Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the new policy of blocking websites by using Server Name Indication ("SNI") filtering.

According to the information received:

On 12 February 2019, Korea Communications Commission ("KCC") announced that it will start using a new technical method called "SNI filtering" to strengthen regulation of online content.[1]

According to the announcement published by the KCC, the new policy of utilizing SNI filtering was adopted to strengthen the regulation of "illegal videos, gambling, pornography, and pirated contents" in order to enhance the protection for the victims whose rights have been infringed by promulgation of these illegal contents.[2]

The new policy compels seven Internet Service Providers ("ISPs") including KT, LGU+, SK Broadband, Samsung SDS, KINX, Sejong Telecom, and Dreamline to block websites that have been flagged by the Korea Communications Standards Commission as inappropriate by monitoring the SNI field.[3]

SNI field is an extension to the Transport Layer Security (TLS) protocol, which allows browsers to inform a web server of the hostname they want to connect to at the beginning of the communication. Although TLS protocol encrypts the content of the traffic, the destination of the traffic remains in the open via SNI field in the current implementation of the protocol. Therefore, monitoring and filtering the SNI fields allows ISPs to identify and block the domains that have been

[1] Korea Communications Commission, 방통위, 불법정보를 유통하는 해외 인터넷사이트 차단 강화로 피해구제 확대,
https://kcc.go.kr/user.do?mode=view&page=A05030000&dc=K05030000&boardId=1113&cp=1&boardSeq=46820
[2] *Id.*
[3] *Id.*

blacklisted by the KCSC.[4] Among the sites that have been blacklisted include child pornography, pirate, and gambling sites.[5] The browsers of users accessing the blocked HTTPS websites will be blacked out without any notification as if they have connection problem.

It has been a long establish practice in the Republic of Korea to block the access of certain websites by using Domain Name System ("DNS") filtering or IP address filtering, but the new SNI filtering technology expands the scope of the regulation by enabling the blocking of websites supporting encrypted communication which previously could not be blocked by the traditional DNS filtering or IP address filtering.[6]

While the previous censorship method alerted the users of the government censorship by diverting the traffic to a warning page, SNI filtering does not inform the users of the state intervention. Hence, without proper notice, the public may be deprived of an opportunity to be aware of the information that they are denied access to and content providers are also preempted from learning about the blocked users and petitioning the government to restore the content.

In addition to the new policy adopted by the KCC, Article 21 of the Act Establishing KCC, which administers technical regulation of the communications industry, confers broad discretion to communication regulatory agencies. The provision provides that the agency has duties to deliberate on "information prescribed by Presidential Decree as necessary for nurturing sound communications ethics, from among information disclosed to the public and distributed via telecommunication lines, or requests for correction thereof" and "matters concerning the soundness of information distributed via telecommunication circuits."[7]

While I recognize the increasing challenges of misuse of Internet platforms and the important goal of using legal and technological tools to protect individuals from such harms, the policy raises some concerns with respect to its compatibility you're your Excellency's Government's obligations under international human rights law, in particular due to the policy's use of vague categories as well as with the broad discretion that the policy confers to the communication regulatory agencies. I note that the new policy was introduced in the context of a framework that already raises concern in the way in which it restricts freedom of expression. In this connection, I wish to remind your Excellency's Government of its obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), acceded by the Republic of Korea on 10 April 1990. Any restriction to the right to freedom of expression must meet the standard established by Article 19(3), that is, restrictions must be provided by law, and be

[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Act on Establishment and Operation of Korea Communications Commission No. 13202 (Feb. 3, 2015), https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=33740&type=part&key=17.

necessary and proportionate to the legitimate aim. My concerns at the compatibility of the policy with Article 19 of the ICCPR are set out in further detail in the Annex accompanying this letter.

In view of these observations and concerns, I urge Your Excellency's Government to ensure that any restrictions on freedom of expression is consistent with Article 19 of the ICCPR and related human rights standards.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please provide information about the human rights assessments made prior or subsequent to the introduction of the new policy of SNI-filtering and about its compliance with international human rights law and standards.

I would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Annex
Reference to international human rights law

General standards for restrictions to the right to freedom of expression

Article 19(1) of the International Covenant on Civil and Political Rights (ICCPR) establishes "the right to hold opinions without interference." The right to hold opinions is so fundamental that it is "a right to which the Covenant permits no exception or restriction" (CCPR/C/GC/34). Accordingly, this right is not simply "an abstract concept limited to what may be in one's mind," and may include activities such as research, online search queries, and drafting of papers and publications" (A/HRC/29/32).

Article 19(2), in combination with Article 2 of the Covenant, establishes State Parties' obligations to respect and ensure the right "to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Since Article 19(2) "promotes so clearly a right to information of all kinds," this indicates that "States bear the burden of justifying any withholding of information as an exception to that right" (A/70/361). The Human Rights Committee has also emphasized that limitations should be applied strictly so that they do "not put in jeopardy the right itself" (CCPR/C/GC/34). The General Assembly, the Human Rights Council and the Human Rights Committee have concluded that permissible restrictions on the Internet are the same as those offline.

Article 19(3) establishes a three-part test for permissible restrictions on freedom of expression:

First, restrictions must be "provided by law." In evaluating the provided by law standard, the Human Rights Committee has noted that any restriction "must be made accessible to the public" and "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly" (CCPR/C/GC/34). Moreover, it "must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution" (CCPR/C/GC/34).

Second, restrictions must only be imposed to protect legitimate aims, which are limited to those specified under Article 19(3), that is "for respect of the rights or reputations of others" or "for the protection of national security or of public order (ordre public), or of public health and morals". The term "rights...of others" under Article 19(3)(a) includes "human rights as recognized in the Covenant and more generally in international human rights law" (CCPR/C/GC/34).

Third, restrictions must be necessary to protect one or more of those legitimate aims. The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions "target a specific objective and do not unduly intrude upon the rights of targeted persons" (A/70/361). The ensuing interference with third parties' rights must also be limited and justified in the interest supported by the intrusion. Finally, the restriction must be "the least intrusive instrument among those which might achieve the desired result" (CCPR/C/GC/34).

Application of international human rights standards to the SNI-filtering policy

While governments enjoy a clear legitimate interest when it comes to protect the right or reputation of others, any restriction must be provided law, and necessary and proportionate to the legitimate aim. The policy, through the vague and overbroad categories of "unlawful sites including illegal videos, gambling, pornography, and pirated contents," may fail the "provided by law" requirement as it leaves open the specific parameters of what constitutes "unlawful" and what standards may be applied by the agencies in conducting SNI filtering. In addition, the broad and vague scope of these terms, coupled with the unilateral executive authority given to the Korean Communication Standards Commission and the Korean Communication Commission, provides your Excellency's Government with broad leeway to disproportionately restrict the public's right to access to information that is protected under international human rights law.

Furthermore, SNI filtering, by utilizing the SNI field representing domain name exchanged at the beginning of encryption process, could interfere with online privacy, which is essential to protecting the freedom of expression of individuals. While it has been argued that SNI filtering does not decrypt the actual contents of online communications, the technology nonetheless expands the real-time monitoring and alteration (filtering) of the online traffic and activities by individuals to a new depth.

As I have explained in my June 2015 report to the Human Rights Council, encryption and anonymity technologies establish a "zone of privacy online to hold opinions and exercise freedom of expression without arbitrary and unlawful interference or attacks" (A/HRC/29/32). Any restrictions on these technologies must meet the well-known three-part test" established under Article 19(3) and "States should avoid all measures that weaken the security that individuals may enjoy online, such as backdoors, weak encryption standards and key escrows."(A/HRC/29/32). Accordingly, governments have encouraged the use of tools such as HTTPS to enhance privacy of the users. The monitoring of SNI fields circumvents the privacy protections provided by encryption, and thereby unduly interferes with freedom of expression. I am concerned that such practice of exploring vulnerabilities for censorship purposes undermines credibility and public confidence in the security governance which requires voluntary technical cooperation and information exchange among all stakeholders.

The opacity of the censorship process, coupled with the broad categories of "unlawful sites," burdens the right of people in the Republic of Korea to access information and exerts a chilling effect on freedom of expression in the country.

With respect to Article 21 of the Act Establishing KCC, I am concerned that this provision fails to meet the level of clarity and precision required by Article 19(3) of the ICCPR for restrictions on freedom of expression. To satisfy the requirements of legality, restrictions must additionally be sufficiently clear, accessible and predictable (CCPR/C/GC/34). The wording of the statute does not meet the level of clarity and

predictability as required by international human rights law and such ambiguity may confer excessive discretion on regulatory agencies. Not only blanket delegation of authority to the lower-level Presidential Decree is unacceptable but also the Presidential Decree itself is any more specific than the statutory language: the scope of its Article 8 includes "any information deemed necessary to be deliberated upon."[8] Under this imprecise mandate, many lawful contents have been deleted or blocked[9] as sometimes courts have shown.[10]

The expansive discretion given to these agencies, combined with the opacity of the procedure, standards, and even the contents subject to censorship, appears particularly problematic given extremely limited opportunities for review or appeal of removals. The lack of independent and external review or oversight of removal orders reinforces the unchecked discretion of government authorities and raises concerns of due process. Consistent with my past reporting, I urge Your Excellency's Government to categorically reject a model of regulation "where government agencies, rather than judicial authorities, become the arbiters of lawful expression." (A/HRC/38/35).[11]

Also, the proportionality of website blocking as a measure abating the harms arising of expressions must be seriously reassessed. Website blocking by a government blinds its own citizens from certain information available to the citizens of all other countries, undermining media literacy and social stock of information of its own citizens while leaving intact the more culpable sources of the harms. Other measures seem more proportionate to the culpability of the parties involved, i.e., filing a suit overseas to identify the source of the harmful information and abating the source either by prosecuting the source or by simply deleting the source content.

[8] 방송통신위원회의 설치 및 운영에 관한 법률 시행령[시행 2018. 5. 22.] [대통령령 제28888호, 2018. 5. 15., 일부개정]

[9] Park, Kyung Sin, *Administrative Internet Censorship by Korea Communication Standards Commission*, 33 SOONGSIL L. REV. 91 (2014), https://ssrn.com/abstract=2748307.

[10] Martyn Williams, *Court rules in favor of North Korea Tech in blocking dispute*, NORTH KOREA TECH (Apr. 24, 2017), https://www.northkoreatech.org/2017/04/24/court-rules-favor-north-korea-tech-blocking-dispute/.

[11] A/HRC/38/35.