

In the Constitutional Court of Korea

**Amicus Brief on the Republic of Korea's National Security Act before the Public Pleading of
the Constitutional Court of Korea**

**Amicus Brief by:
Asian Forum for Human Rights and Development (FORUM-ASIA)**



Submitted by:

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I. Introduction

1. The Asian Forum for Human Rights and Development (FORUM-ASIA) submits this **Amicus Brief** on the Republic of Korea (hereinafter South Korea)'s National Security Act, in consideration of the public pleading before the Constitutional Court of Korea on 15 September 2022.
2. Founded in 1991, FORUM-ASIA is a regional human rights non-governmental organization with 85 member organizations across 23 countries mainly in Asia, including in South Korea, where it has two members, People's Solidarity for Participatory Democracy (PSPD) and Korean House for International Solidarity (KHIS). FORUM-ASIA works to promote and protect all human rights, with particular focus on the rights to freedom of expression and freedom of peaceful assembly and association, as well as strengthening civic space and protection of human rights defenders (HRDs). It also has Consultative Status with the United Nations Economic and Social Council (ECOSOC).
3. This Amicus Brief submits that South Korea's National Security Act, Act No. 11042, contains provisions that violate international laws that are binding on South Korea, specifically in relation to the rights to freedoms of opinion and expression, freedom of peaceful assembly and association, right to liberty and security of person, right to be free from torture and other cruel, inhuman or degrading treatment or punishment and right to cultural life. Especially, Articles 2 and 7 of the National Security Act are in contention.

II. South Korea's International Human Rights Obligations and International Human Rights Standards Relevant to the National Security Act

a. Universal Declaration of Human Rights (UDHR)

4. The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10 December 1948, is a landmark document enshrining human rights and freedoms accepted internationally. The following articles of the UDHR are relevant to the National Security Act of South Korea, touching upon the right to liberty and security of person, right to be free from torture, freedom of thought, freedom of opinion and expression, freedom of peaceful assembly and association and right to cultural life. These rights and freedoms are also manifested in the international treaties that South Korea has ratified as well as in the Constitution of the Republic of Korea.
5. Article 3: "Everyone has the right to life, liberty and security of person."
6. Article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
7. Article 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."
8. Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."
9. Article 20: "(1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association."

10. Article 27: “(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

b. South Korea’s Obligation to International Law

11. South Korea has ratified the International Covenant on Civil and Political Rights (ICCPR) (10 April 1990), International Covenant on Economic, Social and Cultural Rights (ICESCR) (10 April 1990), and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (9 January 1995), all of which are international treaties that guarantee the fundamental human rights including freedom of peaceful assembly and association, freedom of expression, right to be free from torture and other cruel, inhuman or degrading treatment or punishment and right to cultural life.
12. Adoption of international law is enshrined in Article 6 of the Constitution of the Republic of Korea (the Constitution). “Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.”
13. Further, under Article 37 of the Constitution, (1) freedoms and rights that are not enlisted in the Constitution should not be neglected, and (2) the restriction on these freedoms and rights for national security should not violate any “essential aspect of the freedom or right.”¹
14. In addition to South Korea’s obligations to its ratified international treaties, it is also bound to well-respected norms under customary international law, including the right to be free from torture and other cruel, inhuman or degrading treatment or punishment.

International Treaties Binding on South Korea

c. International Covenant on Civil and Political Rights (ICCPR)

15. Article 7 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
16. In its General Comment No. 20, the Human Rights Committee (HRC) has elaborated that the prohibition of torture and other cruel, inhuman or degrading treatment or punishment also relates to “acts that cause mental suffering to the victim,” including “excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.”² Further, the HRC has noted that States Parties should inform of the “legislative, administrative, judicial and other measures they take to prevent” acts delineated in Article 7.³

¹ The second clause of Article 37 imposes restrictions on the State’s action, limiting its “power to the extent necessary to achieve the legitimate purpose pursued.” It applies the “principle of proportionality” that in effect protects the right to freedom of assembly in South Korea strictly in line with international law. André Javier Gutiérrez Gil, “The Case Law from the Constitutional Court of Korea on the Conscientious Objection to Military Service” in *The Constitutional Court of Korea as a Protector of Constitutionalism: Global Perspectives* (Constitutional Court of Korea, Constitutional Research Institute 2021) p. 195.

² U.N. Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.1 (10 March 1992) para. 5.

³ U.N. Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.1 (10 March 1992) para. 8.

17. Article 9 mandates that “[e]veryone has the right to liberty and security of person” and no one should be “subjected to arbitrary arrest or detention.”
18. According to Article 18 of the ICCPR, “[e]veryone shall have the right to freedom of thought, conscience and religion.” This freedom can only be limited as “prescribed by law and [] necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” As indicated in General Comment No. 22, this limitation is to be strictly interpreted, where restrictions must be imposed only for prescribed purposes and “be directly related and proportionate to the specific need on which they are predicated.”⁴
19. Moreover, everyone has the “right to hold opinions without interference” and the “right to freedom of expression” through any media of one’s choice under Article 19.
20. In General Comment No. 34 on freedoms of opinion and expression, the HRC has emphasized that freedoms of opinion and expression are “indispensable conditions for the full development of the person” and “constitute the foundation stone for every free and democratic society.”⁵ The HRC also recognizes the relationship between “opinion and thought” under Articles 18 and 19, as well as the “relationship of freedom of expression to the other rights” and the impact that restriction on freedom of expression will have on other rights and freedoms recognized under the ICCPR.⁶ Any restriction on the freedoms of opinion and expression through law must be written with “sufficient precision to enable an individual to regulate his or her conduct accordingly.”⁷ For the restriction to be deemed compatible with Article 19, (1) it must be “necessary” for a legitimate purpose, and (2) it must not be overbroad.⁸
21. The right of peaceful assembly is recognized under Article 21 of the ICCPR. It further elaborates that there shall be no restrictions on this right “other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”
22. Article 22 further ensures the freedom of association, including the right to form and join trade unions. Similar to Article 21, Article 22 does not allow restrictions “on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”
23. In General Comment No. 37 on Article 21, the HRC has elaborated that any restriction on the right of peaceful assembly must be “necessary and proportionate,” especially “in the context of a society based on democracy, the rule of law, political pluralism and human rights, as opposed to

⁴ U.N. Human Rights Committee, CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) para. 8.

⁵ U.N. Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/35 (16 December 2014) para. 2.

⁶ U.N. Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/35 (16 December 2014) paras. 4-5.

⁷ U.N. Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/35 (16 December 2014) para. 25.

⁸ U.N. Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/35 (16 December 2014) paras. 33-34.

being merely reasonable or expedient.”⁹ The necessity threshold for restriction based on the “interests of national security” is satisfied if the restriction is “necessary to preserve the State’s capacity to protect the existence of the nation, its territorial integrity or political independence against a credible threat or use of force.”¹⁰ Moreover, sanctions for unlawful conduct on those who have participated in a peaceful assembly “must not be based on ambiguous or overbroadly defined offences.”¹¹

d. International Covenant on Economic, Social and Cultural Rights (ICESCR)

24. Article 2(1) of the ICESCR imposes on States Parties an obligation “to take steps, individually and through international assistance and co-operation” to progressively achieve the “full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” The Committee on Economic, Social and Cultural Rights (CESCR) has noted that this applies to all rights recognized in the ICESCR, including articles 6 to 9 where “legislation may also be an indispensable element for many purposes.”¹²
25. Article 4 of the ICESCR holds that the States Parties may impose limitations defined by law on the rights guaranteed by the ICESCR “only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” The CESCR has indicated in General Comment No. 14 that a State Party imposing such restrictions as elaborated under Article 4 “has the burden of justifying such serious measures.”¹³
26. According to Article 8 of the ICESCR, the right to “form trade unions and join the trade union” of one’s choice cannot be restricted unless “prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.”
27. Article 15 guarantees the right to “take part in cultural life” and to benefit from the “protection of the moral and material interests resulting from any scientific, literary or artistic production of which [one] is the author.” The States Parties have the obligation to “respect the freedom indispensable for scientific research and creative activity.”
28. The Committee on Economic, Social and Cultural Rights elaborates that the right elaborated in Article 15 derives from the “inherent dignity and worth of all persons.”

e. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

⁹ U.N. Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (article 21), U.N. Doc. CCPR/C/GC/37 (17 September 2020) paras. 36, 40.

¹⁰ U.N. Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (article 21), U.N. Doc. CCPR/C/GC/37 (17 September 2020) para. 42.

¹¹ U.N. Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (article 21), U.N. Doc. CCPR/C/GC/37 (17 September 2020) para. 67.

¹² U.N. Committee on Economic, Social and Cultural Rights, CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23 (14 December 1990) para. 3.

¹³ U.N. Committee on Economic, Social and Cultural Rights, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (11 August 2000) para. 42.

29. Article 2 of the CAT states that each “State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture,” and no circumstances can be invoked to justify torture.
30. According to Article 16, the State Party’s obligation extends to preventing “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”
31. As explained in the General Comment No. 2 by the Committee against Torture, the aforementioned obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter ill-treatment) are “indivisible, interdependent and interrelated.”¹⁴ States Parties have obligations to both “eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment” and “take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented.”¹⁵ In ensuring this, States Parties also need to continually “review and improve their national laws and performance under the Convention in accordance with the Committee’s concluding observations and views adopted on individual communications.”¹⁶
32. Apart from the international treaties, the right to be free from torture and other ill-treatment is also recognized as a norm of customary international law, imposing an absolute ban on torture and other ill-treatment by internationally recognized norm and general practice.¹⁷

International Principles

f. Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles)

33. The Johannesburg Principles, while non-binding, are one of the foundational guiding principles on national security and freedom of expression widely adopted by the international community including the UN special procedures mandate-holders. The principles were endorsed by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Abid Hussain, in his reports to the UN Commission on Human Rights (UNCHR) and has been regularly referred to by the OHCHR in its resolutions every year.¹⁸

¹⁴ U.N. Committee against Torture, General Comment No. 2: Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (24 January 2008) para. 3.

¹⁵ Committee against Torture, General Comment No. 2: Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (24 January 2008) para. 4.

¹⁶ U.N. Committee against Torture, General Comment No. 2: Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (24 January 2008) para. 4.

¹⁷ International Committee of the Red Cross, “Prohibition and Punishment of Torture and Other Forms of Ill-treatment” (June 2014) <<https://www.icrc.org/en/download/file/1025/prohibition-and-punishment-of-torture-icrc-eng.pdf>>.

¹⁸ In his report to the Commission of Human Rights, Special Rapporteur Abid Hussain has written, “for the purpose of assisting all Governments to promote and protect the right to freedom of expression and to move expeditiously and effectively towards achieving this goal, the Special Rapporteur recommends that the Commission on Human Rights endorse the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which are contained in the annex to the present report and which the Special Rapporteur considers give useful guidance for protecting adequately the right to freedom of opinion, expression and information.” U.N. Commission on Human Rights, Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45, U.N. Doc. E/CN.4/1996/39 (22 March 1996) para. 154.

34. Similar to Article 19 of the ICCPR, Principle 1 clearly lays out that there can be no restriction on freedom of expression on the ground of national security “unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.”
35. Principle 6 emphasizes that for an expression to be considered a threat to national security, it has to have an intention of inciting imminent violence and is directly connected to the occurrence of, or likelihood of, an imminent violence. Under Principle 7, an expression does not constitute a threat to national security if it is mere “criticism of, or insult to, the nation, the state or its symbols, the government” and its officials.
36. Under Principle 8, an expression cannot be prevented or punished as a threat to national security if it merely “transmits information issued by or about an organization that a government has declared threatens national security or a related interest”

g. Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)

37. The Siracusa Principles, internationally recognized principles adopted by the American Association for the International Commission of Jurists, discuss the connection between “respect for human rights and the maintenance of international peace and security,” and emphasize that undermining human rights and fundamental freedoms may harm national security as well, which is included in Principle 32 as well.¹⁹
38. Under Principle 29, national security may be a legitimate reason to restrict certain rights in strictly limited circumstances. Under Principle 30, it is elaborated that national security cannot be invoked as a reason for restrictions “to prevent merely local or relatively isolated threats to law and order.”
39. Principle 31 further emphasizes that the restrictions must be precise and narrow, reiterating that “[n]ational security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.”
40. According to Principle 33, “[p]ublic safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.” Similar to national security, public safety can justify certain limitations on rights under Principle 34, but it “cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.”

h. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders)

41. The United Nations General Assembly adopted the Declaration on Human Rights Defenders during its 53rd session in 1999. The Declaration is based on the UDHR and other internationally binding treaties such as ICCPR and ICESCR as “basic elements of international efforts to promote universal respect for and observance of human rights and fundamental freedoms and the

¹⁹ American Association for the International Commission of Jurists, “Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights” (April 1985) p. 3.

importance of other human rights instruments adopted within the United Nations system, as well as those at the regional level.”²⁰

42. Article 12(1) emphasizes the right to “participate in peaceful activities against violations of human rights and fundamental freedoms.”
43. Article 12(2) mandates the State’s obligations to take necessary measures to protect everyone, individually or collectively, “against any violence, threats, retaliations, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights” elaborated in the Declaration on Human Rights Defenders.
44. According to Article 12(3), this includes protection under national law “in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.”
45. The Commentary to the Declaration on Human Rights Defenders, citing the General Comment No. 31 of the HRC, has reaffirmed that the State Party’s obligation to protect as included in Article 12 includes both negative and positive aspects, and any restrictions imposed by the States on individual rights must be necessary and proportionate.²¹

III. South Korea’s National Security Act Is in Violation of International Laws

46. Article 2 of the National Security Act defines an “anti-government organization” as a “group which uses fraudulently the title of the government or aims at a rebellion against the State, and which is provided with a command and leadership system.”
47. Article 7 of the National Security Act delineates that (1) “[a]ny person 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, or propagates or instigates a rebellion against the State, 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 for not more than seven years,” (3) “[a]ny person who constitutes or joins an organization aiming at the act as referred to in paragraph (1) shall be punished by imprisonment for a definite term of one or more years,” and (5) “[a]ny person who manufactures, imports, reproduces, holds, carries, distributes, sells or acquires any documents, drawings or other expression materials, with the intention of committing the act as referred to in paragraph (1), (3) or (4), shall be punished by the penalty as referred to in the respective paragraph.”
48. The National Security Act was first adopted in 1948 as a succession of the Law for Maintenance of the Public Security during the Japanese colonial period. Historically, it has been applied arbitrarily and often with the intention of suppressing freedom of association and expression of opinions that were not favorable to the government, as well as debates and academic discussions

²⁰ U.N. General Assembly, Declaration the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. Doc. A/RES/53/144 (8 March 1999) preambular para. 2.

²¹ U.N. Special Rapporteur on the situation of human rights defenders, Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (July 2011) p. 10.

on North Korea.²² Articles 2 and 7 of the National Security Act have been criticized both nationally and internationally for their arbitrariness and overbroad criminalization of activities deemed “anti-government.”

49. As the HRC commented in its concluding observations on the second periodic report of South Korea, the National Security Act is “used to establish special rules of detention, interrogation and substantive liability that are incompatible” with Articles 9, 18 and 19 of the ICCPR.²³ In the 2015 concluding observations on the combined third to fifth periodic reports of South Korea, the Committee against Torture expressed concern over the fact that “persons continue to be arrested under the National Security Act and that some persons under the Act have allegedly been subjected to arbitrary arrest and detention, as well as to coerced confessions.”²⁴
50. This amicus brief asserts that Articles 2 and 7 of the National Security Act are in violation of international human rights standards, especially in relation to the freedom of opinion and expression, freedom of peaceful assembly and association, right to be free from torture and other ill-treatment and right to cultural life.
51. The international community, including international human rights organizations, other Member States of the UN and mandate holders of the special procedures, expressed similar concerns over the specific provisions of the National Security Act.²⁵

Freedoms of Opinion and Expression and Freedom of Peaceful Assembly and Association

52. Article 7 of the National Security Act, along with Article 2, violates the international human rights standards to respect freedoms of opinion and expression as well as freedom of peaceful assembly and association enshrined in the UDHR (Article 18, 19 and 20), ICCPR (Articles 18, 19 and 21) and ICESCR (Article 8).
53. As the HRC has laid out in General Comments No. 34 and No. 37, restrictions on freedoms of opinion and expression and freedom of assembly and association can only apply in very limited circumstances. The restrictions must be necessary for a legitimate purpose, proportionate to the purpose and not be ambiguous or overbroad.
54. The provisions of Article 2 and Article 7, as they are in the current phrasing, are not necessary for a legitimate objective of national security or proportionate to the objective. Moreover, the

²² Amnesty International, “The National Security Law: Curtailing Freedom of Expression and Association in the Name of Security in the Republic of Korea” (Amnesty International Publications 2012) pp. 7-10 <<https://www.amnesty.org/en/wp-content/uploads/2021/06/asa250062012en.pdf>>.

²³ U.N. Human Rights Committee, Concluding observations of the Human Rights Committee: Republic of Korea, U.N. Doc. CCPR/C/79/Add.114 (1 November 1999) para. 8.

²⁴ U.N. Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the Republic of Korea, U.N. Doc. CAT/C/KOR/CO/3-5 (30 May 2017) para. 15.

²⁵ See generally, U.N. Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the Republic of Korea, U.N. Doc. CAT/C/KOR/CO/3-5 (30 May 2017); Human Rights Watch, “Cold War Relic Law Criminalizes Criticism” (28 May 2015) <<https://www.hrw.org/news/2015/05/28/south-korea-cold-war-relic-law-criminalizes-criticism>>; U.N. Human Rights Committee, Concluding observations on the fourth periodic report of the Republic of Korea, U.N. Doc. CCPR/C/KOR/CO/4 (3 December 2015); U.N. Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, U.N. Doc. A/HRC/25/55/Add.1 (23 December 2013); Amnesty International, “The National Security Law: Curtailing Freedom of Expression and Association in the Name of Security in the Republic of Korea” (Amnesty International Publications 2012) <<https://www.amnesty.org/en/wp-content/uploads/2021/06/asa250062012en.pdf>>.

definition of “anti-government organization” under Article 2 as well as the activities regulated under Article 7 are ambiguous and overbroad. Therefore, the restrictions imposed under Articles 2 and 7 of the National Security Act are not permissible under international law.

i. Article 7 is not necessary and proportionate for a legitimate purpose

55. Article 7 regulates activities that directly relate to freedoms of opinion and expression and freedom of assembly and association, and thus, the restriction must be necessary for a legitimate purpose, and proportionate to that purpose.
56. The alleged purpose of the restriction is national security, which can be a legitimate objective of restriction on both the freedoms of opinion and expression and freedom of assembly and association.²⁶ The necessity based on national security, however, should be assessed strictly against the standards of a democratic society and the rule of law and necessary “to preserve the State’s capacity” to protect itself against “credible threat or use of force.”²⁷
57. Based on this standard of necessity, and in light of the Johannesburg Principles’ elaboration of necessity for national security as strictly limited to prevention of imminent violence, the activities punishable under Article 7 of the National Security Act do not pass the necessity threshold of a democratic society.
58. Further, there are no safeguards in Article 7 that would protect individuals who are exercising their freedoms of opinion and expression and freedoms of assembly and association in accordance with the standards of a democratic society. Hence, the prescription of punishment of imprisonment up to seven years under Article 7 is not proportionate to the alleged necessity.
59. The HRC already noted in its communication on individual complaint *Park v. Republic of Korea* that the South Korean government “failed to specify the precise nature of the threat” for restricting freedom of expression under Article 7 of the National Security Act.²⁸ This position was reiterated in its communication on individual complaint *Shin v. Republic of Korea* that “the State party must demonstrate in specific fashion the precise nature of the threat” caused by the expression, which South Korea again failed to present.²⁹

j. Articles 2 and 7 are vague and overbroad

60. The ambiguity and the broadness of the definition as well as the scope of activities prescribed as crimes under Articles 2 and 7 have allowed for many ordinary citizens to be arbitrarily arrested and detained under the law.
61. The definition of an “anti-government organization” under Article 2 is vague and overbroad. It defines an “anti-government organization” as a group that fraudulently uses the title of the government or “aims at a rebellion against the State,” without clearly defining what constitutes a “rebellion” in this context. Further, activities punishable by law under Article 7 are wide-ranging and generic, increasing the possibility of criminalizing individuals over mundane activities and

²⁶ International Covenant on Civil and Political Rights (16 December 1966) arts. 18, 21.

²⁷ U.N. Human Rights Committee, General Comment No. 37 (2020) on the right of peaceful assembly (article 21), U.N. Doc. CCPR/C/GC/37 (17 September 2020) paras. 36, 40, 42.

²⁸ U.N. Human Rights Committee, Communication No. 628/1995, *Park v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/628/1995 (3 November 1998) para. 10.3.

²⁹ U.N. Human Rights Committee, Communication No. 926/2000, *Shin v. Republic of Korea*, U.N. Doc. CCPR/C/80/D/926/2000 (16 March 2004) para. 7.3.

contributing to the uncertainty of which conduct is punishable or not. Such a definition is in contrast with Principle 31 of Siracusa Principles which stated that “[n]ational security cannot be used as a pretext for imposing vague or arbitrary limitations” and it “may only be invoked when there exist adequate safeguards and effective remedies against abuse.”

62. As the HRC elaborated in General Comment No. 34, restrictions through law must be written with “sufficient precision to enable an individual to regulate his or her conduct accordingly,” which Articles 2 and 7 of the National Security Act have not reached.³⁰
63. The HRC expressed concern in its concluding observations on the second periodic report of South Korea that the scope of activities punishable under Article 7 are “unreasonably wide.”³¹ It further elaborated that merely expressing ideas that “coincide with those held by an enemy entity or may be considered to create sympathy for that entity” cannot be restricted under the ICCPR.³²
64. The former United Nations Special Rapporteur on the promotion and protection on the right to freedom of opinion and expression, Frank La Rue, has suggested that South Korea abolishes Article 7 of the National Security Act due to its vagueness and “its impact in inhibiting discussions and exchange of views on matters of public interest.”³³
65. Further, the former United Nations Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, criticized the “vague language” of Article 7 in respect to “anti-government organizations,” asserting that it “has led to the conviction of human rights defenders in connection with their work.”³⁴

Right to Be Free from Torture and Other Ill-treatment and Right to Liberty and Security of Person

66. The National Security Act may give rise to torture and other ill-treatment defined under Articles 2 and 16 of the CAT as well as Article 7 of the ICCPR. The right to be free from torture and other ill-treatment is also recognized as a customary international law that is absolutely prohibited by international agreement and general practice.
67. Further, the National Security Act may cause deprivation of the right to liberty and security of person as protected by the UDHR (Article 3) and ICCPR (Article 9) due to arbitrary arrest and detention of an individual.
68. According to the General Comment No. 20 by the HRC, torture and other ill-treatment are not just limited to physical infliction of pain but are understood more broadly to include infliction of “mental suffering” and the “excessive chastisement ordered as punishment.”³⁵
69. This can be understood in line with Article 9 of the ICCPR, which emphasizes the “right to liberty and security of person” including the right not to be “subjected to arbitrary arrest or detention.”

³⁰ U.N. Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/35 (16 December 2014) para. 25.

³¹ U.N. Human Rights Committee, Concluding observations of the Human Rights Committee: Republic of Korea, U.N. Doc. CCPR/C/79/Add.114 (1 November 1999) para. 9.

³² U.N. Human Rights Committee, Concluding observations of the Human Rights Committee: Republic of Korea, U.N. Doc. CCPR/C/79/Add.114 (1 November 1999) para. 9.

³³ U.N. Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, U.N. Doc. A/HRC/17/27/Add.2 (21 March 2011) para. 71.

³⁴ U.N. Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, U.N. Doc. A/HRC/25/55/Add.1 (23 December 2013) para. 32.

³⁵ U.N. Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.1 (10 March 1992) para. 5.

70. As elaborated in the General Comment No. 2 by the Committee against Torture, the obligations to prevent torture and other ill-treatment are “indivisible, interdependent and interrelated.”³⁶ A State Party’s obligations to prevent torture do not just stop at not committing torture but extend to taking “positive effective measures.”³⁷ This includes the obligation to review and improve national laws and performance to be in line with the Committee against Torture’s “concluding observations and views adopted on individual communications.”³⁸
71. In its concluding observations on South Korea, the Committee against Torture raised concern over the “vague wording” of Article 7 of the National Security Act that may result in violations of the CAT, including Articles 2 and 16.³⁹ It further recommended that South Korea repeals or amends the National Security Act to “ensure that it is in full conformity” with the CAT and to “ensure that arrests and detentions under the law do not increase the potential for human rights violations.”⁴⁰ This is in line with the Committee’s previous considerations of reports submitted by South Korea that certain provisions of the National Security Act continue to be vague and applied in an arbitrary manner.⁴¹ Therefore, South Korea has an obligation to ensure that its legislation is in line with the recommendations from the Committee against Torture, including revising Articles 2 and 7 to make it more precise and prevent any arbitrary criminalization of individuals.

Right to Cultural Life

72. Article 7 of the National Security Act has the potential of depriving an individual of one’s right to “take part in cultural life” and to benefit from the “moral and material interests” of one’s production under Article 15 of the ICESCR and Article 27 of the UDHR.
73. Article 7 of the National Security Act criminalizes acts such as manufacturing and reproducing “any documents, drawings or other expression materials” that can be associated with the activities of an “anti-government organization” as defined under Article 2. Due to the wide interpretation of the phrase “any documents, drawings or other expression materials,” the Article 7 contains the risk of restricting individuals’ artistic and other productions, denying them their right to take part in and benefit from cultural life as guaranteed by international law.
74. The Committee on Economic, Social and Cultural Rights, in its concluding observations on South Korea, has expressed concern that the National Security Act “is being used to curtail the activities

³⁶ U.N. Committee against Torture, General Comment No. 2: Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (24 January 2008) para. 3.

³⁷ U.N. Committee against Torture, General Comment No. 2: Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (24 January 2008) para. 4.

³⁸ U.N. Committee against Torture, General Comment No. 2: Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (24 January 2008) para. 4.

³⁹ U.N. Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the Republic of Korea, U.N. Doc. CAT/C/KOR/CO/3-5 (30 May 2017) para. 15.

⁴⁰ U.N. Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the Republic of Korea, U.N. Doc. CAT/C/KOR/CO/3-5 (30 May 2017) para. 16.

⁴¹ U.N. Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture: Republic of Korea, U.N. Doc. CAT/C/KOR/CO/2 (25 July 2006) para. 6; U.N. Committee against Torture, Report of the Committee against Torture: Supplement No. 44, U.N. Doc. A/52/44 (10 September 1997) para. 59.

of intellectuals and artists” as their works are “being censored, confiscated or destroyed” and the “intellectuals and artists themselves are being subjected to criminal prosecution.”⁴²

IV. Comments on South Korea’s National Security Act from the International NGOs, Member States, and Special Rapporteur on the Situation of Human Rights Defenders

k. International NGOs

75. In its report *The National Security Law: Curtailing Freedom of Expression and Association in the Name of Security in the Republic of Korea*, Amnesty International highlighted the arbitrary use of the law, with most people being prosecuted under Article 7 with “charges [that] are vaguely worded and prone to varying interpretations and arbitrary implementation and enforcement.”⁴³ Amnesty International commented that such application of the law “[u]ndermined citizens’ right to freedom of expression, opinion and association” and “[u]nduly restricted the right to academic freedom, the selling or borrowing of books and pursuing critical debate on issues relating to North Korea.”⁴⁴
76. Human Rights Watch also criticized the National Security Act for imposing restrictions on the “freedom of South Koreans to create and join political associations, or even to meet with other people” and suppressing “peaceful expression of opinions.”⁴⁵
77. CIVICUS, a global civil society alliance, monitors civil society freedoms in each country through its research toolkit, CIVICUS Monitor. In its update on South Korea, CIVICUS has expressed concern over Article 7 of the National Security Act that allows the “government to selectively prosecute” under Article 7(1), “a deliberately vague clause that broadly implies the North Korean state and its sympathisers” and can be abused to “repress dissenting voices” in South Korea.⁴⁶

I. Universal Periodic Review (UPR)

78. In all three cycles of the UPR, several Member States have commented on South Korea’s National Security Act and recommended that it is reviewed and revised to be in line with international standards.
79. In the First Cycle of the UPR in 2008, the UK commented that the National Security Act should be “brought in line with international standards regarding clarity of criminal law,” and the USA urged

⁴² U.N. Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea, U.N. Doc. E/C.12/1/Add.59 (21 May 2001) para. 32.

⁴³ Amnesty International, “The National Security Law: Curtailing Freedom of Expression and Association in the Name of Security in the Republic of Korea” (Amnesty International Publications 2012) p. 17 <<https://www.amnesty.org/en/wp-content/uploads/2021/06/asa250062012en.pdf>>.

⁴⁴ Amnesty International, “The National Security Law: Curtailing Freedom of Expression and Association in the Name of Security in the Republic of Korea” (Amnesty International Publications 2012) p. 3 <<https://www.amnesty.org/en/wp-content/uploads/2021/06/asa250062012en.pdf>>.

⁴⁵ Human Rights Watch, “Cold War Relic Law Criminalizes Criticism” (28 May 2015) <<https://www.hrw.org/news/2015/05/28/south-korea-cold-war-relic-law-criminalizes-criticism>>.

⁴⁶ CIVICUS Monitor, “Activist Indicted while NGO’s Concerned about Law Affecting Net Neutrality in South Korea” (17 March 2022) <<https://monitor.civicus.org/updates/2022/03/17/activist-indicted-while-ngos-concerned-about-law-affecting-net-neutrality-south-korea/>>.

for the Government of South Korea to amend the National Security Act to “prevent abusive interpretation by law.”⁴⁷

80. In the Second Cycle of the UPR in 2012, Germany, Norway, Spain and the USA advised South Korea to amend the National Security Act to avoid abusive interpretation of the law.⁴⁸ Spain specifically commented that the application of the National Security Act should fully respect the freedom of expression.⁴⁹ Australia recommended for South Korea to regularly review the application of the law, “to ensure its consistency with human rights principles.”⁵⁰
81. In the Third Cycle of the UPR in 2017, several Member States have recommended South Korea to either review or revise the National Security Act. Germany specifically commented on Article 7’s effect on freedom of expression, and urged South Korea to amend Article 7 of the National Security Act “to ensure that it is not used arbitrarily or to harass and restrict the rights to freedom of expression, opinion and association.”⁵¹ Portugal further commented on the National Security Act’s impact on “the rights to freedom of speech, association and peaceful manifestation.”⁵²

V. Conclusion

82. For several decades, the vague provisions of the National Security Act have contributed to suppressing freedom of expression and freedom of assembly and association in South Korea. It also negatively affected the civic space and cultural life, and sometimes even led to arbitrary detention and torture or other ill-treatment of certain individuals. The international community, including the international treaty bodies, international NGOs, United Nations Member States and Special Rapporteurs, has criticized the overbreadth and arbitrariness of the National Security Act throughout the years. Joining the concerned voices of international and South Korean civil society communities, FORUM-ASIA strongly recommends that the Constitutional Court of Korea decides that the National Security Act, especially Articles 2 and 7, is in violation of the Constitution and relevant international laws.

⁴⁷ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Republic of Korea, U.N. Doc. A/HRC/8/40 (29 May 2008) paras. 24, 33.

⁴⁸ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Republic of Korea, U.N. Doc. A/HRC/22/10 (12 December 2012) para. 124.57.

⁴⁹ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Republic of Korea, U.N. Doc. A/HRC/22/10 (12 December 2012) para. 124.57.

⁵⁰ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Republic of Korea, U.N. Doc. A/HRC/22/10 (12 December 2012) para. 124.56.

⁵¹ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Republic of Korea, U.N. Doc. A/HRC/37/11 (27 December 2017) para. 132.109. Iraq also recommended South Korea to review Article 7, suggesting that it restricts freedom of expression, at para. 132.110.

⁵² U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review: Republic of Korea, U.N. Doc. A/HRC/37/11 (27 December 2017) para. 132.111.