THE CONSTITUTIONAL COURT OF KOREA

Case No. 2017 Hun-Ba 42, et al.

THIRD-PARTY INTERVENTION SUBMISSIONS

BY

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and

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INTRODUCTION AND INTEREST OF ARTICLE 19 AND OPEN NET

1. This *amicus curiae* brief is respectfully submitted by ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) and Open Net Association, Inc. (Open Net) (jointly the Interveners) for the benefit of the Constitutional Court's consideration of the salient issues raised in this case.

2. ARTICLE 19 is an international non-governmental organization which advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and the implementation of such standards in domestic legal systems. It works globally to protect and promote the right to freedom of expression, including access to information and the means of communication. ARTICLE 19 has extensive experience of working to promote freedom of expression and information around the world. It has contributed to the elaboration and advocacy of international law and standards, and has been engaged in litigation in national and international fora involving states' obligations arising from international law on freedom of expression. ARTICLE 19 is well known for its authoritative work in elaborating the implications of the guarantee of freedom of expression in different thematic areas. It also regularly contributes amicus briefs to international and national courts.

3. Open Net is a non-governmental organization that aims to achieve freedom and openness of South Korea's Internet. Its mission is to provide a forum for discussion to promote the rights of Internet users and pursue the public interest. Open Net leads legislative, litigation, grass roots, and media campaigns to guarantee, among other things, freedom of speech on the Internet. It has filed and succeeded in various constitutional challenges, and civil and criminal defences for freedom of speech, privacy and intellectual property. This includes an administrative lawsuit in 2017 that lifted an access ban to northkoreatech.org, a website providing information on the use of digital technologies in North Korea, which Korea Communication Standards Commission imposed for reason that distribution of the website's contents violate the National Security Act Article 7 "praising and encouraging" provision.[1]

4. The Interveners submit that the right to freedom of expression is a fundamental human right which can only be limited in strict circumstances. It is necessary to balance this right within the framework of international law to ensure that it is respected to the greatest available extent.

5. The Republic of Korea is party to several international treaties which provide protection for freedom of expression and freedom of association, as well as limitations on restrictions of these rights. Further, the Constitution of Korea provides limitations on infringements on the right to freedom of expression and opinion. As such, the Interveners submit this brief to provide background for the Constitutional Court on the applicability of international standards to this case.

6. The current case before the Constitutional Court of the Republic of Korea implicates the right of freedom of expression. The Interveners are aware that the National Security Act has been used to prosecute expressive activities including: posting articles praising North Korea on websites; holding books or files related to North Korea or the thoughts of North Korea; delivering books or files related to North Korea or the thoughts of North Korea to acquaintances; sharing books or files related to North Korea or the thoughts of North Korea by means of the internet; and attending a general meeting of a private organization. These prosecutions are limitations on the right of freedom of expression and association, and as such must comply with relevant

[1] See e.g. E. Ramirez, How A Website About North Korea's Tech Use Battled -- And Beat -- Being Blocked In South Korea, Forbes, 22 November 2017.

standards under international law, specifically that restrictions must be defined by law, pursue a legitimate aim, and be necessary and proportionate.

7. Based on the analysis on the basis of international freedom of expression standards, the Interveners submit that the National Security Act violates all three elements of this test, and therefore is not a valid basis for restricting the right to freedom of expression. As documented in this amicus brief, this conclusion is consistent with the findings of international treaty bodies.[2]

THE PROTECTION OF FREEDOM OF EXPRESSION UNDER INTERNATIONAL LAW

8. The right to freedom of expression is protected by a number of international human rights instruments to which the Republic of Korea is a party, in particular Article 19 of the Universal Declaration of Human Rights (UDHR)[3] and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[4]

9. Additionally, General Comment No 34,[5] adopted by the UN Human Rights Committee (HR Committee) in September 2011, explicitly recognises that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.[6] In other words, the protection of freedom of expression applies online in the same way as it applies offline. State parties to the ICCPR are also required to consider the extent to which developments in information technology, such as Internet and mobile-based electronic information dissemination systems, have dramatically changed communication practices around the world.[7] The legal framework regulating the mass media should take into account the differences between the print and broadcast media and the Internet, while also noting the ways in which media converge.[8]

Limitations on the right to freedom of expression

10. While the right to freedom of expression is a fundamental right, it is not guaranteed in absolute terms. Restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put in jeopardy the right itself. The determination whether a restriction is narrowly tailored is often articulated as a three-part test. Restrictions must:

    a. **Be prescribed by law**: this means that a norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.[9] Ambiguous, vague or overly broad restrictions on freedom of expression are therefore impermissible;

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[2] See, e.g., Concluding Observations of the Human Rights Committee, Republic of Korea, CCPR/C/KOR/CO/3, 28 November 2006, para 18: "Under such provisions [of the National Security Law], the restrictions placed on the freedom of expression do not meet the requirements of article 19, paragraph 3 of the Covenant (art.19)."
[3] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[4] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), 52.
[5] CCPR/C/GC/3, adopted on 12 September 2011.
[6] *Ibid.*, para 12.
[7] *Ibid.*, para 17.
[8] *Ibid.*, para 39.
[9] HR Committee, *L.J.M de Groot v. The Netherlands,* No. 578/1994, UN Doc. CCPR/C/54/D/578/1994 (1995).

b. **Pursue a legitimate aim:** exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as respect of the rights or reputations of others, protection of national security, public order, public health or morals. As such, it would be impermissible to prohibit expression or information solely on the basis that they cast a critical view of the government or the political social system espoused by the government;

c. **Be necessary and proportionate**. Necessity requires that there must be a pressing social need for the restriction. The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.[10]

11. Further, the Korean Constitution contains a provision, article 37, paragraph 2, stipulating that "the freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order and for public welfare." Importantly, the test under the Korean Constitution tracks the necessity principle under international law.

Restrictions on freedom of expression based on national security

12. In General Comment 34, the Human Rights Committee held regarding national security laws that "it is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information..."[11]

13. In deciding upon individual cases submitted to it, the Committee has consistently found that when reasons related to national security or public order are invoked in order to justify the restriction of the right to freedom of expression, statements of a general nature do not suffice. Rather, a State "must demonstrate in specific fashion the precise nature of the threat" to such national security that is "caused by the author's conduct", as well as why measures taken to restrict the right to freedom of expression were necessary. In the absence of such an "individualized justification," a violation of Article 19(2) ICCPR will be found.[12]

14. Additionally, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (the Johannesburg Principles)[13] set the key test for restrictions on freedom of expression in the name of national security. The Principles were developed by a group of experts in international law, national security, and human rights, based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgments of national courts), and the general principles of law recognized by the community of nations. The Johannesburg Principles have gained significant status since their adoption. They have been widely endorsed and relied upon by international courts, UN bodies including the UN Commission on Human Rights, regional commissions,

[10] HR Committee, *Velichkin v. Belarus*, No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).
[11] HR Committee, General Comment No. 34: Article 19 (Freedoms of opinion and expression), 12 September 2011, CCPR/C/GC/34, para 30.
[12] *Ibid.*, para 35.
[13] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996).

lawyers, civil society actors, academics, journalists and others, all in the name of freedom of expression. In particular, the Principles have been cited in numerous decisions by the European Court of Human Rights,[14] as well as national proceedings including in the United Kingdom.[15] They have been heavily relied upon by the UN Commission on Human Rights,[16] and frequently appear in the reports of UN Special Procedures.[17] The Special Rapporteur of the Inter-American Commission on Human Rights states that the Inter-American Commission on Human Rights, "like other international authorities, considers [the Johannesburg Principles] to provide authoritative guidance for interpreting and applying the right to freedom of expression in light of considerations of national security."[18] Finally, the Principles are included in UNESCO's toolkit for training judges on international standards on freedom of expression.[19]

15. Under the Johannesburg Principles, the key test for restrictions on freedom of expression in the name of national security is set out in Principle 6, which subject to other principles, prohibits restrictions on the right to freedom of expression and opinion unless:

    a. The expression is intended to incite imminent violence;

    b. It is likely to incite such violence; and

    c. There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

16. In Principle 7, the Johannesburg Principles lay out several types of protected expression. Types of expression which cannot be considered a threat to national security include:

    a. Calling for a non-violent change of government or government policy;

    b. Industrial action;

    c. Criticism of or insult to the nation, the state or its symbols, government, officials or agencies, and the

[14] See, for example, the European Court of Human Rights (the European Court), *Taranenko v. Russia*, App. No. 19554/05, 15 May 2014; or *Szabó and Vissy v. Hungary*, App. No. 37138/14, 12 January 2016.
[15] *Gamini Athukoral "Sirikotha" and Ors v. Attorney-General*, 5 May 1997, S.D. Nos. 1-15/97 (Supreme Court of Sri Lanka); *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (House of Lords).
[16] See, e.g., Commission on Human Rights Resolution 2002/48, UN Commission on Human Rights, 58th Sess., UN Doc. E/CN.4/RES/2002/48 (2002), Preamble; Resolution 2001/47, UN Commission on Human Rights, supra note 676), the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (See, e.g., Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45, UN Commission on Human Rights, 52nd Sess., E/CN.4/1996/39, 22 March 1996, para. 4.), the UN Special Rapporteur on the independence of judges and lawyers (See, e.g., Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, Addendum, Report on the mission to Peru, UN Commission on Human Rights, 54th Sess., E/CN.4/1998/39/Add.1, 19 February 1998, introduction.) and the Special Representative of the Secretary-General on human rights defenders (See, e.g., Report submitted by Ms. Hina Jilani, Special Representative of the Secretary-General on human rights defenders in accordance with Commission resolution 2000/61, UN Commission on Human Rights, 57th Sess, E/CN.4/2001/94, 26 January 2001, para 14).
[17] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/17/27, 16 May 2011, para 36.
[18] IACHR, Special Rapporteur on Freedom of Expression, Report on Terrorism and Freedom of Expression, para. 288.
[19] UNESCO, Training Manual for Judges on International Standards on Freedom of Opinion and Expression, December 2021.

same for a foreign nation;

d. Conscientious objection to or advocating objection to military conscription or service, a conflict, or the threat or use of force in international disputes;

e. Communicating information on human rights violations, or violations of humanitarian law;

f. Expression in a specific language, including minority languages;

g. Expression of information by or about an organisation that the government considers a threat to national security or other interests – for example, journalists reporting on an armed group;

h. Exposure of government wrongdoing or information about public institutions;

i. The discussion or promotion of different ideologies.

ANALYSIS OF THE APPLICATION OF THE NATIONAL SECURITY ACT UNDER INTERNATIONAL FREEDOM OF EXPRESSION STANDARDS

17. Article 7 of the National Security Act provides, *inter alia*,

> Any person who has benefited the anti-State organization by way of praising, encouraging or siding with or through other means the activities of an anti-government organization, its member or a person who had been under instruction from such organization, shall be punished by imprisonment for not more than seven years. ...
>
> Any person who has, for the purpose of committing the actions stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, processed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph.

18. The Interveners submit that the National Security Act fails the three-part test under international standards, and as such, cannot serve as the basis for restrictions on freedom of expression. This finding is consistent with that of the Human Rights Committee, which has on several occasions expressed concerns regarding the National Security Act, and in particular Article 7.

The restrictions of the National Security Act fail to meet the criterion of legality

19. As outlined earlier, any restrictions on freedom of expression based on national security must be precisely defined in law to prevent them being used as excuses for excessive restrictions. To be defined in law, a restriction must be framed with sufficient particularity to give notice as to the prohibited conduct. The Interveners note that the provisions of the National Security Act do not meet these criteria.

20. In particular, the term “anti-government organization” is vague. It is not defined with sufficient particularity in either Article 2 or Article 7 of the Act, and as such, does not provide notice as to the type of speech that will be associated with an “anti-government organization.” For instance, it is unclear whether a human

rights or civil society organization that takes positions that are critical of the Republic of Korea might be considered an "anti-government organization." Similarly, a media organization, newspaper, or other publisher disseminating views that are critical of the government might be considered an "anti-government organization."

21. The vagueness of the National Security Act has also been observed by numerous international bodies. For instance, the UN Committee Against Torture has, in numerous periodic reports, expressed concern over arrests and arbitrary detention of individuals in Korea due to the "vague wording" of Article 7.[20]

22. Without a precise definition of the scope of "anti-government organization," the restrictions of the National Security Act fail to be defined in law.

The restrictions set in the National Security Act fail to properly serve a legitimate aim

23. Restrictions on freedom of expression must be necessary to achieve a legitimate aim. Article 19(3)(b) of the ICCPR provides that "protection of national security" can be a legitimate aim. However, the mere invocation of "national security" does not automatically qualify a restriction on expression as legitimate.

24. The Human Rights Committee has stated with respect to the National Security Act that "the Covenant does not permit restrictions on the expression of ideas, merely because they coincide with those held by an enemy entity or may be considered to create empathy for that entity." As such, the Committee stated that "the State party must urgently amend article 7 as to make it compatible with the Covenant."[21]

25. The Johannesburg Principles outline a number of restrictions of expression that cannot serve a legitimate national security aim. These include, of relevance to this case:

    a. Expression of information by or about an organisation that the government considers a threat to national security or other interests – for example, journalists reporting on an armed group;

    b. The discussion or promotion of different ideologies.

26. The Special Rapporteur on Freedom of Expression expressed concern over "vague and unspecified" nations of "national security," writing that "the use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern. The concept is broadly defined and is thus vulnerable to manipulation by the State as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists, or activists."[22]

27. The Interveners submit that while the National Security Act purports to achieve national security aims, its criminalisation of forms of expression do not actually serve a legitimate aim that can properly be the basis of a restriction. Specifically, the expression of specific ideologies related to North Korea, or merely information regarding "organization[s] that the government considers a threat to national security,"

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[20] Concluding observations on the combined third to fifth periodic reports of the Republic of Korea (CAT/C/KOR/CO/3-5) (30 May 2017); UN Committee Against Torture (CAT) Consideration of reports submitted by States parties under article 19 of the Convention (CAT/C/KOR/CO/2) (25 July 2006)

[21] CCPR/C/79/Add.114, 1 November 1999, para.9.

[22] A/HRC/23/40, report of 17 April 2013, at para. 58.

specifically "anti-government organizations" under the Act, do not actually serve a specific national security purpose.

Restrictions under the National Security Act are not necessary and proportionate to sought aims

28. Restrictions of expression under the National Security Act must meet the tests of necessity and proportionality. Under international standards, the burden rests on the Republic of Korea to establish that the specific restrictions meet these tests.

29. The Republic of Korea maintains that a special security situation exists with respect to North Korea, necessitating the restrictions of the National Security Act. However, this alone is not sufficient to justify broad, generalized restrictions on vague grounds of national security, absent a specific showing of how each restriction serves an articulable aim.

30. The Interveners note that the Human Rights Committee has considered this issue; in its Comments adopted after consideration of the initial report of the Republic of Korea, it observed, in recommending phasing out the Act as a "major obstacle to the full realization of the rights enshrined in the Covenant":

> Although the particular situation in which the Republic of Korea finds itself has implications on public order in the country, its influence ought not to be overestimated. The Committee believes that ordinary laws and specifically applicable criminal laws should be sufficient to deal with offences against national security. Furthermore, some issues addressed by the National Security Law are defined in somewhat vague terms, allowing for broad interpretation that may result in sanctioning acts that may not truly be dangerous for State security [...][23]

31. In one Communication, an author was convicted for having read out and distributed printed material which were seen as coinciding with the policy statements of North Korea.[24] While the government claimed that the conviction was necessary on grounds of national security, the Committee held that there was no clarity that publication of the statements provided a "benefit" for North Korea or how "publication of views similar to their own created a risk to national security." The Committee also observed that it is not "clear what was the nature and extent of any such risk" and as such the restriction was not compatible with Article 19(3) of the ICCPR.

32. Additionally, the Human Rights Committee indicated that:

> [T]he State party has invoked national security by reference to the general situation in the country and the threat posed by 'North Korean communists.' The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19.[25]

33. Elsewhere in the world, sensitive geopolitical situations are not automatically grounds for derogations from international standards. For instance, the European Court of Human Rights has evaluated cases where individuals are prosecuted for expression that touches on the security situation regarding Turkey and the

[23] CCPR/C/79/Add.6, adopted during the Committee's 45th session, October – November 1992, paras 6 and 9.
[24] *Kim v. Republic of Korea,* Communication No. 574/1994, CCPR/C/64/D/574/1994, 4 January 1999.
[25] *Park v. Republic of Korea*, Communication No. 628/1995, CCPR/C/64/D/628/1995, 3 November 1998.

Kurds, and held that general restrictions on expression can still be disproportionate if the restrictions do not cause incitement to violence. In the case of *Okçuoğlu v. Turkey*,[26] the applicant was imprisoned in Turkey for comments regarding the Kurdish situation. The European Court acknowledged the "sensitivity of the security situation in south-east Turkey" and the government's concern that Okçuoğlu's comments would "exacerbate the serious disturbances." Nevertheless, the Court held that the interference with Okçuoğlu's right to expression was *not* proportionate, in part because the comments did not rise to incitement to violence.

34. The Human Rights Committee has heard numerous Communications regarding individuals prosecuted under the National Security Act and the compatibility with these prosecutions under international standards. Consistently, these Communications have failed the test of necessity.

35. The Committee heard a communication from an author, a national of the Republic of Korea, who published a painting that the government held constituted "enemy-benefiting expression" under Article 7 of the National Security Act. The Committee held that the state failed to articulate the "precise nature" of the threat or a restriction's necessity to protect an enumerated purpose. "In the absence of any individualized justification therefore of why the measures taken were necessary in the present case for an enumerated purpose, therefore, the Committee finds a violation of the author's right to freedom of expression through the painting's confiscation and the author's conviction. [27]

36. This same analysis applies to restrictions on the rights of peaceful assembly and association. For instance, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, on his mission to the Republic of Korea, acknowledged that the Republic of Korea faces special challenges in view of the unsettled relationship with its northern neighbour.

37. Nevertheless, the Rapporteur held, even in those circumstances, human rights should not be sacrificed in the name of security concerns. Limitations for reasons of national security must conform to the principles of proportionality and necessity in a democratic society and be tailored to achieve the protective function– in this case to protect against a specific risk or threat to the nation's security, not just a general national interest or security concern. Those limitations must also consist of the least intrusive instrument to achieve the objective sought.[28]

CONCLUSION

38. Recently, from 8 to 15 June 2022, the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence made an official visit to the Republic of Korea, after which he indicated that he urged "full compliance with international standards, including by abolishing Article 7 of the National Security Act, which has been at the centre of many human rights violations in the past and remains in force."[29]

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[26] The European Court, *Okçuoğlu v. Turkey*, App. No. 24246/94, 8 July 1999.
[27] *Shin v. Republic of Korea*, Comm. No. 926/2000, CCPR/C/80/D/926/2000, 19 March 2004.
[28] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea, Thirty-second session, * A/HRC/32/36/Add.2
[29] Preliminary Observations from the Official Visit to the Republic of Korea by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Mr. Fabián Salvioli (8 to 15 June 2022) | OHCHR

39. The Interveners agree with the findings of the Rapporteur, as well as the continued findings of the UN Human Rights Committee, of various Special Procedures, and the recommendations of numerous countries in the Republic of Korea's most recent Universal Periodic Review (UPR), which have all been unanimous in expressing deep concern over the compatibility of the National Security Act with international standards. For instance, Germany recommended that the Republic of Korea "amend the National Security Act, in particular its article 7, to ensure that it is not used arbitrarily or to harass and restrict the rights to freedom of expression, opinion and association." Portugal also called for amendment of the National Security Act, and the United States, similarly, recommended that the Republic of Korea "reform national security laws to provide greater protections for free expression."[30]

40. As set out above in this *amicus curiae* brief, the National Security Act constitutes the restriction of the internationally recognised right to freedom of expression, as well as that of associate. In the present case, as with any restriction of freedom of expression, the burden to justify the limitation rests on the government of the Republic of Korea, and Article 19(3) of the ICCPR sets a high threshold for satisfying the requirements under international human rights law to justify such restrictions.

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[30] Report of the Working Group of the Universal Periodic Review, Republic of Korea, UN Doc. A/HRC/37/11, 27 December 2017.