

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

Special Rapporteur on the rights to freedom of peaceful assembly and of association

Special Rapporteur on freedom of religion or belief

Special Rapporteur on the situation of human rights defenders

Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea

30 December 2020

Re: The Song Young-Gil Amendment to the Inter-Korean Relations Development Act (North Korean information gag law) passed by South Korea's National Assembly on 14 December 2020 and signed into law by President Moon Jae-In on 29 December 2020 to enter into force on 30 March 2021

Following the public threats by North Korea's Kim Yo-Jong in June 2020, the South Korean government accelerated its persecution of North Korean escapees and North Korean human rights defenders in the context of its policy of appeasing North Korea, and an amendment to the Inter-Korean Relations Development, proposed by ruling party lawmaker Song Young-Gil, chair of the foreign affairs and unification committee (North Korean information gag law), was passed by the National Assembly on 14 December 2020 and signed into law by President Moon Jae-In on 29 December 2020 to enter into force on 30 March 2021, despite the expression of concern by the Special Rapporteur on the situation of human rights in the DPRK, international human rights NGOs and public figures in America, Canada and Europe.

The Song Young-Gil Amendment (North Korean Information gag law) criminalizes (1) broadcasting of loudspeakers and posting of placards directed at North Korea in the inter-Korean border area, (2) distribution of "leaflets, etc." to unspecified multiple persons in North Korea for the purpose of propaganda, gifts, etc. without governmental approval, and (3) movement of "leaflets, etc." to North Korea for the purpose of propaganda, gifts, etc., including simply moving "leaflets, etc." via a third country, without governmental approval. While the first category applies only to activities in the inter-Korean border area, the latter two have no such geographical restriction. "The leaflets, etc." are defined broadly and vaguely to include not only leaflets but also USB flash drives and CDs, books and other publications, humanitarian aid or money. All these offenses as well as attempted offenses are punishable up to 3 years imprisonment or 30 million KRW fine. Because of the long arm of South Korea's criminal jurisdiction, the police and state prosecutors may open criminal investigations against the offenses committed by South Korean citizens abroad and foreign nationals abroad under the nationality principle and the protective principle respectively, even if the government formally files no criminal complaints.

The North Korean information gag law violates the right to freedom of expression, which includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, in any medium. Because of North Korea's unique totalitarian dynastic state, the need for free flow of information into North Korea is high and South Korea has the international obligation to not only respect but also to protect and fulfil the freedom of expression as the violent reactions at home and abroad to *Jyllands-Posten* and *Charlie Hebdo* demonstrate. While international law allows for restrictions on freedom of expression when strict conditions are met, the Song Amendment uses overbroad and ill-defined terms such as "harming or causing grave danger to the life or person of South Korean citizens",

“dissemination” and “leaflets, etc.”; the restrictions on sending of “leaflets, etc.” in the inter-Korean border area may be justified by national security and public order but “a direct and immediate connection between the expression and the threat” cannot be established as North Korea’s actual military action occurred over six years ago; the 3-year maximum imprisonment contravenes the principle of necessity and proportionality; there is no justification for the restrictions items other than leaflets to North Korea through the inter-Korean border area for which North Korea has not formally protested or for the movement of “leaflets, etc.” to North Korea through a third country or distribution of “leaflets, etc.” in North Korea as neither poses risk to the inter-Korean border area; and South Korea’s appeasement may encourage Pyongyang to further undermine the freedom of expression.

The Song Amendment may also violate the right to freedom of thought, conscience and religion as it may criminalize wholesale the dissemination of books, electronic devices and objects imbued with faith and secular themes such as Christian and Buddhist scriptures and George Orwell’s *Animal Farm* and Arthur Koestler’s *Darkness at Noon*, Anne Frank’s diary and Aleksandr Solzhenitsyn’s *The Gulag Archipelago* without justification. The North Korean information gag law may also threaten the North Korean people’s right to liberty of movement and the right to seek and enjoy asylum as it prohibits the delivery of mobile phone and cash payment that are necessary to enable them to escape from North Korea to a safe country like South Korea. The Song Amendment, in conjunction with existing laws, may allow the South Korean government to revoke the incorporation of CSOs that fall foul of it. The overbroad and vague terms used in the new provisions may also violate the principle of legality (*nullum crimen, nulla poena sine lege*) for the purpose criminal punishment.

The South Korean government’s arguments to justify the North Korean information gag law are plagued with convoluted logic, contradictions, half-truths, outright falsehoods and fake news, wishful thinking, misrepresentation and mistranslation. The ministry of unification (MOU)’s explanation for the third-country clause makes little legal sense; its pledge to “enact” an “interpretive guideline” to clarify that the Song Amendment does not affect “dissemination of leaflets, etc. from a third country” is a public admission of its overbroad and vague nature, will have limited influence over the police, state prosecutors or judges and it may be revised in the future at will. The government and the ruling party should instead make changes to the law. The MOU’s claim that the maximum 3-year imprisonment is justifiable only goes to show its low regard for freedom of expression. The South Korean courts have held that the government may restrain the sending of leaflets “provided that the said restriction is not excessive” in a non-criminal case; the National Human Rights Commission has in fact recommended the government to allow the sending of leaflets. The MOU has also (mis)quoted outdated case-law of the United State Supreme Court. The inter-Korean agreements are applicable to the governments not private citizens and they cannot trump international human rights norms. Lastly, the MOU maintains that the Song Amendment has nothing to do with Kim Yo-Jong’s threats but at the same time incredulously expresses hope that the new legislation will “contribute to the improvement of inter-Korean relations and promotion of peace on the Korean peninsula”.

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I. The factual background

I.1. The June threats by North Korea

On 4 June 2020, Kim Yo-Jong, sister of supreme leader Kim Jong-Un and the first vice department director of the central committee of the workers' party of Korea (WPK) central committee¹, issued a statement entitled "Do not bring calamity upon yourself"^{2,3}.

The statement referred to the "anti-DPRK leaflets" flown to North Korea by "North Korean escapees"⁴, dubbed "rubbish beyond the pale of human value"⁵, in South Korea on 31 May that "insolently find fault with the 'nuclear issue' while touching upon our supreme dignity [i.e. Kim Jong-Un]"⁶. Kim Yo-Jong reasoned that for the vile deeds of these "shit dogs"⁷, "it is time to hold their masters responsible"⁸.

Recalling the provisions of the Panmunjom declaration of 27 April 2018⁹ and the military agreement of 19 September 2018 that ban all hostile acts including the dispersal of leaflets (in fact, only the former actually contains such provisions while the latter merely refers to the cessation of all hostile acts against each other), the statement warned that "if such malicious acts are left unchecked in the name of 'individual freedom' and 'freedom of expression', the South Korean authorities must look forward to the worst phase shortly"¹⁰.

The statement went on to threaten the rescission of Mount Kumgang tourism, complete demolition of the Kaesong industrial region, the closure of the inter-Korean liaison office or

¹ In Korean: 조선로동당 중앙위원회 제 1 부부장. There have been reports that Kim Yo-Jong *de facto* heads the powerful organization and guidance department (OGD; 조직지도부) of the WPK central committee.

² In Korean: 스스로 화를 청하지 말라.

³ 조선중앙통신사, "김여정제 1 부부장 반공화국베라살포에 북남군사합의파기 경고", 2020. 6. 4., <http://www.kcna.co.jp/calendar/2020/06/06-04/2020-0604-004.html> [in Korean].

⁴ In Korean: 탈북자

⁵ In Korean: 사람값에도 들지 못하는 쓰레기들

⁶ In Korean: 우리의 최고존엄까지 건드리며 《핵문제》를 걸고 무엄하게 놀아댄것이다

⁷ In Korean: 똥개

⁸ In Korean: 이제는 그 주인에게 책임을 물어야 할 때이다

⁹ Formally called the Agreement on the Implementation of the Historic Panmunjom Declaration in the Military Domain [역사적인 판문점선언 이행을 위한 군사분야 합의서].

¹⁰ In Korean: 이런 악의에 찬 행위들이 《개인의 자유》요, 《표현의 자유》요 하는 미명하에 방치된다면 남조선당국은 머지않아 최악의 국면까지 내다보아야 할것이다

termination of the 9.19 military agreement unless the South Korean authorities take “due measures”¹¹.

Kim Yo-Jong’s June 4 statement was unusual in that it was reported not only in the outbound Korean Central News Agency (KCNA), which serves only the international audience, but firstly in *Rodong Sinmun*, the WPK central committee’s official newspaper. It also used the expression “North Korean escapees”, a taboo term as it all too painfully betrays the reality of the workers’ paradise.

This immediately prompted the observation that Pyongyang was fomenting a crisis situation for its domestic political purposes to deflect the instability and discontents generated by failed command economy, exacerbated by COVID-19 border closures with China, as well as possible internal power struggle within the elite ruling class.

Just four hours after Kim Yo-Jong’s early morning bombshell, the South Korean ministry of unification (MOU) announced that it would prepare legislation banning the leaflets to North Korea.¹² The Blue House (the presidential office) officials also told journalists that “the dispersal of leaflets to North Korea are acts that do nothing but harm”¹³ and that “the government will respond resolutely to acts that harm security”¹⁴ adding that “There is no change in the Blue House’s position that the 4.27 Panmunjom declaration and 9.19 military agreement must be observed”¹⁵ in the afternoon.¹⁶

This was a complete reversal of the government’s consistent position for many years of avoiding such legislation for fear of infringing upon the freedom of expression, as the North Korean statement complained, even after the 4.27 Panmunjom declaration in 2018 for over two years. The day after, Kim Hong-Geol, then a ruling party lawmaker (expelled from the party on 18 September 2020 for real estate speculation allegations), sponsored a bill in the National Assembly to ban the leaflets followed by a raft of other similar bills.¹⁷

On 5 June 2020, however, the WPK central committee’s united front department (UFD)¹⁸ issued a spokesperson’s statement scolding Seoul for the lack of apology and signing the 9.19 military agreement without even enacting the anti-leaflet ban for two years. According to the statement, Kim Yo-Jong ordered the UFD to review her statement for practical implementation and the first order was the demolition of the inter-Korean liaison office sitting idly in the Kaesong industrial region.¹⁹

¹¹ In Korean: 응분의 조치

¹² 원선우, “김여정의 삐라 비난 4 시간여 만에…통일부 “삐라 금지법 만들겠다””, *조선일보*, 2020. 6. 4., https://news.chosun.com/site/data/html_dir/2020/06/04/2020060401772.html [in Korean].

¹³ In Korean: 삐라(대북전단) 살포는 백해무익한 행동

¹⁴ In Korean: 안보에 위해를 가져오는 행위에는 정부가 단호히 대응할 것

¹⁵ In Korean: 청와대는 4·27 판문점선언과 9·19 군사합의가 지켜져야 한다는 입장에 변함이 없다.

¹⁶ 박경준, “청와대 “삐라는 백해무익…안보위해에 단호 대응할 것””, *연합뉴스* 2020. 6. 4., <https://www.yna.co.kr/view/AKR20200604085651001> [in Korean].

¹⁷ [2100233] 남북교류협력에 관한 법률 일부개정법률안(김홍걸의원 등 21 인), 2020-06-05 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_A2K0W0Y6E0O5C1B7W5H2X2M7G8B7J6 [in Korean].

¹⁸ In Korean: 조선로동당 중앙위원회 통일전선부

On 9 June 2020, Kim Yo-Jong declared the transition to “hostile relation”²⁰ with South Korea and moved to sever the official communication lines between the two governments including the hotline between the WPK central committee and the presidential office as the “first stage” in the “price to be paid for the sins committed by traitors and rubbish”²¹ in a KCNA article.²²

On 10 June 2020, the South Korean MOU announced that it would file criminal complaints against Park Sang-Hak and Park Jung-Oh, brother defectors from North Korea, for alleged violation of article 13 of the Inter-Korean Exchange and Cooperation Act²³ requiring prior approval of inter-Korean exchange of goods and revoke the incorporation of their organizations, the Fighters For Free North Korea (FFNK)²⁴ and KuenSaem²⁵, as juristic persons for sending leaflets in air balloons and rice-filled PET bottles on sea currents to North Korea, especially on 31 May 2020, as cited by Kim Yo-Jong.²⁶

On 11 June 2020, the Blue House convened the National Security Council (NSC). Afterwards, Kim You-Geun, the NSC spokesperson, issued a statement claiming that North and South Korea had agreed to end the dispersal of leaflets in the 1972 7.4 joint communique, 1992 basic agreement and the 2004 6.4 agreement as well as the 2018 Panmunjom declaration and that such act is in violation of domestic laws such as the Inter-Korean Exchange and Cooperation Act, the Public Waters Management and Reclamation Act²⁷ and the Aviation Safety Act²⁸, threatening “thorough crackdown” and “stern response in accordance with the law in case of violation”.²⁹

However, on 12 June 2020, Jang Kum-Chol, the director of the WPK central committee’s united front department (UFD)³⁰, issued his first-ever statement acknowledging the Blue House’s announcement the previous day but stating that trust in Seoul has been shattered, among other things for the failure to enact an anti-leaflet ban for two years since the Panmunjom declaration and the

¹⁹ 조선중앙통신사, “조선로동당 통일전선부 북남공동연락사무소 철폐,련속 조치도 경고”, 2020. 6. 5., <http://www.kcna.co.jp/calendar/2020/06/06-05/2020-0605-012.html> [in Korean].

²⁰ In Korean: 적대관계

²¹ In Korean: 배신자들과 쓰레기들이 저지른 짓값

²² 조선중앙통신사, “9 일 12 시부터 북남통신연락선 완전차단”, 2020. 6. 9., <http://www.kcna.co.jp/calendar/2020/06/06-09/2020-0609-003.html> [in Korean].

²³ 남북교류협력에 관한 법률 <http://www.law.go.kr/lsInfoP.do?lsiSeq=151783> [in Korean]

²⁴ In Korean: 자유북한운동연합

²⁵ In Korean: 큰섬

²⁶ 정래원, “정부, 교류협력법 위반으로 전단살포 탈북단체 고발…설립 취소(종합)”, 연합뉴스 2020. 6. 10., <https://www.yna.co.kr/view/AKR20200610127451504> [in Korean].

²⁷ 공유수면 관리 및 매립에 관한 법률(공유수면법) <http://www.law.go.kr/lsInfoP.do?lsiSeq=210200> [in Korean].

²⁸ 항공안전법 <http://www.law.go.kr/lsInfoP.do?lsiSeq=219587> [in Korean].

²⁹ 청와대 대통령비서실, “대북 전단 및 물품 등의 살포 관련 정부 입장문”, 2020. 6. 11., <https://www.korea.kr/news/blueHouseView.do?newsId=148873359> [in Korean].

³⁰ In Korean: 장금철 조선로동당 중앙위원회 통일전선부장

“domestic outbursts of all the noise calling for ‘freedom of expression’”³¹ before predicting that “the coming times will be truly regretful and painful for the South Korean authorities”^{32, 33}.

The next day on 13 June 2020, Kwon Jong-Gun, the DPRK foreign ministry’s director-general of the department of U.S. affairs³⁴, lambasted the South Korean foreign ministry’s call for denuclearization and permanent peace regime the previous day, concluding that “it would be good to shove the bollocks about denuclearization”^{35, 36}.

Kim Yo-Jong capped off the 24-hour verbal blitz against South Korea with her second statement of the month on the same day forewarning “the terrible sight of the useless inter-Korean liaison office demolished without a trace before long”³⁷ and adding that “the next right to exercise action against the enemy will be handed to our military’s general staff”³⁸ whom “she also trusts would decide and execute what it takes to cool the anger of the people to some extent”³⁹.

On 16 June 2020, the Korean People’s Army (KPA)⁴⁰ general staff made an “open report”⁴¹ stating that it would draw up military actions plans to speedily execute the suggestions by the WPK central committee’s united front department (UFD)⁴² and other relevant offices to refortify zones demilitarized under the inter-Korean agreement and further strengthen military alertness against South Korea as well as to actively assist the large-scale leaflet campaign against South Korea, for approval by the WPK central military commission^{43, 44}. While apparently submitting to Kim Yo-Jong’s wishes, the KPA general staff deferred the actual decision to the WPK central military commission, under Kim Jong-Un’s direct control.

³¹ In Korean: 집안에서 터져나오는 그 모든 잡음

³² In Korean: 이제부터 흘러가는 시간들은 남조선당국에 있어서 참으로 후회스럽고 괴로울 것이다.

³³ 조선중앙통신사, “조선로동당 통일전선부장 남조선당국에 대한 신뢰는 산산조각”, 2020. 6. 12., <http://www.kcna.co.jp/calendar/2020/06/06-12/2020-0612-016.html> [in Korean].

³⁴ In Korean: 권정근 외무성 미국담당 국장

³⁵ In Korean: 비핵화라는 개소리는 집어치우는 것이 좋다.

³⁶ 조선중앙통신사, “권정근 외무성 미국담당 국장 남조선은 비핵화 소리 집어치우라”, 2020. 6. 13. <http://kcna.co.jp/calendar/2020/06/06-13/2020-0613-005.html> [in Korean].

³⁷ In Korean: 멀지 않아 쓸모없는 북남공동련락사무소가 형체도 없이 무너지는 비참한 광경을 보게 될 것이다.

³⁸ In Korean: 다음번 대적행동의 행사권은 우리 군대 총참모부에 넘겨주려고 한다.

³⁹ In Korean: 인민들의 분노를 다소나마 식혀줄 그 무엇인가를 결심하고 단행할 것이라고 믿는다.

⁴⁰ In Korean: 조선인민군

⁴¹ In Korean: 공개보도

⁴² In Korean: 조선로동당 중앙위원회 통일전선부

⁴³ In Korean: 조선로동당 중앙군사위원회

⁴⁴ 조선중앙통신사, “조선인민군 총참모부 당과 정부의 조치 담보할 군사적태세 갖추다”, 2020. 6. 16.

However, in the afternoon of the same day, North Korea demolished the inter-Korean liaison office in the Kaesong industrial region, as Kim Yo-Jong had threatened to do three days earlier. The South Korean public expressed outrage and disgust since the office building had been constructed with South Korean budget and had served as a symbol of inter-Korean détente. The rapid escalation of tension by Pyongyang, without giving Seoul reasonable time to take any measures helped convince many that the leaflet campaign by North Korean escapees was merely an excuse to foment crisis for internal political purposes.

The South Korean NSC finally expressed “strong regrets” at the North Korean action and warned robust response against actions further aggravating the situation while Suh Ho, the vice minister of the ministry of unification (MOU), stated that the demolition of the inter-Korean liaison office is a violation of the 2018 Panmunjom declaration and that Pyongyang must be held responsible for it, and the ministry of national defense assured robust response in the case of military provocation by North Korea.⁴⁵

On 17 June 2020, Pyongyang lobbed further verbal bombshells at Seoul. KCNA unilaterally revealed in flagrant violation of diplomatic protocol that the day before South Korean president Moon Jae-In had pleaded with Kim Jong-Un to send Chun Eui-Yong, director of the national security office, and Suh Hoon, director of the national intelligence service, as special envoys to Pyongyang at earliest possible date only to be turned down by Kim Yo-Jong.⁴⁶

The spokesperson for the KPA general staff announced that four specific military action plans (stationing of units in the Mount Kungang tourism region and Kaesong industrial region, redeployment in the guard posts that had been evacuated in accordance with the military agreement, raising of combat readiness in the frontier zones and preparation for the leaflet campaign against South Korea) for ratification by the WPK central military commission.⁴⁷

Kim Yo-Jong issued her third statement in the escalating crisis, panning President Moon Jae-In’s speech two days earlier as “riddled with self-justification, evasion of responsibility and deep-rooted serving the great [the United States] ideology”⁴⁸ that was nauseating. She spiced her statement with other personal insults against Moon which she referred to as “a bomb of words”⁴⁹ including her observation that “he makes her worry that he appears to be outwardly normal but mentally insane”^{50, 51}

⁴⁵ 이정진, “북한, 개성 연락사무소 전격 폭파…청 “강력한 유감”(종합 3 보)”, 연합뉴스 2020. 6. 16., <https://www.yna.co.kr/view/AKR20200616134554504> [in Korean].

⁴⁶ 조선중앙통신사, “남조선당국이 특사파견 간청,김여정제 1 부부장 불허 표시”, 2020. 6. 17., <http://www.kcna.co.jp/calendar/2020/06/06-17/2020-0617-005.html> [in Korean].

⁴⁷ 조선중앙통신사, “조선인민군 총참모부 다음단계 대적군사행동계획방향 발표”, 2020. 6. 17., <http://www.kcna.co.jp/calendar/2020/06/06-17/2020-0617-004.html> [in Korean].

⁴⁸ In Korean: 자기변명과 책임회피, 뿌리깊은 사대주의로 점철된

⁴⁹ In Korean: 말폭탄

⁵⁰ In Korean: 겉으로는 멀쩡해보이는 사람이 정신은 잘못된것이 아닌가 하는 걱정이 든다.

⁵¹ 조선중앙통신사, “김여정제 1 부부장 남조선당국자의 연설 비난”, 2020. 6. 17., <http://www.kcna.co.jp/calendar/2020/06/06-17/2020-0617-007.html> [in Korean].

Jang Kum-Chol in the similar spirit stated that there will be no further talks with the South Korean authorities.⁵²

On the same day, in response to Kim Yo-Jong's verbal abuse and unilateral revelation of South Korea's offer to send special envoys, President Moon at last took an uncharacteristically stern stance against North Korea starkly warning it that it will have to take full responsibility for the consequences of its speech and behavior.⁵³

On 20 June 2020, North Korea's state newspapers revealed the leaflets being mass produced for dispersal to South Korea, prompting Seoul's protest.⁵⁴ The spokesperson for the WPK central committee's united front department (UFD) made clear that North Korea will not back down.⁵⁵ North Korea reportedly prepared 12 million leaflets, featuring President Moon and his son, as well as redeployment to the evacuated guard posts in the Demilitarized Zone (DMZ) and placing over 10 loudspeakers for propaganda against South Korea.

However, on 24 June 2020, Kim Jong-Un hosted a "preliminary meeting" for the 5th meeting of the 7th session of the WPK WPK central military commission, which decided to withhold the military actions plans against South Korea that had been raised to the commission by the general staff. Tensions quickly melted away afterwards as it had arisen about 20 days earlier.

Although it is not clear why North Korea beat a hasty retreat, it is obvious that the demolition of the inter-Korean liaison office and the verbal abuse of President Moon alienated the South Korean public to the extent unforeseen by Kim Yo-Jong and that the North Korean saber-rattling also resulted in the deployment of U.S. forces in the oceans to the great irritation of the KPA general staff as well as China.⁵⁶

However, the North Korean government never retracted or apologized for its military provocations or unacceptable public insults against the North Korean escapees in South Korea and President Moon Jae-In.

On 30 June 2020, Russian ambassador Alexander Ivanovich Matsegora stated in his interview with his country's state news agency TASS that the North Korean leadership as well as the general population was incensed by the nature of the leaflets dispersed on 31 May 2020 that contained a crude composite of pornographic materials with the face of North Korean first lady Ri Sol-Ju made using Adobe Photoshop.⁵⁷

⁵² 조선중앙통신사, "장금철 통일전선부장 남측당국과 더는 마주앉을 생각 없다", 2020. 6. 17., <http://www.kcna.co.jp/calendar/2020/06/06-17/2020-0617-008.html> [in Korean].

⁵³ 매일신문, "[전문] 청와대 "北 김여정 담화, 몰상식한 행위" 강력 비판", 2020. 6. 17., <https://news.imaail.com/Society/2020061710525766184> [in Korean].

⁵⁴ 김동현, "통일부 "북한 대남전단 살포계획 매우 유감...즉각 중단해야"(종합) ", 연합뉴스 2020. 6. 20., <https://www.yna.co.kr/view/AKR20200620039351504> [in Korean].

⁵⁵ 조선중앙통신사, "조선로동당 통일전선부 대남배라살포계획 변경할 의사 전혀 없다", 2020. 6. 21. <http://kcna.co.jp/calendar/2020/06/06-21/2020-0621-001.html> [in Korean].

⁵⁶ 김민석, "패착으로 끝난 대남 강공전략, 김여정의 운명은?", 중앙일보 2020. 7. 2., <https://news.joins.com/article/23815339> [in Korean].

However, Park Sang-Hak and Park Jung-Oh have never sent such outrageous leaflets on 31 May 2020 or on any other occasion. Even Kim Yo-Jong's June 4 statement made clear that she was infuriated by the leaflets for criticizing North Korea's nuclear program. In fact, it is true that another North Korean defector named Baek Yo-Sep and other right-wing South Korean groups had sent such inexcusable, misogynistic materials, but that had occurred seven years ago on 6 October 2013.⁵⁸

I.2. The South Korean government's persecution of North Korean escapees and North Korean human rights defenders in the context of its policy of appeasing North Korea

Even after the North Korean government beat a hasty retreat, the South Korean government continued and expanded its assaults on organizations that it deems to be a threat to its policy of appeasing Pyongyang for the elusive goal of improving inter-Korean relations even at the cost of sacrificing human rights and fundamental freedoms in South Korea.

On 17 July 2020, ironically the constitution day in South Korea, the ministry of unification (MOU) announced that it has revoked the incorporation of Park Sang-Hak's Fighters For Free North Korea (FFNK) and Park Jung-Oh's KuenSaem as juristic persons for contravening the conditions for permitting their incorporation by grossly impeding the government's reunification policy, dispersal of leaflets and items to North Korea beyond the stated goal of their incorporation as juristic persons and fomenting tension in the Korean peninsula under article 38 of the civil code after holding a perfunctory hearing on 29 June 2020.⁵⁹

While the government has in the past revoked the incorporation of inactive juristic persons in the past, it is the first time that it has done so for an otherwise functional organization. However, the FFNK and KuenSaem filed lawsuits against the government's revocation (case no. 2020GuHap71710 and case no. 2020GuHap71734), and the courts granted them preliminary injunctions respectively on 18 August 2020 (no. 2020A12197) and 12 August 2020 (no. 2020A12199).

Around the same time, the MOU's criminal complaints against the leafleting were joined by other similar criminal complaints from its political allies. On 12 June 2020, the South Korean Committee for the Implementation of the June 15 Joint Declaration (June 15 South Korean Committee), a pro-government NGO, had filed criminal complaints against Park Sang-Hak two days after the MOU's similar complaints.⁶⁰ On 7 July 2020, the Gangwon provincial government, dominated by the ruling party, also announced that it had filed criminal complaints against the American pastor Eric Foley of the Vom Korea.⁶¹

⁵⁷ 김승현, “저열한 '리설주 합성사진'이 北 도발 불렀다? 대북전단의 진실”, 조선일보 2020. 6. 30., https://news.chosun.com/site/data/html_dir/2020/06/30/2020063002352.html [in Korean].

⁵⁸ 홍성준, ““정은아! 핵 보다 더 무서운게 날아간다!” 리설주 성추문 실체 알리는 대북전단 50만 장 살포”, 블루투데이 2013. 10. 6., <http://www.bluetoday.net/news/articleView.html?idxno=5598> [in Korean].

⁵⁹ 서재준, 나혜윤, “‘베라·페트병 살포’ 북한에 살포한 단체 법인 설립 허가 취소(종합)”, 뉴스 1 2020. 7. 17., <https://www.news1.kr/articles/?3999257> [in Korean].

⁶⁰ 박동해, 6.15 남측위 '대북전단 살포' 탈북민단체 고발...“백해무익 행동”, 뉴스 1 2020. 6. 12., <https://www.news1.kr/articles/?3963530> [in Korean].

⁶¹ 이채현, “‘성경책풍선’ 북에 보내려던 '순교자 소리' 에릭 폴리 목사 고발”, 연합뉴스 2020. 7. 7., <https://www.yna.co.kr/view/AKR20200707047200062> [in Korean].

By mid-July, the police assigned at least 45 officers to a task force to investigate the dissemination of leaflets and other materials to North Korea by FFNK and KuenSaem as well as the Voice of the Martyrs Korea (VOM Korea), founded by pastor Eric Foley which regularly sends bibles by balloon, and the Campaign for Helping North Koreans in Direct Way (NKDW), headed by Lee Min-Bok.⁶²

As if all this was not enough, on 15 July 2020, the Association of North Korean Defectors received a notice from the MOU that there will be an inspection next month for the first time since its incorporation in 2010. When confronted by a journalist, an MOU official, while admitting that it was not a regular inspection, responded that the MOU is not targeting just escapee groups.⁶³

In fact, the day after, on 16 July 2020, the MOU authorities informed journalists that they will first conduct business inspections on 25 incorporated North Korean human rights and escapee settlement support groups, among which 13 are headed by North Korean defectors, with more to be inspected in the future.⁶⁴ While acknowledging that the leaflet issue triggered the inspections, the MOU added that the business inspections will not concern just the leaflet campaign.

On 29 November 2020, a joint allegation letter by the Special Rapporteurs on the situation of human rights in the DPRK, on the rights to freedom of peaceful assembly and of association and on the situation of human rights defenders to the South Korean government expressing concerns about the MOU inspections, dated 30 September 2020 (AL KOR 5/2020), was made public on the OHCHR website.⁶⁵

The current Moon Jae-In administration has already revealed the dangerous and worrying tendency to not only turn a blind eye to ongoing systematic, widespread and gross human rights violations that amount to crimes against humanity but to be its accomplice. In October 2018, the South Korean government acquiesced to North Korea's demand to exclude Kim Myong-Sung, a defector reporter for the daily Chosun Ilbo, from covering an inter-Korean talk in North Korea—all previous administrations, regardless of their political orientation, had rejected such demands.⁶⁶

On 27 February 2019, the Human Rights Foundation (HRF), the Committee for Human Rights in North Korea (HRNK) and the North Korea Freedom Coalition sent a joint letter to the Special Rapporteur on the situation of human rights in the DPRK cataloging the human rights violations and abuses faced by North Korean escapees and North Korean human rights defenders in

⁶² 정성조, “경찰, ‘대북전단’ 탈북민단체 수사 확대…국제범죄수사대 합류”, 연합뉴스 2020. 7. 6., <https://www.yna.co.kr/view/AKR20200706074800004> [in Korean].

⁶³ 권순완, “통일부, 이례적으로 “탈북단체 방문조사””, 조선일보 2020. 7. 16., https://news.chosun.com/site/data/html_dir/2020/07/16/2020071600154.html [in Korean].

⁶⁴ 김지현, “통일부 “북한 인권·정착지원 관련 등록단체 25개 사무검사””, 뉴시스 2020. 7. 16., https://newsis.com/view/?id=NISX20200716_0001097433 [in Korean].

⁶⁵ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25478>

⁶⁶ Anthony Kuhn, “For A North Korean Defector Turned Journalist, Warming Ties Are Cause For Worry”, NPR, 2 January 2019, <https://www.npr.org/2019/01/02/678178615/for-a-north-korean-defector-turned-journalist-warming-ties-are-cause-for-worry>

South Korea and asking him to defend their rights and freedoms.⁶⁷

On 7 November 2019, the South Korean government secretly repatriated two North Korean fishermen who had defected five days earlier and, when leaked to the press, justified it by claiming that they had confessed to mutiny and mass murder without offering any evidence. On 28 March 2020, a joint allegation letter by the Special Rapporteur on the situation of human rights in the DPRK, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment expressing concern with respect to the principle of non-*refoulement* under article 3 of the Torture Convention, dated 28 January 2020 (AL KOR 3/2019), was made public on the OHCHR website.⁶⁸ They noted that “citizens often face serious human rights violations upon return according to [their] well-documented cases, including enforced disappearance, arbitrary execution, torture and ill-treatment, and trials that do not conform to international standards for fairness”. Unfortunately, in a worrying trend, the National Human Rights Commission, dominated by the current government’s appointees, quietly dismissed the complaint after over a year of inaction on the grounds that the two escapees had already been deported to North Korea—as if unlawful rendition itself is no human rights violation.⁶⁹

The South Korean efforts to appease North Korea by shamelessly undermining human rights at home have had no tangible benefits in terms of improved inter-Korean relations or rapprochement. The current administration appears to have trapped itself in a false binary choice between peace and human rights; it thinks it is choosing peace but in fact it will have neither peace nor human rights.

I.3. The enactment of the North Korean information gag law

With North Korea’s anticlimactic climbdown, there was no longer any pressing need for the enactment of anti-leaflet legislation. Indeed, it was far less dramatic than a previous incident on 10 October 2014 when a North Korean border unit fired around 10 rounds of ZPU-4 14.5 mm anti-aircraft machine gun at the 23 air balloons containing 1.32 million leaflets launched by Lee Min-Bok of the Campaign for Helping North Koreans in Direct Way (NKDW) from Yeoncheon County.⁷⁰ The South Korean forces fired back in response and the two sides exchanged another round of volleys; the units in the vicinity were put on alert and the residents evacuated before the calm returned by nightfall. Kim Yo-Jong’s war of words in June 2020 by contrast turned out to be just that—words.

However, even after the crisis largely subsided, the government and the ruling party

⁶⁷ <http://hrf.org/wp-content/uploads/2019/02/Letter-to-SR-on-NKHR-SK-Censorship-of-NK-activities-REDACTED.pdf>

⁶⁸ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24975>

⁶⁹ 이밖음, “인권위 "北선원 북송, 인권침해 파악하는데 한계" 진정 각하”, 2020. 12. 30., <https://www.news1.kr/articles/?4166308> [in Korean].

⁷⁰ 김귀근, 홍지인, 최재훈, “北, 대북전단 향해 고사총 발사…軍, 기관총 대응사격(종합 3 보)”, 연합뉴스 2014. 10. 10., <https://www.yna.co.kr/view/AKR20141010189854043> [in Korean].

lawmakers continued to press for the criminalization of leafleting, insisting that it is necessary for the safety of the residents in the inter-Korean border area. In less than a month, a total of seven anti-leaflet bills were proposed by:

- (1) Kim Hong-Geol on June 5 (revising the Inter-Korean Exchange and Cooperation Act to prescribe punishment of up to 3 years imprisonment or 30 million KRW fine);⁷¹
- (2) Kim Seung-Nam on June 9 (revising the Inter-Korean Exchange and Cooperation Act to prescribe punishment of up to 3 years imprisonment or 30 million KRW fine);⁷²
- (3) Park Sang-Hyuk on June 10 (revising the Special Act on Support for Border Area to prescribe punishment of up to 1 year imprisonment or 10 million KRW fine);⁷³
- (4) Sul Hoon on June 11 (revising the Special Act on Support for Border Area to prescribe punishment of up to 7 years imprisonment or 70 million KRW fine)⁷⁴;
- (5) Yoon Hu-Duk on June 24 (revising the Inter-Korean Exchange and Cooperation Act to prescribe punishment of up to 3 years imprisonment or 30 million KRW fine)⁷⁵;
- (6) Song Young-Gil on June 30 (revising the Inter-Korean Relations Development Act to prescribe punishment of up to 3 years imprisonment or 30 million KRW fine)⁷⁶; and
- (7) An Min-Suk on July 2 (revising the Special Act on Support for Border Area to prescribe punishment of up to 3 years imprisonment or 30 million KRW fine)⁷⁷.

Among them, an amendment to the Inter-Korean Relations Development Act⁷⁸, proposed by Song Young-Gil, the chair of the foreign affairs and unification committee, on 30 June 2020 (the Song Young-Gil Amendment or Song Amendment)⁷⁹, combined with another unrelated amendment to the Inter-Korean Relations Development Act, became the main bill debated and eventually enacted on

⁷¹ [2100233] 남북교류협력에 관한 법률 일부개정법률안(김홍걸의원 등 21 인), 2020-06-05 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_A2K0W0Y6E0O5C1B7W5H2X2M7G8B7J6 [in Korean].

⁷² [2100290] 남북교류협력에 관한 법률 일부개정법률안(김승남의원 등 12 인), 2020-06-09 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_E2A0A0P6F0G9W1B1U2U7P2C4B3L8O8 [in Korean].

⁷³ [2100343] 접경지역 지원 특별법 일부개정법률안(박상혁의원 등 14 인), 2020-06-10 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_T2M0K0W6H1K0P1N7V5M3L4D1Q5C3V9 [in Korean].

⁷⁴ [2100354] 접경지역 지원 특별법 일부개정법률안(설훈의원 등 26 인), 2020-06-11 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_B2P0S0G6O1I1V0L9G5F4P2T9V7J8Y9 [in Korean].

⁷⁵ [2100961] 남북교류협력에 관한 법률 일부개정법률안(윤후덕의원 등 31 인), 2020-06-24 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_W2T0E0Z6G2N4G1Z8U1W6I4S8X0T5I4 [in Korean].

⁷⁶ [2101221] 남북관계 발전에 관한 법률 일부개정법률안(송영길의원 등 12 인), 2020-06-30 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_S2L0L0I6X3K0L1C7D4D7C0J4R4H5B9 [in Korean].

⁷⁷ [2101308] 접경지역 지원 특별법 일부개정법률안(안민석의원 등 14 인), 2020-07-02 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_D2R0Q0D7K0P2H1R1N4B1G4I5O6B4Y2 [in Korean]

⁷⁸ <https://www.law.go.kr/lsInfoP.do?lsiSeq=202630&viewCls=engLsInfoR>

29 December 2020. In fact, the provisions on the definition of terms (article 4), prohibited acts (article 24 (1)) and the penalty (article 25) in the final text comes almost verbatim from Song’s bill.

However, as will be seen below, the Song Young-Gil Amendment and the final legislation, unlike the six other bills, goes far beyond even the stated aim of banning leaflets in the inter-Korean border area. Instead, with its overbroad criminalization of distribution and transport of materials, including through a third country, the legislation may be more accurately dubbed the North Korean information gag law.

When the foreign affairs and reunification committee passed the Song Amendment on 2 August 2020, it immediately set off alarm bells. On 5 December 2020, the Human Rights Watch issued a press release expressing concern about the proposed law.⁸⁰ It was followed by Human Rights Foundation on 14 December.⁸¹ A legal analysis by Tomás Ojea Quintana, the UN Special Rapporteur on the situation of human rights in the DPRK, was published by the daily Donga Ilbo on 17 December.⁸²

Representatives Chris Smith and Gerry Connolly, ranking members of Congress in the United States,⁸³ and Lord Alton, a member of Parliament in the United Kingdom, have also publicly expressed their concerns.⁸⁴ The Asahi Shimbun, one of the leading newspapers in Japan, also ran an editorial critical of the Song Amendment on 21 December.⁸⁵ On 23 December, Christelle Chartrand, the spokesperson at Global Affairs Canada, expressed the Canadian government’s belief that “freedom of opinion and expression remains a cornerstone of prosperous societies and is important for the realization of human rights in society” in response to questions about the amendment bill.⁸⁶

Nevertheless, the Song Amendment was passed by the full assembly on 14 December 2020

⁷⁹ [2106216] 남북관계 발전에 관한 법률 일부개정법률안(대안)(외교통일위원장), 2020-12-08 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_M2H0X1G2U0B2K0N7P1Z2X3P7H1V1C2 [in Korean].

⁸⁰ <https://www.hrw.org/news/2020/12/05/south-korea-scrap-bill-shielding-north-korean-government>

⁸¹ “South Korean Government Criminalizes North Korean Human Rights Activism”, 14 December 2020, https://hrf.org/press_posts/south-korean-government-criminalizes-north-korean-human-rights-activism

⁸² 최지선, 한기재, “[단독] 키타나 “대북전단금지법, 국제 인권표준에 도전””, 동아일보, 2020. 12. 17., <https://www.donga.com/news/article/all/20201217/104482008/1> [the article is in Korean but the Special Rapporteur’s statement is in the English original].

⁸³ “Rep. Chris Smith voices ‘serious concern’ over South Korea’s growing disregard of fundamental civil liberties, acquiescence to Communist North: Republic of Korea on Verge of Penalizing Humanitarian NGOs outreach to North”, 11 December 2020, <https://chris-smith.house.gov/news/documentsingle.aspx?DocumentID=409071>; “Connolly Condemns Controversial Korean Legislation to Suppress Free Speech”, 17 December 2020, <https://connolly.house.gov/news/documentsingle.aspx?DocumentID=4148>.

⁸⁴ “Representations Made To the UK Foreign Secretary about the Republic of Korea’s “Gag Law”” 20 December 2020, <https://www.davidalton.net/2020/12/20/representations-made-to-the-uk-foreign-secretary-about-the-republic-of-koreas-gag-law>

⁸⁵ “文在寅政權 自由の原則貫いてこそ”, 朝日新聞, 2020. 12. 21., <https://www.asahi.com/articles/DA3S14737810.html> [in Japanese].

⁸⁶ 지정은, “캐나다, ‘대북전단금지법’에 “표현의 자유, 인권실현에 중요””, RFA, 2020. 12. 23., https://www.rfa.org/korean/in_focus/human_rights_defector/leafletban-12232020151525.html [the article is in Korean but the spokesperson’s words are in the English original].

and was signed into law by President Moon Jae-In on 29 December 2020. The law will enter into force 90 days later on 30 March 2021.

II. The Song Young-Gil Amendment to the Inter-Korean Relations Development Act (North Korean information gag law)

II.1. The key provisions

The key provisions of the Song Young-Gil Amendment to the Inter-Korean Relations Development Act (North Korean information gag law) are as follows:

Article 4 (Definitions) The definitions of terms used in this Act shall be as follows:

...

4. The term “Military Demarcation Line area” means the area to the north of the Civilian Control Line in accordance with article 2 (7) of the Military Bases and Installations Protection Act.

5. The term “leaflets, etc.” means leaflets, goods (including promotional and propaganda materials, print materials and auxiliary storage devices), money or other property interests.

6. The term “dissemination” means the act of distributing to unspecified multiple persons in North Korea or moving to North Korea leaflets, etc. (including simply moving leaflets, etc. via a third country. Hereinafter the same shall apply) for the purpose of propaganda, gift, etc. without approval in accordance with article 13 or article 20 of the Inter-Korean Exchange and Cooperation Act.

...

Article 24 (Prohibition of acts in violation of inter-Korean agreements) (1) No one shall do harm or cause grave danger to the life or person of [South Korean] citizens with following acts:

1. The act of broadcasting loudspeakers vis-à-vis North Korea in the Military Demarcation Line area

2. The act of posting visual media (posts) vis-à-vis North Korea in the Military Demarcation Line area

3. The act of disseminating leaflets, etc.

(2) The Minister of Unification may, if necessary, request assistance to the heads of the relevant central administrative agencies or of the relevant heads of local governments for the

prevention of acts prohibited under each subparagraph of paragraph 1. In this case, the heads of the relevant central administrative agencies or the relevant heads of local governments shall cooperate unless there are special reasons.

Article 25 (Penal provisions) (1) Any person who violates article 24 (1) shall be punished by imprisonment for not more than three years or by a fine not exceeding thirty million won; provided that the same shall not apply to cases where the effect of the inter-Korean agreements (limited to the ones that stipulate the prohibited act under each subparagraph of article 24 (1)) has been suspended in accordance with article 23 (2) and (3).

(2) Any person who attempts to commit an offense under paragraph (1) shall be punished.

...

ADDENDUM

This Act shall enter into force three months after the date of its promulgation.

[The original Korean text is accessible at <https://www.law.go.kr/lsInfoP.do?lsiSeq=224881>]

II.2. The criminalized acts and the prescribed criminal penalties under the Song Amendment

Article 24 (1) criminalizes “harming or causing grave danger to the life or person of South Korean citizens” by (a) broadcasting of loudspeakers and posting placards aimed at North Korea in the Military Demarcation Line (MDL) area and (b) by “dissemination” of “leaflets, etc.”.

The North Korean information gag law does not define “harming or causing grave danger to the life or person of South Korean citizens”. Nor is it defined anywhere in the Inter-Korean Relations Development Act.

The more specifically criminalized acts may be divided into the following three categories.

- (1) Broadcasting of loudspeakers and posting of placards directed at North Korea in the inter-Korean border area under article 24 (1) (1) and (2)

Article 4 (4) defines the “the Military Demarcation Line (MDL) area” as the area to the north of the Civilian Control Line. This refers to the South Korean side of the inter-Korean border area where groups and individuals have used as the staging point for sending leaflets to North Korea.

Article 24 (1) (1) and (2) therefore criminalizes broadcasting of loudspeakers and posting of placards directed at North Korea in the inter-Korean border area. Article 25 prescribes punishment of up to 3 years imprisonment or 30 million KRW fine for these offenses as well as attempted offenses.

- (2) Distribution of “leaflets, etc.” to unspecified multiple persons in North Korea for the purpose of propaganda, gifts, etc. without governmental approval under article 24 (1) (3)

Article 4 (5) defines “leaflets, etc.” as “leaflets, goods (including promotional and propaganda materials, print materials and auxiliary storage devices), money or other property interests”. This overbroad and ill-defined term may include not only leaflets but also *inter alia* electronic devices such as USB flash drives and CDs that contain South Korean dramas, movies, music or comics; religious literatures such as the Bible and Buddhist scriptures; fictional and non-fictional works such as George Orwell’s *Animal Farm* and Arthur Koestler’s *Darkness at Noon*, Anne Frank’s diary and Aleksandr Solzhenitsyn’s *The Gulag Archipelago*; South Korean or foreign news periodicals and academic journals; humanitarian aid such as food or medicine; and cash remittances to family members and rescue money to brokers for escapees in North Korea.

Article 24 (1) (3) therefore criminalizes the distribution of the items mentioned above under the rubric of “leaflets, etc.” to unspecified multiple persons in North Korea for the purpose of propaganda, gifts, etc. “without approval in accordance with article 13 or article 20 of the Inter-Korean Exchange and Cooperation Act”. Articles 13 and 20 of the Inter-Korean Exchange and Cooperation Act require the Minister of Unification’s approval for the transporting in and out of goods and services as well as operation of transportation equipment between the two Korea (<https://www.law.go.kr/lsInfoP.do?lsiSeq=105245&viewCls=engLsInfoR>).

While article 13 of the Inter-Korean Exchange and Cooperation Act prohibits unauthorized transporting in and out of goods and services, punishable by a maximum of 3 years imprisonment or 30 million KRW fine (article 27), the transporting in and out is defined as the inter-Korean movement of goods and services, including simply via a third country, for purposes of sale, exchange, lease, loan for use, donation, use, etc. in article 2 (3). Although the South Korean MOU had filed charges against Park Sang-Hak and Park Jung-Oh for alleged violation of article 13 on 10 June 2020, as explained above, this was a legally questionable move because their actions were not motivated by commercial purposes as set out in article 2 (3). In fact, no one had faced charges under the said provision for information dissemination activities prior to the Park brothers’ case.

The new article 4 (6) added to the Inter-Korean Relations Development Act by the Song Amendment will remove such doubts as it clearly criminalizes information dissemination activities for the purpose of propaganda.

It is also worth noting that unlike the acts prohibited under article 24 (1) (1) and (2), which applies only to the ones in the inter-Korean border area, article 24 (1) (3) has no such geographical restriction.

Accordingly, individuals or groups who have never set foot on the inter-Korean border area may be subject to prosecution under article 24 (1) (3) for non-commercial distribution of electronic devices, books and other publications, humanitarian aid and money to “unspecified multiple persons” in North Korea without authorization by the South Korean MOU.

Article 25 prescribes punishment of up to 3 years imprisonment or 30 million KRW fine for these offenses as well as attempted offenses.

- (3) Movement of “leaflets, etc.” to North Korea for the purpose of propaganda, gifts, etc., including simply moving “leaflets, etc.” via a third country, without governmental approval under article 24 (1) (3)

The explanation immediately above about the amendment’s effect on the distribution of “leaflets, etc.” to unspecified multiple persons in North Korea is equally applicable to the movement, including via a third country, of “leaflets, etc.” to North Korea.

Accordingly, individuals or groups who have never set foot on the inter-Korean border area may be subject to prosecution under article 24 (1) (3) for non-commercial movement, including via a third country like China or Russia, of electronic devices, books and other publications, humanitarian aid and money to North Korea without authorization by the South Korean MOU.

Article 25 prescribes punishment of up to 3 years imprisonment or 30 million KRW fine for these offenses as well as attempted offenses.

II.3. The exercise of criminal jurisdiction over South Korean citizens and foreign nationals

The general provisions in South Korea’s criminal code provide for the general exercise of criminal jurisdiction under the territorial principle (articles 2 and 4), the nationality principle (article 3), the passive personality principle (article 6) and the protective principle (articles 5 and 6) thereunder and under criminal provisions in other applicable laws (article 8), as set out below (<https://www.law.go.kr/lsInfoP.do?lsiSeq=205820&viewCls=engLsInfoR>).

PART I GENERAL PROVISIONS

CHAPTER I LIMIT OF APPLICABILITY OF CRIMINAL CODE

...

Article 2 (Domestic Crimes) This Act shall apply to both Korean nationals and aliens who commit crimes in the territory of the Republic of Korea.

Article 3 (Crimes by Koreans outside Korea) This Act shall apply to all Korean nationals who commit crimes outside the territory of the Republic of Korea.

Article 4 (Crimes by Aliens on Board Korean Vessel, etc. outside Korea) This Act shall apply to aliens who commit crimes on board a Korean vessel or Korean aircraft outside the territory of the Republic of Korea.

Article 5 (Crimes by Aliens outside Korea) This Act shall apply to aliens who commit any of the following crimes outside the territory of the Republic of Korea:

1. Crimes concerning insurrection;
2. Crimes concerning foreign aggression;
3. Crimes concerning the national flag;
4. Crimes concerning currency;
5. Crimes concerning securities, postage, and revenue stamps;
6. Crimes specified in Articles 225 through 230 among crimes concerning [government] documents;
7. Crimes specified in Article 238 among crimes concerning seals.

Article 6 (Foreign Crimes against Republic of Korea and Korean National outside Korea)
This Act shall apply to aliens who commit crimes, other than those specified in the preceding Article, against the Republic of Korea or her nationals outside the territory of the Republic of Korea: Provided, that this shall not apply where such acts under Act in effect at the place of the act [“time of the act” in the English translation provided by the Ministry of Government Legislation “time of the act” but this is an obvious mistranslation of the term “행위지”] do not constitute a crime, or the prosecution thereof or the execution of the punishment therefor is remitted.

...

Article 8 (Application of General Provisions) The general provisions of this Act shall also apply to such crimes as are provided by other Acts and subordinate statutes unless provided otherwise by such Acts and subordinate statutes.

[The original Korean text is accessible at <https://www.law.go.kr/lsInfoP.do?lsiSeq=222447>]

The possible legal grounds for the exercise of criminal jurisdiction over South Korean citizens and foreign nationals under (1) the territorial principle, (2) the nationality principle and (3) the protective principle are explained below.

(1) Offenses committed by South Korean citizens and foreign nationals (territorial principle)

Article 2 makes clear that any violation of the North Korean information gag law within the South Korean territory may result in criminal prosecution regardless of the nationality of the perpetrators. Foreign nationals, as well as South Korean citizens, that commit offenses such as sending of leaflets in the inter-Korean border areas can face the prescribed punishment.

As described above in section I.2, in July 2020, a police task force officially investigated Eric Foley, a United States citizen who founded and heads VOM Korea, for the dissemination of

bibles by balloon upon criminal complaints filed by the Gangwon provincial government.⁸⁷ Members of the international crime investigation unit joined the task force for this purpose.⁸⁸

(2) Offenses committed by South Korean citizens abroad (nationality principle)

Article 3 on the surface appears to grant boundless criminal jurisdiction to the authorities for offenses committed abroad by South Korean citizens. The Supreme Court had held in its judgment of 23 April 2004 (case number 2002Do2518) that a South Korean convicted for gambling at the Mirage Hotel Casino in Las Vegas cannot claim justification on the ground that gambling was legal under the local law without stating instances where such justification may be admitted (<https://www.law.go.kr/precInfoP.do?precSeq=133579>). The South Korean criminal law is known for its long-arm jurisdiction under the “absolute” nationality principle.

A more recent ruling by the Seoul High Court on 14 June 2018 (case number 2017No2802) (<https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial=143938>), later affirmed by the Supreme Court on 30 August 2018 (case number 2018Do10042) (<https://lbox.kr/대법원-2018-도-10042>), took a somewhat more restricted approach to the nationality principle: the offender may claim justification if the impugned act was lawful where it was committed and no legal interest such as South Korea’s national security, maintenance of law and order or public welfare, was at stake. The Seoul High Court, however, upheld the defendant’s conviction on the ground that he was operating a gambling venue in Vietnam, a legal operation under Vietnamese law, frequented by South Korean tourists and residents.

Even under the new case-law, South Korean citizens distributing USB flash drives or books in North Korea or moving them to North Korea via China or Russia may face criminal charges if they are shown, for instance, to threaten South Korea’s national security or public welfare. One cannot rule out the possibility that Kim Yo-Jong or other senior North Korean figures publicly threaten Seoul to clamp down on such activities or suffer military retaliation.

(3) Offenses committed by foreign nationals abroad (protective principle)

The activities criminalized by the Song Amendment do not fall under article 5 of the criminal code but may fall under article 6 thereof under certain circumstances. The exercise of jurisdiction over foreign nationals for their acts abroad that is considered prejudicial to the state security may be justified by the application of the protective principle, a well-established but poorly delineated concept, under international law (see Malcom N. Shaw, *International Law* (6th ed.), pp. 666-667).

⁸⁷ 이채현, “‘성경책풍선’ 북에 보내려던 ‘순교자 소리’ 에릭 폴리 목사 고발”, 2020. 7. 7., <https://www.yna.co.kr/view/AKR20200707047200062> [in Korean].

⁸⁸ 정성조, “경찰, ‘대북전단’ 탈북민단체 수사 확대…국제범죄수사대 합류”, 연합뉴스 2020. 7. 6., <https://www.yna.co.kr/view/AKR20200706074800004> [in Korean].

If distributing USB flash drives or books in North Korea or moving them to North Korea via China or Russia is deemed to compromise South Korea's national security in the not wholly unlikely event where the North Korean government threatens military action in retaliation, a case may be made to prosecute foreign offenders. After all, the protective principle is cited to punish foreign nationals charged with counterfeiting of currencies beyond borders. There is no South Korean legislation or case-law to preclude such application of the protective principle.

As seen above, article 6 does require that the impugned acts constitute indictable and punishable crimes under the local law. However, North Korea is known for its draconian punishment of possession or distribution of unauthorized electronic devices or books as crimes against the state under its criminal law. Also, the transport of electronic devices or books through China may fall foul under article 153 of China's penal code that prescribes varying lengths of imprisonment for smuggling of goods and articles (<https://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>).

Granted, the South Korean authorities may hesitate to bring criminal charges against foreign nationals for their activities abroad for fear of inviting embarrassing diplomatic incidents. However, the Song Amendment gives them the power to do so and they may instead opt to use it as an excuse to deport or deny visas to foreign nationals that are engaged in such unwelcome activities.

II.4. Bringing criminal charges against the offenders

The criminal complaints can be filed against the offenders by anyone; it does not have to be the directly affected or injured party. As explained above in section I.2., not only the MOU but provincial and local governments, NGOs with no formal ties to the government like the June 15 South Korean Committee, or private citizens can file criminal complaints to the police or state prosecutors.

Furthermore, the police and state prosecutors can initiate criminal investigations without any criminal complaints if they become aware of criminal acts. Even news reports of activities violating the amendment bill would suffice to bring about criminal investigations.

III. Violations of international human rights law

III.1. The right to freedom of expression

(1) The need for free flow of information into North Korea

North Korea is one of the last remaining totalitarian states in the world. The most recent country resolutions adopted by the UN Human Rights Council on 22 June 2020 (A/HRC/RES/43/25) and by the UN General Assembly on 16 December 2020 (A/RES/75/190) "not[ed] with regret that

independent civil society organizations cannot operate in the Democratic People’s Republic of Korea and [that], as a result, no civil society organization based in the Democratic People’s Republic of Korea was able to submit a stakeholder report [during] the universal periodic review process”.

North Korea also has no independent press and journalists to disseminate information or ideas to the ordinary North Korean people. This is why many North Korean escapees and North Korean human rights defenders have resorted to various means to impart information and ideas from the outside world to North Koreans, especially about the totalitarian cult of personality under three generations of the Kim dynasty, whose program to develop weapons of mass destruction (WMD) has resulted in mass impoverishment of the country.

North Korea has been repeatedly condemned for the diversion of its resources into pursuing nuclear weapons and ballistic missiles over the welfare of its people in Security Council resolutions 2321 (2016) of 30 November 2016, 2371 (2017) of 5 August 2017, 2375 (2017) of 11 September 2017 and 2397 (2017) of 22 December 2017 as well as General Assembly resolutions 72/188 of 19 December 2017, 73/180 of 17 December 2018, 74/166 of 18 December 2019 and 75/190 of 16 December 2020 and Human Rights Council resolutions 37/28 of 23 March 2018, 40/20 of 22 March 2019 and 43/25 of 22 June 2020.

The North Korean government’s vehement hatred of North Korean escapees in South Korea, who have acquired South Korean nationality, variously referred to as traitors, “rubbish beyond the pale of human value” and “shit dogs”, is based on the understanding that they are criminals because they have exercised their freedom to leave their former country, as guaranteed in article 13 (2) of the UDHR and article 12 (2) of the ICCPR.

To be fair, the North Korean officials are rarely sparing when it comes to attacking foreigners who offend their supreme leader. Most notably, on 27 December 2014, the policy division of the DPRK national defence commission (NDC) issued a statement with infamous racist phrases such as “Obama whose words and deeds are unfailingly imprudent just like the image of a monkey inhabiting tropical jungles”^{89, 90}.

- (2) The South Korean government’s international obligation to not only respect but also to protect and fulfil the freedom of expression

While it may not come as a surprise that Kim Yo-Jong and other North Korean officials have difficulties mentioning freedom of expression or other individual freedoms with anything but disdain, it is truly sad to see the South Korean government fail to uphold its proud tradition of liberal democracy when it comes to its relation with North Korea. In fact, the extent to which the Blue House and the ministry of unification (MOU) under President Moon Jae-In, a former human rights lawyer, would go to sacrifice human rights and the rule of law is nothing short of scandalous.

⁸⁹ In Korean: 열대수림속에서 서식하는 원숭이상 그대로 언제 봐야 말과 행동이 경망스럽기 그지없는 오바마

⁹⁰ 조선중앙통신사, “국방위정책국 미국의 불순반동영화상영 규탄”, 2014. 12. 27., <http://www.kcna.co.jp/calendar/2014/12/12-27/2014-1227-008.html> [in Korean].

When Kim Yo-Jong first raised the issue of leaflets on 4 June 2020, President Moon could have politely but sternly reminded his North Korean counterpart that South Korea is a liberal democracy where the rule of law takes precedence over the rule of personality cult. Instead, the Blue House and the MOU tried to find any legal pretext possible to stymie the exercise of freedom of expression. The South Korean government is in effect blaming the North Korean escapees and North Korean human rights defenders, rather than the North Korean government.

A principle is here at stake. The violent reactions, including terrorist attacks by extremists, at home and abroad, to the cartoons and other caricatures of Islamic prophets by Danish and French papers such as *Jyllands-Posten* and *Charlie Hebdo*, for instance, demonstrate that the threats to the freedom of expression come not only from one's own government. As the General Assembly reaffirmed in its resolution 72/180 of 19 December 2017 (A/RES/72/180), "States are under the obligation to respect, protect and fulfil all human rights and fundamental freedoms of all persons [emphasis added]".

(3) The application of the freedom of expression under international law

Articles 19 of the Universal Declaration provides that: "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".

Articles 19 of the ICCPR, to which both North and South Korea are parties, further provides for the right to freedom of opinion and expression as follows:

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. 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.
3. 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:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The Song Amendment's ban on "dissemination" of "leaflets, etc." restricts the North Korean escapees and North Korean human rights defenders' freedom to seek and receive and the North Korean people's freedom to impart information and ideas through any media regardless of frontiers. Such restrictions must conform to the strict tests required in a democratic society, as set out in

international law.

With respect to article 19 (3), the Human Rights Committee stated in its general comment 34 (<https://undocs.org/CCPR/C/GC/34>) that the restrictions must be “provided by law”, limited to the enumerated grounds, and subjected to the principle of necessity and proportionality:

22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

The Human Rights Committee’s general comment no. 34 elaborates upon the phrase “provided by law” thus:

25. For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

Unfortunately, the Song Amendment uses overbroad and ill-defined terms such as “harming or causing grave danger to the life or person of South Korean citizens”, “dissemination” and “leaflets, etc.” that lacks “sufficient precision to enable an individual to regulate his or her conduct accordingly” and may “confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”. The resulting chilling effect on the exercise of freedom of expression violates the requirement that the restriction must be “provided by law”.

The North Korean information gag law also fails to pass the strict test of necessity and proportionality, as set out in the Human Rights Committee’s general comment No. 34:

34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; *they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected*...The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law”. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, *the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain*

[emphasis added].

According to the Human Rights Committee, when invoking a legitimate ground for restriction of freedom of expression, the government must prove “a direct and immediate connection between the expression and the threat”:

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat [emphasis added].

Furthermore, the Human Rights Committee made clear that the value placed upon uninhibited expression is particularly high in public debate concerning public figures and that all public figures, including heads of state, are legitimately subject to criticism and political opposition:

38. As noted earlier in paragraphs 13 and 20, concerning the content of political discourse, the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition [emphasis added].

With respect to the unauthorized movement of leaflets to North Korea through the inter-Korean border area for the purpose of their distribution to unspecified multiple persons in North Korea, the North Korean information gag law may appear to serve a legitimate aim in a democratic society, namely protection of national security, given North Korea’s verbal threats of military action in June 2020 as well as the earlier shooting incident of 10 October 2014.

However, as the Special Rapporteur on the situation of human rights in the DPRK noted⁹¹, the government has not established “a direct and immediate connection” between the sending of “leaflets, etc.” over the inter-Korean border intended for the North Korea people and the threat posed by North Korea’s reaction. Indeed, actual military action by North Korea in response to the sending of leaflets occurred over six years ago.

In addition, the punishment of up to 3 years imprisonment prescribed by the North Korean information gag law cannot be considered “the least intrusive instrument”. The government

⁹¹ 최지선, 한기재, “[단독] 키타나 “대북전단금지법, 국제 인권표준에 도전””, 동아일보, 2020. 12. 17., <https://www.donga.com/news/article/all/20201217/104482008/1> [the article is in Korean but the Special Rapporteur’s statement is in the English original].

alternatively could have deployed security forces in tense moments to prevent the sending of leaflets on a temporary basis or imposed a financial penalty instead of imprisonment. Nor is the Song Amendment's 3-year maximum imprisonment, which is prescribed for home intruders (article 319 of the criminal code) and sex traffickers (19 (1) of the Act on the Punishment of Arrangement of Commercial Sex Acts, etc.), proportionate to the non-violent exercise of the freedom to impart information.

With respect to the unauthorized movement of items other than leaflets to North Korea through the inter-Korean border area for the purpose of their distribution to unspecified multiple persons in North Korea, the North Korean information gag law serves no legitimate aim. The North Korean officials have never made complaints about the dissemination of USB flash drives and CDs, books and other publications, humanitarian aid or money. While Pyongyang may up the ante later, no "direct and immediate connection between the expression and the threat" presently exists.

With respect to the unauthorized movement of "leaflets, etc." to North Korea through a third country or the unauthorized distribution of "leaflets, etc." to unspecified multiple persons in North Korea, there is no legitimate aim justifying its criminalization as neither act endangers South Korea's national security or public order in the inter-Korean border area. Although this may change if North Korea starts to threaten military retaliation for such an act as well, there is clearly no "direct and immediate connection between the expression and the threat" for the moment.

There is also an additional risk of further erosion of freedom of the peoples of the two Koreas to seek, receive and impart information and ideas through any media and regardless of frontiers in the coming years if North Korea responds to South Korea's appeasement with more outrageous demands. Pyongyang for instance may be tempted to demand the criminalization of radio broadcast into North Korea which does not appear to be covered by the Song Amendment.

While one can never downplay the importance of peace and security in the Korean peninsula, securing peace cannot come at the price of sacrificing freedom of expression in violation of international law.

III.2. The right to freedom of thought, conscience and religion

Articles 18 of the Universal Declaration provides that: "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".

Articles 18 of the ICCPR further provides for the right to freedom of thought, conscience and religion as follows:

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his

religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

As described above, it is not uncommon for groups and individuals in South Korea to send religious materials to North Koreans. The North Korean information gag law will criminalize these activities. Not only books, electronic devices and objects with Christian, Buddhist and other religious contents and themes but also those imbued with secular thoughts and convictions such as George Orwell's *Animal Farm* and Arthur Koestler's *Darkness at Noon*, Anne Frank's diary and Aleksandr Solzhenitsyn's *The Gulag Archipelago* may fall prey to the Song Amendment.

Such restriction, in addition to the freedom to seek, receive and impart information under article 19 of the Universal Declaration and article 19 (2) of the ICCPR, engages the freedom of thought, conscience and religion. The Human Rights Committee opined in its general comment No. 22 (CCPR/C/21/Rev.1/Add.4) that "the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, inter alia, ... *the freedom to prepare and distribute religious texts or publications* [emphasis added]" (paragraph 4).

Article 6 of the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly resolution 36/55 of 25 November 1981 (<https://www.ohchr.org/EN/ProfessionalInterest/Pages/ReligionOrBelief.aspx>) further elaborates:

Article 6

... [T]he right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

...

(c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

(d) To write, issue and disseminate relevant publications in these areas;

...

(i) To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.

While freedom to manifest one's religion or beliefs in worship, observance, practice and teaching is subject to restrictions in accordance with article 18 (3) of the ICCPR, the North Korean information gag law cannot be justified for the same reason that it fails to meet the strict tests required under article 19 (3) of the ICCPR.

III.3. The right to liberty of movement and the right to seek and enjoy asylum

According to articles 13 and 14 of the Universal Declaration, everyone has the right to freedom of movement within the borders of each State, to leave any country, including his own, and to seek and to enjoy in other countries asylum from persecution.

Article 12 of the ICCPR further provides for the liberty of movement as follows:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

North Korea has sadly ignored the repeated urgings, most recently by the Human Rights Council in paragraph 2 (i) of its resolution 43/25 of 22 June 2020 and by the General Assembly in paragraph 17 (e) of its resolution 75/190 of 16 December 2020, to ensure that everyone within the North Korean territory "enjoys the right to liberty of movement and is free to leave the country, including for the purpose of seeking asylum outside [North Korea], without interference by the [North Korean authorities]".

The Song Amendment's ban on the unauthorized movement of "leaflets, etc." to North Korea through a third country and their distribution to unspecified multiple persons in North Korea may have the effect of criminalizing the delivery of mobile phones and cash payment that are necessary to enable North Koreans to escape from North Korea to a safe country like South Korea.

Although the right to liberty of movement within the territory of a State and freedom to leave it is subject to restrictions in accordance with article 12 (3) of the ICCPR, there can be no legitimate aim justifying a ban on the unauthorized movement of mobile phones, money and other items necessary for the escape from North Korea or their unauthorized distribution to unspecified multiple persons in North Korea; neither act endangers South Korea's national security or public order in the inter-Korean border area.

III.4. The right to freedom of association

Article 20 (1) of the Universal Declaration provides that: “Everyone has the right to freedom of peaceful assembly and association”.

Article 22 of the ICCPR further provides for the freedom of association as follows:

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

...

The North Korean information gag law may be used not only to bring criminal charges against individual offenders but, in conjunction with the existing provisions in the civil code, may also be used to revoke the incorporation of incriminated civil society organizations (CSOs) as legal persons.

The South Korean civil code provides rather broad, unfettered powers to the government ministries in permitting, inspecting or revoking incorporation as a legal person (<https://www.law.go.kr/lsInfoP.do?lsiSeq=188377&viewCls=engLsInfoR>): article 32 provides that “an association or foundation relating to science, religion, charity, art, social intercourse, or otherwise relating to enterprises not engaged for profit or gain, may be formed as a juristic person subject to the permission of the competent authorities”; article 37 that “The business of a juristic person shall be inspected and supervised by the competent authorities”; and article 38 that “Where a juristic person operates such business outside the scope of its purpose, violates such conditions attached to the permission for its incorporation, or engages in acts harming public interests, the competent authorities may cancel the permission”.

The MOU, like other government ministries, can approve, inspect and terminate the incorporation of CSOs as juristic person under the delegated administrative legislation.⁹² These legal provisions served to restrict the creation and operation of CSOs in the authoritarian era and continue to hinder the CSOs acquiring legal personality, which is necessary among other things to receive tax-

⁹² 통일부 소관 비영리법인의 설립 및 감독에 관한 규칙 <http://www.law.go.kr/lsInfoP.do?lsiSeq=178333> [in Korean]; 통일부 소관 비영리법인의 사무 처리 규정 <http://law.go.kr/admRulLsInfoP.do?chrClsCd=&admRulSeq=2200000068180> [in Korean].

deductible donations.

As described above in section I.2, the government has already used the extremely vague wording of article 38 of the civil code such “operating business outside the scope of its purpose”, “violating conditions attached to the permission for its incorporation” or “engaging in acts harming public interests” to cancel the permission for the incorporation of the FFNK and KuenSaem. It has also conducted politically motivated “business inspections” of other incorporated North Korean human rights and escapee settlement support groups.

With the passage of the North Korean information gag law, any incorporated CSO accused of violating its provisions may be subjected to revocation of its incorporation. This will undoubtedly have an impermissible chilling effect on the exercise of the right to freedom of expression and association by new or existing CSOs.

III.5. The principle of legality (*nullum crimen, nulla poena sine lege*)

Article 11 (2) of the Universal Declaration provides that: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.

Article 15 (1) of the ICCPR similarly provides that: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby”.

As explained above in section III.1., however, the North Korean information gag law suffers from overbroad and ill-defined terms such as “harming or causing grave danger to the life or person of South Korean citizens”, “dissemination” and “leaflets, etc.” that violates the principle of legality, a fundamental principle of modern criminal law.

IV. Flaws in the arguments made by the South Korean government

As the international criticism of the Song Young-Gil Amendment to the Inter-Korean Relations Development Act (North Korean information gag law) continued to mount, the South Korean ministry of unification (MOU) reportedly sent an English-language document entitled “On the amended provisions of ‘the Development of Inter-Korean Relations Act’ (December 2020)” to the members of the Seoul Foreign Correspondents’ Club (SFCC) on 17 December 2020 and to over 50 diplomatic missions in Seoul⁹³ as well as apparently almost every person on its e-mail list on 20

⁹³ 나혜윤, “‘대북전단법’ 국제사회 논란 속 관보 게재…효력은 3월 30일부터”, 뉴스 1 2020. 12. 29.,

December 2020. The document is a somewhat haphazard English translation of the MOU's "Explanatory material on the amendment to the 'Development of Inter-Korean Relations Act' with respect to the regulation of anti-North leaflets", previously distributed to South Korean journalists on 15 December 2020.⁹⁴

On 22 December 2020, the MOU issued a press release upon the State Council's deliberation and passage of the promulgation proposal of the Song Amendment, a formality prior to the president's signature.⁹⁵ The minister of unification interestingly pledged to "enact" an "interpretive guideline on the provision concerning dissemination of leaflets, etc." prior to the North Korean information gag law's entry into force on 30 March 2021, namely to clarify that the dissemination of leaflets, etc. from a third country does not fall under its ambit.

However, the South Korean government's arguments are plagued with convoluted logic, contradictions, half-truths, outright falsehoods and fake news, wishful thinking, misrepresentation and mistranslation, as will be seen below.

IV.1. The applicability of the Song Amendment to the distribution of "leaflets, etc." in North Korea or movement of "leaflets, etc." via a third country to North Korea

With respect to the Song Amendment's applicability to the distribution of "leaflets, etc." in North Korea or movement of "leaflets, etc." via a third country to North Korea, the MOU's "On the amended provisions" of 17 December 2020 confidently boasts that:

This includes 'flying leaflets to North Korea simply via a third country' when defining 'scattering' is to show that it considers the consistency of the legal system along with the 'Inter-Korean Exchange and Cooperation Act' when the movement of goods between South and North Korea are also defined as to "include movements simply via a third country." This means that regulations also apply to leaflets and others to the North from South Korean territory or waters by way of a third country's airspace or waters. The simple action of delivering goods through third countries is not applied by this amendment.

* The third country's law will be applied if leaflets and others are sent to North Korea from that country, and thus this amendment will not be applied.

The MOU's "On the amended provisions" of 20 December 2020 similarly claims that:

This law is applied to the situation that the scattering leaflets and other items are sent to North Korea from South Korea. 'Leaflets sent to North Korea simply via a third country'

<https://www.news1.kr/articles/?4164579> [in Korean].

⁹⁴ In Korean: 대북전단 규제 관련 「남북관계 발전에 관한 법률」 개정 설명자료

⁹⁵ 통일부, "「남북관계 발전에 관한 법률」 일부개정법률 공포안이 국무회의에서 심의·의결되었습니다.", 2020.12.22, <https://www.korea.kr/news/pressReleaseView.do?newsId=156428495>.

refers to an exceptional case in which leaflets and other items scattered from South Korea are sent to North Korea via a third country due to tidal current or air current.

If leaflets and other items are sent to North Korea from a third country, the third country's law will be applied, and thus this amendment will not be applied. The ROK government will prepare thoroughly so that this amendment can be clearly implemented.

As explained above in section II.2., the plain reading of the Song Amendment does not suggest rule out the possibility of criminalizing the “dissemination of leaflets, etc.” outside of the inter-Korean border area. If anything, the new article 24 (1) (3), read in conjunction with the definitions in the new article 4 (5) and (6), explicitly prohibits the distribution of “leaflets, etc.” in North Korea or movement of “leaflets, etc.” via a third country to North Korea.

The MOU's assurance that “third country's law will be applied if leaflets and others are sent to North Korea from that country, and thus this amendment will not be applied” is puzzling to say the least. As discussed above in section II.3., South Korea can exercise criminal jurisdiction over the criminal offenses of South Korean citizens and foreign nationals abroad under the nationality principle and protective principle. It is ultimately up to the police or state prosecutors to initiate criminal investigations.

The MOU's claim that the third-country clause merely applies to “leaflets and others to the North from South Korean territory or waters by way of a third country's airspace or waters” or to “an exceptional case in which leaflets and other items scattered from South Korea are sent to North Korea via a third country due to tidal current or air current” beggars belief. Even a cursory look at the map of Northeast Asia below lays bare the logistical impracticality and implausibility of sending balloons or any other flying objects from South Korea to North Korea by taking an unnecessarily long detour through an third country.⁹⁶



The minister of unification's pledge to “enact” an “interpretive guideline” to clarify that the North Korean information gag law does not affect “dissemination of leaflets, etc. from a third

⁹⁶ “Korean Peace - A Comprehensive Analysis”, April 3, 2018, <https://www.iasparliament.com/article/korean-peace-a-comprehensive-analysis?q=ICAN>

country” is revealing, problematic and unreliable in equal measure.

The talk of “interpretive guideline” is nothing short of a public admission that the Song Amendment is overbroad and vague enough to criminalize the distribution of “leaflets, etc.” in North Korea or movement of “leaflets, etc.” via a third country to North Korea. Had the North Korean information gag law been narrowly and strictly tailored to avoid chilling effect on the freedom of expression and to be consistent with the principle of legality for criminal punishment, such an “interpretive guideline” would not be necessary in the first place.

The MOU’s “interpretive guideline” will have limited persuasive powers and certainly no binding force over the police or state prosecutors, let alone courts, that are charged with the implementation of the criminal provisions. As discussed above in sections I.2. and II.4., criminal complaints can be filed by provincial and local governments, NGOs with no official ties to the government like the June 15 South Korean Committee, or private citizens; the police or state prosecutors can even initiate criminal investigations in the absence of any formal criminal complaints.

Lastly, an “interpretive guideline” is just that: a “guideline” and nothing more. It certainly cannot and should not override legislation duly passed by the National Assembly and signed into law by the president. The MOU’s “interpretive guideline” may also be revised at the minister’s (or more accurately the president’s) pleasure. This obviously is not reassuring to North Korean escapees and North Korean human rights defenders.

Instead of resorting to such dubious non-law like an “interpretive guideline”, the government and the ruling party can remove the legal uncertainty in good faith within the next three months before the Song Amendment enters into force on 30 March 2021 by simply adding “in the Military Demarcation Line area” at the end of article 24 (1) (3) as is the case with article 24 (1) (1) and (2):

Article 24 (Prohibition of acts in violation of inter-Korean agreements) (1) No one shall do harm or cause grave danger to the life or person of [South Korean] citizens with following acts:

1. The act of broadcasting loudspeakers vis-à-vis North Korea in the Military Demarcation Line area
2. The act of posting visual media (posts) vis-à-vis North Korea in the Military Demarcation Line area
3. The act of disseminating leaflets, etc. in the Military Demarcation Line area

[the proposed addition emphasized]

The overbroad and vague definition of “dissemination” in the new article 4 (6) that encompasses distribution of “leaflets, etc.” in North Korea or movement of “leaflets, etc.” to North Korea via a third country may be deleted in its entirety as it only creates unnecessary confusion and misunderstanding.

The South Korean government has also never explained why it is necessary to prohibit the “dissemination” of items other than leaflets such as USB flash drives and CDs, books and other

publications, humanitarian aid or money that North Korea never complained about.

Again, to remove any unnecessary confusion or misunderstanding, the government and the ruling party may in good faith delete the overbroad and vague definition of “leaflets, etc.” in the new article 4 (5) that encompasses “print materials and auxiliary storage devices” and “money or property interests” in its entirety; all references to “leaflets, etc.” in the Song Amendment may be replaced with simply “leaflets”.

IV.2. Excessive criminal penalties prescribed by the Song Amendment

The MOU’s “On the amended provisions” further tries to justify the Song Amendment’s 3-year maximum imprisonment under the North Korean information gag law by claiming that: “The level of punishment is also appropriate as the same punishments are applied to acts of violation of the ‘Inter-Korean Exchange and Cooperation Act’ (the unapproved taking out and bringing in of goods between the two Koreas)”.

However, as discussed above in section II.2., the Inter-Korean Exchange and Cooperation Act criminalizes unauthorized commercial trade with North Korea. The North Korean escapees and North Korean human rights defenders in South Korea are not seeking financial profit from inter-Korean export or import of goods and services; they are instead interested in transmitting information and ideas to the North Korean people.

The South Korean government’s willful, disingenuous ignorance of this patent difference is shocking to say the least. It is further proof that the South Korean government does not take the right to freedom of expression, including freedom to seek, receive and impart information and ideas, regardless of frontiers through any medium, seriously.

In fact, the MOU’s “On the amended provisions” only has this to say about freedom of expression under the ICCPR before moving to the relevant jurisprudence of South Korean and United States domestic courts: “The ‘International Covenant on Civil and Political Rights stipulates that freedom of expression can be subject to certain restrictions by law or when necessary for respect of the rights of others, and for the protection of national security or of public order (Article 19)” failing to take into account the strict scrutiny required under the ICCPR jurisprudence explained above in section III.1.

IV.3. Misrepresentation of the case-law in South Korean national courts

The MOU’s “On the amended provisions” claims that the South Korean Supreme Court held that “freedom of expression cannot be guaranteed under the Constitution for the flying of leaflets which threatens the safety and lives of the people” in 2016. In fact, as early as 11 June 2020, the Blue House cited the judgment in justifying the criminalization of leafleting.⁹⁷

⁹⁷ 하수영, “[전문] 청와대 “대북전단 살포 행위, 법으로 엄정 대응할 것””, 뉴스핌 2020. 6. 11.,

That case arose when Lee Min-Bok of the Campaign for Helping North Koreans in Direct Way (NKDW) filed a lawsuit against the South Korean claiming damages for stopping his sending of leaflets to North Korean in the inter-Korean border area by the South Korean authorities.

The fuller passage of the court judgment from which the MOU liberally quoted the sentence above presents a more nuanced approach. The Uijeongbu District Court held as follows in its judgment of 6 January 2015 (case no. 2014GaDan109976), which was upheld on appeal judgment of 8 October 2015 (case no. 2015Na50546) and finalized by the Supreme Court on 25 February 2016 (no. 2015Da247394):

But, as observed earlier, North Korea continuously threatened to conduct aimed strikes at the point of provocation if the balloons carrying anti-North leaflets enter the northern side and later, when the dissemination of anti-North leaflets continued, it threatened to carry out full-fledged destruction fire against not only the point of provocation but the defendant (South Korea)'s side until, when the plaintiff began disseminating balloons carrying anti-North leaflets en masse in the neighborhood of Yeoncheon area in Gyeonggi Province, North Korea's anti-aircraft guns opened fire and their rounds landed on the Civilian Control Line neighboring Yeoncheon County, Gyeonggi Province, on 10 October 2014. In light of all this, it may be said that the act of flying large balloons carrying anti-North leaflets creates a pressing and grave danger to the life and limb of the plaintiff and police officers standing guard around him as well as of the [South Korean] citizens residing in the vicinity of the area where the large balloons carrying anti-North leaflets are flown away or where large balloons carrying anti-North leaflets cross the ceasefire line. Accordingly, the police officers and military personnel belonging to the defendant may restrain the act of flying of balloons carrying anti-North leaflets in response to such a clear and present danger if it creates the said danger in accordance with article 5 (1) of the Act on the Performance of Duties by Police Officers or article 761 (2) of the Civil Code and, *provided that the said restriction is not excessive, such restraining act cannot be considered unlawful*. [emphasis added]⁹⁸

The courts has made clear that the restriction on the sending of leaflets in the inter-Korean border area must not be “excessive”, but the criminalized acts and the prescribed criminal penalties under the Song Amendment are indeed excessive as described above. The MOU’s “On the amended

<http://www.newspim.com/news/view/20200611001075> [in Korean].

⁹⁸ In Korean: “그러나 앞서 살펴본 바와 같이, 북한은 대북전단을 실은 풍선이 북측으로 들어올 경우 도발지점을 조준·타격하겠다고 계속적으로 위협하다가 대북전단 살포가 이어지자 그 후에는 도발지점 뿐 아니라 피고측에 대하여 전면적인 격파·사격을 하겠다고 위협하였으며, 실제로 원고가 2014. 10. 10. 경기 연천 지역 인근에서 대북전단을 실은 풍선을 대량으로 살포하기 시작하자, 북한에서는 고사포를 쏘아 그 포탄이 경기 연천 인근 민통선에 떨어졌던 점에 비추어 볼 때, 대북전단을 대형풍선에 실어 날리는 행위는 원고, 원고의 주변에서 신변을 경호하는 경찰관을 비롯하여 대북전단을 실은 대형풍선을 날리는 지역 혹은 대북전단을 실은 대형풍선이 휴전선을 지나가는 지역 부근에 사는 국민들의 생명, 신체에 대한 급박하고 심각한 위협을 발생시킨다고 할 것이다. 따라서 피고 소속 경찰관이나 군인은 이러한 명백하고 현존하는 위협에 대응하기 위하여 경찰관직무집행법 제 5 조 제 1 항 혹은 민법 제 761 조 제 2 항에 따라 대북전단을 실은 풍선이 위와 같은 위협을 발생시킬 경우 이를 날리는 행위를 제지할 수 있고, 그 제한이 과도하지 아니한 이상, 이러한 제지행위를 위법하다고 할 수는 없다.” 의정부지방법원 2015. 1. 6. 선고 2014 가단 109976 판결 [손해배상(기)], <https://casenote.kr/의정부지방법원/2014가단109976>

provisions” glosses over this crucial and commonsensical aspect of the case-law.

The Uijeongbu District Court’s judgment must also be distinguished because it concerned a lawsuit challenging the South Korean authorities’ power to restrain leafleting activities on a temporary basis; the North Korean information gag law that carries the maximum penalty of three is a whole different ballpark.

It also needs no reminding that the courts only considered the sending of leaflets in the inter-Korean border area. They never considered let alone give green light to the wholesale criminalization of “dissemination of leaflets, etc.” outside of the inter-Korean border area.

In addition, the MOU is silent about the National Human Rights Commission’s recommendation of 6 December 2010 to the ministers of unification and national defense to make efforts to fulfil the North Korean people’s right to freely access outside information and its decision of 26 January 2015 that an even more progressive stance that the government must not restrict the sending of leaflets as it is protected as the exercise of freedom of expression and inter-Korean agreements do not prohibit leafleting by private citizens.⁹⁹

IV.4. Reference to outdated case-law of the Supreme Court of the United States

For reasons that are not entirely clear but perhaps because of the reference to “clear and present danger” in the Uijeongbu District Court’s judgment above, the MOU’s “On the amended provisions” cites the United States Supreme Court’s pre-Civil Rights era case-law, namely *Schenck v. United States*, 249 U.S. 47 (1919), *Gitlow v. New York*, 268 U.S. 652 (1925) and *Dennis v. United States*, 341 U.S. 494 (1951):

【Reference】 U.S. Case on the Principle of Clear and Present Danger

In the case of *Schenck vs. the U.S.*, the U.S. Supreme Court noted “The most stringent protection of free speech would not protect a person falsely shouting fire in a theatre and causing a panic” ruling that “the question in every case is whether the words used in such circumstances are of such a nature as to create a ‘clear and present danger’ that they will bring about the ‘substantive evils.’” (1919)

Furthermore, from *Gitlow vs. New York* (1925), the U.S. Supreme Court ruled “As long as the speech tends toward a bad or disturbing result, the government can restrict it even when the danger is not clear or present” and in *Dennis vs. the U.S.* (1951), it ruled “the gravity of the ‘evil’, discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger.”

⁹⁹ 국가인권위원회, “인권위, 대북전단활동 제지에 관한 의견 표명”, 2015. 2. 17., <https://www.humanrights.go.kr/site/program/board/basicboard/view?menuid=001004002001&boardtypeid=24&boardid=610465>

Firstly, as a matter of fact, nowhere in *Gitlow v. New York*, 268 U.S. 652 (1925)¹⁰⁰ does the United States Supreme Court state that: “As long as the speech tends toward a bad or disturbing result, the government can restrict it even when the danger is not clear or present”. The closest quote from the majority opinion in *Gitlow* from which Justice Oliver Wendell Holmes, the author of the “clear and present danger” doctrine, dissented, would be: “That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. ... And the general statement in the *Schenck* Case (p. 52) that the “question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,”—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character”.

Likewise, the MOU's partial quote of “the gravity of the ‘evil’, discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger” from *Dennis v. United States*, 341 U.S. 494 (1951)¹⁰¹ is rather misleading. The full sentence actually reads: “Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” 183 F. 2d at 212. We adopt this statement of the rule”.

On a more substantive level, the United States precedents cited by the MOU sets the standards for the permissibility of speech that may cause harm or danger. The acts criminalized by the North Korean information gag law concern the exercise of freedom of expression that in and of itself causes no harm or danger; rather, it is the use or threat of force from North Korea in response to it that may cause harm or danger.

Furthermore, *Schenck*, *Gitlow* and *Dennis* can no longer be cited as good law in modern America as these Red Scare and McCarthyism-era precedents have been overturned or superceded by subsequent case-law. Since *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the United States Supreme Court has applied the stricter “imminent lawless action” test on laws restricting the freedom of speech.¹⁰²

IV.5. Limited applicability of inter-Korean agreements to private citizens

The MOU's “On the amended provisions” makes the claim that: “Starting from the ‘July 4th South-North Joint Communiqué’ of 1972 to the ‘Inter-Korean Basic Agreement’ of 1992 and the ‘Panmunjom Declaration’ of 2018, South and North Korea have repeatedly agreed to ban mutual slander and leaflet drops. However, some civilian organizations have continued to scatter leaflets despite the inter-Korean agreements and government requests to refrain from such actions. The tensions between South and North Korea escalated as the North denounced the South for violating

¹⁰⁰ <https://tile.loc.gov/storage-services/service/ll/usrep/usrep249/usrep249047/usrep249047.pdf>

¹⁰¹ <https://tile.loc.gov/storage-services/service/ll/usrep/usrep341/usrep341494/usrep341494.pdf>

¹⁰² <https://tile.loc.gov/storage-services/service/ll/usrep/usrep395/usrep395444/usrep395444.pdf>

agreements and threatened to take punitive measures against leaflet scattering”.

However, it is difficult for the South Korean government to argue that inter-Korean agreements, including the Panmunjom declaration of 27 April 2018, provide the legal justification for the enactment of the North Korean information gag law. The relevant text of the Panmunjom declaration, for instance, as seen below, imposes obligations of the North and South Korean governments without reference to actions by private parties:

2. *South and North Korea* will make joint efforts to alleviate the acute military tension and practically eliminate the danger of war on the Korean Peninsula. Alleviating the military tension and eliminating the danger of war is a highly significant challenge directly linked to the fate of the Korean people and also a vital task in guaranteeing their peaceful and stable lives.

① *South and North Korea* agreed to completely cease all hostile acts against each other in every domain, including land, air and sea, that are the source of military tension and conflict. In this vein, *the two sides agreed to transform the demilitarized zone into a peace zone in a genuine sense by ceasing as of May 1 this year all hostile acts and eliminating their means, including broadcasting through loudspeakers and distribution of leaflets, in the areas along the Military Demarcation Line.*

② *South and North Korea* agreed to devise a practical scheme to turn the areas around the Northern Limit Line in the West Sea into a maritime peace zone in order to prevent accidental military clashes and guarantee safe fishing activities.

③ *South and North Korea* agreed to take various military measures to ensure active mutual cooperation, exchanges, visits and contacts. The two sides agreed to hold frequent meetings between military authorities, including the Defense Ministers Meeting, in order to immediately discuss and solve military issues that arise between them. In this regard, the two sides agreed to first convene military talks at the rank of general in May.

[emphasis added]¹⁰³

In any case, it is axiomatic that states cannot choose to opt out of their international obligations to respect and observe fundamental human rights norms under international law such as freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, in any medium by concluding bilateral agreements.

Furthermore, as a matter of precedence in South Korea’s legal system, the Panmunjom declaration has never received consent from the National Assembly whereas the International Covenant on Civil and Political Rights (ICCPR) has received consent from the National Assembly before its ratification by the president in 1990.

IV.6. Misrepresentation of Carl Gershman, President of the National Endowment for

¹⁰³ Korea Times, “[FULL TEXT] Panmunjeom Declaration”, 2018. 4. 27., https://www.koreatimes.co.kr/www/nation/2018/04/731_248077.html

Democracy (NED)

According to the MOU's "On the amended provisions": "President Gershman of NED (National Endowment for Democracy) also mentioned in his interview with VOA on June 12, 2020 that leaflet drops are not an effective means to flow information into the DPRK".

However, Gershman in the VOA interview on 12 June 2020 was highly critical of the South Korean government's move to criminalize the sending of leaflets to North Korea, emphasizing the plans to support more efficient ways to deliver information to the North Korean people than leaflets.¹⁰⁴ Indeed, on 22 December 2020, he expressed his disappointment at the misrepresentation of his earlier statements. "While NED has not funded any leaflet activities, we do support civil society groups that make accurate and up-to-date information available to the people of North Korea, who otherwise would be entirely cut off from the outside world. ... I am disappointed by the MOU's misuse of my VOA interview about leaflet activities."¹⁰⁵

IV.7. An unconvincing denial of the Song Amendment's attempt to appease North Korea

The MOU's "On the amended provisions" claims that: "Distorting and denouncing the amendment under a false frame by calling it a 'bill capitulation to Kim Yo Jong' is clearly an inappropriate interpretation". According to the MOU, 14 bills to restrict leafleting has been proposed by lawmakers in the National Assembly since 2008 and hence "claiming that the legislation was drafted in response to a comment made by a high-profile North Korean in 2020 is not true".

However, the MOU fails to mention that 7 of those 14 bills were proposed by lawmakers in a month after Kim Yo-Jong's verbal bombshells began on 4 June 2020. Before that, the last anti-leaflet bill had been proposed on 28 September 2008.¹⁰⁶ It is safe to say that an anti-leaflet bill has not been on the priority list for the government and the ruling party until North Korea's June 2020 threats.

The MOU's "On the amended provisions" interestingly also writes in a rather contradictory manner that: "This legislation is highly likely to contribute to the improvement of inter-Korean relations and promotion of peace on the Korean Peninsula". We obviously do not share the MOU's naïve optimism; instead we fear that North Korea will continue blackmail South Korea and hold our human rights and democracy hostage.

¹⁰⁴ 조은정, "NED 회장 "대북전단 금지 유감...효과적인 정보유입 방법은 아냐", 2020. 6. 12., <https://www.voakorea.com/korea/korea-politics/ned-dprk-leaflets>

¹⁰⁵ 지정은, "거쉬먼 "대북전단금지법은 남북 분단의 벽 강화할 것", 2020. 12. 22., https://www.rfa.org/korean/in_focus/human_rights_defector/leaflet-12222020155209.html [the article is in Korean but parts of Gershman's interview is in the English original]

¹⁰⁶ [2015763] 남북교류협력에 관한 법률 일부개정법률안(김병욱의원 등 12 인), 2018-09-28 제안, https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_D1F8W0S9M2L8N0W9E2U5V0E4G7H3F1 [in Korean].

There is no justice in this world—not unless we make it. The tortuous history of human rights and democracy in South Korea is the best proof. This is why 46 groups, representing over 300 civil society groups and 7 concerned individuals expressed concern about the South Korean government’s increasingly weak stance on human rights violations and accountability in North Korea.¹⁰⁷ It is time for South Korea to fight for the people in North Korea who cannot fight for themselves.

Sincerely,

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Justice For North Korea

Mulmangcho

Improving North Korean Human Rights Center

Transitional Justice Working Group (TJWG)

¹⁰⁷ Human Rights Watch, “South Korea: Promote Human Rights in North Korea”, December 15, 2020, <https://www.hrw.org/news/2020/12/15/south-korea-promote-human-rights-north-korea>