

Mandates of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Working Group on Arbitrary Detention; and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE:
UA KOR 2/2017

16 August 2017

Excellency,

We have the honour to address you in our capacity as Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Working Group on Arbitrary Detention; and Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolutions 32/2, 33/30 and 34/18.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received in connection with the **recent cases of arrests interrogations, detentions and prosecutions of soldiers and military personnel perceived to be gay, under the Republic of Korea's Military Criminal Act.**

According to the information received:

In January 2017, a video clip appearing to show a sex act between two male soldiers was posted on social media and remained online for 3 hours.

In early February 2017, the leadership of the Army of the Republic of Korea, at the instruction of [REDACTED], decided on the basis of the video clip to launch a broad investigation under the Indecent Act provision (article 92-6) of the Military Criminal Act, which stipulates that "[a] person who commits anal intercourse or other indecent act shall be punished by imprisonment with prison labor for not more than two years."

On 6 February 2017, Mr. [REDACTED] - one of the soldiers appearing in the video clip, was identified by the Cyber Investigation Team of the Republic of Korea's Army Central Investigation Department and was interrogated about the incident as well as about his alleged sexual relationships with other military personnel. Among the methods used by the investigation team was to confiscate the soldier's mobile phone and search the history of live communications and messages with other military personnel. The soldier was forced to confess his sexual orientation and to admit homosexual sexual acts under threat of being exposed to his fellow soldiers.

It appears that the investigation team approached the soldier without prior information and without any authorization by the soldier's commanders. The investigation officers intimidated the soldier by saying "I have something to tell you", "You have to say everything honestly because we already know that you are gay", and "Don't make any excuse. [XXX] already said that you had sexual relations with him". The investigation officers allegedly made also condescending and demeaning comments about the soldier's sexual orientation, such as "I am just curious, but does it make you feel good when you have sex with a man? I don't know exactly because I slept only with a woman", "How do you choose your sexual preference?", "I want you to recover from your sexual orientation by taking this as an opportunity", and "It sounds weird to get along with gays when you are an active military serviceman." In addition, the identified soldier was forced to indicate all those soldiers and officers appearing in his mobile phone's contact list with whom he would have had sexual intercourse.

According to military rules, it is forbidden for the soldiers to carry, while in service, any electronic device with hard drive and access to internet, including mobile phones.

There were two hearings on the case of Mr. [REDACTED]; the first one on 1 May 2017 and the final one on 19 May 2017. Mr. [REDACTED] was not in the position to meet his defense lawyer prior to the final hearing. Following the two hearings, on 19 May 2017, Mr. [REDACTED] was sentenced by the Military Court of the Army III Corps to three months of imprisonment with one year of suspension.

On 13 June, the Military Court of the Army III Corps dismissed Mr. [REDACTED]'s request for an appeal of his sentence. Following this, Mr. [REDACTED] appealed to the Army's High Military Court. However, by that time, he was already discharged from the Army and his case was transferred to the [REDACTED] District Court with the view to have his appeal reviewed by the Court's civil judges.

Based on the initial results of the interrogation of Mr. [REDACTED], the Cyber Investigation Team expanded the investigation to dozens of other soldiers and officers, including the 16 mentioned below. For the identification of other gay military personnel, the investigation team used also web-based dating applications.

Mr. [REDACTED] was one of those servicemen identified during this investigation. He was arrested on 13 April 2017 following a search warrant of his residence, located near his unit. The issuance of the arrest warrant took only 45 minutes, even though, according to procedures, such a warrant had to pass from the military police officer to the military prosecutor for review and validation, and then through formal request to the military court and military judge for final decision. Mr. [REDACTED] was detained in the military detention house at the Army

Headquarters until the Army General Military Court's decision on 24 May 2017, which sentenced him to 6 months imprisonment with one year suspension for having sex with another male soldier.

As of today, the majority of the cases against gay military personnel identified by the Cyber Investigation Team, including the 16 identified gay service men mentioned below, are still pending before military and civil courts, or further investigated by military prosecutors and military and civil police:

| | Surname | First Name | Rank | Current State of Legal Process |
|----|---------|------------------|---------------------------------|---|
| 1 | ██████ | ██████ | Srgt. 1 st | Military Prosecutor Prosecution |
| 2 | ██████ | ██████ | 1 st Lieut. | Military Prosecutor Prosecution |
| 3 | ██████ | ██████ ██████ | 1 st Lieut. | Military Police Investigation |
| 4 | ██████ | ██████ ██████ | Srgt. 1 st | On the 1 st Trial |
| 5 | ██████ | ██████ ██████ | Srgt. 1 st | Terminated (out of arraignment) |
| 6 | ██████ | ██████ ██████ | Staff Srgt. | Terminated (suspension of indictment) |
| 7 | ██████ | ██████ | Master Srgt. | Military Prosecutor Prosecution |
| 8 | ██████ | ██████ | Srgt. 1 st ██████ | Military Prosecutor Prosecution (Transferred to the ██████████ ██████████) |
| 9 | ██████ | ██████ | Cpt. | Terminated (suspension of indictment) |
| 10 | ██████ | ██████ | Srgt. 1 st | Witness Investigation (for #12 Srgt. 1 st Class ████████) by the Central Investigation Department and the Military Police of the Army's 1 st Corps ██████ |
| 11 | ██████ | ██████ | Srgt. 1 st | Military Prosecutor Prosecution |
| 12 | ██████ | ██████ | Srgt. 1 st | Military Prosecutor Prosecution |
| 13 | ██████ | ██████ | Srgt. 1 st | Military Prosecutor Prosecution |
| 14 | ██████ | ██████ | Srgt. 1 st | On the 1 st Trial |
| 15 | ██████ | ██████ ██████ | Staff Srgt. | Forwarded to the Western Branch of Seoul District Prosecutor's Office |
| 16 | ██████ | ██████ | Srgt. ██████ | Civil Police Investigation |

While we do not wish to prejudge the accuracy of the information made available to us, we express our serious concern over these allegations of investigation and criminal

prosecution against military personnel based on their actual and/or perceived sexual orientation, as well as on their alleged same-sex sexual conduct. An equal matter of serious concern is the level of response by the Army of the Republic of Korea, through the launch of an investigation that took the form of a generalized campaign against all those soldiers and military officers suspected of being gay, through intimidation and deception, forcing the identified military personnel to disclose their sexual orientation and to denounce other gay servicemen. In addition, we are concerned about the alleged absence of due process in the investigation and prosecution, in particular regarding the context around the arrest and detention of those service men perceived to be gay and accused of indecent acts under Article 92-6 of the Military Criminal Act. Finally, we express concern at the criminalization of same-sex sexual conduct in the Military, as provided by article 92-6.

We are furthermore concerned that provisions in the Military Criminal Act, such as article 92-6, can be used to systematically discriminate against persons in military service, based on their actual or perceived sexual orientation, and to violate their integrity and security. We are deeply concerned about information on the continuous high prevalence of harassment, intimidation, abuse and violence against soldiers and military personnel based on their sexual orientation, as well as about information regarding the ineffective enforcement of military guidelines and instructions for the protection of all men in military service.

In connection with above alleged facts and concerns, we would like to recall articles 2, 9, 14, 17 19, and 26 of the International Covenant on Civil and Political Rights (ICCPR), which guarantee the enjoyment of human rights without distinction of any kind, the right to liberty and security, the principle of presumption of innocence and of minimum guarantees of due process, the right to effective remedy, the right to privacy (including of her/his correspondence), the freedom of expression, and equality before the law.

Sexual orientation and gender identity are prohibited grounds of discrimination under international law. In 2016, the Committee on Economic, Social and Cultural Rights explained that “State parties also have an obligation to combat homophobia and transphobia, which lead to discrimination” (E/C.12/GC/22, para. 23). Both the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have found that States have a legal obligation to ensure to everyone the rights recognized by the Covenants without discrimination on the basis of sexual orientation or gender identity (E/C.12/GC/20, para. 32, and CCPR/C/GC/35, para. 3).

In 2015, the Human Rights Committee called on the government of the Republic of Korea to strengthen the legal framework to protect lesbian, gay, bisexual, transgender and intersex individuals and to repeal article 92-6 of the Military Criminal Act. It also recommended that the government of the Republic of Korea conduct full and impartial investigations into all allegations of abuse in the military and ensure that perpetrators of

human rights violations are tried and punished (CCPR/C/KOR/CO/4, paragraphs 15 and 31).

In 2017, the Committee against Torture has expressed concern about the repeated crackdowns on gay soldiers on the grounds that they have violated article 92-6 of the Military Criminal Act and recommended that the Republic of Korea consider repealing the said article and take all measures necessary to punish violent actions against lesbian, gay, bisexual, transgender and intersex persons in the military. It also recommended that the Republic of Korea put an end to the “guardhouse detention” of soldiers, without a warrant and without judicial review (CAT/C/KOR/CO/3-5, paragraphs 35 and 36).

On the basis of international human rights norms and standards and the work of the United Nations human rights treaty bodies and special procedures, the United Nations High Commissioner for Human Rights has emphasized that States have obligations to, *inter alia*, prohibit discrimination on the basis of sexual orientation and gender identity; protect individuals from violence, torture and discrimination on the basis of their sexual orientation; provide redress to victims; and, provide training to law enforcement personnel and judges in gender-sensitive approaches to addressing violations related to sexual orientation and gender identity. In addition, the High Commissioner for Human Rights has recommended that States ensure that anti-discrimination legislation includes sexual orientation and gender identity among prohibited grounds (A/HRC/29/23, para. 78 and 79).

Finally, we would like to recall that arbitrary arrest and detention of individuals is a clear breach of international law, in particular the right not to be deprived arbitrarily of liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the Republic of Korea.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

In the view of the urgency of the matter, we would appreciate a response as soon as possible on the initial steps taken by your Excellency’s Government to ensure that no discrimination and/or violence is perpetuated against any soldier and/or military personnel based on her/his perceived and/or actual sexual orientation and gender identity.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comments you may have on the above-mentioned allegations.

2. Please indicate the measures taken to protect and promote the rights of lesbian, gay, bisexual, transgender and intersex persons who are in military service.
3. Please provide information on how the competent military authorities investigate cases that fall under the current provision in article 92-6 of the Military Criminal Act.
4. Please provide information on how the competent military authorities ensure due process in cases that fall under the current provision in article 92-6 of the Military Criminal Act, and on whether any investigation has been undertaken in all those instances where due process has been violated.
5. Please indicate any measures taken with the view to providing support and redress to all those persons in military service suspected of being gay and/or of having same-sex sexual conduct, including those who were interrogated and/or detained, and against whom there was no official prosecution.
6. Please indicate the intention of your Excellency's government to review and amend the Military Criminal Act by repealing the provision in article 92-6.
7. Please provide information on the steps taken to tackle the practice of "guardhouse detention" without warrant of soldiers and military personnel, and in particular the disproportionate use of such a practice on the grounds of soldiers' perceived and/or actual sexual orientation and gender identity.

While awaiting a reply, we urge your Excellency's Government to put an end to the abuse and persecution of gay soldiers and military personnel and to withdraw all charges against all those accused under the provisions of article 92-6 of the Military Criminal Act and annul all those sentences already imposed following trial.

We may have the intention to publicly express our concerns in the near future as, in our view, the information upon which the press release would be based is sufficiently reliable to indicate a matter warranting immediate attention. The press release would indicate that we have been in contact with your Excellency's Government to clarify the issues in question.

In addition, we would like to draw your Excellency's Government's attention to paragraph 23 of the methods of work of the Working Group on Arbitrary Detention, according to which, "after having transmitted an urgent appeal to the Government, the

Working Group may transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such appeals — which are of a purely humanitarian nature — in no way prejudge any opinion the Working Group may render. The Government is required to respond separately for the urgent action procedure and the regular procedure.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Vitit Muntarbhorn

Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Elina Steinerte

Vice-Chair of the Working Group on Arbitrary Detention

David Kaye

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

