutch Government to the effect that denunciation was not possible, and no further action was taken by the Netherlands.[9]

When the HRC convened in Geneva in October 1997 for its 61st session, it discussed

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7 *S W M Broeks v Netherlands*, 172/1984, views adopted 9 April 1987. *F H Zwaan-de Vries v Netherlands*, 182/1984, views adopted 9 April 1987. General Comment on Discrimination, No 18.

8 In the Netherlands, treaty provisions have a special status in law, ranking above ordinary legislation.

9 Nowak M, *UN Covenant on Civil and Political Rights, CCPR Commentary*, Engel, 1993, Introduction §§25, 26. It can also be noted that Germany later sought, through a reservation to the Optional Protocol, to preclude the HRC considering under the Optional Protocol any issue of discrimination in an area not connected with the rights protected by the ICCPR.

in closed session what response it should make to the actions of the DPRK. It was agreed that the HRC should prepare a General Comment on the question of denunciation or withdrawal from the ICCPR, and that the General Comment would be sent to the DPRK with a covering letter.[10]

The ICCPR does not make provision for denunciation or withdrawal. In the absence of express provision, the matter has to be considered in the light of the Vienna Convention on the Law of Treaties, 1969 (Vienna Convention). Even though the DPRK is not a party to the Vienna Convention and it post-dates the ICCPR by some years, that Convention is generally recognised as reflecting customary international law. Its principles are applicable to the situation on that basis.

Article 56 of the Vienna Convention provides:

> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
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> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
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> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
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> 2. A party shall give not less than 12 months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

In answering the question whether the state parties to the drafting of the ICCPR intended to allow for the possibility of denunciation or withdrawal, the Committee's General Comment draws attention to Article 41 of the ICCPR and to the Optional Protocol. Under Article 41, states parties may withdraw a declaration made under Article 41, recognising the competence of the HRC to examine complaints by other states parties concerning their fulfilment of ICCPR obligations.[11] The Optional Protocol, which was drafted and adopted at the same time as the ICCPR, makes express provision for denunciation, specifying the period of notice and the effect of denunciation on pending matters.[12] The absence of any such provision relating to the ICCPR as a whole suggests that the states parties did not intend that there should

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10 The text of the General Comment is annexed.

11 Article 41(2).

12 Optional Protocol to the ICCPR, Article 12. Both Jamaica and Trinidad and Tobago have availed themselves of this provision.

be any possibility of denunciation or withdrawal. Further support for this view is derived from the fact that the Convention on the Elimination of All forms of Racial Discrimination (CERD), adopted one year before the ICCPR, does make express provision for denunciation.[13] It seems that the question of denunciation could not have been overlooked when the ICCPR was being drafted. In addition, Nowak has pointed out that there was no reference to denunciation in the travaux préparatoires, that is the debates in the Commission for Human Rights, ECOSOC or the General Assembly, prior to the adoption of the ICCPR.[14] All these factors point not just to the absence of any intention on the part of the drafters of the ICCPR to allow for the possibility of denunciation or withdrawal but to an intention that it should not be open to that possibility.

The Vienna Convention provides that a right of denunciation or withdrawal may be implied by the nature of the treaty. If, as seems likely, there was a deliberate choice by the drafters not to include provision for denunciation or withdrawal, it would be difficult to reach the conclusion that the right of denunciation or withdrawal should be implied from the nature of the treaty. The right to denounce is, in any event, more likely to be implied in respect of treaties that have a temporary character, rather than in the case of those that establish norms that are intended to have a long term impact on states.

If a right of denunciation could be implied in respect of human rights treaties, there would be no need to make provision for this. However, several UN and other human rights treaties provide expressly for withdrawal or denunciation. The Convention on the Elimination of All forms of Racial Discrimination, the Convention Against Torture, and the Convention on the Rights of the Child are examples.[15] The Optional Protocol to the ICCPR, makes express provision for denunciation. The European Convention for the Protection of Human Rights and Fundamental Freedoms also allows for denunciation.[16] The ICCPR makes no such provision. There are significant factors against the implication of any right of denunciation or withdrawal in the case of the ICCPR. The two covenants, together with the Universal Declaration of Human Rights (Universal Declaration), are part of the International Bill of Human Rights. The Universal Declaration is increasingly regarded as laying down universal minimum

13 CERD, Article 21.

14 Nowak M, *UN Covenant on Civil and Political Rights, CCPR Commentary*, Engel, 1993, Introduction, §25.

15 Article 21 of CERD and Article 52 of the Convention on the Rights of the Child; CAT, Article 31.

16 Article 65.

standards of human rights and as embodying international legal obligations for all states.[17] It is drawn upon by the International Court of Justice[18] and by national courts, including the High Court of Australia.[19] The common goal of the UN has been universal ratification of the Covenants. The permanent character of these instruments as expressions of generally binding principles of international law suggests strongly that no right of denunciation or withdrawal could be implied in respect of the obligations assumed by states parties.

Other factors which could give rise to a right to denounce or withdraw under the principles of the Vienna Convention include a fundamental change of circumstances.[20] This appears to have no application to the situation facing the DPRK. Its concern was the action of the Sub-Commission, not a change in the circumstances which radically transformed the extent of its obligations.

The General Comment of the HRC follows generally the above line of discussion. The General Comment also reaffirms a principle which the HRC has referred to more than once, in connection with the former Yugoslavia, Bosnia and Croatia. That principle is that the rights of the ICCPR belong to the people in the territory of the state party and that the protection of the ICCPR devolves with the territory and continues to belong to the people of that territory despite changes in government, dismemberment or change in the exercise of sovereignty.[21] In effect, the HRC is saying that the rights of people under the ICCPR cannot be removed by denunciation. The HRC's letter to the DPRK, annexing the General Comment, expressed the hope that the Government would continue to carry out its obligations under the ICCPR.

In one respect, the HRC agreed with the DPRK, namely that it was not the responsibility of the Sub-Commission to ask the DPRK to prepare and submit its overdue report to the HRC. The Chairperson's letter to the DPRK, annexing the General Comment, pointed out that the HRC is the only competent body established by the ICCPR to address questions relating to the states parties reports submitted under Article 40 of the ICCPR and that other bodies or institutions do not engage its

17 See Simma and Alston, 'The Source of Human Rights Law: Custom, Jus cogens and General Principles' (1992) 12 Aust YB of Int Law 82.

18 *South West Africa* cases [1962] ICJ Rep 319, 323; [1966] ICJ Rep 288.

19 See observations of Mason J in *Gerhardy v Brown* (1985) 59 ALJR 311 at 325; Brennan, Toohey and Gaudron JJ and Deane J in *Mabo v Queensland* (1988) 63 ALJR 84, 95, 101 and Kirby J in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 71 ALJR 1346, 1424.

20 Vienna Convention Article 62.

21 See Concluding Observations in respect of Hong Kong, Annual Report for 1996, 24.

responsibility. The language adopted by the HRC in this letter was in keeping with its usual moderate and impartial approach to human rights issues. It is always mindful of the importance of dealing with states parties on the basis of equality and of encouraging their continuing co-operation with the HRC.

Another way out?

The UN Secretary-General had been faced with a difficult problem in view of the fact that the DPRK was seeking to withdraw from the ICCPR, while legal opinion said that it was not possible. He referred back to the Vienna Convention, and found that it also provides for the withdrawal of a party from a treaty if all the other parties agree.[22]

> The termination of a treaty or the withdrawal of a party may take place:
> (a) in conformity with the provisions of the treaty; or
> (b) at any time by consent of all parties after consultation with the other contracting states.

On 12 November 1997 the UN Secretary-General issued a statement in which he affirmed the view of legal counsel that withdrawal from the ICCPR was not possible unless all states parties agree with such a withdrawal. He circulated to all States parties and signatories the exchange of written communications between the DPRK and himself, with a view to seeking their views on the matter.

No time limit has been set for getting agreement of all the states parties. It seems highly unlikely that all the other states parties will agree to the withdrawal of the DPRK from the ICCPR. It appears that in the meantime, the DPRK is still a party to the ICCPR and that its obligations, including its reporting obligations under Article 40, continue. The second periodic report, due on 13 December 1987, is now 11 years overdue. The third report fell due in 1992, and the fourth report in December 1997.[23] In regard to its reporting and other obligations, the DPRK challenged the Chairperson's statement that the DPRK had ceased all co-operation with the HRC in 1984, apparently on the view that the period between reports submitted by a state party under Article 40 could not be regarded as a cessation of co-operation. The argument is curious in that the DPRK had in fact been in breach of its reporting obligations for nearly ten years when the events occurred. ●

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22 Vienna Convention, Article 54.

23 By way of comparison, Australia has failed to present its third report, due in 1991, and now is also due to present its fourth report.

Annexure A

General comment on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights

General comment 26 GENERAL CCPR/C/21/Rev1/Add 8/Rev 1 8 December 1997

Addendum General Comment No 26 (61)*

1. The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty.

2. That the parties to the Covenant did not admit the possibility of denunciation and that it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that Article 41(2) of the Covenant does permit a state party to withdraw its acceptance of the competence of the Committee to examine inter-state communications by filing an appropriate notice to that effect while there is no such provision for denunciation of or withdrawal from the Covenant itself. Moreover, the Optional Protocol to the Covenant, negotiated and adopted contemporaneously with it, permits states parties to denounce it. Additionally, by way of comparison, the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted one year prior to the Covenant, expressly permits denunciation. It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted.

3. Furthermore, it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as

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* Adopted at the 1631st meeting (61st session), held on 29 October 1997.

the 'International Bill of Human Rights'. As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.

4. The rights enshrined in the Covenant belong to the people living in the territory of the state party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the state party, including dismemberment in more than one state or state succession or any subsequent action of the state party designed to divest them of the rights guaranteed by the Covenant.

5. The Committee is therefore firmly of the view that international law does not permit a state which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.