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البند ٣ من جدول الأعمال

تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

تقرير المقرر الخاص المعني بتعزيز وحماية الحق في حرية الرأي والتعبير، فرانك لا رو

إضافة

بعثة إلى جمهورية كوريا*

موجز

قام المقرر الخاص المعني بتعزيز وحماية الحق في حرية الرأي والتعبير ببعثة رسمية إلى جمهورية كوريا في الفترة من ٦ إلى ١٧ أيار/مايو ٢٠١٠. ويقدم في هذا التقرير لمحة وجيزة عن الخلفية السياسية والتاريخية في جمهورية كوريا، ويعرض المعايير القانونية الدولية والإطار القانوني المحلي فيما يتعلق بالحق في حرية الرأي والتعبير. وفي الفرع الرئيسي من التقرير، يركز المقرر الخاص على بواعث القلق التالية: التشهير، وحرية الرأي والتعبير على الإنترنت، وحرية الرأي والتعبير قبل الانتخابات، وحرية التجمع، والقيود المفروضة على حرية التعبير حفاظاً على الأمن الوطني، وحرية المسؤولين العاميين في الرأي والتعبير، واستقلال وسائط الإعلام، واللجنة الوطنية لحقوق الإنسان في كوريا.

* يُعمّم موجز هذا التقرير بجميع اللغات الرسمية، أما التقرير نفسه، الوارد في مرفق الموجز، فيُعمّم باللغة التي قُدّم بها فقط.

ويشيد المقرر الخاص بالتقدم المحرز على مرّ العقود في جمهورية كوريا بوصفها ديمقراطية حيّة. ويشمل هذا التقدم بلوغ أحد أعلى مستويات تغلغل الإنترنت ذات النطاق العريض في العالم. غير أنه يعرب عن قلقه إزاء ما يُفرض، منذ مظاهرات عام ٢٠٠٨ التي خرج فيها الناس تحت ضوء الشموع، من قيود متزايدة على حق الأفراد في حرية الرأي والتعبير. ويُعزى هذه القلق بالأساس إلى تزايد عدد الملاحقات القضائية المستندة إلى قوانين لا تتوافق في الغالب مع المعايير الدولية، وهي ملاحقات تستهدف أفراداً يعربون عن آراء مخالفة لموقف الحكومة. ويقدم المقرر الخاص عدداً من التوصيات بشأن كل من المسائل الرئيسية المطروحة حتى يُكفل بالكامل، في القانون وفي الممارسة، حق الأفراد كافة في التعبير عن آراء مختلفة، وهو ما سيثبت الأسس الديمقراطية لجمهورية كوريا بقدر أكبر.

Annex

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, on his mission to the Republic of Korea (6-17 May 2010)

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I. Introduction

1. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, undertook an official mission to the Republic of Korea from 6 to 17 May 2010, at the invitation of the Government. The visit was carried out pursuant to his mandate to assess compliance with international standards on the right to freedom of opinion and expression. During the visit, the Special Rapporteur visited the cities of Seoul and Gwang-ju.

2. In Seoul, the Special Rapporteur met with officials from the Prime Minister's Office; the Ministry of Foreign Affairs and Trade; the Ministry of Culture, Sports and Tourism; the Ministry of Justice; the Ministry of Education, Science and Technology; the Ministry of Public Administration and Security; the Ministry of National Defence; and the National Police Agency. He also met with individuals from the judiciary and members of the National Assembly, as well as representatives of other institutions such as the National Human Rights Commission of Korea (NHRCK). He also visited the Seoul Detention Centre to meet with individuals accused of violating laws related to his mandate.

3. In Gwang-ju, he visited the Mangwol-dong national cemetery, which constitutes a memorial for those who gave their lives for democracy in the country. The Special Rapporteur also met with officials from the National Tax Service, the Gwang-ju Metropolitan City and the May 18 Foundation.

4. In both cities, the Special Rapporteur met with representatives of civil society, including human rights organizations, journalists and writers' associations, trade unions, academics, and women's organizations. He also met with a number of individuals who were facing criminal or civil charges for what they believe constituted a legitimate exercise of their right to freedom of opinion and expression.

5. The Special Rapporteur wishes to thank the Government for its invitation to visit the country. However, he regrets that he could not meet with the President, the Prime Minister, or a single minister of the Government. In addition, he was unable to meet with the Prosecutor General or with officials of the National Intelligence Service, despite the fact that he came to the country on an official invitation. He expresses his disappointment on account of the importance of the issues that are entrusted to him by the Human Rights Council in the exercise of his mandate, and the importance of the right to freedom of opinion and expression in building strong, democratic States. He also regrets that despite numerous requests, he was unable to meet collectively with the commissioners of NHRCK.

6. The Special Rapporteur would also like to thank the United Nations High Commissioner for Refugees for facilitating meetings and some of the logistical aspects of his mission. He also expresses his appreciation for the invaluable contribution by civil society representatives to the mission.

II. Political and historical background

7. The Republic of Korea was proclaimed in 1948, followed by the formation of the Democratic People's Republic of Korea to the north of the 38th parallel. A conflict between the two countries broke out in 1950, until a ceasefire was signed in July 1953. For most of its history, the Republic of Korea has been ruled by a succession of authoritarian and military regimes, until a multi-party political system was restored in 1987.

8. Since then, the Republic of Korea has become a key economic player in the region as a member of the Organization for Economic Cooperation and Development and the

Group of 20 (G-20), and hosted the G-20 summit in November 2010. According to the latest Human Development Index ranking by the United Nations Development Programme, the Republic of Korea is ranked 12th in the world.¹

9. The Republic of Korea is a democratic republic, and the Constitution provides for the separation of powers between the executive, the legislature, and the judiciary. The President is the head of State, chief executive of the Government, and commander-in-chief of the armed forces, who serves a single five-year term by direct election. The State Council, which includes the President and the Prime Minister, is responsible for formulating Government policy. The Prime Minister is appointed by the President and approved by the National Assembly.

10. The National Assembly is a unicameral legislature composed of at least 200 members who serve four-year terms. The judiciary consists of the Supreme Court, High Courts, District Courts and their Branch Courts, and specialized courts. The Supreme Court rules on all appeals from lower courts. It is also empowered to review the legality of Government decrees and regulations, and is the final arbiter of the validity of Presidential and general elections. The Republic of Korea also maintains a separate Constitutional Court composed of nine Justices, empowered to interpret the Constitution and the constitutionality of laws.

11. The most recent presidential election was won in December 2007 by Lee Myung-bak of the Grand National Party (GNP), who began his five-year term in February 2008. The GNP also won a majority of seats in the National Assembly in the general election held in April 2008.

III. International legal standards

12. In carrying out his assessment of the situation regarding the right to freedom of opinion and expression in the Republic of Korea, the Special Rapporteur is guided by several international legal standards. The most pertinent is the International Covenant on Civil and Political Rights (“the Covenant”), which was ratified by the Government on 10 April 1990, and article 19 in particular, which provides that:

(a) Everyone shall have the right to hold opinions without interference;

(b) Everyone shall have the right to freedom of expression; this right shall include 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;

(c) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(i) For respect of the rights or reputations of others;

(ii) For the protection of national security or of public order (*ordre public*), or of public health or morals.

13. The Special Rapporteur is also guided by other relevant declarations, resolutions and guidelines of various United Nations bodies, including general comments No. 10 and 11 of the Human Rights Committee, Human Rights Council resolution 12/16, and the Siracusa

¹ Human Development Report 2010, see <http://hdr.undp.org/en/statistics/>.

Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

IV. Domestic legal framework

14. The legal system of the Republic of Korea is a civil law system that has its basis in the Constitution of the Republic of Korea, which guarantees fundamental human rights, including the right to freedom of expression. Article 21 of the Constitution states that: (1) All citizens enjoy the freedom of speech and the press, and of assembly and association; and (2) licensing or censorship of speech and the press, and licensing of assembly and association may not be recognized. However, article 21(4) provides that “neither speech nor the press may violate the honour or rights of other persons nor undermine public morals or social ethics”.

15. In addition, article 37(2) of the Constitution sets out a general principle that the freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare, provided that no essential aspect of the freedom or right shall be violated. The main Acts which restrict the right to freedom of opinion and expression are the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (Network Act), Assembly and Demonstration Act, Framework Act on Telecommunications (Framework Act), Juvenile Protection Act, National Security Act (NSA), Public Official Election Act (POEA), and State Public Officials Act.

16. The Republic of Korea is also a monist State whereby treaties ratified by the Government have the same effect as domestic law, as provided in article 6 of the Constitution.

V. Situation of the right to freedom of opinion and expression in the Republic of Korea

A General overview

17. The political liberalization in the late 1980s led to a loosening of media control by the Government, ushering in a period of rapid expansion of the sector and freedom of the press. Today, newspaper readership is high, and there are more than a hundred national and local dailies, including four main national daily newspapers. In addition, cable and satellite services began in 1995 and 2002 respectively, while around 90 per cent of the population owns a mobile phone. More than 80 per cent of the population accesses the Internet using broadband high-speed services, giving the country one of the highest broadband penetration in the world.

18. However, despite the progress made over the decades, the Special Rapporteur notes that the space for freedom of expression in the Republic of Korea has been shrinking in recent years, in particular since the candlelight demonstrations of 2008. On the weekend of 2 May 2008, more than 12,000 people, mostly middle- and high-school students, gathered in central Seoul to hold a candlelight vigil against the resumption of beef imports from the United States of America, due to fears over bovine spongiform encephalopathy (BSE, or “mad cow disease”). Through Internet discussion boards such as Agora and online community sites such as Cassiopeia, “netizens” were able to mobilize people quickly, and

the protests took place almost on a daily basis in the evening throughout the months of May and June, and during the first week of July. Although the initial focus of the candlelight vigil was on the issue of beef imports, as the protests continued and grew by 10 June to a crowd of over 100,000, people began expressing their dissatisfaction with a broad range of President Lee Myung-bak's policies. Although the demonstrations were initially largely peaceful and both the protesters and the police showed restraint, acts of violence on both sides have been reported.

19. It appears that since these events, there have been increased restrictions on individuals' right to freedom of opinion and expression. According to the NGO Reporters without Borders, the Republic of Korea was ranked 39th for freedom of the press in the world in 2007 and 42nd in 2010. The Special Rapporteur observes that the shrinking space for freedom of expression in the Republic of Korea in recent years is primarily due to an increasing number of prosecutions and harassment of individuals who express views which are not in agreement with the position of the Government.

20. The Special Rapporteur recognizes the important role played by the judiciary in the Republic of Korea in upholding the right to freedom of opinion and expression. However, he expresses his concern that many of the laws that restrict the right to freedom of opinion and expression do not meet international human rights standards, and the increasing frequency of suits filed against individuals on the basis of such laws increase the risk of exerting a chilling effect on the right to freedom of expression.

B. Issues of concern

1. Defamation

21. In the Republic of Korea, defamation is a criminal offence under the criminal code. Chapter XXXIII of the Criminal Act prohibits "crimes against reputation", and provides that a person who defames another by publicly alleging facts is punishable by imprisonment of up to two years or by a fine of up to 5 million won. However, there is a justification clause which stipulates that if the alleged facts are true and solely for the public interest, the act shall not be punishable (art. 310). A separate clause provides that a person who alleges *false* facts is punishable by imprisonment of up to five years, suspension of qualifications of up to two years, or a fine of up to 10 million won (art. 307).

22. Additionally, "defamation through printed materials" by alleging facts with intent to defame another individual carries a sentence of imprisonment with or without prison labour of up to three years or by a fine of up to 7 million won. If the alleged fact is false, the Criminal Act provides for a sentence of up to seven years of imprisonment, suspension of qualifications for 10 years, or a fine of 15 million won (art. 309 (2)).

23. Furthermore, article 311 of the Criminal Act establishes that a person who "publicly insults another" can be punished by imprisonment or imprisonment without prison labour for up to a year or by a fine of up to two million won.

24. With regard to defamation via the Internet, a specific article was introduced in 2001 to the Network Act to complement article 309 of the Criminal Act. Article 70 of the Network Act provides that a person who defames another by disclosing a *fact* to the public via the Internet is punishable by imprisonment, with or without prison labour, for up to three years or by a fine of up to 20 million won. If the disclosed fact is *false*, the punishment is imprisonment with prison labour for up to seven years, suspension of qualification of up to ten years, or a fine of up to 50 million won. While article 70(3) of the Network Act provides that prosecution should not be brought against the victim's will,

there is no reference to non-justiciability of true statements or the requirement of malicious intent. Defamation in cyberspace is regulated by the Korea Communications Commission (KCC), which is further elaborated in the following chapter.

25. The Special Rapporteur is concerned that in the Republic of Korea, many criminal defamation suits are filed for statements that are true and are in the public interest, and used to penalize individuals who express criticisms of the Government. This includes the case of four producers and one scriptwriter from the Munwha Broadcasting Corporation's (MBC) investigative programme, *PD Notebook*, who reported on the alleged risk of mad cow disease, associated with beef import from the United States of America, and criticized Government officials in charge of the trade negotiations. As a result, they were arrested and charged with defaming Government officials of the Ministry of Agriculture in 2009. The Seoul Central District Court acquitted all staff in January 2010. The Prosecutor's Office appealed the decision, which was dismissed by the same court on 2 February 2010. Subsequently, the Prosecutor's Office has brought an appeal to the Supreme Court.

26. In another well-known case, in September 2009, Park Woon-soon, Executive Director of a non-governmental organization, was sued by the National Intelligence Service (NIS) for publicly stating that the NIS was pressuring corporations not to financially support civil society groups. The NIS claimed he defamed the State and demanded 200 million won in damages. Although the case was still pending during the visit of the Special Rapporteur, he welcomes the decision adopted by the Seoul Central District Court which ruled in favour of Mr. Park. On 15 September 2010, the court determined that in principle, the State is not eligible to file a defamation suit as a victim of defamation. However, the Court also noted that the State can be considered as a victim of defamation in exceptional cases.

27. The Special Rapporteur reiterates that for a statement to be considered defamatory, it must be false, must injure another person's reputation, and made with malicious intent to cause injury to another individual's reputation.² Additionally, no one may be punished for criticizing or insulting the nation, the State or its symbols, as the protection of rights and reputation extends to individuals under international human rights law, not abstract entities.³ Furthermore, the following principles must be respected: (a) public figures should refrain from bringing defamation suits, as they are required to tolerate a greater degree of criticism than private citizens; (b) to require truth in the context of publications relating to matters of public interest is excessive; (c) with regard to opinions, it should be clear that only patently unreasonable views may qualify as defamatory; (d) the onus of proof of all elements should be on those claiming to have been defamed rather than on the defendant; where truth is an issue, the burden of proof lies with the plaintiff; (e) in defamation actions, a range of remedies should be available, including apology and/or correction, and penal sanctions, in particular imprisonment, should never be applied.⁴

28. Indeed, the Special Rapporteur is concerned that defamation remains a criminal offence in the Republic of Korea, which is inherently harsh and has a disproportionate chilling effect on the right to freedom of expression. Individuals face the constant threat of being arrested, held in pre-trial detention, subjected to expensive criminal trials, heavily fined, imprisoned, saddled with a criminal record, and stigmatized in society. Additionally, criminal sanctions cannot be justified, particularly in light of adequacy of non-criminal sanctions in redressing any harm to individuals' reputation, as provided for in the Civil Act.

² See A/HRC/4/27, para. 47. See also A/HRC/14/23 (paras. 82-83), A/HRC/14/23/Add.2, A/HRC/7/14 (paras. 39-43), E/CN.4/2006/55 (paras. 44-55), E/CN.4/2001/64 (paras. 43-48), E/CN.4/2000/63 (paras. 45-52) and E/CN.4/1999/64 (paras. 24-28)

³ Ibid.

⁴ Ibid.

Hence, the Special Rapporteur recommends that the Government remove defamation as an offence from the Criminal Act.⁵

2. Freedom of expression on the Internet

29. As mentioned previously, the Republic of Korea has one of the highest levels of Internet connectivity in the region and the world. This has led to the emergence of an active and vibrant online culture with active “netizens” exchanging diverse information, views and opinions online, including via discussion forums. The Internet has thus become an indispensable tool to exercise the right to seek, receive, and impart information and ideas as guaranteed in article 19 of the Covenant.

30. At the same time, the Special Rapporteur is cognizant of the fact that the Internet can be used as a means to facilitate the commission of a crime, such as child pornography, and the responsibility of the Government to ensure that the Internet remains a safe place and responsible persons behind such criminal conduct are brought to account. However, he is concerned that in the Republic of Korea, peaceful expression of opinion or dissemination of information, which are considered to be defamatory or insulting, constitute crimes under domestic law, punishable by imprisonment or a fine.

31. Additionally, the regulation of online content by intermediaries, as well as by the KCC, a Government agency operating directly under the President, and by the Korea Communications Standards Commission (KCSC), is a matter of great concern. The KCC was established in February 2008 when the new administration took office; it replaced the former Ministry of Information and Communication and the Korean Broadcasting Commission.

32. The KCSC was also established in February 2008, and it merged the functions of the former Korea Internet Safety Commission and the Korea Broadcasting Commission. It is empowered to determine what content constitutes “unlawful information” on the Internet, as explained below. However, its precise mandate, operational procedure, and the relationship with the KCC are not entirely clear. The KCSC is composed of nine members: three are nominated by the Speaker of the National Assembly; three by the relevant Standing Committee of the National Assembly; and three by the President. The nominees are then appointed by the President. While it claims to be an independent statutory organization, the Special Rapporteur is concerned that the nomination and appointment procedure does not fully guarantee its independence, given the degree of influence that can be exerted by the dominant political party and the President.

33. With regard to the legislative framework, there are two main laws which relate specifically to the regulation of expression on the Internet: the Framework Act, which aims to “promote public welfare through the effective management of telecommunications and promotion of their development”,⁶ and the Network Act, which aims to ensure that “information and communications networks are used in a sounder and safer way”.⁷

(a) *Framework Act on Telecommunications*

34. In his statement containing preliminary findings at the conclusion of the visit, the Special Rapporteur expressed his concerns regarding article 47(1) of the Framework Act, which stipulates that “any person who has publicly made a false communication over the telecommunications facilities and equipment for the purpose of harming the public interest

⁵ Civil Act as amended by Act No.9650, articles 751 and 764.

⁶ Article 1, Framework Act.

⁷ Network Act, art.1.

shall be punished by imprisonment for not more than five years or by a fine not exceeding fifty million won". He noted that terms such as "harming the public interest" and "false communication" are vague; the punishment of imprisonment for publishing false information does not meet the test of proportionality; and the "prohibition to spread false information for the purpose of harming the public interest" is broader than any of the permissible grounds for restricting the right to freedom of expression under article 19, paragraph 3, of the Covenant. The Special Rapporteur thus recommended that the Government repeal, or amend, article 47(1) of the Framework Act so that it is in line with international standards on the right to freedom of opinion and expression.

35. The Special Rapporteur is pleased to note that following his visit, on 28 December 2010, the Constitutional Court ruled that article 47 (1) of the Framework Act is unconstitutional due to vagueness of terms such as "public interest" and "false communication", and thus the provision is now void.

36. The Special Rapporteur also expressed concerns that on 10 January 2009, Park Dae-sung, a blogger known as "Minerva", was arrested for violating article 47(1) of the Framework Act after he posted articles online predicting the economic crisis and criticizing the Government's economic policy. He was accused of "posting fraudulent information on the Internet that harmed public welfare by negatively influencing the Republic of Korea's foreign exchange markets", for two articles in particular. The Special Rapporteur noted that even though Mr. Park was found innocent on 24 April 2009, this case has led to an increase in self-censorship online, particularly regarding criticisms of the Government or its policies, and that the Prosecutor's Office has appealed the decision.

37. The Special Rapporteur has been informed that on 30 December 2010, following the decision by the Constitutional Court regarding article 47(1) of the Framework Act, the Prosecutor's Office withdrew the appeal against Mr. Park Dae-sung.

(b) *Regulation of online content by intermediaries*

38. The Network Act provides that when information which intrudes upon a person's privacy, defames an individual, or otherwise violates another person's rights is disseminated via the Internet, the "victim of such a violation may request the provider of information and communications services who handled the information to delete the information or publish a rebuttable statement".⁸ Upon receiving such a request, the provider of information communication services, or intermediaries, must delete or block access to the information for up to 30 days, then notify the applicant and the publisher of information immediately of the measures taken, and post a public message to inform the users that it has taken the necessary measures.⁹

39. If it is difficult to judge whether a particular information "violates any right or is anticipated that there will probably be a dispute between interested parties", article 44-2(4) of the Network Act stipulates that information and communications services providers, such as blog service providers and web portals with user-generated content, may temporarily block access to the information for up to 30 days, irrespective of whether there has been a request for any measures to be taken.

40. Additionally, article 44-3 stipulates that the service provider may, if it finds that information circulated through its network and managed by it intrudes upon someone's privacy, defames someone, or violates someone's rights, "take temporary measures at its discretion". Further, article 44-2(6) provides that "if [a provider of information

⁸ Network Act, art. 44-2(1).

⁹ Ibid.

communications services] takes necessary measures [to delete or block access to information], it may have its liability for damages caused by such information mitigated or discharged”.

41. The Special Rapporteur is concerned that the Network Act relegates the responsibility for controlling information on the Internet to intermediaries or private companies, rather than to an independent body that is capable of assessing whether a particular post or information violates existing laws on privacy and defamation, and other relevant laws. Moreover, the excessive authority given to intermediaries to regulate online content is a matter of concern, particularly due to the fact that the scope of their liability as prescribed in article 44-2(6) is vague. Hence, although article 44-2(5) of the Network Act stipulates that “Every provider of information and communications services shall clearly state the details, procedure, and other matters concerning necessary measures in its standardized agreement in advance”, there is a concern that intermediaries will be more inclined to err on the side of safety by deleting or blocking access to information to avoid liability.

42. Furthermore, even if the original publisher contests the decision taken by online service providers to delete or block access to the information that he or she has disseminated online, the Network Act does not set out any requirements for the service providers to take any follow-up action. Instead, it is left to the discretion of intermediaries to establish their own procedures in their service terms and conditions. Hence, there are no guarantees in place to ensure that the right to freedom of expression is protected from arbitrary and excessive limitation, including the possibility of abuse by political figures to censor criticism. While individuals may seek recourse through the judiciary after a decision has been taken by online service providers, it can be lengthy and financially burdensome, and creates a chilling effect on the right to freedom of expression.

(c) *Regulation of other “unlawful information” by the KCC and the KCSC*

43. In addition to the above-mentioned types of content regulated by intermediaries, article 44-7(1) of the Network Act prohibits any individual from circulating information via the Internet which contains:

- (a) Obscene content;
- (b) Content that defames another person by divulging a fact, true or false, openly and purposely to disparage the person’s reputation;
- (c) Content that arouses fear or apprehensions by reaching the other person repeatedly;
- (d) Content that mutilates, destroys, alters or forges an information and communications system, data, a programme or similar without a justifiable ground;
- (e) Content that falls within an unwholesome medium for juveniles under the Juvenile Protection Act;
- (f) Content that falls within speculative activities prohibited by Acts and subordinate statutes;
- (g) Content that divulges a secret classified by Acts and subordinate statutes or any other State secret;
- (h) Content that commits an activity prohibited by the National Security Act; or
- (i) Content that attempts, aids or abets to commit a crime.

44. It is further stipulated that the KCC “may order a provider of information and communications services or a manager of an operator of an open message board to reject, suspend, or restrict handling of [above-mentioned types of] information”, subject to deliberation by the KCSC.¹⁰ Should the person responsible for an online service provider or the operator of an open message board fail to comply with the request issued by the KCSC through the KCC, he or she is punishable by imprisonment with prison labour for up to two years or by fine of up to 10 million won.¹¹ Hence, while the KCSC may not technically “order” the KCC and service providers to delete or block information online, given the threat of imprisonment as well as a large fine for failing to comply with its request, the KCSC exerts a significant degree of authority over intermediaries in regulating online content.

45. The Special Rapporteur notes that the prohibited categories of information in article 44-7(1) lack clarity, including the broad prohibition of “content that attempts, aids or abets to commit a crime”, including “obstruction of business”, as prohibited under article 314 of the Criminal Act, which itself is problematic. This has been illustrated in the case of 24 members of a boycott campaign who posted a list of companies that placed advertisements in three newspapers, which they believed were biased towards the Government. On the basis of article 44(7) of the Network Act, the KCSC requested web hosts to delete 58 postings which allegedly encouraged the boycott, and some of the individuals involved were sentenced to imprisonment.

46. In another case that was brought to the attention of the Special Rapporteur, the KCSC recommended for deletion articles posted on the Internet by Choi Byung-sung which exposed that the cement used by certain companies contains electronic waste products with carcinogenic substances. The KCSC claimed that these articles defamed the cement companies, despite the fact that as a result of his articles, the National Assembly deliberated on this issue and requested a national audit to be conducted, which has resulted in improved safety standards. While the Special Rapporteur’s concerns regarding defamation laws have been dealt with in the previous section, the lack of transparency, accountability and scrutiny to ensure that information of public interest is not recommended for blocking or deletion under the pretext of defamation by the KCSC is a matter of serious concern.

47. Indeed, there are insufficient safeguards in place to ensure that the KCSC does not operate as a de facto post-publication censorship body to delete information critical of the Government or powerful corporations on the grounds of violating the Network Act. In this regard, the Special Rapporteur notes that since his visit, the NHRCK has adopted an advisory opinion on 30 September 2010 regarding the KCSC, which found the current procedure of removing illegal content online to be in breach of due process principles, as it does not allow the publisher of the allegedly illegal content to provide his or her opinion before the KCSC makes its decision, and that the decisions made by the KCSC may be arbitrary and subjected to political influence. The opinion also highlighted that the categories of “illegal content” set out in article 44-7 of the Network Act do not meet the legal standard of clarity. On these bases, the NHRCK recommended the authority and functions of the KCSC to be transferred to an independent self-regulatory body with more transparency and accountability.

48. The Special Rapporteur welcomes the NHRCK opinion and underscores that any law that restricts the right to freedom of expression to serve a legitimate aim as set out in article 19, paragraph 3, of the Covenant must be clear and accessible to everyone,¹² and

¹⁰ Network Act, art.44-7(2).

¹¹ Network Act, art.73(5).

¹² See for example Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4), principle 17.

applied by a body which is independent of any political, commercial, or other unwarranted influence in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse.

(d) *Real-name identification system and identification verification system*

49. In 2005, the real-name identification system was introduced under article 82-6 of the Public Officials Election Act (POEA) to identify an individual's name whenever he or she posts information or materials on the Internet, with the purported aim to ensure fairness of elections.

50. In 2007, due to concerns regarding abusive behaviour on the Internet, including a number of suicides committed by prominent actresses, a separate identity-verification system was introduced under article 44(5) of the Network Act. This system verifies the identity of the publisher with his or her resident registration number, although it allows for the use of aliases. Since then, the real-name identification system has been expanded through a series of amendments to existing legislation and the introduction of Presidential decrees. For example, in January 2009, an amendment to the Network Act through a Presidential Decree took effect, requiring websites with at least 100,000 visitors per day to verify the real name of their users before they are able to upload or post information.¹³ Failure to do so is punishable by fine for negligence of up to 30 million won.¹⁴

51. On 9 April 2009, due to such identity-verification systems in the Republic of Korea, Google disabled the features on its Korean-language YouTube site (kr.youtube.com) for uploading videos and comments.

52. The Special Rapporteur is concerned about the impact of such identification systems to the right to freedom of expression, which is rooted in anonymity. Additionally, individuals may be less inclined to express their opinions, particularly those that are critical of the Government, given the threat of criminal sanctions for doing so. In this regard, he notes the decision adopted by the NHRCK in February 2004, which stated that the real-name identification "clearly qualifies as pre-censorship, restricts freedom of Internet-based expression rooted in anonymity, and contravenes freedom of expression". While there are legitimate concerns regarding crimes perpetrated via the Internet and the responsibility of the Government to identify such persons, the Special Rapporteur recommends that the Government consider other means to identify a person and only if there is probable cause or reasonable doubt that the person to be identified has committed or is about to commit a crime.

3. Freedom of expression on before elections

53. The Public Officials Election Act broadly limits political discussion during the critical period leading up to elections. Article 93 of the POEA prohibits individuals to distribute or post photographs, documents, drawings, printed matter, "or the like", which contains content supporting or opposing a political party or candidate, with the intention of influencing the elections, from six months before the election to the election day.¹⁵ A violation of this provision is punishable by imprisonment of up to two years or a fine of up to 4 million won.

54. Although article 58 of the POEA provides that a simple statement of opinion or manifestation of an intention on the election is permitted, the Special Rapporteur notes that

¹³ Network Act, art.44-5; Presidential Decree No.21278, 28 January 2009, art. 29.

¹⁴ Network Act, art.76(1).

¹⁵ POEA, art.93.

it is very difficult to distinguish expression that is permitted from that which is prohibited under article 93. Indeed, the line between campaigning and normal discussion is extremely vague.

55. In addition, on 26 April 2010, the National Election Commission (NEC), responsible for controlling all aspects of elections in the country, issued a guideline entitled “Announcement on the activities of various organizations with respect to election issues”, which prohibits organizations, including NGOs and religious groups, from installing, posting or distributing advertisements, posters, photographs, documents “or the like” on main election issues, as an extension of the prohibition to support or oppose a political party or candidate. Consequently, some of the activities of NGOs and religious groups have been restricted, as they are not permitted to disseminate information or hold a rally on key election issues such as the “Four Major Rivers Restoration Project” and “Free School Meals”.

56. Additionally, as mentioned in the section concerning the real-name identification system, if an individual posts messages or comments expressing support or opposition towards a political party or a candidate, every “Internet press agency” is required to identify that person’s real name,¹⁶ and failure to do so is punishable by a fine of up to 10 million won.¹⁷

57. It is unclear on what basis the dissemination of information related to election issues or candidates may be justified as grounds for limiting the right to freedom of expression. Even if the restrictions mentioned above may be justified as being necessary to achieve one of the purposes listed in article 19, paragraph 3, of the Covenant, the Special Rapporteur is concerned that the six-month ban is a disproportionate length of time to achieve such purposes. Moreover, the Special Rapporteur considers criminal punishment for disseminating information in support of, or in opposition to, a political party, candidate, or election issues to be excessive and disproportionate.

4. Freedom of assembly

58. The right to freedom of expression includes the right to collective expression in the form of peaceful assemblies and demonstrations, which is essential for democracy. In the Republic of Korea, this right is guaranteed in article 21 of the Constitution. However, there are concerns with regard to a de facto authorization system and a lack of accountability of law enforcement officials for alleged use of excessive force against peaceful demonstrators.

59. Article 21 of the Constitution explicitly stipulates that “licensing of assembly and associations may not be recognized”. However, the Assembly and Demonstration Act provides that any person who desires to hold an outdoor assembly or a demonstration must submit a report to the chief of the competent police station with details regarding the planned event,¹⁸ who has the authority to ban an assembly or demonstration if it is deemed to pose a direct threat to public peace and order.¹⁹ A violation of the ban is punishable by imprisonment of up to two years or a fine of up to 2 million won.²⁰

60. In this regard, the Special Rapporteur notes the statement made by the former Chair of the NHRCK in June 2009 that “the Government claims to protect peaceful assemblies and demonstrations and only prohibit ones that may give rise to illegal and violent actions.

¹⁶ POEA, art. 82-6.

¹⁷ Ibid., art. 261.

¹⁸ Assembly and Demonstration Act, art.6.

¹⁹ Ibid., art. 8.

²⁰ Ibid., art. 22.

Yet, by presuming that certain demonstrations will become violent and cracking down on them before violence occurs, the Government violates the fundamental right to freedom of assembly and demonstration". The Special Rapporteur concurs that such a system is in contravention of the Constitutional provision which explicitly prohibits prior approval of assemblies.

61. Article 10 of the Assembly and Demonstration Act also prohibited demonstrations after sunset and before sunrise, except in cases where permission was obtained from the competent authorities. As no permission had been granted by the police for the candlelight demonstrations of 2008, they were presumably unlawful under national law. However, the Special Rapporteur welcomes the decision adopted by the Constitutional Court on 24 September 2009, which ruled that this provision violated the spirit of the Constitution, and which requested the National Assembly to revise the law by 30 June 2010. As the provision had not been revised by the set date, article 10 of the Assembly and Demonstrations Act is now void. NGOs have reported that as a result, there have been many positive changes, as individuals are now free to assemble during the night, and charges of violation of article 10 of the Act which were filed during the candlelight vigils have been dismissed.

62. The Special Rapporteur recognizes the important role that law enforcement agencies play in ensuring public safety during demonstrations. However, various instances of excessive use of force have been brought to the attention of the Special Rapporteur, including during the candlelight demonstrations of 2008 and the confrontation between the riot police and tenants in the Yongsan area of Seoul in January 2009. The latter case has been referred to as the "Yongsan incident", when six people, including one police officer, were killed in a fire during a raid to evict tenants from a building that was to be redeveloped. While it has been reported that some protesters also resorted to violence during such clashes, the Special Rapporteur would like to reiterate the need for law enforcement agencies to adhere to the United Nations Code of Conduct of Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. In this regard, the Special Rapporteur notes that the NHRCK has found that the police used disproportionate force during the candlelight demonstrations and the Yongsan incident in its decisions of 27 October 2008 and 11 January 2010, respectively.

63. Although the Special Rapporteur is cognizant of efforts made by the Korean National Police Agency (KNPA) to investigate allegations of violence by riot police officials, he is concerned that investigations of cases of excessive use of force is hindered by the fact that there are no visible name badges, identification numbers or other identifiable information on the uniform of riot police. It has also been brought to his attention that the police do not wear badges, which makes it impossible for individuals to file charges of assault or other forms of violence. In this regard, the Special Rapporteur would like to stress the importance of prompt and thorough investigations of all allegations of excessive use of force by an independent body, and of bringing responsible persons to account. Such measures are not only essential to protect individuals' rights, but also to build public confidence in the Government.

64. Since his visit, however, he has been informed by the Government that the name badges are now attached to all police uniforms, and that there are markings on the protective helmets worn by police officials, which make it possible to identify which unit they belong to.

5. Restrictions to freedom of expression on the basis of national security

65. The Special Rapporteur is acutely aware of the security concerns faced by the Republic of Korea, particularly in light of the Cheonan incident of 26 March 2010.

Moreover, the Special Rapporteur recognizes that States can legitimately have national security laws in place.

66. However, the Special Rapporteur notes that the Human Rights Committee has on several occasions expressed concerns regarding the National Security Act (NSA), and in particular its article 7, which provides that anyone who praises, incites, or propagates the activities of an anti-Government organization, a member thereof or of the person who has received an order from it, or who acts in concert with it, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment of up to seven years.

67. Specifically, the Human Rights Committee has stated that it “considers the scope of activities that may be regarded as encouraging “anti-State organizations” under article 7 of the NSA is unreasonably wide. From the cases that have come before the Committee in individual communications under the Optional Protocol, and other information provided on prosecutions brought under article 7, it is clear that the restrictions placed on freedom of expression do not meet the requirements of article 19, paragraph 3, of the Covenant, as they cannot be regarded as necessary to protect national security. 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.”²¹ The Committee thus stated that “the State party must urgently amend article 7 as to make it compatible with the Covenant”.²²

68. In 2006, the Human Rights Committee noted the attempts made in recent years to amend the NSA and the absence of consensus regarding its alleged continued necessity for reasons of national security, but reiterated its concerns that prosecutions continue to be pursued under article 7 of the NSA, and that the restrictions placed on freedom of expression do not meet the requirements under article 19(3) of the Covenant. It thus reiterated its recommendation to ensure the compatibility of article 7 of the NSA, and sentences imposed under it, with the requirements of the Covenant as a matter of urgency.²³

69. Additionally, following his official visit to the Republic of Korea in June 2005, the former Special Rapporteur noted that “only in exceptional cases can a nation’s security be directly threatened by a person’s exercise of the right to freedom of expression. Such a threat would require, at the very least, the clear establishment of the person’s ability and intention to cause the taking of actions directly threatening national security, in particular by propagating or inciting the use of violence. In no instance may the exercise of the right to freedom of expression be punished on the mere ground that it might, possibly, jeopardize national security. It is for the State to establish what consequences would ensue and why they would constitute a direct threat to national security”. He urged the Government to repeal the NSA and to consider other means, in accordance with international human rights law, to protect its national security.²⁴

70. Moreover, the NHRCK recommended in August 2004 that the NSA be abolished, given its “long history of seriously infringing on human rights”, including the right to freedom of expression, and the fact that provisions in the Criminal Act and other laws related to national security provide a sufficient basis to address the country’s security concerns.

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

²² Ibid.

²³ CCPR/C/KOR/CO/3, 28 November 2006, para.18.

²⁴ E/CN.4/1996/39/Add.1, para. 16.

71. Given the vagueness of article 7 of the NSA and its impact in inhibiting discussions and exchange of views on matters of public interest, as noted by several bodies mentioned above, the Special Rapporteur encourages the Government to abolish this provision.

72. Finally, the Special Rapporteur is concerned by the banning of 23 books in the military by the Minister of National Defence on 22 July 2008, on the grounds that these books were seditious, and may affect the thinking of soldiers so as to prevent them from properly carrying out their duties towards the country. He notes that there is a lack of clarity with regard to criteria or guidelines used to determine the types of books that are deemed to be seditious. Seven military judicial officers filed a constitutional complaint regarding this prohibition, and as a consequence, on 19 March 2009, two were expelled from the military by the Ministry of National Defence for not adhering to the internal regulations and procedures and disgracing the military.

73. Since the visit of the Special Rapporteur, on 28 October 2010, the Constitutional Court adopted a decision ruling that the banning of the books by the Ministry of National Defence is constitutional, as the “military limited the books that seriously undermine the spiritual strength of the soldiers” in accordance with article 16(2) of the Military Service Regulation, thus affirming that the scope and the intent behind the ban is justifiable and appropriate.

74. Additionally, on 23 April 2010, the Seoul Administrative Court ruled that the disciplinary actions taken by the Ministry of National Defence, including the dismissal of two military judicial officers and reprimand of four other officials, were justified, on the grounds that the right to file a petition to the Constitutional Court may be restricted for national security purposes. The court argued that the military judicial officers did not resort to the petition procedure within the military before bringing the case to the Constitutional Court, thus breaching the military chain of command. The plaintiffs have reportedly submitted an appeal to a higher court on 12 May 2010.

75. The Special Rapporteur emphasizes that the right to seek and receive information includes the freedom to select the types of books one may read, which is essential for realizing one’s right to freedom of thought and opinion. As the NHRCK stated in its decision of September 2009, “one’s status as a human being takes precedence over one’s status as a soldier in uniform”. The Special Rapporteur considers banning of books an undemocratic practice in any part of the world.

6. The right to freedom of opinion and expression of public officials

76. In the Republic of Korea, public officials, including Government officials and teachers of public schools, are prohibited from expressing their opinions on the basis that they should remain politically neutral in accordance with the State Public Officials Act. The Special Rapporteur is particularly concerned about members of the Korea Teachers and Education Workers Union (KTU, or “Jeon Gyo Jo”), who have been subjected to investigation, dismissal, suspension without pay, harassment and surveillance for signing peaceful statements on matters of interest to the public.

77. On 18 June 2009, 17,147 teachers signed a statement requesting the withdrawal of education policies designed to drive students into fierce competition at the expense of quality education. In response, the Ministry of Education, Science and Technology announced that the teachers who signed the statement would receive disciplinary sanctions, including dismissal of 22 KTU central executive members from their teaching posts, and suspension of 67 KTU provincial leaders and full-time unionists. On 29 June 2009, the Seoul Prosecutor’s Office reportedly launched an investigation into 89 KTU Executive Committee members who had signed the statement, and police forces raised the KTU’s offices in Seoul, during which computer hard drives and documents were seized.

78. On 19 July 2009, the KTU issued a second statement entitled “Teachers’ Statement for the Protection of Democracy”, which inter alia called for schools to be run democratically and teachers’ freedom of expression to be respected, and was endorsed by 28,637 teachers across the country. Consequently, the Government again filed a complaint against 89 KTU leaders to the Prosecutor’s office, and initiated disciplinary procedures against 22 KTU central-committee members and 67 other full-time union officials.

79. The Special Rapporteur has been informed that at least eight teachers have been expelled, 21 suspended, and one has received a salary cut as a result of their involvement in the above-mentioned statements. Additionally, many have reported that they cannot lead normal lives, as they are subjected to harassment and surveillance.

80. While the Special Rapporteur recognizes the influential role of civil servants to shape views and opinions and thus their responsibility to behave in an objective and fair manner, they are also entitled, as individuals, to their right to freedom of opinion and expression, particularly when it is exercised outside of their official duties and on matters of public interest, such as educational policies. Moreover, the Joint ILO and UNESCO Recommendation by the Committee of Experts on the Application of Recommendations Concerning Teaching Personnel states that “teachers should be free to exercise all civic rights generally enjoyed by citizens and should be eligible for public office”.²⁵ It also provides that “the participation of teachers in social and public life should be encouraged in the interests of the teacher’s personal development, of the education service and of society as a whole”.²⁶ Furthermore, in its decision of 29 May 2008, the Constitutional Court of the Republic of Korea also ruled that even though civil servants are required to be politically neutral, they cannot be an exception to the guarantee of freedom of expression, a view that has also been endorsed by the NHRCK.

7. Independence of the media

81. While there may be several newspapers in the Republic of Korea that share the same political views as the ruling party, there are many independent and pro-opposition media to ensure diversity and pluralism of the media in the country. However, the Special Rapporteur is concerned that after the new administration took office in 2008, the heads of various media outlets, including Korea Broadcasting Station (KBS), Korean Broadcasting Advertising Corporation, Arirang TV, Sky Life and Yonhap Television Network (YTN), were replaced, reportedly by supporters of President Lee Myung-bak. The Special Rapporteur stresses the importance of ensuring that the independence of heads and management of broadcasting corporations be guaranteed through an effective appointment process.

82. In addition, in July 2009, amendments to the Newspaper Act and the Broadcasting Act were proposed by the GNP and adopted by the National Assembly. The amendments purportedly aim to allow cross-ownership in printing and broadcasting sectors. The Special Rapporteur is concerned that conglomerates, newspaper companies and foreign capital will now be able to enter the broadcasting sector, which may undermine media diversity and pluralism.

²⁵ Joint ILO and UNESCO Recommendation by the Committee of Experts on the Application of Recommendations Concerning Teaching Personnel, art. 80.

²⁶ Ibid, art.79.

8. National Human Rights Commission of Korea

83. The NHRCK was established by the NHRC Act in 2001 and has played an important role in promoting and protecting human rights in the Republic of Korea, including the right to freedom of opinion and expression. In particular, the Special Rapporteur welcomes the decisions of the NHRCK regarding a violation in over a dozen cases related to freedom of opinion, expression and assembly between 2004 and 2009, most of which have already been mentioned in the report.

84. The Special Rapporteur notes that since the new administration took office, three standing Commissioners and six non-standing Commissioners, out of the total of 11 Commissioners of the NHRCK, have been appointed.²⁷ Since then, due to the lack of majority votes required in the Plenary Committee, the NHRCK has reportedly decided not to adopt a decision on key cases involving violations of the right to freedom of expression, with the majority of Commissioners reasoning that the Commission should wait until the cases are resolved in the courts. This includes the prohibition of demonstrations after sunset as stipulated in article 10 of the Assemblies and Demonstrations Act and the defamation suit filed by the NIS against Mr. Park Won-soon. The Special Rapporteur notes, however, that the NHRC Act specifically states that if deemed necessary by the Commission, it may present its opinion on de facto and de jure matters to the competent court or the Constitutional Court.²⁸

85. As noted by the Sub-Committee on Accreditation (SCA) of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, the process of appointing Commissioners, on nomination from the President, National Assembly or the Chief Justice of the Supreme Court, does not provide for formal public consultation in the recruitment and scrutiny of candidates nor the participation of civil society.²⁹ Given the crucial role of the NHRCK in promoting and protecting the right to freedom of opinion and expression, he emphasizes the importance of ensuring that the appointment process guarantees the independence and human rights expertise of the Commissioners.

86. Despite the NHRCK's reluctance to deliberate on prominent cases noted above, the Special Rapporteur welcomes the fact that since his visit, the NHRCK has adopted an advisory opinion on 30 September 2010 regarding the KCSC. He hopes that the NHRCK will continue to be proactive in examining human rights violations promptly, and, as recommended by the SCA, to "consider issuing public statements and reports through the media in a timely manner to address urgent human rights violations".³⁰

VI. Conclusions and recommendations

87. Since 1987, the Republic of Korea has achieved significant gains in human rights as a vibrant democracy with one of the highest broadband Internet penetration in the world. The Special Rapporteur commends the judiciary for upholding the right to freedom of opinion and expression in accordance with international standards where restrictions have been applied. However, he notes with concern that domestic laws which restrict the right to freedom of expression do not meet the criteria that

²⁷ However, since a new Chairperson was appointed in July 2007, two Standing Commissioners and one Non-Standing Commissioner has reportedly resigned.

²⁸ NHRCK Act, art.28.

²⁹ A/HRC/10/55, section 4.10.

³⁰ A/HRC/10/55, section 4.10.

laws restricting the right must be: (a) clear and unambiguous; (b) necessary to achieve one of the purposes set out in article 19, paragraph 3, of the International Covenant on Civil and Political Rights and have the demonstrable effect of attaining that purpose; and (c) proportionate to achieve the purported aim. Hence, even though the judiciary may ultimately uphold the right to freedom of expression, the existence of laws that do not conform to international standards, and the threat of harsh criminal sanctions, encourages self-censorship.

88. To further strengthen the democratic foundations of the Republic of Korea by guaranteeing an open, frank and diverse expression of opinions, including criticisms of public officials, the Special Rapporteur recommends the steps set out below.

A. Defamation

89. The Government should, in line with the global trend, remove defamation as a criminal offence from the Criminal Act, given the existing prohibition of defamation in the Civil Act. The Special Rapporteur stresses that public officials and bodies should refrain from filing defamation suits, as public office entails public scrutiny as part of checks and balances in any democratic society. He also encourages the Government to promote a culture of tolerance regarding criticism, particularly of public officials and bodies and other influential figures, which is essential for democracy.

B. Freedom of opinion and expression on the Internet

90. The Special Rapporteur welcomes the decision adopted by the Constitutional Court on 28 December 2010, which ruled that article 47(1) of the Framework Act is unconstitutional, and is thus now void.

91. However, the Special Rapporteur remains concerned that the types of “illegal” online content as set out in article 44(7) of the Network Act are broad and ambiguous, which can create a chilling effect on the exercise of the right to freedom of opinion and expression. The Special Rapporteur therefore recommends that the Government to ensure that the provisions in the Network Act, including article 44(7), are brought in line with the principles of legal clarity and justified as being necessary to protect one of the grounds listed in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.

92. The Special Rapporteur is concerned about the vague condition and scope of liability of intermediaries as prescribed in article 44-2(6) of the Network Act, which may lead to excessive regulation of online content. The Special Rapporteur recommends that the Government repeal all provisions relating to intermediary liability.

93. The Special Rapporteur is also concerned that there are insufficient safeguards to ensure that the KCSC does not operate as a de facto post-publication censorship body to delete information critical of the Government on the grounds of violating the Network Act. In accordance with the decision adopted by the NHRCK on 30 September 2010, the Special Rapporteur recommends the current functions of the KCSC be transferred to an independent body which is free from any political,

commercial, or other unwarranted influences with adequate safeguards against abuse, including judicial review.

94. Given that the real-name registration system restricts the exercise of the right to freedom of Internet-based expression rooted in anonymity, the Special Rapporteur recommends that the Government consider other means to identify a person and only if there is probable cause or reasonable doubt that the person to be identified has committed or is about to commit a crime.

C. Freedom of opinion and expression before elections

95. The Special Rapporteur recommends that the Government fully guarantee the right of freedom of expression in the crucial period leading up to elections, including open, free, and public exchange of views and information on key issues related to elections and the candidates.

D. Freedom of assembly

96. The Special Rapporteur recommends that the Government ensure the right of all individuals to freedom of assembly and peaceful demonstrations, as a collective exercise of the right to freedom of expression, by refraining from any de facto practices of prior approval in violation of article 21 of the Constitution. In addition, the Special Rapporteur calls upon the Government to ensure that allegations of excessive use of force by law enforcement officials be effectively investigated and that the persons responsible be held accountable.

E. Restrictions on freedom of opinion and expression on the basis of national security

97. While protection of national security is one of the legitimate aims for limiting the right to freedom of expression, the Special Rapporteur recommends that the Government abolish article 7 of the NSA, as it is vague, inhibits legitimate discussions on matters of public interest, and has a long history of seriously infringing on human rights, in particular the right to freedom of opinion and expression.

98. The Special Rapporteur encourages the Government to give effect to the concluding observations and views of the Human Rights Committee on individual cases where it found the application of the NSA to be in violation of the right to freedom of opinion and expression.

99. The Special Rapporteur is concerned by the decision adopted by the Constitutional Court on 23 October 2010, which ruled that the banning of 23 “seditious” books within military units and barracks is constitutional. He underscores that all individuals have the right to choose the types of books to read, as an extension of their right to the freedoms of thought and opinion. The Special Rapporteur considers banning of books an undemocratic practice in any part of the world, and encourages the Government to repeal the prohibition, particularly in light of the fact that there are no clear criteria to determine what types of books are seditious.

F. Right to freedom of opinion and expression of public officials

100. While the Special Rapporteur recognizes the influential role of public school teachers to shape the views and opinions of their students, he recommends that the Government guarantee their right to freedom of expression, to which they are entitled as individuals, particularly when it is exercised outside of their official duties and on matters of public interest, such as educational policies.

G. Independence of the media

101. The Special Rapporteur commends the existence of media pluralism in the Republic of Korea. However, there is a need to ensure that there is an effective appointment procedure which guarantees the independence of heads and management of broadcasting corporations. Additionally, he urges the Government to promote and protect media diversity and pluralism by preventing cross-ownership of printing and broadcasting sectors, as well as the formation of conglomerates.

H. National Human Rights Commission of Korea

102. The Special Rapporteur commends the work of the National Human Rights Commission of Korea, particularly in finding a violation in over a dozen cases related to freedom of opinion and expression and freedom of assembly between 2004 and 2010. Given its crucial role to promote and protect the right to freedom of opinion and expression, he encourages the Government to fully implement the recommendations issued by the NHRCK, and to give effect to the recommendations made by the SCA to ensure complete functional autonomy from the Government, a broad and transparent appointment process, and more autonomy to appoint its own staff.
