



PERMANENT MISSION OF THE REPUBLIC OF KOREA
GENEVA

KGV/219/2013

The Permanent Mission of the Republic of Korea to the United Nations Office and other International Organizations at Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights (the Secretariat of the Working Group on Arbitrary Detention) and has the honour to submit the enclosed *Response of the Government of the Republic of Korea* for the Working Group on Arbitrary Detention Questionnaire on the Application of Article 9, Paragraph 4 of the ICCPR attached in the latter's letter dated 17 June 2013.

The Permanent Mission of the Republic of Korea to the United Nations Office and other International Organizations at Geneva avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.

Enclosure : as stated.

Geneva, 14 November 2013

Secretariat of the Working Group on Arbitrary Detention (WGAD)
Office of the United Nations High Commissioner for Human Rights (OHCHR)
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OHCHR REGISTRY

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Response of the Government of the Republic of Korea for the Working Group on Arbitrary Detention Questionnaire on the Application of Article 9, Paragraph 4 of the ICCPR

Ref. G/SO 218/2

The Government of the Republic of Korea presents its response to the letter dated 17 June 2013 for the questionnaire of the Working Group on Arbitrary Detention.

Specific legislations and provisions referred to the response are attached at the end of this document.

1) Specific provisions of domestic law and their adoption dates to incorporate Article 9 (4) of the International Covenant on Civil and Political Rights

1. Constitution of the Republic of Korea prescribes that “any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention” in Article 12 (6) to ensure the liberty of persons (this Article has been effective since the establishment of the Founding Constitution in 1948).
2. Article 214-2 of the *Criminal Procedure Act* provides the review of legality of arrest and detention system, which is in compliance with the object and purpose of Article 9 (4) of the Covenant(adopted in 1980; amended in 1987, 1995, 2005, and 2007). Article 214-3 of the Act also stipulates that the suspect who has been released through the review of legality of arrest or detention shall not be re-arrested or re-detained for the same crime unless he flees or destroys evidence (adopted in 1995; amended in 2007).
3. Other types of detention based on non-criminal procedures are explained below.

2) Applicability of the mechanism above to administrative detention, including detention for security reasons, involuntary hospitalization, and immigration detention

4. The review of legality of arrest and detention referred to in Paragraphs 1 and 2 is applicable only to the criminal procedure, and other forms of detention are regulated by different corresponding acts.
5. The *Habeas Corpus Act* prescribes that when the confinement of an inmate in any

medical facility, welfare facility, confinement facility, or protective facility is initiated by illegal administrative disposition or by any individuals, or an inmate remains confined even after the cause that gave rise to such confinement ceases to exist, such inmate or his/her legal representative, guardian, spouse, lineal blood relative, brother, sister, cohabitant, employer, or an employee at the relevant confinement facility may file a petition for habeas corpus with a court (established in 2007; entered into force in 2008).

6. The *Habeas Corpus Act* is not applicable to detentions in immigration detention centers. However, according to the *Administrative Litigation Act*, a person who is under internment or his/her legal representatives can institute a revocation litigation to the court within 90 days from the date the internment is known, and may raise an objection to the Minister of Justice at anytime during the internment. When the objection is dismissed, revocation litigation against the dismissal can be filed under the *Administrative Litigation Act* within 90 days from the date the decision of the dismissal is known.
7. The justice system of the Republic of Korea does not allow administrative detention for security reasons.

3) Availability of the right to bring proceedings before the court for individuals subjected to preventive detention

3. Preventive detention measures intended for those who are deemed likely to commit crime are not legally provided in the Republic of Korea. Under the *Medical Treatment and Custody Act*, the court may declare a sentence of medical treatment and custody by an application of a prosecutor to prevent those who have committed an offensive act in a state of mental disorder, addiction to narcotics, alcohol or other drugs, or psychosexual disorder from recommitting crime (established in 2005; partially amended in 2013. 7.). However, this act mainly aims to facilitate rehabilitation through medical treatment.

4) Relevant remedies including the mechanism providing for release and compensation for unlawful detention

4. The review of legality of arrest and detention is a system that determines the legality of arrest and detention in the process of a lawful arrest and detention. It could also be used in the context of an illegal arrest and detention, and thus a person under illegal arrest or detention is eligible to request the review of legality of his arrest or detention and claim for his release (Supreme Court Decision 97Mo21, August 27, 1997).
5. The public prosecutor shall conduct regular inspection of the arrest and detention facilities of investigative institutions and, if there is a valid reason for suspecting that the prisoner has been arrested or detained not through due process of law, the arrested or detained shall be immediately released (Article 198-2 of the *Criminal Procedure Act*, enacted in 1961, amended in 1995).
6. Constitution of the Republic of Korea prescribes that “in case a person has sustained damages by an unlawful act committed by a public official in the course of official duties, he may claim just compensation from the State or public organization under the conditions as prescribed by statute.” The concept of this provision is provided in detail under the *State Compensation Act*.
7. When public officials inflict damage on other persons by intention or negligence in performing their official duties, the State or local governments shall compensate for such damage under the *State Compensation Act*. Thereby, a person who was unlawfully detained can bring legal proceedings against the government of the Republic of Korea for compensation (legislated in 1951, amended in 2008).
8. Furthermore, if the prosecutor or the police arrest or imprison a person by abusing his official authority, his/her action constitutes crime of unlawful arrest and unlawful confinement under the *Criminal Act* (Article 124, adopted in 1950; entered into force in 1953).
9. In addition, if there is a complaint by any inmate or it is deemed that there is a possibility of unlawful confinement, the National Human Rights Commission, established under the *National Human Rights Commission Act* in conformity with the UN *Paris Principles*, may visit the place of confinement and conduct an inspection even if no complaint was filed, and, when it is confirmed that the confinement is unlawful, the Commission may recommend appropriate remedies (legislated in 2001).

5) Persons who may commence the proceedings on behalf of the detained

10. In criminal procedure, a suspect who is arrested or detained, his defense counsel, legal representative, spouse, lineal relative, sibling, family member, cohabitant, or employer may, pursuant to the *Criminal Procedure Act*, submit a petition to the competent court to examine the legality of the arrest and detention (Article 214-2, Paragraph 1 of the *Criminal Procedure Act*, adopted in 1980 and amended in 1987, 1995, 2005, and 2007)
11. Under the *Habeas Corpus Act*, inmate or his/her legal representative, guardian, spouse, lineal blood relative, brother, sister, cohabitant, employer, or an employee at the relevant confinement facility may file a petition for habeas corpus with a court (Article 3 of the *Habeas Corpus Act*, enacted in 2007, amended in 2010).

6) Formal requirements or procedures for the court review of legality of detention

12. There is no legal procedure which must precede the filing of the petition for the review of legality of arrest and detention, but the request document for review shall contain a description on each of the following: name and resident registration number, residence of the suspect under arrest or detention, date of arrest or detention, the purpose and grounds of the request, and name of the applicant and his/her relation to the suspect under arrest or detention (Article 102 of the *Regulations on Criminal Procedure*).
13. Submission to the judge of other relevant documents or evidence is the responsibility of the public prosecutor or judicial police officer.

7) Whether the period for the filing of petition for legality review is restricted by law

14. There is no restriction as to the period for the filing of petition for the review of legality of detention other than the requirement that the petition must be submitted before the public indictment of the accused. In the case of the review of legality of arrest, the petition for review of legality of arrest should be submitted within 48 hours as it is mandated that the detention warrant be requested within 48 hours of the arrest, but there is few example in practice.

8) Important decisions of the Constitutional Court or the Supreme Court relevant to the procedural rights of the arrested or the detained

15. Constitutional Court Decision 2002Hun-Ba104, 25 March 2004

Held, “Article 12, Paragraph 6 of the Constitution provides that ‘Any person who is arrested or detained shall have the right to request the court to review the legality of the arrest or detention.’ Although this provision guarantees a specific procedural right of the ‘right to request the court to review the legality of detention’ in the constitutional dimension with respect to a very specific circumstance of ‘upon arrest or detention,’ there exists no means in reality for the court to review with respect to the ‘right to request review over the legality of arrest or detention’ of the parties concerned without formative statutes legislated by the legislators. Therefore, the holder of the right may substantively exercise such right only if the legislators have formed the specific content thereof in the form of the statute. Furthermore, as such right to request arrest or detention legality review is endowed with an independent status at the constitutional level, the legislators are obligated to offer throughout the overall system of law a minimum of one opportunity in which the relevant parties may properly exercise the specific procedural right thereof” and “Article 12, Paragraph 6 of the current Constitution, which regulates the legality review of arrest and detention, has the concept of the Writ of Habeas Corpus in the Anglo-American law as its origin, and taking such legislative history into consideration, it is reasonable to deem that Article 12, Paragraph 6 of the Constitution is essentially a provision which guarantees on a constitutional level the procedure for the request of a court review of the legality of an arrest or detention, existing independently of the procedure for the final judicial decision on the causality etc. of the arrest or detention.”

16. Supreme Court Decision 97Mo21, 27 August 1997

Held, “Since Article 12, Paragraph 6 of the Constitution stipulates that any person who is arrested or detained shall have the right to request the court to review the legality of the arrest or detention and Article 214-2, Paragraph 1 of the *Criminal Procedure Act* stipulates that a suspect etc., who has been arrested or detained pursuant to a warrant, may request the review of legality of the arrest or detention, it is not to be deemed that the purpose of the above provision of *the Criminal Procedure Act* is to exclude the right to request a legality review of those whose arrest was not based on a warrant. Even those suspects, who were arrested

without an arrest warrant and through other routes such as emergency arrest, have the right to ask the court to review the legality of such arrest pursuant to the above provisions of the Constitution and the *Criminal Procedure Act.*”

Annex

Constitution

Article 12

(6) Any person who is arrested or detained shall have the right to request the court to review the legality of the arrest or detention.

Article 29

(1) In case a person has sustained damages by an unlawful act committed by a public official in the course of official duties, he may claim just compensation from the State or public organization under the conditions as prescribed by Act. In this case, the public official concerned shall not be immune from liabilities.

Criminal Procedure Act

Article 198-2 (Inspection of Arrest or Detention Place by Public Prosecutors)

(1) The chief public prosecutor of the district public prosecutor's office or the chief of the branch office shall have a public prosecutor inspect the place where a suspect is arrested or detained in the investigation agencies under the control of such office once or more every month in order to investigate, whether illegal arrest or detention has been made or not. The inspecting public prosecutor shall examine and question the detained or the arrested, and shall examine the documents concerned.

(2) The public prosecutor shall, if there is a valid reason which makes him suspicious that the prisoner has been arrested or detained not through due process of law, release the arrested or the detained immediately or order transmission of such case immediately to the public prosecutor's office.

Article 214-2 (Review of Legality of Arrest and Detention)

(1) A suspect who is arrested or detained, his defense counsel, legal representative, spouse, lineal relative, sibling, family member, cohabitant, or employer may submit a petition to the competent court to examine the legality of the arrest and detention.

(2) A public prosecutor or a judicial police officer who has arrested or detained a suspect shall notify the arrested or detained suspect or a person designated by the suspect among the persons specified in paragraph(1) that the suspect has a right to file a petition for reviewing the legality of the arrest or detention under paragraph (1).

(3) If a petition filed under paragraph (1) falls under any of the following subparagraphs, the court may deny the petition by its ruling without necessarily holding a hearing for examination under paragraph (4):

1. Where the petition is filed by a person who has no right to petition or filed again for the same

warrant of arrest or detention; and

2. Where it is obvious that accomplices or co-suspects file petitions in succession with an intention to interfere with investigation.

(4) The court shall, upon receiving a petition under paragraph (1), examine the suspect arrested or detained, relevant documents and evidence within 48 hours from the time on which the petition is filed, and either deny the petition by ruling if there is no valid ground for the petition or order the release of the arrested or detained suspect by ruling if there is a valid ground for the petition. The foregoing shall also apply in cases where a public prosecution is instituted against the suspect after the petition for review is filed.

(5) The court may order the release of the detained suspect (including any suspect against whom a public prosecution is instituted after the petition for review is filed) as referred to in paragraph (4) by ruling under the condition of payment of bail money to guarantee appearance of the suspect: Provided, That this provision shall not be applicable to cases falling under any of the following subparagraphs:

1. Where there is a good reason to believe that the defendant is likely to destroy evidence of a crime; and

2. Where there is a good reason to believe that the defendant does harm to or is likely to do harm to the life, body or property of a victim, a person who is deemed to know the facts necessary for the public trial of the case, or such person's relatives.

(6) In case of the ruling of release under paragraph(5), restriction to dwelling, duty to attend on the date and place designated by the court or public prosecutor, or other proper conditions may be added.

(7) The provisions of Articles 99 and 100 shall apply mutatis mutandis to the case of release under the condition of payment of bail money as prescribed in paragraph(5).

(8) The ruling of the court made pursuant to paragraphs (3) and (4) is not subject to appeal.

(9) A public prosecutor, a defense counsel and a requester may appear before the court and present their views on the date of the examination under paragraph (4).

(10) When the arrested or detained suspect is not represented by a defense counsel, the provisions of Article 33 shall be applied mutatis mutandis.

(11) In holding a hearing under paragraph (4), the court shall examine accomplices separately or take other measures appropriate for protecting the secret in investigation.

(12) The judge who has issued a warrant of arrest or detention may not participate in the examination, investigation and ruling under paragraphs (4) through (6): Provided, That this shall not apply to the case where there is no other judge who examines, investigates, or makes a ruling, except the judge who has issued a warrant of arrest or detention.

(13) The period of time from the date on which the court receives investigation-related documents and evidential materials to the date on which such documents and materials are returned to the public prosecutor's office after making a ruling shall not be included in the period of restriction for the purpose of applying Articles 200-2 (5) (including the case of mutatis

mutandis application in Article 213-2) and 200-4 (1), while the afore-mentioned period of time shall not be included in the period of detention for the purpose of applying Articles 202, 203, and 205.

(14) Article 201-2 (6) shall apply mutatis mutandis to a hearing for examination of a suspect under paragraph (4).

Article 214-3 (Restriction on Re-arrest and Re-detention)

(1) The suspect who has been released through the review of legality of arrest or detention under the provisions of Article 214-2 (4) shall not be re-arrested or re-detained for the same crime unless he flees or destroys the evidence.

(2) The suspect who has been released under the provisions of Article 214-2 (5) shall not be re-arrested or re-detained for the same crime unless he falls under any of the following subparagraphs:

1. When he has fled;
2. When there is a good reason to believe that he is likely to flee or destroy evidence;
3. When he does not appear without due cause upon the request for appearance; and
4. When he violates the restriction to domicile or other conditions designated by the court.

Habeas Corpus Act

Article 1 (Purpose)

The purpose of this Act is to protect fundamental human rights guaranteed to all citizens by the constitution of the republic of Korea, by establishing the procedure of habeas corpus relief for individuals unduly deprived of their personal liberty by an illegal administrative disposition or by individuals.

Article 2 (Definitions)

(1) The term "inmate" in this Act means any person held, protected or confined against his/her free will in any medical facility, welfare facility, confinement facility or protective facility managed by the State, a local government, a public corporation, an individual, a private organization, etc.: Provided, That this shall not include any person arrested and detained according to criminal procedure, any convict, nor any person who is protected in accordance with the Immigration Control Act.

(2) The term "custodian" in this Act means the head or administrator of a detention facility.

Article 3 (Habeas Corpus Petition) Where the confinement of an inmate is illegally initiated or an inmate remains confined even after the cause that gave rise to such confinement ceases to exist, such inmate or his/her legal representative, guardian, spouse, lineal blood relative, brother, sister, cohabitant, employer or an employee at the relevant confinement facility may file a petition for habeas corpus with a court.

Article 3 (Habeas Corpus Petition)

Where the confinement of an inmate is illegally initiated or an inmate remains confined even after the cause that gave rise to such confinement ceases to exist, such inmate or his/her legal

representative, guardian, spouse, lineal blood, relative, brother, sister, co-habitant, employer or an employee at the relevant confinement facility (referred to as "habeas corpus petitioner" hereinafter) may file a petition for habeas corpus with a court, as prescribed by this Act: *Provided*, That if any procedure for habeas corpus relief is included in any other Act, this is applicable where it is obviously impossible to seek habeas corpus relief under such other Act within a reasonable period.

Immigration Control Act

Article 55 (Objections to Internment)

- (1) A person interned pursuant to an internment order, or his/her legal representative, etc., may raise an objection to the internment to the Minister of Justice via the head of the office or branch office, or the head of a foreigner internment camp.
- (2) The Minister of Justice, in receipt of an objection under paragraph (1) shall promptly examine the relevant documents, and if the application is deemed groundless, the Minister shall reject it by decision, and if it is deemed reasonable, the Minister shall issue a directive for the foreigner to be released from internment.
- (3) If required before making a decision under paragraph (2), the Minister of Justice may hear statements from interested persons.

Administrative Litigation Act

Article 20 (Period For Bringing Litigation)

- (1) A revocation litigation shall be instituted within 90 days from the date a disposition is known: in case where the proviso of Article 18 (1) is provided, or a request for an administration adjudication is permitted, or an administrative agency informs mistakenly that a request for an administration adjudication is permitted, the period during which a request for an administrative adjudication is made shall be reckoned from the date the exemplification of a written adjudication is served.
- (2) A revocation litigation shall not be instituted after the lapse of one year (in the case of the proviso of paragraph (1), one year from the date the adjudication is made) from the date the disposition is made: if there is any justifiable reason, this shall not apply.
- (3) The period as prescribed in paragraph (1) shall be a peremptory term.

Medical Treatment and Custody Act

Article 1 (Purpose)

The purpose of this Act is to prevent from recommitting crime those who have committed an offensive act in a state of mental disorder, addiction to narcotics, alcohol or other drugs, or psychosexual disorder and are deemed likely to recommit crime and to require special education, betterment and medical treatment and facilitate their rehabilitation by providing them with proper

protection and medical treatment.

Article 4 (Medical Treatment and Custody Application by Prosecutor)

(1) A prosecutor may, in cases where a person subject to medical treatment and custody is in need of medical treatment and custody, make an application for medical treatment and custody to the competent court for such person.

Article 12 (Judgments, etc. on Medical Treatment and Custody)

(1) The court shall, after trying a medical treatment and custody case, declare a sentence of medical treatment and custody by means of judgment when it deems the request concerned well-grounded or dismiss the request by means of judgment when it deems the request concerned groundless, or declares not guilty or a death sentence for a prosecuted case on grounds other than insanity.

State Compensation Act

Article 2 (Liability of Compensation)

(1) When public officials or private persons entrusted with public duties inflict damage on other persons by intention or negligence in performing their official duties, in violation of the provisions of Acts and subordinate statutes or when they are liable to compensate for damage under the Guarantee of Automobile Accident Compensation Act, the State or local governments shall compensate for such damage under this Act: Provided, That in relation to combat, training, etc., they or their bereaved family shall not claim damages under this Act and the Civil Act, if they may receive compensation, such as disaster compensation, pension for the bereaved family, disability pension or such under other Acts and subordinate statutes.

(2) In cases of the main sentence of paragraph (1), if such damage has been caused by intention or gross negligence of a public official, the State or local governments may demand reimbursement to the relevant public official.

Criminal Act

Article 124 (Unlawful Arrest and Unlawful Confinement)

(1) If a person who performs or assists in activities concerning judgment, prosecution, police, or other functions involving the restraint of the human body, arrests or imprisons another by abusing his official authority, he shall be punished by imprisonment for not more than seven years and suspension of qualifications for not more than ten years.

(2) Attempts to commit the crimes specified in the preceding paragraph shall be punished.

Regulations on Criminal Procedures

Article 102 (Matters to be Stated in Request for Review on Legality of Arrest or Detention)

The request for review on the legality of arrest or detention shall contain a description on each of the following subparagraphs:

1. Name and resident registration number, etc. and residence of the suspect under arrest or detention;
2. Date of arrest or detention;
3. Description that such document is required for and description on the grounds thereof;
4. Name of the applicant and his/her relation to the suspect under arrest or detention.