United Nations CCPR/C/127/D/2725/2016

International Covenant on Civil and Political Rights

Distr.: General
2 January 2020

Original: English

Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2725/2016*, **

Communication submitted by:	S.J. (represented by counsel, Kinam Kim and Dasol Lyu)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	20 October 2015 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 17 December 2019 (not issued in document form)
Date of adoption of decision:	7 November 2019
Subject matter:	Unlawful detention; mistreatment and fair trial violations
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Arbitrary detention; fair trial; fair trial – adequate time and facilities; conditions of detention; access to court; retrospective application of the lenient penalty
Articles of the Covenant:	9 (1), 14 (1) and (7), and 15 (1)
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication is S.J., a national of the Republic of Korea born in 1964. He claims that the preventive detention to which he has been subject since 2013 amounts to a violation of his rights under articles 9, 14 (1) and (7), and 15 (1) of the Covenant. The Optional Protocol entered into force for the State party on 10 July 1990. The author is represented by counsel.

* Adopted by the Committee at its 127th session (14 October–8 November 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany and Hélène Tigroudja.

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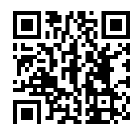

Factual background

2.1 The author committed a number of crimes prior to his preventive detention, including larceny in 1983 (suspension of prosecution), assault in 1984 (sentenced to eight months' imprisonment with two years' suspension) and assault in 1986 (sentenced to 10 months' imprisonment with two years' suspension). On 2 December 1988, he was convicted of "special robbery" and sentenced to 10 months' imprisonment. On 1 June 1991, while he was in prison, the author received an additional prison sentence of one year, for attempted larceny. On 2 December 1992, he was sentenced to two years and six months in prison for larceny in violation of the Act on the Aggravated Punishment, etc. of Specific Crimes. On 14 February 1996, he was sentenced to two years in prison and to preventive detention for larceny in violation of the same Act. After two years, the author was placed in preventive detention that was expected to expire on 25 May 2004. On 25 May 2001, however, the author was released on parole.[1]

2.2 After his release on parole, the author again engaged in a number of criminal acts. On 30 January 2004, he received a 10-year prison sentence along with indefinite preventive detention for numerous crimes under the Social Protection Act.[2] In its judgment of January 2004, the Trial Court held that, given his criminal record, the author was a potential recidivist. The Court also held that there was the risk that the author would recommit crimes given his age, personality, family background, criminal record and his tendency towards recidivism. Nonetheless, the author was never consulted by a psychological or psychiatric expert during or in relation to the trial. The author appealed against the judgment to the appellate court, which dismissed the case on 9 July 2004. The sentence became final on 14 July 2004, as the author withdrew a second appeal.

2.3 In the meantime, the preventive detention system under the Social Protection Act was challenged before the Constitutional Court in 1991, 1996 and 2001. Nonetheless, the Court confirmed the constitutionality of the Act. On 13 January 2004, however, the National Human Rights Commission of Korea recommended that the Government abolish the Act.[3]

2.4 On 4 August 2005, the National Assembly of the Republic of Korea abolished the Social Protection Act by passing supplementary provisions (the Abolishment Act), noting that the Social Protection Act imposed double punishment, provided for prison-like conditions that were similar to criminal punishment and functioned as remote confinement.[4] On the same day, the Medical Treatment and Custody Act was enacted to replace the abolished Social Protection Act. However, offenders who were already on preventive detention or convicted and sentenced for preventive detention before its passage remained subject to continued detention under article 2 of the Abolishment Act.[5] The author, who

[1] In addition, the author was fined seven times between 10 October 1990 and 19 April 2002 for the violation of Road Traffic Act, in amounts ranging from 500,000 to 1 million Korean won.

[2] The crimes include larceny, "special robbery", forgery, fraud, rape, assault and violation of the Road Traffic Act. The Social Protection Act stipulates that indefinite preventive detention should not exceed seven years in total, subject to annual review for possible parole.

[3] The Commission concluded that the preventive detention system in the Republic of Korea amounted to double punishment, violated due process, breached the right to be tried by a judge, took measures disproportionate to achieving legitimate ends and presented abusive conditions of detention in various aspects.

[4] The Abolishment Act transferred authority of the Social Protection Committee, which used to handle issues of management and execution of preventive detention, including annual parole review, to the Medical Treatment and Custody Deliberation Committee, installed by the Medical Treatment and Custody Act.

[5] See article 2 of the Abolishment Act (Interim measures regarding the ruling and execution of protective custody that have already been sentenced), which indicates that the effect of the protective custody rulings that have already been confirmed before the enactment of the law should be maintained, and the execution of the corresponding protective custody should be in compliance with the previous Social Protection Act. However, the authority of the Social Protection Committee regarding the management and execution of protective custody should be exercised by the Medical Treatment and Custody Act. According to the Constitutional Court decision of 26 March 2009, this article is aimed at preventing the social disorder that could be caused by the sudden release of a large number of preventive detainees.

was sentenced in 2004 to 10 years’ imprisonment and indefinite preventive detention, was consequently not exempted from the execution of his sentence, including the portion that calls for indefinite preventive detention.

2.5 On 26 March 2009, the Constitutional Court confirmed the constitutionality of article 2 of the Abolishment Act, because it was difficult to view preventive detention in the Social Protection Act, now abolished, as unconstitutional. It did not amount to double punishment or to a disproportionally excessive violation of personal liberty because the lawmakers, while abolishing the Social Protection Act, rendered preventive detention applicable only to those who had been sentenced to preventive detention before the establishment of the Abolishment Act, given the social chaos that the sudden release of a considerable number of inmates from preventive detention could cause to society, the Court’s sentencing practice and respect for the final judgment of the court. The Constitutional Court also held that it was not contrary to the constitutional principle of equality because it had reasonable grounds to justify a legislative discretion that might cause discriminatory effect between those convicted with the final judgment and those with pending proceedings at the time of enforcement of the Abolishment Act.

2.6 After completing a 10-year prison sentence on 31 March 2013, the author commenced his preventive detention the next day. He was transferred to the third correctional facility of northern Gyeongbuk, under the supervision of the Ministry of Justice. In the transition from criminal imprisonment to preventive detention, there was no trial or other interim review by any body of a judicial nature to determine the validity of the author’s preventive detention.

2.7 In March and September 2014, the Medical Treatment and Custody Deliberation Committee reviewed the author’s preventive detention sentence and denied his release on parole. During the review, the Deliberation Committee did not order a psychiatric assessment of the author, in order to examine the progress made in his rehabilitation and to review his status as a detainee. The author then initiated an appeal against the Deliberation Committee’s first refusal of his release. He claims that the Government failed to notify him of procedural remedies to challenge the decision on the first refusal of release, which was in violation of the Administrative Appeals Act. On 4 November 2014, the Central Administrative Appeals Commission rejected the author’s appeal against the decision of the Deliberation Committee to refuse his release. The author never filed an appeal against his preventive detention after 2014.

The complaint

3.1 The author claims that, after 2014, he filed no further appeals against his preventive detention, which began on 1 April 2013,[6] since he deemed such an appeal to be futile and ineffective to exhaust all legal remedies available to him. In its decision dated 26 March 2009, the Constitutional Court acknowledged the constitutionality of article 2 of the Abolishment Act in a similar case. Therefore, the author claims he is not required to exhaust domestic remedies available to him as required by article 5 (2) (b) of the Optional Protocol.

3.2 The author claims that his preventive detention amounts to arbitrary detention under article 9 (1) of the Covenant. The author notes that, according to the Committee’s jurisprudence, the notion of arbitrariness must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, which leads that preventive detention must not only be lawful but reasonable and necessary, and proportionate to achieving the legitimate ends of the State in order to avoid arbitrariness in the framework of the Covenant.[7] The author also notes that detention for

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[6] Please note that the date of submission was 20 October 2015.

[7] *De Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.1; Human Rights Committee, general comment No. 8 on liberty and security of person, para. 4 (as updated in general comment No. 35 on liberty and security of person). The author also refers to *van Alphen v. The Netherlands* (CCPR/C/39/D/305/1988), para. 5.8; *Mukong v. Cameroon* (CCPR/C/51/D/458/1991), para. 9.8; *A. v. Australia* (CCPR/C/59/D/560/1993), para. 9.2; *Taright et al. v. Algeria* (CCPR/C/86/D/1085/2002),

preventive purposes must be justified by compelling reasons that are applicable as long as detention for those purposes continues. The decision must also be reviewable by a judicial authority.[8]

3.3 The author claims that indefinite detention up to seven years for prevention purposes under the Social Protection Act is arbitrary for the following reasons. First, the legislation background and history of the Act shows there was no compelling reason for the Government to resort to preventive detention in order to protect citizens and society from crimes and to fulfil the legislative purpose of the Act.[9] Second, the decision to place the author in preventive detention was neither objective nor reasonable, since the court considered whether the author's case satisfied, in principle, the category of a person who is deemed to pose a danger of recommitting crimes under article 5 of the Social Protection Act,[10] and there was no assessment of an expert in the relevant fields, including psychiatry, of the author's specific risk of recidivism.[11] Third, in this case, the court conducted no review of the author's progress in rehabilitation when he finished his sentence of 10 years' imprisonment, and the State presented no compelling reason to keep the author separate from society before his preventive detention commenced. Fourth, less intrusive measures have not been taken to rehabilitate the author, such as detaining him in a rehabilitative or therapeutic programme, which should serve the purpose of the Social Protection Act to facilitate rehabilitation of criminal offenders and protect society from a criminal threat. Fifth, placing the author in preventive detention is not proportionate, given that his crimes are mostly economic offences such as robbery and larceny;[12] although he did also commit a

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para. 8.3; *Rameka et al. v. New Zealand* (CCPR/C/79/D/1090/2002), para. 7.3; *Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 3.3.

[8] *Rameka et al. v. New Zealand*, para. 7.3.

[9] See art. 1 of the Social Protection Act. The author alleges that the Act, enacted in the process of seizing power by the military group in 1982, provided legal grounds for placing vagrant and repeat offenders into concentration camps in the name of "purifying society". Inmates in the camps were exposed to cruel and inhumane treatment, as well as to forced labour under harsh conditions and an oppressive educational programme controlled by the military. Although forced labour and the training programme were abolished in the process of democratization, the author alleges that the Government has failed to achieve rehabilitation of criminals without imposing preventive detention to repeat offenders.

[10] See art. 5 of the Social Protection Act, which indicates that when a person subject to protection falls under any of the following subparagraphs and is considered to be in danger of recidivism, he or she shall be taken into preventive custody:

(a) When a person who was sentenced to an actual penalty or heavier penalty for the same or a similar offence twice or more, with at least three years of total prison time, recommits the same or a similar offence in the attached list after serving all or parts of the final sentence or getting exempted;

(b) When recidivism is recognizable, because the person has committed the offences prescribed in the attached list numerous times;

(c) When a person who has been sentenced with preventive custody recommits the same or a similar offence in the attached list after serving all or parts of the sentence or getting exempted.

The fact that the author was sentenced to imprisonment six times, constituting imprisonment of a total of seven years and eight months for similar crimes, including larceny, robbery and assault, satisfies art. 5 (1). The long list of criminal activity of the author seems likely to satisfy art. 5 (2). The fact that the author had been released on parole from the previous preventive detention when he committed the crimes made him subject to consideration for another preventive detention and satisfies article 5 (3).

[11] See *Rameka et al. v. New Zealand* (CCPR/C/79/D/1090/2002). The author also suggests the process in the present case goes against the Supreme Court ruling in a different case, in which it was decided that the perceived future threat posed by an individual had to amount to a substantial probability of potential to commit a future crime and the court was required to consider it objectively (see the Supreme Court decision dated 14 May 1999). Moreover, the author alleges that it is not appropriate to make a judgment on the author's recidivism based on his past, including his age, personality, family background and criminal record, because the Social Protection Act requires the court to engage in fact-finding on the suspected future behaviour.

[12] The author also notes that the damages he caused over a period of more than 20 years amounted to no more than 100 million Korean won (equivalent to approximately $82,000), which is minor according to the guidelines of the Ministry of Justice of the Republic of Korea.

sexual offence, it was not a repeat offence and not premediated.[13] Sixth, after having been subjected to aggravated punishment with a 10-year prison term, it is disproportionate for the author to be placed in prison-like preventive detention in order to achieve the goal of the Social Protection Act of rehabilitation and protection of the public from crime.

3.4 The author claims that his preventive detention amounts to double punishment in violation of article 14 (7) of the Covenant, as it is not different from criminal detention,[14] despite its alleged civil nature and official purpose of prevention.[15] The author notes that the initial order for his preventive detention was made as part of the criminal sentencing in the court without any psychiatric assessment by experts. The author also claims there is no significant difference in treatment between inmates under preventive detention and ordinary prisoners, as both groups are placed under almost the same regulations and programmes, as well as similar treatment with regard to their correspondence, visitation rights and limited access to medical care.[16] Supervision of inmates in preventive detention is undertaken by wardens who do not receive professional education and training in the guiding of inmates for rehabilitation. The author also notes that the inmates in preventive detention are housed in a prison-like facility, meaning that they are isolated from the general population, and that they share their cells and toiletry facilities with other inmates. These facilities lack privacy and are not heated in winter. In addition, there is not enough vocational training or personal psychological care for the rehabilitation of the inmates.[17]

3.5 The author claims a breach of the right to a fair trial by a competent court under article 14 (1) of the Covenant, because it was the Deliberation Committee that reviewed the release on parole of the author from preventive detention in March and September 2014. The author alleges the reviews were conducted without a legal representative and without application of a set of rules regarding assessment of evidence, including an expert opinion that the court could have heard at trial.[18]

3.6 The author also claims that, owing to his continuous detention, the State party violated article 15 (1) of the Covenant since he has been prevented from benefiting from a change in the preventive detention system making a penalty lighter than was applicable at the time when the criminal offence was committed owing to his continuous detention under article 2 of the Abolishment Act and the Medical Treatment and Custody Act.[19]

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[13] The author also notes that he submitted a letter of apology over his sexual offence to the court many times.

[14] Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 15, 54 and 57; *Perterer v. Austria* (CCPR/C/81/D/1015/2001), para. 9.2.

[15] See Constitutional Court decision dated 26 March 2009.

[16] The author notes many inmates in preventive detention are suffering from various diseases due to long-term confinement, but they stop medical treatment because the national medical care does not cover their medical expenses.

[17] See European Court of Human Rights, *M. v. Germany* (application no. 19359/04), judgment of 17 December 2009.

[18] The Deliberation Committee was installed pursuant to the Medical Treatment and Custody Act, which replaced the Social Protection Act. It consists of no more than six members who hold the qualification of judge, public prosecutor, attorney-at-law or medical specialist. The author contends that despite the Constitutional Court decision of 26 March 2009, in which it was decided that as long as the Court rendered the initial decision of preventive detention, it was within legislative discretion to decide whether to give authority regarding administration and execution of the decision to the Court or a third entity, the author alleges the judicial review in determining the lawfulness of continued detention must be provided in each annual review of the progress of the author's rehabilitation. The author also notes that although the Deliberation Committee's decision on the lawfulness of continued detention can be appealed to the Court, it is clear that the author's right to be tried by a tribunal was breached when the Deliberation Committee took charge of the annual review process, as he claims it is a non-judicial body.

[19] The author claims that article 2 of the Abolishment Act made it clear that those who were serving or convicted for preventive detention before its passage are subject to continued detention. The Medical Treatment and Custody Act legislates that sex offenders should be subject to continued detention of a preventive nature.

3.7 The author requests that the Committee declare that the State party has violated its obligations under articles 9 (1), 14 (1) and (7), and 15 (1) of the Covenant. The author also requests that the Committee recommend that the State party adopt all necessary actions to abide by the Covenant, including through the immediate release of the author, or at least the improvement of the conditions of his prison-like detention, and the provision of appropriate remedies to the author.

State party's observations on admissibility and the merits

4.1 In a note verbale of 29 September 2016, the State party submit its observations on admissibility and merits.

4.2 The State party argues that the author has not exhausted all available domestic remedies. The State party notes those whose custody was determined under the repealed Social Protection Act are subject to a review by the Deliberation Committee every six months. The author therefore has opportunities to be released from preventive detention every six months, and he may contest the decision of the Deliberation Committee to refuse his release through the Central Administrative Appeal's Commission. Alternatively, the author may file an administrative litigation in court, which may order his release. However, the author never sought an administrative litigation procedure.

4.3 The State party also contends that the Supreme Court simply ruled that preventive detention measures provided under article 2 of the Abolishment Act, or in the repealed Social Protection Act, do not violate the Constitution. Such a ruling does not affect the validity of the procedure for the release by the Deliberation Committee or render futile the administrative litigation. The State party notes the Constitutional Court based its decision on constitutionality on the fact that any person whose preventive detention is deemed unlawful can be released through the administrative litigation process.

4.4 The State party further notes that the author does not specifically substantiate how his individual rights have been violated but merely argues about legal and policy issues related to the Social Protection Act or the Abolishment Act. The State party contends that such a general argument, lacking proof as to how the author's rights have been violated as a result of the law or an omission by the Government, does not satisfy the requirement of article 1 of the Optional Protocol. It therefore does not satisfy the admissibility criteria in rule 96 (b) of the Committee's rules of procedure.

4.5 With regard to the alleged violation of article 9 (1), and in response to the author's assertion about the historical context under which preventive detention was used for control of civilians during the past military regime, the State party claims that this history is in no way related to the preventive detention of the author. The decision regarding the author's preventive detention was finalized in June 2004, at which time the preventive detention system had already been established for crime prevention.

4.6 The State party also refutes the author's assertion about the lack of objectivity and reasonableness in the court judgment regarding the author's risk of recidivism. The State party notes that article 5 of the Social Protection Act distinguishes between the risk of recidivism and reliance on past criminal records in connection with the determination of the preventive detention, and this has been confirmed by the Supreme Court ruling.[20] The State party also claims that the judge's decision, which takes into account of all the relevant facts and circumstances, cannot be deemed unreasonable simply because the opinion of a psychological or psychiatric expert was not considered. The State party notes that in a criminal trial, the author is allowed to submit the result of a voluntary psychiatric evaluation for the consideration of the judge, which would be relevant to determine his preventive detention.[21]

[20] The State party notes that the Supreme Court maintains its strict position that, even if the criminal is a repeat offender, preventive detention cannot be ordered unless various matters are taken into account and the risk of recidivism is acknowledged.

[21] Even after the commencement of preventive detention, an inmate may request that the detention centre provide him or her with a psychiatric evaluation and for its outcome to be considered by the Deliberation Committee, which includes two or more psychiatric experts.

4.7 Regarding the author’s third claim of violation of article 9 (1) – namely, that the decision concerning his preventive detention was made simultaneously with the judgment of the criminal case – the State party claims that the judge in charge of a case can most accurately determine the necessity for preventive detention, assessing the person’s risk of recidivism. The State party also notes that an inmate may be provisionally released or exempted from preventive detention after being examined by the Deliberation Committee, and that he or she may contest the decision of the Deliberation Committee through administrative litigation.

4.8 The author also asserts that, in his case, preventive detention is neither inevitable nor appropriate for rehabilitation and integration into society. However, the State party claims that preventive detention inmates are provided with distinct treatment from ordinary prison inmates, fully taking into account its purpose to facilitate the rehabilitation of inmates and the non-punitive nature of the preventive detention. The State party also adds that therapeutic and educational programmes are provided so as to effectively support the social reintegration of preventive detention inmates.

4.9 The State party also argues against the author’s fifth assertion that his preventive detention was unjustified because he did not commit a serious economic crime and that the rape he was convicted for was a singular act of impulse, which does not pose a serious threat to society. The State party notes the repeated acts of larceny and robbery committed by the author on 23 and 31 January, and 5 February 2003, which also included the threatening of a female acquaintance, who the author took into the car. On 7 February 2003, the author raped and injured a woman, assaulted her numerous times and threatened her with a knife to her neck. He stabbed her thigh and face and helped his accomplice rape her in a nearby inn. The State party asserts that these are serious crimes that infringe upon a person’s right to personal liberty and life, as well as sexual self-determination, and therefore pose a significant threat to social security. The State party also notes that when the author was provisionally released from three years’ preventive detention, he committed similar crimes and demonstrated a propensity to commit more serious crimes.

4.10 The State party submits that the author’s assertion that he had already been subject to aggravated punishment for being a repeat and habitual offender is baseless. Only the author’s crime of larceny was subject to aggravated punishment, owing to an acknowledgement of recidivism, and the author was only sentenced to the specific term of imprisonment applicable for the most severe crime among his concurrent offences.

4.11 The State party concludes that the author’s preventive detention follows the lawful procedure laid out under the Social Protection Act. As a result, his detention is legitimate, pursuant to article 12 (1) of the Constitution of the Republic of Korea, and does not constitute arbitrary detention.[22]

4.12 With regard to the alleged violation of article 14 (7) of the Covenant, the State party notes that preventive detention does not conform to criminal punishment in terms of its nature and the practical treatment of the inmates. The doctrine of double jeopardy, which is intended to prevent a defendant from being punished twice for the same offence, does not apply to preventive detention. Such detention has a different purpose and function from that of punishment, that is, of protecting society from criminals who present a high risk of recidivism and assisting their reintegration into society. In addition, having the decision on preventive detention made by the court in charge of the criminal case allows the judgment to be based on strict due process, in compliance with the procedure outlined in the criminal procedure act. The State party also notes that the treatment of preventive detention inmates, which is distinct from the treatment of convicted prisoners serving their original sentence, cannot be regarded to possess the same characteristics as punishment.[23] For example, preventive detention inmates in principle have no limits on receiving visitors, are allowed

[22] See Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 12.

[23] The State further notes that the inmates are given more autonomy, social experience, field trips, a family relations recovery programme, and the use of various facilities as part of the process of rehabilitation. In the case of the author, the State party notes that since his placement under preventive detention, he has completed a bachelor’s degree and has earned a degree in business administration.

extensive use of phones, are given work upon request or agreement and are given much higher labour compensation compared with the general labour incentives for prisoners. Preventive detention inmates can also participate in various activities, including music and art therapies, daily life etiquette and anger management programmes, and employment and start-up education. The author also has been allowed to participate in an autonomous living programme since September 2016.

4.13 Regarding the alleged violation of article 14 (1), the State party claims that the execution of the preventive detention ordered by the court does not concern a “criminal charge” or “rights and obligations in a suit at law” in the meaning of article 14 (1) and lies outside of the scope of application of the Covenant *ratione materiae*. The State party also claims that the decision concerning the preventive detention of the author was made by the court with authority under relevant laws, guaranteeing him all the due process, including his right to appeal and the right to counsel.[24] The Deliberation Committee is a quasi-judicial body that can decide on the termination of preventive detention based on a psychiatric and legal evaluation, which is subject to judicial review including through administrative litigation.[25] Thus, the State party concludes that the author’s right to a fair trial by the competent court was not violated.

4.14 With regard to the alleged violation of article 15 (1), the State party alleges that the principle against *ex post facto* criminal law or the principle of prioritizing the later law with a lighter penalty under the Covenant is not applicable to preventive detention as it is a preventive measure for social protection, and therefore distinct from criminal punishment. The decision regarding the preventive detention of the author was based on legislation that was in force at the time and of the final judgment. Given the non-criminal nature of preventive detention, when the pre-existing system was abolished by a new law, implementing the transitional provision that provides for the execution of such a final order by the court cannot be regarded as a violation of article 15 (1), as it falls under the Government’s discretion to choose the way to achieve the purpose of criminal justice policy. Moreover, the State party alleges that having transitional provisions that execute preventive detention to those who had already been sentenced is reasonable, in order to avoid social disorder arising from simultaneously releasing a considerable number of preventive inmates back to society upon its abolishment.

Author’s comments on the State party’s observations on admissibility and the merits

5.1 On 31 December 2016, the author submitted his comments on the State party’s observations. He reiterates that the pursuit of administrative litigation against the decision of the Deliberation Committee is deemed futile and ineffective as the Constitutional Court held that preventive detention under article 2 of the Abolishment Act does not amount to double punishment and does not disproportionally violate personal liberty. The author also notes that on 24 September 2015, the Constitutional Court once again confirmed its previous position when it rendered a judgment on article 2 of the Abolishment Act.[26]

5.2 In respect of the arbitrariness of determination of his preventive detention under article 9 (1) of the Covenant, the author reiterates that the consideration of the court was neither objective nor reasonable, as it was an intuitive prediction reached by the judges solely based on his past instead of employing examinations and evaluations by psychiatric or psychological experts, to whom the author was never given access. The author reiterates that the State party failed to provide a compelling reason to justify his preventive detention, recalling the Committee’s jurisprudence, in which it was established that, in order to avoid arbitrariness, the author’s preventive detention must have been reasonable, necessary in all

[24] The author appealed to the High Court against the judgment confirming his preventive detention, but he did not appeal to the Supreme Court. Thus, the High Court decision of 14 July 2004 was determined as the final judgment. In the trial, a public defender was appointed to guarantee the author’s rights to defence.

[25] See arts. 37, 40 and 41 of the Medical Treatment and Custody Act of the Republic of Korea.

[26] In both cases, the petitioners filed an application for constitutional review after failing to succeed in administrative litigation while they were serving preventive detention.

circumstances of the case and proportionate to achieving the legitimate ends of the State party.[27]

5.3 The author emphasizes that his treatment in preventive detention does not differ from the treatment he was subject to while in prison, with no comprehensive programme designed to focus on rehabilitation or treatment. Though he accepts having committed a number of economic crimes along with a serious rape crime, he still asserts that there is reasonable doubt about the conclusion made by the judge that he has a propensity to recommit crimes posing a substantial risk to society. With regard to that point, he highlights the State party's observation that the court did not acknowledge his recidivism for aggravated robbery, rape and the crime of hit and run, but only for larceny. According to this, the author alleges the court should not have concluded that he had a propensity toward recidivism or that he was a danger to society, and also alleges that it is disproportionate to place him in preventive detention for the crime of larceny.

5.4 With regard to the double punishment under article 14 (7) of the Covenant, the author reiterates that inmates in preventive detention at the third correctional facility in northern Gyeongbuk are placed in similar facilities as ordinary prisoners. The author has been staying on the different floor of the same building in which ordinary prisoners are detained since 19 August 2016. He previously stayed in a wing of the same facility separate from the prisoners. The author also notes that no budget has been allocated for inmates in preventive detention, including for rehabilitation programmes.[28] In fact, the programmes for inmates in preventive detention are even worse than those offered to ordinary prisoners.[29] Furthermore, the daily living conditions of inmates in preventive detention are not significantly different from those of ordinary prisoners.[30] The author highlights that he earned a bachelor's degree in business administration through a self-taught programme, but this was not offered to him as part of a rehabilitative programme that was designed for him. No support was provided. The author was motivated to do this because earning a bachelor degree would entitle him to more benefits according to the guidance on category and treatment of inmates in preventive detention. The author had to pay for his own books and for the relevant materials necessary for the exam. The author concludes that there are few rehabilitative or social adjustment programmes available to him. The third correctional facility of northern Gyeongbuk informed the author that it had formed a taskforce to study effective measures for improving the treatment of inmates in preventive detention. It also stated that it had assembled a group of local volunteers who were able to provide treatment counselling to the author and other inmates in preventive detention. However, it turned out that none of these things had actually occurred. For the reasons listed above, the author submits that preventive detention is penal in character, which makes the current preventive

[27] *Fardon v. Australia* (CCPR/C/98/D/1629/2007), annex.

[28] According to the information provided by the third correctional facility in northern Gyeongbuk, any budget being spent in relation to preventive detention comes from the general correctional budget.

[29] The vocational training programme available to the author includes auto mechanic and industrial facility, whereas general prisoners are allowed to participate in training activities related to electronics, food service, computing and foreign languages. The author and other inmates in preventive detention are not allowed to apply for training activities offered to ordinary prisoners in different correctional facilities. They are also are not eligible for field visits and volunteering opportunities, whereas a model or well-behaved prisoner is eligible every three months. In particular, the rehabilitative programmes for inmates in preventive detention are limited to just character education and Korean traditional performance. Ordinary prisoners, on the other hand, may participate in sex education, character education, and courses on calligraphy, painting, storytelling and percussion.

[30] Since September 2016, the author and other inmates in preventive detention at the third correctional facility in northern Gyeongbuk have been allowed to live in a more autonomous manner. This includes a room of approximately 10 square metres, with cable television, a refrigerator and a microwave, which model prisoners in general prisons have been already enjoying. This living arrangement was offered to the author and other inmates in preventive detention after they went on a hunger strike to protest the decision to move them into the same building with the ordinary prisoners. The author and other inmates are allowed visitors for only 20 minutes per day, whereas ordinary prisoners are allowed 20–30 minutes and model prisoners 40–60 minutes. The author and other inmates are allowed phone calls 5 to 12 times per month, whereas ordinary prisoners allowed phone calls 3 to 5 times per month.

detention system an extension of criminal punishment. Since he has already served his sentence, this amounts to a violation of article 14 (7) of the Covenant.

5.5 With regard to the right to a fair trial under article 14 (1) of the Covenant, the author refutes the State party's observation that the execution of preventive detention ordered by the court lies outside of the scope of application of the Covenant. The author recalls that, in *Perterer v. Austria* and in general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Committee held, that the right to a fair trial might also extend to acts that were criminal in nature, with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.[31] Although the State party claims that preventive detention is an administrative measure, the preventive detention to which the author is subject is penal in character and severe enough to constitute punishment. Therefore, the author submits that his rights with respect to preventive detention are included in "rights and obligations in a suit at law" within the meaning of article 14 (1) of the Covenant.

5.6 The author reiterates that criminal punishment and preventive detention are fundamentally different in terms of objectives and legitimacy. While criminal punishment serves retribution for past acts, preventive detention is solely aimed at preventing future criminal offences. Therefore, preventive detention is only justifiable if the deprivation of liberty is indispensably necessary and proportionate, and its measures should seek rehabilitation or therapy that complies with therapeutic requirements in a systematic manner. In addition, preventive detention should be distinguished from standard prison regimes in all respects. However, as described in the original submission and above, the State party has violated the author's rights pursuant to articles 9 (1), 14 (1) and (7), and 15 (1) of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether it is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that article 5 (2) (b) of the Optional Protocol precludes it from considering a communication unless it has been ascertained that domestic remedies have been exhausted.

6.4 The Committee notes the State party's challenge to the admissibility of the communication on the grounds that domestic remedies have not been exhausted, since the author appealed the decision of the Deliberation Committee to refuse his release. The appeal was made to the Central Administrative Appeals Commission, which rejected the appeal but did not contest it further in the administrative litigation procedure. The author claims it is futile and ineffective, because the Constitutional Court has already ruled that the preventive detention measures provided for in article 2 of the Abolishment Act or in the repealed Social Protection Act did not violate the Constitution and confirmed this in its subsequent decision.

6.5 In this connection, for the purpose of article 5 (2) (b) of the Optional Protocol, the Committee recalls that domestic remedies must not only be available but also effective, which also depends on the nature of the alleged violation, and that the term "domestic remedies" must be understood as referring primarily to judicial remedies.[32] It also recalls that an applicant must make use of all judicial or administrative avenues that offer him a

[31] *Perterer v. Austria*, para. 9.2; general comment No. 32 (2007), para. 15.

[32] *R.T. v. France* (CCPR/C/35/D/262/1987), para. 7.4; and *Vicente et al. v. Colombia* (CCPR/C/60/D/612/1995), para. 5.2.

reasonable prospect of redress.[33] The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result.[34] However, the Committee finds that subjective presumptions of the futility of a remedy are insufficient.[35]

6.6 In the present case, the Committee notes that the author's comment that his pursuit of administrative litigation against the decision of the Deliberation Committee is deemed futile and ineffective as the Constitutional Court held that preventive detention under article 2 of the Abolishment Act, did not amount to double punishment and to disproportionally excessive violation of personal liberty, which was confirmed in the following constitutional review, after failing to succeed in the administrative litigation while they were serving in preventive detention.

6.7 The Committee notes, however, the State party's observation that the Constitutional Court based its decision on constitutionality on the fact that any person under unlawful execution of the preventive detention can be released through the administrative litigation process. The Committee further notes that the author challenged his conviction and the preventive detention part of the sentence before the High Court, but did not further appeal the sentence before the Supreme Court. It also notes that, with the single exception of the appeal brought in 2014 before the Central Administrative Appeal's Commission, the author did not challenge any of the subsequent individual determinations of his risk status, neither before the Central Administrative Appeal's Commission nor through administrative proceedings in court, despite the fact that those determinations took place every six months before the Deliberation Committee. In the absence of further clarifications from the author as to why he did not attempt to or succeed in pursuing appeals in relation to the individualized risk determination, and why he did not present expert evidence on his own to support his claims, the Committee is unable to find that the author exhausted all the domestic remedies that were reasonably available to him to challenge his continued incarceration and the associated violation he alleged of his rights under articles 9, 14 and 15 of the Covenant. In the light of the information before it, the Committee considers that it is precluded from considering the present communication by virtue of article 5 (2) (b) of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 and 5 (2) (b) of the Optional Protocol;

(b) That the decision shall be communicated to the State party and to the author.

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[33] *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2.

[34] *Pratt and Morgan v. Jamaica* (CCPR/C/35/D/225/1987), para. 12.3; *Young v. Australia* (CCPR/C/78/D/941/2000), para. 9.4; *Barzhig v. France* (CCPR/C/41/D/327/1988), para. 5.1.

[35] *Pratt and Morgan v. Jamaica,* para. 12.3; *Kroumi v. Algeria* (CCPR/C/112/D/2083/2011), para. 4.5.