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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 convey herewith the response of the Government of the Republic of Korea to the Joint Communication from Special Procedures (AL KOR 4/2020).

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, 28 September 2020

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 observations on the joint communication from special procedures concerning the dismissal of a soldier, Staff Sergeant Byun Hui-Su, following surgery to affirm her gender identity

Additional information or opinions with regards to the details of Former SSG Byun Hui-Su as written in the "Joint Communication from Special Procedures" (Hereafter Joint Communication)

- All Korean male citizens are obligated to serve in the military, a duty with its basis upon the Republic of Korea (hereafter ROK) Constitution.
- Relevant domestic laws do not allow for a person who has undergone Sex Reassignment Surgery (hereafter SRS) to enlist as a conscript or NCO(non-commissioned officer) or commission as a warrant or officer to the ROK Armed Forces. ("Military Service Act, Article 11, Article 12 Section 4, Medical Examination Standards for Draft Conscript, Addendum 3, et cetera")

Military Service Act, Article 11

(Draft Physical Examination)

- ① Every person liable for military service shall undergo a draft physical examination at the time and place designated by the director of the regional military manpower office in the year when he turns 19 years old to determine whether he is capable of performing military service.

Military Service Act, Article 12

(Determination of Physical Grades)

- ① Doctors exclusively in charge of the draft physical examination, doctors specializing in the draft physical examination, or military surgeons under Article 12-2 who have performed a physical examination (including physical examination for volunteers for active duty service) shall determine physical grades as follows:

1. Those whose physical and psychological constitution is healthy enough to perform active or supplementary service shall be determined at Grade I, II, III, or IV, according to their physical and psychological condition;
2. Those incapable of entering active or supplementary service, but capable of entering the wartime labor service, shall be determined at Grade V
3. Those incapable of performing military service due to any disease or mental or physical incompetence shall be determined at Grade VI
4. Those unable to be graded according to subparagraphs 1 through 3, due to any disease or mental or physical incompetence, shall be determined at Grade VII

Medical Examination Standards for Draft Conscription, Addendum 3

Extent of disease and physical disability	Grade		
	Draft	discharge	Wartime
394. Penile Amputation			
a. Partial amputation of glans penis	5	5	4
b. Complete amputation of glans penis (less than a half of total penis or not as severe as C level)	5	5	4
c. Loss of more than a half of total penis add: C level include people who are not capable of sexual intercourse or underwent a sexual exchange operation	5	5	4

Enforcement Decree of the Military Service Act, Article 136

2. Those to be transferred in order to be included in wartime labor service are as follows : f. Those who have changed their gender from female to male on the Family Register

- The decision to allow persons who have undergone SRS to serve in the ROK Military is a policy issue that requires consideration from broad areas of interest, including effects on combat readiness requirements originating from the unique ceasefire security environment with regards to north Korea (nK), effects on personnel morale, and the availability of, or, in

the formation of, a social consensus.

- Currently, former SSG Byun has filed a lawsuit for 'annulment/cancel of discharge disposition', which is being processed under the Korean judicial system.
- We would like to provide correct information with regards to several statements with discrepancies from the truth as listed in the Joint Communication :

i. In July 2019, Ms. Byun notified her unit of her wish to undergo sex reassignment surgery. In August 2019, she and her unit agreed on the schedule of the surgery, based on which she applied to seek permission to travel overseas on 8 October 2019. In the submission, she explained that she wanted to go to Thailand for medical treatment. On 14 October 2019, the Army 5th Armored Brigade approved the submission." (Paragraph 5, Page 1)

- The decision to undergo SRS is a personal one, to be decided based on an individual's right to act upon his or her free will. Korean law or ROK Army Regulations do not require any permission or agreement from a chain of command should a service member hope to undergo SRS
- Under relevant current legislation, a service member is required to receive permission from his or her commander for Leaves outside of Korean territory. Former SSG Byun's overseas travel was approved by her chain of command to ensure her rights to a private vacation, and is irrelevant to the chain of command's permission of, agreement with, or support of her SRS.
- In conclusion, it is incorrect to assume that the approval of Former SSG Byun's overseas travel plans and requests support the claim that '(Former SSG Byun) and her unit agreed on the schedule of the surgery.'

ii. "Reportedly, her unit and superiors have been supportive of her decision to have surgery. For instance, one of her superior officers visited her in hospital and was discussing with her the possibility to be redeployed to a different unit/troop after her treatment, if she wished so."

(Paragraph 2, Page 2)

- During her service at her prior unit, Former SSG Byun displayed actions and behaviors indicative of operational and behavioral maladjustment and concern,

originating from her gender identity issues. Her actions indicative of concern and maladjustment required her command structure and unit to provide close attention, support, and execute unit management/protection procedures.

- In terms of unit management and personnel health, welfare, and protection, Former SSG Byun's superiors conducted multiple counseling sessions with Former SSG Byun. It seems that Former SSG Byun misconstrued the content of the conversations favorably to her point of view.
- iii. The army instructed her to directly go back to her private home instead of her military residence where most of her personal belongings were, therefore preventing her from having contact with her unit." (Paragraph 3, pg. 3)
- Upon discharge, all service members of the ROK Armed Forces lose the right to utilize their last unit's Bachelor's Enlisted/Officers' Quarters. The notification of her previous unit to return to her listed civilian address is a procedural one.
 - After the notification, the unit provided Former SSG Byun enough time so that she can prepare a new residence and move her belongings.
- iv. Usually, a decision to discharge military members becomes effective after a period of up to three months."(Paragraph 3, pg. 3)
- Discharge Orders are issued upon the decision of Discharge Evaluation Committee, and take immediate effect.
- v. "On 29 June, the army acknowledged that the original decision did not take into account that her gender identity is female." (Paragraph 4, Page 3)
- The ROK Army has NEVER expressed any statements and/or interviews with the intent of acknowledging 'that the original decision did not take into account that (Former SSG Byun's) gender identity is female.'
 - Also, ROK Army's Committee for Examination of Military Personnel Petitions held its evaluations and came with a conclusion only upon being provided with the entirety of the petitioner's (Former SSG Byun) statements with regards to her gender identity, and only upon undergoing a meticulous evaluation process.

- vi. 6) The starting date for a Medical Examination Committee examination of Former SSG Byun's case was NOT 6 January 2020, BUT 26 December 2019. (Paragraph 5, Page 2)

The Discharge Evaluations Committee's Decision-making Process and Framework

- The ROK Army's Discharge Evaluations Committee conducted panels with Former SSG Byun and her legal representative (lawyer) present. The Committee reached a decision to discharge Former SSG Byun after very careful and sufficient discussions in consideration of various questions and issues. Details of such areas considered and items of discussion are as follows.
- The framework for items of evaluation were based upon Article 37 of the Military Personnel Management Act and Article 53 of the Enforcement Decree of the Military Personnel Management Act. Pursuant to aforementioned relevant legislation, the evaluation was based upon Former SSG Byun's official given statements/testimonies and medical professional statements from the Medical Examination Committee.
- Specific questions asked within the committee, and items debated upon with much consideration and redundancy, were issues including: Whether the physical disorder was caused with intent and awareness; Whether Former SSG Byun's continued service was required with necessity by the Army; Whether Former SSG Byun was Fully Mission Capable within her original branch and rank.

Article 53, Enforcement Decree of the Military Personnel Management Act
(Standards for discharge, et cetera)

- ① The standards for Officers, Warrant Officers, and Noncommissioned Officers to retire, be discharged, or expunged from active duty service due to mental and physical disorders are as follows. <revised 2016. 2. 4.>
1. If the physical or mental disorder was incurred with intent or through violation of law.
- ② Despite conditions fulfilling the subparagraph of Paragraph 1, if a person with conditions that fall under subparagraph 1 or 2 hope to serve as an active duty service member in the military, his/her status will be decided after each service branch Discharge Evaluations Committee of his/her availability and necessity to the military, with expert referral from the Medical Evaluations Committee. However, if oneself with physical or mental disorder falls under any subparagraph below, that person shall not continue his/her service as an active duty service member. < Revised 2016.2.4.>.
1. If the physical or mental disorder was incurred with intent or through violation of law.
 2. If oneself is considered incapable of or requires others' help and assistance in executing his/her work, training, operations and missions that are required by his/her branch and rank.

Enforcement Decree for Military Personnel Management Act

Addendum 1: Mental and Physical Disorder Evaluation Chart

Extent of disease and physical disability	Eval. Grade
320. Penile Amputation	
a. Complete amputation of glans penis with erectile dysfunction	5
b. Complete amputation of glans penis (not A or C level)	7
c. Partial amputation of glans penis without injury of corpus bulbocavernosus penis	10
326. Loss of testes	
a. Loss of both testicles	5

b. Loss of one of testicles	10
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- With regards to determining the cause of physical disorder, the Army decided that Former SSG Byun's physical disorder was 'Caused with intent and awareness' based upon her given testimony that acknowledged that; Quote: "I decided to undergo SRS with full knowledge of the possibility that I could be discharged"
- With regards to the Army's requirements and utility in Former SSG Byun's prospective continual of service, the Discharge Evaluations Committee based its decision based on professional statements from the Medical Examination Committee and from her respective personnel management branch.
 - The Medical Examination Committee's professional medical statement described Former SSG Byun's conditions as "requiring medical attention, should (Former SSG Byun) reside in, and be part of, daily communal residence and routines"
 - The respective personnel management branch noted that "additional, further, separate recovery time and treatment is required until (Former SSG Byun's) full recovery. Immediate demonstration of combat power is limited while under medication. It is especially hard to accept that (Former SSG Byun) would be fully mission capable whilst under medication, considering that requirements from her branch and rank include duties, training and exercises, and operations that require her command of military equipment (Tank) as a squadron leader (Armor Operator)"
 - Former SSG Byun herself stated at the Discharge Examination Committee that "(I) am taking hormone injections every three weeks." This led the Discharge Examination Committee to conclude that Former SSG Byun's personal situation and conditions, which require constant hormonal therapy, was not to be concluded in a short period of time.

Reasons behind the discrepancy between the recommendations of the National Human Rights Commission of Korea (NHRCK) and the ROK Army Discharge Examination Committee

- The NHRCK recommended urgent relief measures, believing that the case is related to discrimination based on sexual identity, and pertinent to basic human rights.
- The Discharge Evaluation Committee's evaluation process on Former SSG Byun was one based on the Military Personnel Management Act and other relevant legislations. The Discharge Evaluation Committee evaluates and decides whether a certain servicemember, befitting certain conditions based on pertinent laws, should be allowed to continue his or her service, or to be discharged.
- Recommendation of Urgent Relief Measures to hold administrative processes, based on Article 48, National Human Rights Commission of Korea Act, are recommendations to the respondents to conduct certain measures if there is reasonable concern of potential irrevocable damages.

A decision with regards to Former SSG Byun is based on, and only upon domestic legislation that is current, pertinent and relevant. There are conflicting, different social opinions domestically with regards to the acceptance of servicemembers who have undergone SRS. The issue especially requires broad consideration of the distinctive security environment of the ROK Armed Forces, social consensus and understanding, and legality and legal foundation of the decision.

Should Former SSG Byun be allowed to serve temporarily despite the current absence of relevant legal foundations and lack of a unified national, civilian consensus, other Defense-related policies, operations, and missions, based on current existing relevant legislature, will be obfuscated with confusion, rendering confusion in the execution of defense-related policies of the ROK Ministry of National Defense.

- Because of the aforementioned reasons, although the ROK Army fully understands the background and the reasoning of the NHRCK's recommendation for urgent action to suspend the execution of the Discharge Evaluation Committee's decision, the Committee's procedures complied with relevant domestic laws.

The legal grounds for classifying the removal of male genitals as a “mental of physical disorder”

- Please refer to answers to previous questions.

Please provide information on the measures taken by the Republic of Korea Government, including providing training on gender diversity, in order to guarantee the rights of service members regarding privacy and gender identity, and ensure that trans and sexual minority members of the military are protected from discrimination or violence.

- In order to protect the human rights of homosexual soldiers and provide the infrastructural conditions allowing homosexual soldiers to fulfill their military service as any other service member would, the MND Directive no. 2273 'Military Unit Management Directive' Chapter 7 Service of Homosexual Soldiers was enacted and is being enforced at each unit under the respective commander's control.

Art. 252(Purpose)

Art. 253(Basic Principles)

Art. 254(Protection of Privacy)

Art. 255(Prohibition of Outing)

Art. 256(Prohibition of Discrimination)

Art. 257(Strengthened Education and Counseling)

Art. 258(Consistent Interest and Attentiveness)

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