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The Permanent Mission of the Republic of Korea to the United Nations and Other International Organizations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights (OHCHR) and has the honor to transmit herewith the response of the Government of the Republic of Korea to the Joint Communication from Special Procedures (OL KOR 2/2021).

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

Geneva, 1 June 2021

Office of the United Nations High Commissioner for Human Rights (OHCHR)

Palais des Nations, CH-1211 Geneva 10, Switzerland



## The Government of the Republic of Korea's Response to the Joint Communication from Special Procedures (15 March, 2021)

### 1. Detailed information on how your Excellency's Government intends to proceed with regard to Bill for the "Act on the Prevention of Human Trafficking-Exploitation, the Protection of Victims, Etc." (Bill No. 6912) and amendments proposed to the "Immigration Control Act" (Bill No. 6907), as well as how its provisions comply with your Excellency's Government obligations under the international legal framework of human rights law relating to trafficking in persons and related practices such as contemporary forms of slavery.

(a) Detailed information on the bill for the "Act on the Prevention of Human Trafficking-Exploitation, the Protection of Victims, Etc." (Bill No. 6912)

\* This law will be referred to as the *Act on the Prevention of Trafficking in Persons and Protection, etc. of Victims*, which describes its Korean meaning and reflecting amendment during the proceedings of legislation.

- The *Act on the Prevention of Trafficking in Persons and Protection, etc. of Victims* (hereinafter referred to as "the Prevention of Trafficking in Persons Act") was legislated to define concepts such as trafficking in persons and other offenses corresponding to international norms, establish comprehensive measures to prevent trafficking in persons and other offenses, and provide protection and support to victims.
- Assemblywoman LEE Su-jin proposed the Prevention of Trafficking in Persons Act on December 24, 2020. It was passed by the National Assembly on March 24, 2021, and promulgated on April 20, 2021. It will enter into force on January 1, 2023.
- The Prevention of Trafficking in Persons Act defines trafficking in persons-related concepts and other offenses comprehensively in step with the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime" (hereinafter referred to as the "UN Protocol)." A comprehensive plan and government-wide integrated system will be launched for collaboration between the relevant public agencies. The Prevention of Trafficking in Persons Act also prescribes overall measures, for identifying and protecting victims earlier and providing support for them.
- The measures include victim identification indicators; emergency protocol at the initial stage; medical and legal support; lodging, meal, and job support; special provisions for foreign victims; etc.

(b) Detailed information on the amendments proposed to the "Immigration Control Act" (Bill No. 6907)

\* Hereinafter, this law will be referred to as the "*Immigration Act*", the official title in English.

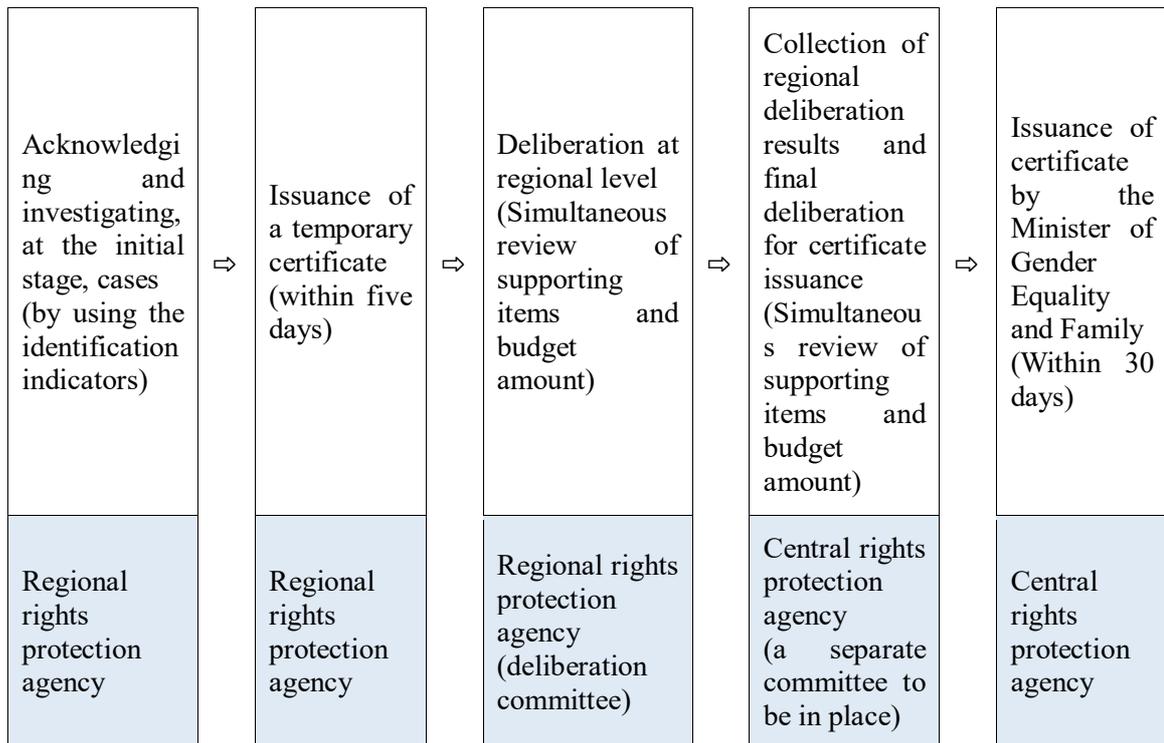
- An amendment bill of the *Immigration Act* added with special provisions is being processed in order to secure the protection of foreign victims' rights.
- \* The amendment was proposed in December 2020 and is currently pending in the National Assembly.
- The special provisions are being added to the *Immigration Act* for extending or granting a residence permit to a foreign victim of trafficking in persons, defined in Article 3 of the Prevention of Trafficking in Persons Act, such that he/she can stay in the Republic of Korea until any investigation, trial, and civil or criminal remedy procedure is completed.
- The “Deliberation Committee on Stay of Foreigners” in Article 42 of the amendment is an institutional strategy to maintain objectivity and ensure fairness in the process of extending periods of stay or suspending the deportation of foreign victims of trafficking in persons, domestic violence, sexual harassment, or child abuse. The Committee will be comprised of experts from the public and private sectors.

**2. Information on any measures that your Excellency’s Government has taken or intends to take in order to implement the recommendations by human rights bodies.**

(a) The Bill No. 6912 fails to introduce developed indicators for victim identification under Article 14, “Indicators for Identification of Victims of Human trafficking-exploitation, Etc.” The Bill does not include any provision relating to identification procedure. The criteria and indicators of trafficking in persons for the purpose of labour exploitation should be strengthened referring to the indicators of forced labour issued by ILO.

- In order to develop case-oriented victim identification indicators that can be utilized immediately on-site, the Government of the Republic of Korea is planning to form a consultative body attended by experts from the public and private sectors, including relevant agencies, such as the Ministry of Justice, the Ministry of Employment and Labor, and the Korean National Police Agency, and related organizations, academics, and field experts.
- The development process will refer to the indicators of forced labor issued by the ILO and other international indicators related to trafficking in persons.
- After developing the indicators, the procedure and criteria for issuing a victim identification certificate will be set out in subordinate laws such as enforcement decrees or regulations. The procedure will consist of the following two steps: 1) issuing a temporary certificate (within five days after application), and 2) issuing a certificate (within 30 days).
- A deliberation committee will be put in place, with experts from the public and private sectors, including related officials and field experts, participating to maintain objectivity and ensure fairness of the procedure for issuing a certificate.

### Certificate-issuing Process (Proposal)



(b) It is critical for an effective implementation that the non-punishment principle is practically applied from the starting point of the detection of a victim of trafficking.

- Article 12 of the *Criminal Act* of the Republic of Korea prescribes that action compelled shall not be punished; in addition, Article 6(1) of the *Act on the Punishment of Arrangement of Commercial Sex Acts, etc.* stipulates that victims of sex trafficking shall not be punished. It is evident that the existing laws of the Republic of Korea have provisions to protect such victims from being penalized.
  - \* Article 12 of the *Criminal Act*
    - Action compelled by either irresistible force or threat against the life or body of the compelled person or his/her relatives which cannot be protected shall not be punishable.
  - \* Article 6(1) of the *Act on the Punishment of Arrangement of Commercial Sex Acts, etc.*
    - Victims of sex trafficking shall not be punished.
- Article 4 of the Prevention of Trafficking in Persons Act also provides that the penalties for offenses committed by victims of human trafficking or exploitation can be reduced or exempted to protect such victims.
  - \* Article 4(2) of the Trafficking in Persons Prevention Act
    - The penalties for offenses committed by victims of trafficking in persons may be reduced or exempted.

(c) Both the CERD and CEDAW have called for a comprehensive law on trafficking in persons that complies with the standards under the Palermo Protocol and consolidates the laws currently dispersed across sectoral legislation. Prevention of human trafficking within the E-6-2 visa system, referred to as Artist, Entertainer, and Athlete visa, and fishing industry, as well as victim identification and protection, have been described as among the most urgent challenges that need to be addressed in the country.

- In March 2021, the *Act on the Prevention of Trafficking in Persons and Protection, etc. of Victims* as a comprehensive law on trafficking in persons was legislated to define concepts such as trafficking in persons and other offenses corresponding to international norms, establish comprehensive measures to prevent trafficking in persons and other offenses, and provide protection and support to victims.
- The Prevention of Trafficking in Persons Act defines trafficking in persons-related concepts and other offenses comprehensively in step with the UN Protocol. A comprehensive plan and government-wide integrated system will be launched for collaboration between the relevant public agencies. The Prevention of Trafficking in Persons Act also prescribes overall measures, for identifying and protecting victims earlier and providing support for them.
- Moreover, in order to improve identification of victims of trafficking in persons, the Republic of Korea has reformed its system including the introduction of an indicator form for those with E-6-2 visa applying for extension of their stay.

**3. Any addition information and/or comment(s) you may have on the above-mentioned information.**

(a) As regards to Article 2 the Bill No. 6912 on definitions, the separation of the terms, “human trafficking”, “human trafficking-exploitation”, and “human trafficking-exploitation crime” may create confusion and negatively impact potential investigations and prosecutions of perpetrators. It may also hinder identification and referral for assistance of victims and potential victims.

- The English expression “trafficking in persons” for the purpose of exploitation from the UN Protocol was translated in a fashion that was interpreted by the Korean public as “an act of buying and selling persons.” Against this backdrop, the translation has created a potential for a misunderstanding, where Korean citizens may conceptualize the term “trafficking in persons” with a narrower scope.
- As such, in the draft bill of the Prevention of Trafficking in Persons Act, both terms “trafficking in persons” and “exploitation” were considered in order to fill the gap caused by translation and to highlight the purpose of exploitation included in the definition of “trafficking in persons” based on international law.
- However, accepting the concern that the terms are repetitive by definition and may create confusion, the Republic of Korea has changed the expression of the draft bill

from “trafficking in persons and exploitation” to “trafficking in persons, etc.” in the finalized version.

(b) There are also concerns over the absence of a penalty provision specifically for the expansive definition of “human trafficking-exploitation”. Under Article 2.2, “human trafficking-exploitation crime” refers to existing penalty clauses in different laws that reportedly cover all human trafficking cases. It is alleged that there are gaps in the current anti-human trafficking framework as it covers only some forms of trafficking in persons, and does not encompass the diverse act that can constitute human trafficking as described in the Palermo Protocol.

■ **The current laws criminalize all forms of trafficking in persons.**

- The Republic of Korea punishes different forms of “Trafficking in persons for the purpose of exploitation,” e.g, trafficking in persons, sexual exploitation, and labor exploitation, through the *Criminal Act* and other special laws, e.g, the *Act on the Punishment of Arrangement of Commercial Sex Acts, etc.*, and imposes aggravated punishment against child and youth trafficking.
- \* The Republic of Korea’s laws criminalizing offenses related to trafficking in persons for the purpose of exploitation are as follows: the *Criminal Act, Act on the Punishment of Arrangement of Commercial Sex Acts, etc.*, *Act on the Protection of Children and Youth against Sex Offenses, Youth Protection Act, Labor Standards Act, Seafarers’ Act, Act on Welfare of Persons with Disabilities, Act on Special Cases Concerning the Punishment of Specific Violent Crimes, Act on the Aggravated Punishment, etc. of Specific Crimes, etc.*
- The most representative law is the *Criminal Act*. Chapter 31 of the *Criminal Act* includes provisions strongly criminalizing all forms of trafficking in persons. Trafficking in persons carries stringent penalties so that the following are penalized:
  - A person who buys or sells another
  - A person who buys or sells another or obtains and maintains another under the control of his/hers or a third person by means of the threat or use of force or other forms of coercion, or by means of fraud, deception or enticement for the purpose of engaging in an indecent act, sexual intercourse or marriage, or for gain
  - A person who buys or sells another or obtains and maintains another under the control of his/hers or a third person by means of the threat or use of force or other forms of coercion, or by means of fraud, deception or enticement for the purpose of labor exploitation, sex trafficking, sexual exploitation, or the acquisition of organs
  - A person who buys or sells another or obtains and maintains another under the control of his/hers or a third person by means of the threat or use of force or other forms of coercion, or by means of fraud, deception or enticement for the purpose of transporting him/her out of the Republic of Korea, or a person who transports

such a victim out of the Republic of Korea

- A person who receives or harbors a victim of any of the crimes delineated above and recruits, transfers or delivers another with the intent to commit any of the crimes delineated above
  - Trafficking in persons, as well as making preparations or conspiring with intent, is penalized only by imprisonment according to Chapter 31 of the *Criminal Act*. In contrast, fines or imprisonment can be selectively sentenced to crimes against property, including fraud and robbery, crimes of inflicting bodily harm and violence, and other crimes. As a fundamental criminal code, the *Criminal Act* criminalizes trafficking in persons with stringent penalties, commensurate with the seriousness of the crime.
  - Moreover, special laws such as the *Act on the Protection of Children and Youth against Sex Offenses*, the *Act on Welfare of Persons with Disabilities* and the *Labor Standards Act* prescribe provisions to penalize different forms of trafficking in persons, including the exploitation of children, youth, and labor. The *Act on Special Cases Concerning the Punishment of Specific Violent Crimes* stipulates that the period of imprisonment for repeated crimes of trafficking in persons prescribed in the *Criminal Act* shall be doubled.
  - Therefore, even if the Trafficking in Persons Prevention Act does not prescribe a penalty provision itself, there is no concern of impunity with regard to the act of trafficking in persons. Rather, if a new penalty provision is added, this can potentially jeopardize the legislative consistency between legislations, i.e. the interpretation, applicability and criminal liability across the current laws.
- **The Prevention of Trafficking in Persons Act encompass all forms of trafficking in persons as described in the UN Protocol.**

\* Article 2(1) of the Prevention of Trafficking in Persons Act (Definition)

- “Trafficking in persons, etc.” shall mean the recruitment, transportation, transfer, harboring or receipt of persons for the purpose of exploitation including the exploitation of prostitution, sexual exploitation, exploitation of labor, removal of organs, etc. by means of one of the following set forth in subsections (a), (b) or (c) of this article. The recruitment, transportation, transfer, harboring or receipt of children or youth, in Article 2, Section 1 of the *Act on the Protection of Children and Youth against Sex Offenses*, or the disabled, defined in Article 2 of the *Act on Welfare of Persons with Disabilities*, shall be considered “trafficking in persons, etc.” even if this does not involve any of the means set forth in subsections (a), (b) or (c) of this article.

(a) by means of the threat, the use of force, other forms of coercion, false arrest, illegal confinement, kidnapping, abduction, buying another, or selling another.

(b) by using fraudulent means (including fraud or deception), abusing power, or taking advantage of a person in a position of vulnerability.

(c) to give payments, benefits, or a promise of the aforementioned kind for detaining or confining another in relation to business, employment, etc.

- Moreover, the term “children or youth” in the Prevention of Trafficking in Persons Act refers to a wider range of children than the “child” in the UN Protocol. The “children or youth” in the Prevention of Trafficking in Persons Act refers to “persons below the age of nineteen”, while the UN Protocol defines a “child” as “any person below the age of eighteen”. That is, the former can apply to a wider range of potential victims.
- In addition, the Prevention of Trafficking in Persons Act provides wider protection than the UN Protocol as its protection covers the disabled as well as children and youth.
- Article 2(2) referred to in the joint communication organizes various laws prescribing crimes in relation to trafficking in persons and a group of offenses and identifies them as “trafficking in persons crimes.” The article is included in order to raise awareness of the group of human trafficking crimes and management of statistics and to ensure the protection of victims and provision of support for them.

(c) The language in Article 2.1(b), “taking advantage of another person’s strained circumstances” or “abuse of another person’s strained circumstances”, is a marked difference from “abuse of a position of vulnerability” upheld under Article 3(a) of the Palermo Protocol.

- According to precedents by the Supreme Court of Korea, “strained” circumstances should be assessed comprehensively by taking into account all situations. Economic factors, including being categorized as vulnerable, as well as psychological elements could cause “strained” circumstances.

\* Supreme Court’s precedent (Decision 2008Da98006, Nov. 2009)

- “Strained” in Article 104 of the *Civil Act* refers to “pressing destitution” that can arise from economic, mental, or psychological reasons.

(d) Chapter V of Bill No. 6912 refers to a partial amendment to the “Immigration Control Act (Bill No.6907), instead of stipulating protection guarantees for migrant victims, potential victims of trafficking. This bill would not prevent the immigration authority from issuing deportation order and/or detention order to migrant victims, nor would it guarantee residence, nor protection safeguards to ensure that returns are voluntary,

- Chapter V of the Prevention of Trafficking in Persons Act ensures the protection of and support for foreign victims. Support, including the status of stay, will be extended through the amendment of the *Immigration Act*.
- The amendment bill includes special provisions for extending or granting a residence permit to a foreign victim of trafficking in persons such that he/she can stay in the Republic of Korea until any investigation, trial, and civil or criminal remedy procedure is completed.

\* Rep. KIM Yongmin proposed the amendment bill to the *Immigration Act* as of December 2020.

- The Prevention of Trafficking in Persons Act followed the Republic of Korea's existing legal practice in that the status of stay for protection of and support for foreign victims, etc. are set out mainly in the *Immigration Act* such as Article 25-2 (Special Rules for Immigrants through Marriage), Article 25-3 (Special Rules for Victims of Sexual Offenses) and Article 25-4 (Special Rules for Victims of Child Abuse).
- The *Immigration Act* of the Republic of Korea prescribes that if a trial in a court, an investigation by an investigative agency or procedures for remedying an infringement of the right of a foreigner due to human trafficking for prostitution and sexual exploitation is proceeding but his/her qualifications for staying in the Republic of Korea has expired due to the lapse of the period of stay, etc., he/she may be granted an extension of the period of stay (a G-1 visa may be granted in the case of an illegal migrant) and be allowed to find employment during the period. As such, the law of the Republic of Korea guarantees such foreign victims' stay in the Republic of Korea in consideration of the circumstances.
- Thus, a foreign victim of trafficking in persons will be granted support including the status of stay, and be provided with protection and assistance from support facilities based on the Prevention of Trafficking in Persons Act.

(e) With reference to Article 42 in the "Immigration Control Act" which would seek to establish a Deliberation Committee within the Ministry of Justice and regional immigration service, migrants, confirmed as trafficking victims by the Minister of Gender Equality and Family, would have to be approved again by a Deliberation Committee in order to receive the protection offered, in Article 25-5 and 62-2 of the Immigration Control Act, which includes extension of period of stay, suspension of executing deportation order.

- As prescribed by the *Immigration Act* of the Republic of Korea, the Minister of Justice (the head of a Regional Immigration Service) may decide on the eligibility of a confirmed foreign victim applying for an extension of the period of stay or a suspension of deportation.

\* The relevant provisions in the *Immigration Act* are Article 25-2 (Special Rules for Victims of Domestic Violence Among Immigrants Through Marriage), Article 25-3 (Special Rules for Victims of Sexual Crimes), Article 25-4 (Special Rules for Victims of Child Abuse Crimes), and Article 65 (Temporary Release from Detention).

- Victim protection agencies are neither judicial institutions nor quasi-judicial institutions like legal administration agencies. Therefore, allowing them to provide written confirmations determining foreigners' status of stay could undermine the administration of immigration policy, which must be a national administrative action that the Republic of Korea takes as a sovereign state.

\* Constitutional Court's precedent (2017Hun-Ka29, Decided Feb. 22, 2018)

- 'Immigration' administration is a national administrative action that aims to promote national interest and safety through the proper control and coordination of the entry and departure of nationals and foreigners and the stay of foreigners.
- Matters concerning the entry and departure of foreigners, in particular, are essential for the Republic of Korea to perform functions as a sovereign state, and therefore, shall be strictly controlled.
- The "Deliberation Committee on Stay of Foreigners" is an institutional strategy to maintain objectivity and ensure fairness on the process of making decisions on extension of the period of stay or suspension of executing deportation orders for foreign victims of trafficking in persons, domestic violence, sexual harassment, or child abuse. The Committee will be comprised of experts from the public and private sectors.
- Similarly, in other countries, immigration authorities make final decisions on granting permission of stay to suspected victims of human trafficking as follows; the U.S. Immigration and Customs Enforcement Homeland Security Investigations in the United States of America; in the United Kingdom, the Single Competent Authority (composed of the National Crime Agency and UK Visas and Immigration) in the United Kingdom of Great Britain and Northern Ireland; and Immigration, Refugees and Citizenship Canada in Canada.

