

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea; the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the situation of human rights defenders

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea; Special Rapporteur on the rights to freedom of peaceful assembly and of association and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 43/4, 43/25, 41/12 and 43/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received regarding a legislative amendment to the *Development of Inter-Korean Relations Act*, that was passed in the Republic of Korea (ROK) in December 2020 and came into effect on 30 March 2021, which we are concerned may negatively impact the enjoyment of the right to freedom of expression and the legitimate activities of some civil society organisations and human rights defenders in the ROK.

Relevant International Human Rights Law Standards

Before providing our comments on the legislative amendment itself, we would like to highlight several relevant international standards, and in particular the provisions of Article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by your Excellency's Government in 1990, which protect the right to freedom of expression. In particular, we would like to recall that under article 19, the right to freedom of expression is defined broadly, and includes the "freedom 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" (emphasis added). Any limitation to the right to freedom of expression must meet the strict criteria established by article 19 (3) of the ICCPR, which include the protection of national security or of public order.

Any limitations to article 19, even if they have a legitimate aim under article 19(3) of the ICCPR, must further conform to the strict tests of legality, necessity, and proportionality, and only be applied for those purposes for which they were prescribed and be directly related to the specific need on which they are predicated. Here we note that according to the United Nations Human Rights Committee, the requirement of legality entails that a "norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its

execution.”¹ Moreover, with the requirement of necessity, the Committee stressed that any restrictions must be “necessary” for a legitimate purpose and not overbroad in their scope.² The Committee further emphasised that, before resorting to restrictions, States “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” (para. 35).³ Referring to the principle of proportionality, the Committee held that both the form of expression at issue as well as the means of its dissemination must be taken into account when applying restrictions. Citing its General Comment 27, the Committee recalled that “restrictive measures 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 which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law” (para. 34).⁴

Similarly, we would also like to recall that the right to freedom of association, as set forth in article 22 of the ICCPR implies a wide range of positive and negative obligations for the State to ensure its enjoyment. In particular it foresees that: “No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”. We would also like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. Moreover, we would like to draw your Government's attention to the principles enunciated by Human Rights Council resolution 24/5, and in particular operative paragraph 2, which “reminds States of their obligation to respect and fully protect the [right] of all individuals to... associate freely,... including human rights defenders... seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the [right] to freedom of... association are in accordance with their obligations under international human rights law”.

Concerns about the compatibility of the amendment to the *Development of Inter-Korean Relations Act* with international human rights law

¹ UN Human Rights Committee, General Comment no. 34 on freedoms of opinion and expression (article 19 ICCPR) Para 25.

² Ibid Para 33.

³ Ibid Para 35

⁴ Ibid.

We note that the amendment to the *Development of Inter-Korean Relations Act*⁵ criminalises loudspeaker broadcasting and posting visual materials towards the Democratic People’s Republic of Korea (DPRK) in the areas along the Military Demarcation Line and the dissemination of leaflets/flyers and “other items” into the DPRK. According to article 4 of the law, “other items” are defined as “including, but not limited to, advertising propaganda materials, printed materials, auxiliary memory units, cash and other property profits.” The amended law makes it a crime, punishable by up to three years in prison or by a fine not exceeding 30 million won, to violate these provisions without the ROK’s Government’s permission.⁶ We further note that in late January 2021, the Ministry of Unification of the ROK (MOU) issued a document which clarified the "scope of application" of the law.⁷

We also take this opportunity to note that easing cross-border tensions and protecting individuals in border regions of the ROK have consistently been described as a key aim of this amendment,⁸ as highlighted in a letter from the Governor of Gyeonggi Province sent to the mandate holders and to the Secretary-General in late January 2021⁹. We appreciate the prerogative of the State to maintain peace and security, and are aware of the stated position of Your Excellency’s Government underlining that the amendments were passed in view of the DPRK’s negative reaction to some cross-border activities of this sort and with the consequent aim of avoiding increased tensions on the Korean peninsula.

Nevertheless, we are concerned that this legislative amendment, due to its vague wording, may be interpreted broadly, and that its application may lead to the disproportionate penalisation of some forms of political expression and legitimate activities of some civil society actors in the ROK. We are accordingly concerned that the imprecise and vaguely-defined language of these amendments could be employed against civil society groups and human rights defenders working on issues related to the DPRK, which if confirmed may be contrary to international human rights law, in particular articles 19 and 22 of the ICCPR. We are further concerned about the potential effects that this legislative amendment may have on access to information inside the DPRK. In this regard we recall that the UN Declaration on Human Rights Defenders recognises and protects the right of individuals and organisations to promote human rights and fundamental freedoms, at both the national and international levels.

We respectfully conclude that the indeterminate language contained in the amendment may undermine the compliance of the law as a whole with international human rights standards, which we recall prohibit vague and overbroad restrictions on freedom of expression that do not conform with the principle of proportionality (CCPR/C/GC/34). Finally, while recognising that your Government has orally informed the mandate holders that the amendments were limited in scope, and that the degree of punishment foreseen by the changes is in line with other national laws, we nevertheless respectfully express our concerns about the severity of the potential

⁵ Inter-Korean Relations Development Act - [Enforcement 2020. 10. 1.] [Act No. 17162, 2020. 3. 31, partially amended].

⁶ However, this does not apply to dissemination from or through third countries.

⁷ In particular the MOU clarified that the law does not apply to dissemination of items from or through third countries.

⁸ The Ministry of Unification, Republic of Korea. “On the amended provisions of ‘the Development of Inter-Korean Relations Act’ for disseminating leaflets”. December 2020.

⁹ On 10 February 2021, the Special Rapporteur on the situation of human rights in the DPRK sent a reply to the Governor.

punishments outlined by this amended piece of legislation, especially when considering the range of activities that may be criminalised due its vague wording. Bearing in mind our concerns about the impact of the amendment on the enjoyment of articles 19 and 22 of the ICCPR in particular, as well as on the legitimate activities of some civil society groups and human rights defenders in the ROK, we are of the view that this amendment consequently appears to violate the principle of proportionality in punishment.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we 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 information.
2. Please provide further information about the compliance of the above-mentioned legislative amendment with international human rights law.
3. In particular please provide clarification about the extent of the range of activities criminalised by article 4 of the amended law and how they are in compliance with article 19 of the ICCPR

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. 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 our highest consideration.

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