

# INTERNATIONAL FELLOWSHIP OF RECONCILIATION

UPR SUBMISSION

REPUBLIC OF KOREA

28<sup>th</sup> SESSION

(Oct/Nov 2017)

## Executive Summary

1. This submission deals with the situation in the Republic of Korea with regard to conscientious objection to military service. It was prepared in March 2017 and incorporates the latest information available to IFOR at that time.

2. The concerns to which it draws attention are:

- non-recognition of the right of conscientious objection to military service
- routine imprisonment of very large numbers of conscientious objectors
- repeated punishment of those who on grounds of conscience refuse the call-up to reserve service
- continued civil disadvantages suffered by those who have not performed military service, compounded in the case of conscientious objectors who have been imprisoned by bearing a criminal record throughout life
- the severe consequences for the right to privacy of the recently enacted Article 81.2 of the Military Service Act.

## A. Background

3. Military service is obligatory for all male citizens of the Republic of Korea. The current duration is 21 months.

4. There are no legal provisions regarding conscientious objection to military service; the only grounds specified in the Military Service Act on which a person may be excused obligatory military service are physical or mental disability.

5. Article 88.1 of the Military Service Act stipulates that “If a person who has received a draft notice for active duty or Notice of Summons (...), without justifiable cause, does not report for service within the period specified in the following clauses or refuses the summons, then he shall be sentenced to a prison term of three years or less...”. Until 2001, those charged under this article were tried in military courts and following imprisonment could face repeated call-up and conviction. This is no longer the case; trials now take place in civilian courts and the Enforcement Decree (Article 136.2) of the Military Service Act now stipulates that those who have served sentences of 18 months or more are released from the obligation to perform military service. All those who refuse military service on grounds of conscientious objection are prosecuted under this article; since 2001 almost all have been sentenced to exactly eighteen months' imprisonment.

## B. Previous UPR Recommendations

6. The Republic of Korea was examined in the Second Session of the UPR Working Group, in May 2008. In the Working Group “Slovenia noted the recommendation by the Human Rights

Committee that the Republic of Korea recognize the right of conscientious objectors to be exempted from military services (...). Slovenia recommended that the Republic of Korea follow up on the Committee's recommendation to provide the authors of these communications with an effective remedy. It also recommended recognizing the right of conscientious objection by law, to decriminalize refusal of active military service and to remove any current prohibition from employment in government or public organizations.”<sup>i</sup> The United Kingdom recommended “that active steps be taken to introduce alternatives to military services for conscientious objectors.”<sup>ii</sup>

7. The Republic of Korea did not explicitly accept these recommendations, but reported that it had “announced a new programme to give conscientious objectors the opportunity to participate in alternative in civilian service, in September 2007. For the implementation of the new system”, the statement continued, “the Government has to revise the Military Service Act, and considers submitting a revised Act to the National Assembly this year.”<sup>iii</sup> In its written responses at the time of adoption of the report, the Republic of Korea stated with regard to both recommendations only that “Alternative service programs for conscientious objectors are currently being studied.”<sup>iv</sup>

8. In August 2008, the Military Manpower Administration commissioned a study of the feasibility of implementing a civilian alternative service system. Although the final report, recommended the adoption of such a scheme, the Ministry of Defence however seized upon the result of an opinion poll conducted as part of the study, in which 68.1% of respondents – a figure much higher than in any other survey on the issue – opposed this. On that basis it announced on 24<sup>th</sup> December that it was therefore “still too early to allow alternative forms of military service for conscientious objectors.”<sup>v</sup>

9. In the second round of the UPR, the Republic of Korea received recommendations from eight States on this issue. These are appended in the annexed matrix. All were “noted”; none have yet been implemented.

### **C Obligations under the International Covenant on Civil and Political Rights (ICCPR)**

10. The Republic of Korea is party to the ICCPR and its First Optional Protocol, under which individual communications regarding some 500 Korean conscientious objectors to military service have been considered by the Human Rights Committee.<sup>vi</sup> In all cases the Committee found violations of Article 18.1 of the ICCPR.

11. In *Yeong et al*, the Committee found: “the State party is under an obligation to provide the authors with an effective remedy, including expunging their criminal records and providing them with adequate compensation. The State party is under an obligation to avoid similar violations of the Covenant in the future, which includes the adoption of legislative measures guaranteeing the right to conscientious objection.”<sup>vii</sup>

12. In *Young kwan Kim et al* the Committee also found a violation of article 9 of the Covenant (arbitrary detention), on the basis that any detention arising from the exercise of Covenant rights is by definition arbitrary. In this it may be noted that it duplicates the reasoning of the Working Group on Arbitrary Detention in its Opinions 8/2008 and 16/2008 regarding Turkey and Colombia.

13. The Committee has also addressed this issue in its examination of Periodic Reports by the

Republic of Korea under the ICCPR.<sup>viii</sup> In its most recent Concluding Observations, the Committee also expressed its concern that its Views in the cases concerning conscientious objectors had not been implemented, and included its recommendations on conscientious objection among the paragraphs among those on which it requested the State to provide a follow-up report within twelve months.<sup>ix</sup>

14. Seventeen months after the examination of the State Report no follow-up report has been made public, no action has been taken on the Committee's recommendations, and the Committee's Views have still not been implemented.

#### **D The Constitutional Court**

15. On 30<sup>th</sup> August 2011, the Constitutional Court, by a majority of 7 to 2, confirmed its decision of 26<sup>th</sup> August 2004 that Article 88.1 of the Military Service Act was in accordance with the constitution. In doing so, the Court would have appeared not only to have overlooked intervening developments in jurisprudence elsewhere, including in the European Court of Human Rights<sup>x</sup> and the Constitutional Court of Colombia<sup>xi</sup>, but also to have failed to take account of the Republic of Korea's own obligations under the ICCPR, as spelled out by the Human Rights Committee.

16. District Court judges have however continued to express doubts about the compatibility of the mandatory sentencing of conscientious objectors with the constitutional guarantees of freedom of conscience and human dignity, and in 2013 six cases<sup>xii</sup> were referred by District Courts to the Constitutional Court for review. It is believed that the Constitutional Court will consider the six cases jointly; IFOR joined with Amnesty International, Friends World Committee for Consultation (Quakers), the International Commission of Jurists and War Resisters International in submitting to the Court an amicus brief<sup>xiii</sup> outlining developments in international standards and jurisprudence and state practice world-wide.

17. Two other related sets of cases are currently before the Constitutional Court. The 433 authors of the communications under the Optional Protocol to the ICCPR in the names of *Yeong et al*, and *Jong-nam Kim et al* have filed a complaint that the failure to provide a remedy through legislation is a violation of that Covenant. Twenty-two individuals have separately filed complaints that the practice of uniformly sentencing conscientious objectors to eighteen months imprisonment, together with the failure to make available a civilian alternative to military service, is unconstitutional.

18. The Court held a public hearing on the issue in July 2015. In December 2016 the National Human Rights Commission made a submission to the Court in which it argues that conscientious objection to military service “is a fundamental human right beyond any restriction and one that the government must protect”<sup>xiv</sup> and reiterated calls it made in 2005 and 2008 for the introduction of an alternative civilian service in line with international standards.

19. The outgoing president of the Court reportedly indicated that a decision would be announced before his term of office came to an end at the end of January 2017,<sup>xv</sup> but in the event this timetable was disrupted by the impeachment of the Republic's then President. It is however possible that before the Session of the UPR Working Group, the Constitutional Court will have pronounced

on the issue, and it is to be hoped that its judgement will mark a significant step forward in dealing with these human rights abuses.

## **E History and recent developments**

20. The Jehovah's Witnesses report that since 1950 more than 19,000 of their members have been imprisoned for refusing to perform military service. Extrapolating from the figures they were quoting at the time of the Republic of Korea's last UPR review, that implies that in the last five years there have been more than 2,200 new imprisonments, or an average of 450 per annum, and that the combined total of years served by Jehovah's Witnesses on such charges since 1950 now exceeds 35,000.

21. Although Jehovah's Witnesses are by far the most numerous, they are not the only conscientious objectors in the Republic of Korea. None of the eleven authors of the second batch of individual communications treated by the Human Rights Committee<sup>xvi</sup> was a Jehovah's Witness. One identified himself as a Buddhist, one as a Roman Catholic. The other nine made no mention of religious allegiance, so it is to be assumed that they were secular pacifist objectors. As of January 2017, the organisation World Without War was supporting three imprisoned pacifist conscientious objectors, and were aware of more than 400 imprisoned Jehovah's Witnesses.<sup>xvii</sup> It is likely that several other imprisoned objectors from different backgrounds exist; IFOR has been aware in the last five years of objectors who were Catholic, Seventh Day Adventist, Anabaptist, anarchist or gay rights activists. Even the confirmed figures, which have in recent years represented over 90% of a declining world total of conscientious objectors to military service imprisoned at any one time, are therefore a minimum.

22. At the end of December 2016, the Jehovah's Witnesses report, more than 40 conscientious objection cases were pending with the Supreme Court, the Republic of Korea's chief appellate court. Since May 2015, seventeen not-guilty verdicts have been handed down by courts of first instance.<sup>xviii</sup> Unprecedentedly, in October 2016 the Gwangju District Court upheld a not-guilty verdict on appeal, and overturned the conviction of two other conscientious objectors.<sup>xix</sup>

23. World Without War points out that, quite apart from the number of appeals pending, many District Courts have deferred conscientious objection cases pending the decision of the Constitutional Court. The recent reduction from over 700 objectors imprisoned at any one time does not indicate that fewer conscientious objectors are coming forward.

24. Although first-time conscripts are no longer liable to repeated call-up once they have served a sentence of 18 months imprisonment, this is not the case with those who have developed conscientious objections only after having performed their initial period of military service, and have refused the call-up to reserve duty. The penalty for such refusal may be a short prison sentence, but is usually a fine. However it does not discharge the responsibility; conscientious objectors who are reservists may be subjected to repeated call-ups and repeated penalties over an eight-year period. As the Human Rights Committee has observed, this "may amount to punishment for the same crime if (the) subsequent refusal is based on the same constant resolve grounded in reasons of conscience," thereby breaching the principle of *ne bis in idem*.<sup>xx</sup> There is theoretically no restriction on the cumulative length of sentences for refusing reserve service. It is estimated that in January 2017 some 80 conscientious objectors, mainly men who had converted to the Jehovah's

Witnesses after their initial period of military service, but including at least three who were not Jehovah's Witnesses were facing prosecution for the refusal of reserve service.<sup>xxi</sup>

25. According to the Jehovah's Witnesses, one convert, Dong-hyuk Shin, who had refused 118 separate call-ups to reserve service between 2006 and 2013, and had received 49 convictions, has now submitted an individual communication under the ICCPR. Although he had been sentenced to cumulatively to more than three years' imprisonment it seems that in his case all the prison sentences were either suspended or commuted to community service or fines. Nevertheless the repeated cycle of court appearances had serious financial, social and psychological consequences.<sup>xxii</sup>

26. No consideration has been given to alternative service by the Ministry of Defence since 2008, but in 2013 a Bill<sup>xxiii</sup> to revise the Military Service Act so as to introduce an alternative civilian service was introduced without success by twelve Assemblymen. Nevertheless, when in that year the Human Rights Council adopted Resolution 24/17<sup>xxiv</sup> on conscientious objection to military service, the Republic of Korea did not block consensus, merely making an explanatory statement that at the time it was unable to bring its legislation and practice into conformity with the principles set out in the resolution

27. Public opinion appears to be becoming more favourable to conscientious objectors. In a survey conducted by the Military Manpower Administration in 2014, the proportion opposing the introduction of alternative service had fallen to 58.3%.<sup>xxv</sup> Meanwhile a Gallup Poll held a year earlier had by contrast shown a similar majority *favouring* alternative service.<sup>xxvi</sup> A further Gallup poll commissioned by Amnesty International, Korea in early 2016, showed 70% of respondents favouring the introduction of alternative service.<sup>xxvii</sup>

28. Under Article 76 of the Military Service Act, those who have not satisfied the military service requirements are precluded from employment by government or public organisations. Moreover, as the Human Rights Committee has recognised in its views, conscientious objectors are not only penalised for the exercise of the freedom of thought, conscience and religion guaranteed under Article 18 of the ICCPR, but also have to carry through life the stigma of a criminal record, which may cause them to suffer discrimination in many fields of life. This stigmatisation has been recently strengthened, as admitted by the state authorities: "Article 81-2 of *Military Service Act* was newly established in July 2015, allowing the Commissioner of the Military Manpower Administration to publish on the internet website the personal information of those who evade military service, without justifiable grounds except for disease or imprisonment, by staying abroad or refusing physical examination or enlistment, and matters concerning non-compliance with the duty. To this end, the Committee for Deliberation on Cases of Evasion of Military Service is established in the regional military manpower offices. The Committee notifies tentative persons that their personal information will be disclosed, gives them an opportunity to explain, deliberates after 6 months of notification considering the status of their military service fulfillment, and decides whose personal information will be disclosed."<sup>xxviii</sup> Under this provision the names, ages and addresses of 237 "draft evaders", 160 of which are known to be Jehovah's Witnesses, were published on Dec. 20<sup>th</sup> 2016.<sup>xxix</sup>

## 29 Suggested recommendations:

- i) that the Republic of Korea immediately acknowledge the right of conscientious objection to military service
- ii) that as soon as possible, and certainly by the time of the mid-term review, it make legislative provision for a civilian alternative service for conscientious objectors which is fully compliant with international standards
- iii) that pending (ii) it *immediately* stop prosecuting conscientious objectors for the refusal of military service, including reserve service, and release all those currently imprisoned on such charges
- iv) that it overturn all convictions of conscientious objectors to military service since 1950, cancel any criminal records based solely on such charges, repay any fines levied, and report to the mid-term review what arrangements it has made for the compensation of those who have been imprisoned
- v) specifically, that it should immediately implement the Views so far issued by the Human Rights Committee under the Optional Protocol to the ICCPR, and, as recommended by the Committee, that it establish a mechanism to ensure the future implementation of the Committee's Views.
- vi) that it immediately cease to implement Article 81-2 of the Military Service Law, and repeal this Article and Article 76 of the same Law as soon as possible, and certainly by the time of the mid-term review.

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A/HRC/8/40, para 19 and para 64.17

ii Ibid, para 37 and para 64.24.

iii Ibid, para 59.

iv A/HRC/8/40/Add1, 25<sup>th</sup> August 2008, paras 17 and 24.

v Herskovitz, J. and Kim Junghzun, "South Korea rethinks alternative to conscription", Euronews24, 24<sup>th</sup> December, 2008,

vi *Yoon & Choi v Republic of Korea* (CCPR//C/88/D/1321-1322/2004), 3rd November 2006 ; *Jung et al v Republic of Korea* (CCPR/C/98/D/1593-1603/2007), 23rd March 2010 ; *Jeong et al v Republic of Korea* (CCPR/C/101/D/1642-1741/2007, 24th March 2011 ; *Jong-nam Kim et al v Republic of Korea* (CCPR/C/1786/2008), 25th October 2012 ; *Young-kwan Kim et al v Republic of Korea* (CCPR/C/112/D/2179/2012, 15th October 2014.

vii CCPR/C/101/D/1642-1741/2007, para 9.

viii See CCPR/C/KOR/CO/3, 28 November 2006, para 17 and CCPR/C/KOR/CO/4, 2<sup>nd</sup> December 2015 , paras 44 and 45..

ix CCPR/C/KOR/CO/4, op. Cit, paras 6,7 and 59.

x European Court of Human Rights, Grand Chamber. Case of Bayatyan v Armenia (Application no. 23459/03): Judgment Strasbourg, 7<sup>th</sup> July 2011.

xi Corte Constitucional de Colombia, Comunicado No.43 – Expediente D7685 Sentencia C-728/09, 14<sup>th</sup> October 2009.

xii Cases Nos: 2013HunGa5, submitted to the Constitutional Court by Seoul Northern District Court; 2014HunGa8, submitted to the Constitutional Court by Seoul Eastern District Court; 2012HunGa17, submitted to the Constitutional Court by Masan Branch of Changwon District Court; 2013HunGa23, submitted to the Constitutional Court by Seoul Southern District Court; 2013HunGa27, submitted to the Constitutional Court by Ulsan District Court; 2013HunGa13, submitted to the Constitutional Court by Suwon District Court.

xiii Dated 30th August 2014 and available from the websites of these ngos

xiv "National Human Rights Commission Urges Respect for Freedom of Conscience", www.jw.org, 25<sup>th</sup> January 2017,

xv "South Korea's Constitutional Court Soon to Release Significant Decision" , www.jw.org , 20<sup>th</sup> December 2016.

xvi CCPR/C/98/D/1593-1603/2007, opcit.

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- xvii World Without War, Submission to UN OHCHR for Report on Conscientious Objection, February 2017.
- xviii Ibid
- xix Gwangju District Court, Third Criminal Division, judgment regarding Lak-hoon Cho, dated October 18, 2016
- xx Human Rights Committee, General Comment No. 32 (CCPR/C/GC/32, 23 August 2007), para 55.
- xxi World Without War, op cit.
- xxii “South Korea’s Unjust Treatment of Dong-hyuk Shin”, jw.org, 7<sup>th</sup> March 2017.
- xxiii No. 6042 (18th July)
- xxiv 30th September 2013.
- xxv CCPR/C/KOR/Q4/Add.1, 31<sup>st</sup> July 2015, para 67.
- xxvi Human Rights Without Frontiers International (www.hrwf.net) “Gallup poll reveals shift in perception of conscientious objection in South Korea”, 26<sup>th</sup> February 2014
- xxvii Amnesty International Korea, (amnesty.org.kr) *70% of the respondents are in favor of allowing alternative service to conscientious objectors*, 10<sup>th</sup> May 2016
- xxviii CCPR/C/KOR/Q4/Add.1, op cit, para 68.
- xxix World Without War, op cit.7