

Stakeholder

# **The Center for Military Human Rights, KOREA (CMHRK)**



## **Republic of Korea**

### **Submission to the UN Universal Periodic Review**

The 14<sup>th</sup> Session of the UPR Working Group

22 OCTOBER - 5 NOVEMBER 2012

#### Contact Information

The Center for Military Human Rights, KOREA(CMHRK)

Address: #303, Women's center for Equality & Peace, 6, Gukhoe-daero 55-gil,  
Yeongdeungpo-gu, Seoul, Rep. of Korea, 150-037

Website: [www.mhrk.org](http://www.mhrk.org)

E-mail: [mhrk119@gmail.com](mailto:mhrk119@gmail.com)

Phone: +82 2 733 7119

FAX: +82 2 2677 8119

23 April 2012

## **The Center for Military Human Rights, KOREA**

### **Submission to the UN Universal Periodic Review**

The 14<sup>th</sup> Session of the UPR Working Group (22 OCTOBER - 5 NOVEMBER 2012)

#### **Part I Background Information**

#### **Part II Implementation of International Human Rights Obligations**

**Theme A** Equality and Non-discrimination

**Theme B** Right to Life, Liberty and Security of the Person

**Theme C** Freedom of Religion or Belief, Expression, Association and Peaceful  
Assembly and Right to Participate in Public and Political Life

**Theme D** Administration of Justice and the Rule of Law

In each topic paragraph, the Center for Military Human Rights, KOREA states a concerned situation of the Republic of Korea regarding human rights issue and gives recommendations in bold.

## **I. Background Information**

1. The Center for Military Human Rights, KOREA (CMHRK), established in 2009, is located in Seoul, the Republic of Korea (ROK). Its main focuses are counseling victims of human rights violation in the military, providing legal assists, and observing human rights violation cases in the military. The CMHRK (at then, it was Establishment of the center for human rights in military) participated in the 1st cycle of the Universal Periodic Review in 2008.

## **II. Implementation of International Human Rights Obligations**

### **A. Equality and Non-discrimination**

1. **Discrimination based on Sexual Orientation and Gender Identity in the Military (Recommendation 23 – Unacceptable):** The Constitutional Court ruled that the Article 92(5) (Sodomy Law)<sup>1</sup> of the Military Criminal Law is constitutional. However, the term that the provision used to describe a crime is evidently discriminating toward LGBT people.<sup>2</sup> Comparing the cases applied by the Article 92(5) to the other paragraphs of the Article 92, the Article 92(5) has no reason to exist.<sup>3</sup> Also, because this provision could be applied regardless of place, time and duty relevancy, it would violate one's rights to privacy, self-determination, and equality. According to the Ministry of National Defense, from 2004 to 2007, total 4 "consented" same-sex relationships were reported, and 3 of them were brought to trial and punished. While not punishing heterosexual relationship, criminalizing and punishing a particular type of relationship is unjust and may entail hatred and

<sup>1</sup> **Military Criminal Law Article 92(5) (Sexual Molestation)** A sodomite (one who committed "copulation of chickens") and anyone who committed any other form of sexual molestation are sentenced to up to 2 year of imprisonment.

<sup>2</sup> In the Korean language, the provision expresses "the same-sex relationship" as "copulation of chickens (more directly translated version: 'adultery of chickens')" which is a metaphoric term that stems from the similarity between actual depiction of chicken's copulation and the homosexual relationship – in this case, especially, regarding anal intercourse. In short, the term per se entails highly discriminative and inhumane bias.

<sup>3</sup> From 1 Jan 2004 to 31 Dec 2007, total 176 cases were applied by the Article 92. Four of them were related to the Article 92 (5), and the rest 172 cases were forceful sexual molestation or raised complaint by the victims. 98% of the cases applied by the Article 92 could be applied by the provision of sexual assault in the Criminal Law or Act on the Prevention of Sexual Assault and Protection, etc. of Victims Thereof. Considering the fact that only the Article 92 (5) does not require victim's complaint, the only role of the provision is to fill the blank of the provisions that are antragsdelikt.

prejudice. On 17 June 2011, at the 17<sup>th</sup> Session of the UN Human Rights Council, a resolution that contains concerns about the infringement of human rights based on sexual orientation and gender identity was adopted,<sup>4</sup> and the ROK was one of 23 nations that voted for the resolution in favor. **The Government should immediately nullify the Article 92(5) of the Military Criminal Law and provide human right trainings to soldiers to prevent the discrimination against LGBT in the military.**

## B. Right to Life, Liberty and Security of Person

2. **Beating and Brutal Treatment in the Military:** A number of soldiers suffer from beating and brutal treatments in the military. As beating and brutal treatments in the military are done by a superior, it is a form of torture according to the Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Although the number of cases related to beating and brutal treatments is increasing, perpetrators are not properly punished<sup>5</sup>. A lot of damaged soldiers suffer from the post-traumatic stress disorder not only during the military service, but also even after they are discharged. Moreover, they even commit suicide because of this.<sup>6</sup> Although it is necessary to ratify OP-CAT to alleviate beating and brutal treatments in the military, the Ministry of National Defense, the Ministry of Justice and National Police Agency have opposed instant ratification of the protocol due to security matters. The instant accession was called on by the National Human Rights Commission of Korea (NHRCK) as well. **The Government should prepare fundamental measures to eradicate beating and brutal treatments in the military and ratify the OP-CAT immediately.**
3. **Sexual Crimes in the Military:** From 2003 to 2010, the number of sexual crime was 336; in 256 cases the victims were civilians and 71 cases were soldiers. Yet, 52% of the cases were not indicted.<sup>7</sup> Although the situation appears serious, there is limited assistance given to the sexual assaults happening in the military according to the Article 25 of the Decree of Military Service<sup>8</sup>. As most sexual assaults occur due to unequal power relationship in the military, it is difficult for victims to bring sexual crimes inside the military to the court. Under these circumstances, victims' juridical rights enshrined in the Article 7 of the Universal Declaration of Human Rights can easily be deprived of. **The Government should provide institutional aid to sexual victims in the military, take concrete action to protect rights of victims and abolish the Article 25(4) of the Decree of Military Service.**

## C. Freedom of Religion or Belief, Expression, Association and Peaceful Assembly and Right to Participate in Public and Political Life

4. **Conscientious Objectors (Recommendation 17, 24 - Alternative service programs for conscientious objectors are currently being studied):** It is reported that from 2001 to 2011, 7,108 people had refused to perform military service.<sup>9</sup> Currently about 800 conscientious objectors are

<sup>4</sup> **Resolution 17/19** "Human rights, sexual orientation and gender identity" (A/HRC/RES/17/19)

<sup>5</sup> The number of army soldiers and officers who are punished for beating and brutal treatments increased according to the following data released by Shin Hak-yong, a congressperson: in the case of soldiers, 3,197(2007), 4,144(2008), 5,415(2009), 5,437(2010) and in the case of officers, 29(2007), 44(2008), 30(2009), 54(2010) [number (year)]. The problem here is that army officers who are punished severely (dismissal, suspension, etc.) are very limited: 2 out of 29 in 2007 (6.9%), 4 out of 44 in 2008 (9.1%), 3 out of 30 in 2009 (10%) and 10 out of 53 in 2010(9.3%).

<sup>6</sup> According to the data released from the Ministry of National Defense, the number of suicide commitment in the military is growing larger: 75 in 2008, 81 in 2009, 82 in 2010. Additionally, the **2010 Country Reports on Human Rights Practices** submitted by the U.S. Department of State states that 35 Korean soldiers committed suicide in the first half of 2010, and 13 of those were due to beating, brutal treatments and maladjustment.

<sup>7</sup> According to Kim Dongsung, a congressperson, in total, 336 sexual crimes in the military were reported from 2009 to 2010 and only 173 were prosecuted. The victims of 265 cases out of 336 were civilians, and the victims of 71 cases out of 336 were soldiers.

<sup>8</sup> **The Decree of Military Service Article 25 (grievance procedure) (4)** Soldiers may not require help from out of the army through procedures such as presenting a petition or a collective signature or any ways that are not stated in the law.

<sup>9</sup> *Yonhapnews Agency*, on 15 December 2011, reported that "according to the Military Manpower Administration, from 2001 to 2011, those who refused to join the army or hold guns are 7,108. Among them, 6,428 received criminal penalty. Amid those who received

imprisoned. The UN plainly stands by the approval of the right to conscientious objection to military service,<sup>10</sup> and recommends that governments should provide an alternative service.<sup>11</sup> Nonetheless, the Government does not provide alternative service on the basis that most people do not agree with having an alternative service according to the survey.<sup>12</sup> Moreover, the Government has not shown any efforts on raising awareness on the alternative military service. **The Government should take an immediate action to adopt an alternative service in line with the international standards and enact relevant legal provisions.**

5. **Freedoms of Thought and Right to Participation in the Cultural Life in the Military:** According to the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, there has been considerable increase regarding restrictions on individuals' right to freedoms of opinion and expression in the ROK since 2008.<sup>13</sup> In 2008, the Ministry of National Defense made a list of seditious books<sup>14</sup> based on the Article 16(2) of the Decree of Military Service<sup>15</sup>. Seven juridical advisors filed a constitutional appeal on this, but the Constitutional Court ruled that banning seditious books in the military is constitutional. The Special Rapporteur on Freedom of Expression showed his concerns on the decision of the Constitutional Court.<sup>16</sup> Even worse, on 15 Nov 2011, *SisaIn*, a news magazine, alleged that the Air Force added 19 more books on the list. This arbitrary decision on banning books in the military contrasts the Principles 5 and 7 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles) and the Constitution.<sup>17</sup> Moreover, it also infringes the rights to participate in cultural life enshrined in the Article 15 (right to take part in cultural life) of the International Covenant on Economic, Social and Cultural Rights. **The Government should nullify the Article 16(2) of the Decree on Military Service and the Article 47(2) of the Military Personnel Act,<sup>18</sup> and the Ministry of National Defense should annul arbitrarily decided seditious book list.**
6. **Freedoms of Opinion and Right to Privacy in the Military:** On 31 January 2012, the Consolidated Maintenance Depot under the command of Army Logistics Command of the ROK assigned eight smart-phone applications<sup>19</sup> as anti-government and pro-Democratic People's Republic of Korea. According to this, soldiers were obligated to delete them, and the military checked whether

---

criminal penalty, 6,405 were sentenced to imprisonment of less than 2 years more than 1 year and 6 months.”

<sup>10</sup> General Comment No. 22 in 1993(CCPR/C/21/Rev.1/Add.4), Commission on Human Rights Resolution 1998/77.

<sup>11</sup> Concluding observations (CCPR/C/KOR/CO/3), UPR Recommendation 17 (A/HRC/8/40)

<sup>12</sup> A survey on the conscientious objections due to religious belief, subcontracted by the Military Manpower Administration on 24 Dec 2008, showed 68.15% answered “no” for adopting the alternative service.

<sup>13</sup> The summary of his report (A/HRC/17/27/Add.2) says “however, the Special Rapporteur expresses his concern that ... there have been increased restrictions on individuals' right to freedom of opinion and expression ... based on laws that are often not in conformity with international standards, of individuals who express views which are not in agreement with the position of the Government.”

<sup>14</sup> The list of books are followings: *Missile Strategy of North Korea*, *“We” Culture of North Korea*, *One Spoon on the Earth*, *History Never Missed Me*, *Why 20 rules 80?*, *Unification - The Last Blue Ocean of Korea*, *What Uncle Sam Really Wants*, *US Army Crimes and SOFA*, *Salt-flower Tree*, *Blood in Flower*, *The Conquest Continues*, *Our History Series*, *Bad Samaritans*, *Critical Biography of Kim Namju*, *21C Philosophy Story*, *History of Republic of Korea*, *Our God*, *Die Globalisierungsfalle: Der Angriff auf Demokratie und Wohlstand*, *Republic of SAMSUNG*

<sup>15</sup> **Decree of Military Service Article 16 (2) (prohibition of possessing and distributing the seditious expressions)** Soldiers must not produce, copy, possess, deliver, distribute or obtain any of the seditious publication, prints, paintings, and other expressions; when they acquired any of those, he or she must report immediately.

<sup>16</sup> **Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue** says “the Special Rapporteur is concerned by the decision adopted by the Constitutional Court on 23 October 2010, which ruled that the banning of 23 “seditious” books within military units and barracks is constitutional. He underscores that all individuals have the right to choose the types of books to read, as an extension of their right to the freedoms of thought and opinion ... and encourages the Government to repeal the prohibition, particularly in light of the fact that there are no clear criteria to determine what types of books are seditious.”

<sup>17</sup> **Article 37 (2) (restriction of rights)** The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

<sup>18</sup> **Military Personnel Act Article 47 (2) (code of conduct)** the rest of the codes of conduct regarding soldiers' service follow what a Presidential decree states.

<sup>19</sup> The name of applications are: ‘Naneun Ggomsuda’, ‘Smart Candle’, ‘Smart Unification Card’, ‘Gaka Retirement Counter’, ‘South Korea Center of Pan-national Rally Union for Unification of Korea’, ‘North Korea World’, ‘Kim Jong-il Puzzle’, ‘Patriotic Line’

soldiers deleted them or not. In addition, a similar case was reported in a unit under the 6<sup>th</sup> ROK Corps on 17 January 2012. The CMHRK filed a petition to the NHRCK regarding this case, but the situation was deteriorating. According to *The Hankyoreh*, around 13 February 2012, while investigation of the NHRCK was underway, Brigade Commander Oh Wonjin of the 6<sup>th</sup> Artillery Brigade, censored almost 800 soldiers' smart phones without search warrants. The CMHRK filed another petition to the NHRCK and is about to send individual complaints about this massive human rights infringement to the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The censorship is a clear violation of the Article 12(3) of the Constitution and the Article 9 of the International Covenant on Civil and Political Rights (ICCPR), and it contrasts the Principle 5 of the Johannesburg Principles. **The Government should protect those rights, and enact legislations in order to prevent further violation of rights of soldiers, and the commanders' orders must be withdrawn.**

7. **Right to Participate in Political Life of Military Personnel:** On 6 February 2012, the 3<sup>rd</sup> ROK Field Army restricted their soldiers from participating in the congressperson candidate election<sup>20</sup> of a certain opposition party<sup>21</sup> based on a vague interpretation of the Article 18 of the Decree of Military Service.<sup>22</sup> It is still arguable whether soldiers are government officers or not. According to the report on 6 Feb 2012 of *Yonhapnews Agency*, the National Election Commission said "according to the Political Party Law, there is no ground to restrict soldiers' participation in an open primary of a party", and the Ministry of Public Administration and Security explained that "although there is no provision that explicitly regulates this issue, it is a matter of interpretation of the National Public Service Law". Therefore, the Ministry of National Defense arbitrarily infringed the right to participate in political life of military personnel. **The Government should allow all soldiers to participate in an open primary of any party, and amend relevant provisions of the Decree of Military Service.**

#### D. Administration of Justice and the Rule of Law

8. **Arbitrary Detention in the Military (Recommendation 22, 26 – "Inter-ministerial consultations on the accession to OP-CAT is currently underway"):** From 2007 to 2010 over 43,066 soldiers have been sent to military prison under the command of their commander without going through juridical procedure, deprived right to liberty and security of person that is enshrined in the Article 9 of the ICCPR and the Constitution.<sup>23</sup> Their detention was decided by superiors without going through due process. Although the Constitution explicitly requires an arrest warrant issued by a judge to detain a person,<sup>24</sup> the authority of disciplinary action to send a soldier to a military prison is given to military personnel who are not judges.<sup>25</sup> This shows a deficit of legitimacy in the disciplinary actions according to the Article 14 of the ICCPR. **All arbitrary detentions must be ceased immediately, and the Military Personnel Act should be amended along with Korea's instant ratification of OP-CAT.**
9. **Military Juridical System:** Though all persons shall be entitled to a fair and independent trial according to the Article 14 of the ICCPR, the right to fair trial of military personnel is frequently

<sup>20</sup> According to the report on 6 Feb 2012 of *Yonhapnews Agency*, on 6 Feb, the 3<sup>rd</sup> Headquarter recently updated a weekly regulation training guideline on the military intranet that says "participating in an open primary of a party as a soldier is improper". This guideline denotes that "soldiers cannot be a member of party or engage in an election for a party executive".

<sup>21</sup> United Democratic Party

<sup>22</sup> **Decree of Military Service Article 18 (restriction of political performance)** Soldiers must not practice any of the following political performances except voting that is legislated by laws: Item 5 Other actions that violate political neutrality.

<sup>23</sup> **Article 12 (1) (personal liberty)** All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized, or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or be subjected to involuntary labor except as provided by Act and through lawful procedures.

<sup>24</sup> **Article 12 (3) (due procedure)** Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search.

<sup>25</sup> **Military Personnel Act Article 58 (1) (disciplinary action)** A Minister of National Defense and commanders of a corps or institution have the authority of disciplinary action over his/ her subordinates or soldiers of his/ her subordinates according to the following items: **Item 5.** Disciplinary Action over the ranks: company commanders or the equivalent figures or a chief of an organization.

violated. It is because the Military Commission is affiliated with the Ministry of National Defense, not the Supreme Court. Due to the fact that an adjudicator, who is appointed by the Minister of National Defense, is allowed to intervene in a trial of the Military Commission, independence of the Commission and military judge is not ensured.<sup>26</sup> **The Government should abolish peacetime military commission and trials of soldiers and civilian workers in the military should be held in a general court rather than a special court.**

10. **Abolishment of Provisions Related to the Offense Subject to Compliant Regarding Sexual Crime (Recommendation 19 – “The relevant provisions will be reviewed”):** From 2009 to 2010, 173 sexual crime cases out of 336 were not indicted, and 60% of nonprosecution was that they were out of right to arraignment.<sup>27</sup> The reason for this high rate of nonindictment is that the sexual assault is defined as an antragsdelikt<sup>28</sup>, and people refuse to reveal the fact they are sexually attacked or cause problems. Especially when they are in the army, it might bring harmful results to victims. Excluding the sexual assault provisions from antragsdelikt has been requested from many women’s rights organizations since it has been often abused to placate or intimidate victims so that they would drop the charges. Especially, when a victim and a suspect are both members of the military, it could be used to cover up the case and oppress victims. **The Government should revise or abolish the Article 92(8) of the Military Criminal Law and the Article 296 in the Criminal Law.**
11. **Implementation of the Plan of Action for the Second Phase (2010-2014) of the World Programme for Human Rights Education (A/HRC/15/28) in the Military (Recommendation 11 – “Acceptable”):** The Plan of Action for the Second Phase of the World Programme for Human Rights Education emphasizes the importance of human rights training.<sup>29</sup> Unfortunately, the ROK Government fails to respond to this plan of action. Very few people completed human rights training in the military.<sup>30</sup> Moreover, the quality of human rights education is not guaranteed because the training is not administered by specialized trainers.<sup>31</sup> Also, its effect is concerned trainings because programs operated by educational institutions are implemented limitedly.<sup>32</sup> Fundamentally, despite the Plan stating that all soldiers should receive human rights training<sup>33</sup>, it has not been provided for all ranks of military personnel. **The Ministry of National Defense should provide human rights training programs to military personnel at all levels.**

<sup>26</sup> Judges of Military Commission are composed of two military judges and a adjudicator and that of High Military Commission are composed of three military judges and two adjudicators appointed by a commander.

<sup>27</sup> According to Kim Dongsung, a congressperson, in total, 336 sexual crimes in the military were reported from 2009 to 2010 and only 173 were prosecuted. Among 173, 105 cases were classified into ‘out of right to arraignment.’ When the sexual assault can only be prosecuted with a complaint from the victim, and the victims are usually reluctant to do so, the considerable number of crimes are not indicted.

<sup>28</sup> **Military Criminal Law Article 92(8)** Crimes stated in the Article 92 and from the Article 92(2) to the Article 92(4) may be prosecuted only when there is a complaint.

<sup>29</sup> **Plan of Action for the Second Phase(2010-2014) of the World Programme for Human Rights Education** says “the military would need to be trained in international human rights norms and standards as relevant to their conflict-related tasks, as well as to those duties of modern professional soldiers that go beyond the waging of war.”

<sup>30</sup> The maximum ratio of trained military personnel was merely just 4.75%. ROK has maintained about 648,000 soldiers. According to the CMHRK, the state report of training on human rights practitioners (2008~2010), provided by the Ministry of National Defense through petition for release of the information, states that the total number of practitioners who received human rights training was 160 in 2008, 257 in 2009, 308 in 2010. Among them, medical practitioners were 33(2008), 32(2009), 59(2010), investigation practitioners were 0(2008), 40(2009), 47(2010), judge advocates were 0(2008), 38(2009), 37(2010), correctional practitioners were 0(2008), 35(2009), 34(2010), human rights instructors were 40(2008), 33(2009), 57(2010) and women’s advisors were 87(2008), 79(2009), 74(2010).

<sup>31</sup> According to the CMHRK, the state report of training on human rights practitioners (2008~2010), provided by the Ministry of National Defense through petition for release of the information, states that “daily education is practiced by platoon commanders, weekly education is practiced by company commanders, monthly education is practiced by battalion commanders and semiannual education is practiced by over general officers.”

<sup>32</sup> According to the CMHRK, the state report of training on human rights practitioners (2008~2010), provided by the Ministry of National Defense through petition for release of the information, states that “educational institution implements training course in soldier training curriculum and commissioned officer/ noncom training and managing curriculum.

<sup>33</sup> **Plan of Action for the Second Phase (2010-2014) of the World Programme for Human Rights Education** says “on human rights education for ... military personnel at all levels ....” and “commitment to human rights training for ... the military should not translate into just one-off training courses for selected officials but should encourage the establishment of a sound national training structure ...”