

## COVINGTON

### **HRW Amicus Brief: Repealing Article 92-6 of the Republic of Korea's Military Criminal Act** Honorable Justices of the Constitutional Court of Korea

#### **I. Introduction**

Human Rights Watch respectfully submits this amicus brief in connection with case 2017Hun-Ga16, now before the Constitutional Court of Korea (“Constitutional Court”), which involves a review of the constitutionality of the Republic of Korea’s military law that criminalizes sodomy between servicemen.

Article 92-6 of the Military Criminal Act (“Article 92-6”) provides that a person who commits anal intercourse or any other indecent act with “a military person”<sup>1</sup> shall be punished by imprisonment for not more than two years.<sup>2</sup> The Korean military has invoked Article 92-6 to punish sexual acts between male servicemen with sentences of up to two years in prison — regardless of whether the acts were consensual or whether they happened within or outside of military facilities.<sup>3</sup> While Article 92-6 on its face renders both same-sex and heterosexual anal intercourse punishable, it appears there have not been any cases where the military investigated or convicted heterosexual people of its violation.<sup>4</sup>

Human Rights Watch understands that this Court is now reviewing whether Article 92-6 is consistent with the Constitution of the Republic of Korea, which recognizes numerous fundamental human rights, such as the rights of equality, privacy and the right to work,<sup>5</sup> and also provides that generally recognized rules of international law have the same force and effect as the domestic laws of the Republic of Korea.<sup>6</sup> As the Court reviews case 2017Hun-Ga16, Human Rights Watch urges it to take into account (1) international human rights law and authoritative interpretations of how it applies to Article 92-6 and (2) examples of other countries that have eliminated similar provisions in their military codes. The laws and jurisprudence of the Republic of Korea should comply with its international human rights obligations by decriminalizing same-sex activity in the military and by ending discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) persons in the military. Because Article 92-6 violates the Republic of Korea’s obligations under international law, Human Rights Watch urges this Court to nullify this Article.

#### **II. Article 92-6 Violates Many Norms of International Law**

The right of LGBT persons to equal enjoyment of their human rights, irrespective of sexual orientation or gender identity, is well established in human rights jurisprudence. The following section of

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<sup>1</sup> GoonHyeongBup [Military Criminal Act], Act No. 9820, Nov. 2, 2009, *amended by* Act No. 14183, May 29, 2016, art. 1 (S. Kor.).

<sup>2</sup> GoonHyeongBup [Military Criminal Act], Act No. 9820, Nov. 2, 2009, *amended by* Act No. 11734, Apr. 5, 2013, art. 92-6 (S. Kor.).

<sup>3</sup> Kyle Knight, *South Korea's Military 'Sodomy Law' Should Go*, HUMAN RIGHTS WATCH (May 2, 2017, 6:30AM), <https://www.hrw.org/news/2017/05/01/south-koreas-military-sodomy-law-should-go>.

<sup>4</sup> Jaehyun Huh, 동성애 군인의 항변 “난 범죄자가 아니다”, HANKYOREH (May 25, 2017), <http://www.hani.co.kr/arti/society/rights/795759.html>.

<sup>5</sup> DaeHanMinGook HyeongBup [Constitution of the Republic of Korea], *amended by* Constitution No. 10, Oct. 29, 1987, Chapter II, articles 11(1), 15, 17, 32.

<sup>6</sup> *Id.*, Chapter I, article 6(1).

this amicus brief outlines critical international obligations relating to the equal protection of LGBT persons' rights, and how Article 92-6 violates the rights of LGBT persons.

Article 92-6 violates the rights of LGBT persons in two distinct ways. First, it violates the substance of fundamental rights. Second, it discriminates against service members based on their sexual orientation. The criminalization per se of consensual adult same-sex conduct is a violation of the right to privacy under international law. Enforcement action, pursuant to Article 92-6, involving detention is arbitrary and therefore a violation of the right to liberty and security. In this case, as it creates an arbitrary barrier to service in the military and an arbitrary ground for dismissal, it also violates the right to work.

In addition to these violations, Article 92-6, while in theory applicable to any service member, has a clear and overwhelmingly disproportionate impact on gay men, and so discriminates on the basis of sexual orientation in violation of international law.

The Republic of Korea has undertaken legally binding obligations to respect and protect the rights guaranteed by the various international treaties to which it is a party, including the International Covenant on Civil and Political Rights (the "ICCPR")<sup>7</sup>, the International Covenant on Economic, Social and Cultural Rights (the "ICESCR")<sup>8</sup>, and the Convention against Torture, Cruel, Inhuman, and Degrading Treatment (the "CAT").<sup>9</sup> The scope of the rights within these treaties, as well as States' obligations to respect, protect and fulfill those rights, have been further articulated by the respective bodies established under the treaties to monitor compliance by governments (also known as "State Parties") subject to them. These bodies include the Human Rights Committee, which monitors compliance with the ICCPR, the Committee on Economic, Social and Cultural Rights, which monitors compliance with the ICESCR, and the Committee against Torture, which monitors compliance with the CAT. As a party to these treaties, the Republic of Korea has agreed to both uphold the human rights enumerated by each treaty and do so without discrimination against LGBT persons.

The Republic of Korea has previously acted in support of international efforts to protect individuals from discrimination and violence resulting from sexual orientation and gender identity. In 2011, the UN Human Rights Council, of which the Republic of Korea is a member, adopted a resolution on human rights, sexual orientation and gender identity "expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity."<sup>10</sup> Pursuant to this resolution, the UN Human Rights Council commissioned a report "documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity."<sup>11</sup> In two subsequent resolutions, in 2014 and 2016, the UN Human Rights Council requested continued reporting and also appointed an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity with a mandate to investigate, raise awareness of human rights violations and work with Member States to help

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<sup>7</sup> The Republic of Korea became a party on April 10, 1990.

<sup>8</sup> *Id.*

<sup>9</sup> The Republic of Korea became a party on January 9, 1995.

<sup>10</sup> Resolution of the UN Human Rights Council (A/HRC/RES/17/19).

<sup>11</sup> *Id.*

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implement measures that contribute to protection from discrimination on the basis of sexual orientation.<sup>12</sup> The Republic of Korea voted in favor of all three of these resolutions.

International institutions have also specifically criticized Article 92-6 and have called for reform. As described below, UN treaty bodies as diverse as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee against Torture have specifically called for the repeal or abrogation of Article 92-6 due to its incompatibility with fundamental human rights.<sup>13</sup> Furthermore, several countries in the most recent Universal Periodic Review (“UPR”) involving the Republic of Korea have recommended repeal of Article 92-6.<sup>14</sup> The concerns motivating these institutions and countries revolve around fundamental human rights with which Article 92-6 cannot be reconciled.

### **A. *The Right to Privacy***

The right to privacy is a fundamental human right, embodied in the ICCPR, that is recognized in jurisdictions around the world. The ICCPR states that no person should endure “arbitrary or unlawful interference with his privacy, family, home or correspondence.”<sup>15</sup> The ICCPR also obligates State Parties, including the Republic of Korea, to affirmatively protect this right, promising that everyone should enjoy “the protection of the law” against attacks on their privacy.<sup>16</sup> The Human Rights Committee has stated that arbitrary state action, even when performed under the color of law, can violate this right.<sup>17</sup> An act that interferes with privacy is considered arbitrary when it is not “reasonable in the particular circumstance.”<sup>18</sup>

The right to privacy encompasses privately conducted “adult consensual sexual activity.”<sup>19</sup> As a result, States may not arbitrarily interfere with such conduct. In the seminal case of *Toonen v. Australia*, for example, the Human Rights Committee decided that a law in the Australian state of Tasmania violated the right to privacy by criminalizing “various forms of sexual contacts between men,” including private, consensual same-sex conduct.<sup>20</sup> The Committee determined that the right to privacy “undisputed[ly]” covered adult sexual activity and further determined that the interference in *Toonen* was arbitrary, finding the state had presented no permissible motivations for such interference.<sup>21</sup>

Since *Toonen*, the Human Rights Committee has repeatedly found that laws criminalizing adult consensual same-sex conduct violate the ICCPR. For example, the Committee determined that the

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<sup>12</sup> Resolution of the UN Human Rights Council (A/HRC/RES/27/32); Resolution of the UN Human Rights Council (A/HRC/RES/32/2).

<sup>13</sup> See *infra* notes 44-48 and accompanying text.

<sup>14</sup> These include recommendations by France, Ireland, Canada, Costa Rica, the Netherlands, and Denmark to repeal Article 92-6 on human rights grounds. Report of the Working Group on the Universal Periodic Review: Republic of Korea (A/HRC/37/11).

<sup>15</sup> G.A. Res. 2200 (XXI), annex, International Covenant on Civil and Political Rights, (Dec. 16, 1966).

<sup>16</sup> *Id.*

<sup>17</sup> See Human Rights Committee, General Comment No. 16, ¶¶ 1-4, U.N. Doc HRI/GEN/1/Rev.9 (Vol. I) (1988). While interference may take place “on the basis of law,” that law itself must be in line with the “provisions, aims, and objectives” of the ICCPR. *Id.* at ¶ 3.

<sup>18</sup> *Id.* at ¶ 4.

<sup>19</sup> *Toonen v. Australia*, Communication No. 488/1992, Hum. Rts. Comm., U.N. Doc CCPR/C/50/D/488/1992 (1994); Opinions adopted by the Working Group on Arbitrary Detention (A/HRC/4/40/Add.1), at 93 (Feb. 2, 2007) (“[T]he existence of laws criminalizing homosexual behavior between consenting adults in private and the application of criminal penalties against persons accused of such behavior violate the rights to privacy and freedom from discrimination. . .”).

<sup>20</sup> *Toonen*, ¶ 2.1.

<sup>21</sup> *Toonen*, ¶¶ 8.2, 8.6.

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continued existence of such laws in Chile violated the right to privacy.<sup>22</sup> For the same reason, the Committee instructed Cameroon to stop criminalizing “consensual sexual acts between adults of the same-sex,” and “bring its law into conformity with the Covenant.”<sup>23</sup> Today, the Committee continues to call for decriminalization of consensual same-sex sexual activity in Bahrain and Gambia, citing the right to privacy.<sup>24</sup>

Like the laws of these other countries, Article 92-6 constitutes an arbitrary and impermissible interference with the right to privacy, violating the protections of the ICCPR. Particularly in its enforcement, Article 92-6 criminalizes privately conducted, consensual same-sex sexual activity between adults, which the Human Rights Committee has established is within the bounds of private activity under the ICCPR.

### ***B. The Right to Work***

The right to work is another important right that is protected under international law. While many male members of the Korean military fulfill only their compulsory two-year service, others choose to stay in the military for longer periods and may exercise their right to work by choosing a career in the military. The Covenant on Economic, Social and Cultural Rights protects the right to work, and provides that everyone must have the chance to “gain his living by work which he freely chooses or accepts.”<sup>25</sup> By ratifying the ICESCR, the Republic of Korea undertook to guarantee that the rights in the Covenant, including the right to work, could be “exercised without discrimination.”<sup>26</sup>

By criminalizing consensual adult same-sex conduct between male service members, Article 92-6 imposes a serious, unjustified, and disproportionate barrier on the right to work. The law restricts the ability of gay men to pursue military employment, imposing on them an arbitrary condition to the terms of their service. As such, the Article violates the protection of the right to work under the ICESCR.

### ***C. The Right Against Arbitrary Detention***

Article 9 of the ICCPR establishes that all persons have “the right to liberty and security of person.”<sup>27</sup> Further, no person “shall be subjected to arbitrary arrest or detention.”<sup>28</sup> The detention of a serving member of the military on charges under Article 92-6 constitutes arbitrary detention under international law and therefore violates Article 9 of the ICCPR.

International bodies such as the Working Group on Arbitrary Detention, a United Nations body that investigates arbitrary arrest and detention, consider detention because of sexual orientation to be “arbitrary.”<sup>29</sup> For example, in a case where Egyptian authorities arrested and detained dozens of men

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<sup>22</sup> Concluding observations of the Human Rights Committee on Chile (CCPR/C/79/Add.104), at ¶ 20 (Mar. 3, 1999).

<sup>23</sup> Concluding observations of the Human Rights Committee on Cameroon (CCPR/C/CMR/CO/4), at ¶ 12 (Aug. 4, 2010).

<sup>24</sup> Concluding observations of the Human Rights Committee on the Initial Report of Bahrain (CCPR/C/BHR/CO/1), at ¶¶ 23-24 (Nov. 15, 2018); Concluding observations of the Human Rights Committee on the Gambia in the Absence of its Second Periodic Report (CCPR/C/GMB/CO/2), at ¶¶ 11-12 (Aug. 30, 2018).

<sup>25</sup> G.A. Res. 2200 (XXI), annex, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966).

<sup>26</sup> *Id.*

<sup>27</sup> International Covenant on Civil and Political Rights, *supra* note 15.

<sup>28</sup> *Id.*

<sup>29</sup> *See, e.g.*, Opinions adopted by the Working Group on Arbitrary Detention (E/CN.4/2003/8/Add.1), at 68-73 (Jan. 24, 2003).

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“who appeared to be homosexuals,”<sup>30</sup> the Working Group on Arbitrary Detention deemed the detentions arbitrary, rejecting the justification that homosexuality incites “social dissension.”<sup>31</sup> The Working Group also reached the same conclusion in a case regarding Cameroon. In that case, authorities detained and charged eleven persons under an article of the criminal code that provides for imprisonment and fines for anyone found guilty of homosexual activity. Again, the Working Group on Arbitrary Detention found that these detentions violated rights to privacy and liberty, concluding that the detention was arbitrary.<sup>32</sup> The Human Rights Committee has voiced similar concerns regarding countries like Iran.<sup>33</sup>

Article 92-6, which provides for detention as a punishment for homosexual conduct, also violates the right against arbitrary detention. Detention solely on the basis of sexual orientation is arbitrary and contrary to the Republic of Korea’s obligations under the ICCPR, and there is no reasonable justification for such detention. For this and other reasons, the Human Rights Committee has expressed concern regarding the military’s treatment of homosexual conduct and has directly called upon the Republic of Korea to repeal Article 92-6.<sup>34</sup>

In August 2017, a communication regarding “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,” prepared by three UN independent experts with mandates from the UN Human Rights Council, was submitted to the Government of Korea.<sup>35</sup> The experts formally expressed concern over the “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.”<sup>36</sup> The experts also noted that arbitrary arrest and detention constitutes 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.”<sup>37</sup>

#### ***D. The Right to Nondiscrimination and Equality***

The right to nondiscrimination and equality in the exercise of a person’s substantive rights detailed in international treaties is protected in numerous human rights treaties.<sup>38</sup> According to Article 26 of the ICCPR: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex,

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<sup>30</sup> *Id.* at 69.

<sup>31</sup> *Id.* at 73.

<sup>32</sup> Opinions adopted by the Working Group on Arbitrary Detention (A/HRC/4/40/Add.1), at 91-94 (Feb. 2, 2007).

<sup>33</sup> Concluding observations of the Human Rights Committee on the Islamic Republic of Iran (CCPR/C/IRN/CO/3), at ¶ 10 (Nov. 29, 2011).

<sup>34</sup> Concluding observations of the Human Rights Committee on the Fourth Periodic Report of the Republic of Korea (CCPR/C/KOR/CO/4), at ¶¶ 14-15 (Dec. 3, 2015).

<sup>35</sup> UA KOR 2/2017. The experts were the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, the Vice-Chair of the Working Group on Arbitrary Detention, and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who received mandates pursuant to Human Rights Council resolutions 32/2, 33/30 and 34/18, respectively.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 5.

<sup>38</sup> For example, According to Article 2 of the ICESCR: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” International Covenant on Economic, Social and Cultural Rights, *supra* note 25.

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language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>39</sup> This applies to both a right to the equal protection of the law generally, and specifically a right to equal protection and nondiscrimination in the exercise of those rights specifically enumerated in the various human rights treaties, including, for example, the right to privacy.<sup>40</sup>

The Human Rights Committee has repeatedly affirmed that the right to nondiscrimination as expressed in the various UN human rights treaties applies to LGBT persons. The Human Rights Committee and other UN human rights bodies have expressed concerns about discrimination based on sexual orientation and related human rights violations repeatedly since the early 1990s.<sup>41</sup>

Specifically, UN human rights bodies have stated that criminalization of private, consensual same-sex sexual contact between adults violates international law, and they have repeatedly urged numerous countries to reform and repeal laws that criminalize such conduct.<sup>42</sup> As discussed above, the Human Rights Committees in *Toonen* found the Tasmanian law that criminalized same-sex conduct between consenting adults violated a person’s rights to privacy but also to nondiscrimination. In addition, various special rapporteurs and other ancillary bodies of the UN Human Rights Council have expressed concern about how the criminalization of consensual same-sex conduct — which is discriminatory against LGBT persons — “legitimizes prejudice and exposes people to hate crimes, police abuse, torture and family violence.”<sup>43</sup>

Article 92-6 cannot be reconciled with the rights to nondiscrimination and equality protected by these human rights treaties. Article 92-6 effectively prohibits men from engaging in consensual sexual activity with other male members of the military and therefore constitutes an interference in their private lives. However, it does not have the same impact on consensual sexual relations between men and women in the military and is therefore discriminatory on the basis of sexual orientation. In addition, because military service is mandatory for Korean males, if a Korean male does not complete his military service

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<sup>39</sup> International Covenant on Civil and Political Rights, *supra* note 15.

<sup>40</sup> *Id.*

<sup>41</sup> <https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx>.

<sup>42</sup> Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law, UN Human Rights Office of the High Commissioner, 2012 (HR/PUB/12/06), at 31, citing the following concluding observations: Concluding observations of the Human Rights Committee on Togo (CCPR/C/TGO/CO/4), at ¶ 14; Uzbekistan (CCPR/C/UZB/CO/3), at ¶ 22; Grenada (CCPR/C/GRC/CO/1), at ¶ 21; United Republic of Tanzania (CCPR/C/TZA/CO/4), at ¶ 22; Botswana (CCPR/C/BWA/CO/1), at ¶ 22; St. Vincent and the Grenadines (CCPR/C/VCT/CO/2); Algeria (CCPR/C/DZA/CO/3), at ¶ 26; Chile (CCPR/C/CHL/CO/5), at ¶ 16; Barbados (CCPR/C/BRB/CO/3), at ¶ 13; United States of America (CCPR/C/USA/CO/3), at ¶ 9; Kenya (CCPR/C/CO/83/KEN), at ¶ 27; Egypt (CCPR/CO/76/EGY), at ¶ 19; Romania (CCPR/C/79/Add.111), at ¶ 16; Lesotho (CCPR/C/79/Add.106), at ¶ 13; Ecuador (CCPR/C/79/Add.92), at ¶ 8; Cyprus, (CCPR/C/79 Add.88), at ¶ 11; United States of America (A/50/40), at ¶ 287. Concluding observations of the Committee on Economic, Social and Cultural Rights on Kyrgyzstan (E/C.12/Add.49), at ¶¶ 17, 30; Cyprus (E/C.12/1/Add.28), at ¶ 7. Concluding observations of the Committee on the Elimination of Discrimination against Women on Uganda (CEDAW/C/UGA/CO/7), at ¶¶ 43-44; Kyrgyzstan (A/54/38), at ¶¶ 127, 128. Concluding observations of the Committee on the Rights of the Child on Chile (CRC/C/CHL/CO/3), at ¶ 29.; Report of the Office of the United Nations High Commissioner for Human Rights: Discrimination and violence against individuals based on their sexual orientation and gender identity (A/HRC/29/23), at ¶¶ 43-45.

<sup>43</sup> Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law, UN Human Rights Office of the High Commissioner, 2012 (HR/PUB/12/06), at 31, citing, for example, the report of the Special Representative of the Secretary-General on human rights defenders (E/CN.4/2002/16/Add.1), at ¶ 154; report of the Special Rapporteur on violence against women (E/CN.4/1999/68), at ¶ 15. See also, reports of the Special Rapporteur on torture: C/CN.4/2002/76; and A/56/156, at ¶¶ 18-25.

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because he has engaged in consensual same-sex conduct that is prosecuted under Article 92-6, there could be additional negative consequences such as prejudice or disadvantages getting a job.

Multiple UN treaty bodies have thus specifically called for the repeal of Article 92-6 on the grounds that it violates the right to nondiscrimination. For example, the Committee on Economic, Social and Cultural Rights has expressed concern over Article 92-6, stating:

The Committee is concerned at the criminalization of same-sex acts in the Military Criminal Act. The Committee is also concerned that the persons involved in same-sex relationships are exposed to discrimination in the enjoyment of several Covenant rights. Moreover, it is concerned at reports of discriminatory attitudes and acts against lesbian, gay, bisexual, transgender and intersex persons in many fields of public life.<sup>44</sup>

With regard to these concerns, the Committee specifically called for the Republic of Korea to “[a]brogate the provision of the Military Criminal Act, criminalizing same-sex acts.”<sup>45</sup>

The Committee Against Torture, which monitors compliance with the CAT, has also called for the repeal of Article 92-6. It has affirmed the importance of nondiscrimination to the CAT, stating that “the principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention.”<sup>46</sup> The Committee Against Torture has also voiced concerns regarding Article 92-6, specifically noting the “repeated crackdowns against gay soldiers on grounds of violating article 92-6 of the Military Criminal Act, which criminalizes consensual sexual relations between same-sex adults.”<sup>47</sup> It has called on the Republic of Korea to “consider repealing article 92-6 of the Military Criminal Act and take all necessary measures to make punishable violent actions against LGBT persons in the military.”<sup>48</sup>

### **III. Nullification of Article 92-6 Would Conform to the Examples of Many Other Countries That Have Rejected Similar Laws in Recent Years.**

Over the past two decades, governments around the world have changed their laws to bring them in line with human rights obligations as they related to sexual orientation and gender identity and obligations to protect LGBT persons from violence and discrimination. This includes repealing provisions similar to Article 92-6, and other forms of sodomy laws, from their military codes.

To highlight some examples, the following sections of this amicus brief describe how these changes developed in the United States, United Kingdom, Germany, Peru, Ecuador and Brazil.

#### **A. *United States***

In the United States, Article 125 of the Uniform Code of Military Justice, when it was adopted in 1951, criminalized consensual sodomy. From 1993 to 2011, the United States followed the so-called “Don’t Ask, Don’t Tell” policy (“DADT”), which limited the enforcement of that provision but did not

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<sup>44</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights on the Fourth Periodic Report of the Republic of Korea (E/C.12/KOR/CO/4), at ¶ 24 (Oct. 19, 2017).

<sup>45</sup> *Id.* at ¶ 25.

<sup>46</sup> United Nations Committee against Torture, General Comment No. 2, ¶ 20, U.N. Doc. CAT/C/GC/2 (2008).

<sup>47</sup> Concluding observations of the Committee against Torture on the Combined Third to Fifth Periodic Reports of the Republic of Korea (CAT/C/KOR/CO/3-5), at 35 (May 30, 2017).

<sup>48</sup> *Id.* at 36.

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repeal it.<sup>49</sup> Under DADT, LGBT service members were not allowed to talk about their sexual orientation or to engage in sexual activity, and their commanding officers were not allowed to question service members about their sexual orientation.<sup>50</sup> DADT prohibited LGBT service members from disclosing their sexual orientation on the purported ground that their presence “would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>51</sup> DADT ensured that consensual same-sex sexual conduct, whether committed on or off a military base, could still be a ground for dismissal from military service.<sup>52</sup> By 2008, more than 13,000 service members had been discharged from the military under DADT.<sup>53</sup>

In 2010, DADT came under significant legislative and judicial scrutiny. In May 2010, the U.S. House of Representatives voted to repeal DADT.<sup>54</sup> The Senate Armed Services Committee also voted to change the policy.<sup>55</sup> A few months later, a federal district court in a case called *Log Cabin Republicans* held that DADT was unconstitutional and suspended its enforcement.<sup>56</sup>

The court in *Log Cabin Republicans* found that DADT was unconstitutional because it denied LGBT persons serving in the military the right to enjoy “intimate conduct in their personal relationships.” The court also held that DADT violated the right to freedom of speech because, among other reasons, it denied LGBT service members “the right to speak about their loved ones while serving their country in uniforms.” The court also rejected various justifications offered by the U.S. government, including the claim that DADT was necessary to advance military readiness or for military unit cohesion.<sup>57</sup>

On November 30, 2010, the Department of Defense released a report which found that repealing the DADT policy would pose little risk to military effectiveness.<sup>58</sup> The report, which looked at studies on militaries of Australia, Canada, Germany, Israel, Italy, the Netherlands and the United Kingdom — all of which had years of experience with LGBT personnel serving in their forces without any restrictions — concluded that a shared commitment to the unit’s mission, rather than interpersonal liking, is necessary to effective unit cohesion. None of the militaries studied reported that having LGBT service members had affected unit performance.<sup>59</sup> The General Accounting Office, a legislative agency attached to the U.S. Congress, had similar findings after surveying Canada, Israel and Sweden, and concluded that inclusion

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<sup>49</sup> Policy concerning homosexuality in the armed forces, Pub.L. 103-160, 10 U.S.C. § 654 (1993); *Uniform Discrimination: The “Don’t Ask, Don’t Tell” Policy of the U.S. Military*, HUMAN RIGHTS WATCH 7, (Jan. 2003), <https://www.hrw.org/reports/2003/usa0103/>.

<sup>50</sup> Human Rights Watch, *supra* note 49, at 12.

<sup>51</sup> Policy concerning homosexuality in the armed forces, *supra* note 49, at (a)(15).

<sup>52</sup> Human Rights Watch, *supra* note 49, at 4.

<sup>53</sup> *Log Cabin Republicans v. U.S.*, 716 F. Supp. 2d 884, 915 (C.D. Cal. 2010). Many years earlier, in the landmark case of *Lawrence v. Texas*, the U.S. Supreme Court struck down a Texas statute that prohibited sodomy because the statute violated the plaintiffs’ fundamental rights, including a constitutionally protected freedom to establish relationships of intimate conduct and intimate association. *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186\_\_ (1986), which upheld an anti-sodomy law).

<sup>54</sup> Perry Bacon Jr. and Ed O’Keefe, *House votes to end ‘don’t ask, don’t tell’ policy*, WASHINGTON POST (May 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/27/AR2010052704540.html>.

<sup>55</sup> *Id.*

<sup>56</sup> *Log Cabin*, 716 F. Supp. 2d at 929.

<sup>57</sup> *Id.* at 884, 923, 929 and 957.

<sup>58</sup> Bernard D. Rostker, Susan D. Hosek and Mary E. Vaiana, *Gays in the Military*, RAND CORP. (Spring 2011), <https://www.rand.org/pubs/periodicals/rand-review/issues/2011/spring/gays.html>.

<sup>59</sup> *Id.*

(continued...)



of LGBT persons in their militaries had not adversely affected unit readiness, effectiveness, morale or cohesion.<sup>60</sup> The formal repeal of DADT became effective on September 20, 2011.<sup>61</sup>

### **B. United Kingdom and Germany**

Before 2000, military policies under both the U.K. Ministry of Defence and the Federal Republic of Germany prohibited LGBT service members from serving openly in the armed forces, regardless of the individual's conduct or service record.<sup>62</sup> In the United Kingdom, LGBT persons were banned from joining the armed forces.<sup>63</sup> In Germany — which at the time had mandatory conscription — the policy required LGBT service members to be restricted to administrative jobs and to be denied promotions, regardless of their service record or consensual same-sex activity, and also required dismissal for same-sex sexual activity between a commanding and junior officer.<sup>64</sup>

Both the United Kingdom and Germany changed their policies in 2000 in response to the decisions in *Lustig-Prean v. the United Kingdom* (“Lustig-Prean”) and *Smith and Grady v. the United Kingdom* (collectively with Lustig-Prean, “Smith”). These two decisions were rendered by the European Court of Human Rights (“ECtHR”), which is authorized to hear human rights complaints from individuals for violations of the European Convention of Human Rights (the “Convention”).<sup>65</sup> With jurisdiction over 45 countries, its judgments are legally binding on European governments in cases to which they are a party (as was the United Kingdom in the aforementioned cases), and the ECtHR also provides binding interpretation of the Convention for all State Parties to the Convention (such as Germany).<sup>66</sup> The United Kingdom ratified the Convention in 1951 and Germany in 1952.

In *Smith*, the ECtHR considered whether the U.K. military policy that authorized the dismissal of military personnel following investigations into their sexuality violated the right to privacy protected under Article 8 of the Convention. Interference with that right is permitted only to the extent “necessary in a democratic society in the interests of national security . . . for the prevention of disorder . . . [and] for the protection of health or morals.”<sup>67</sup> The ECtHR found that these investigations into the applicants’

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<sup>60</sup> Human Rights Watch, *supra* note 49, at 46.

<sup>61</sup> *Repeal of “Don’t Ask, Don’t Tell” (DADT): Quick Reference Guide*, U.S. DEP’T OF DEF. (Oct. 28, 2011), [http://archive.defense.gov/home/features/2010/0610\\_dadt/Quick\\_Reference\\_Guide\\_Repeal\\_of\\_DADT\\_APPROVE\\_D.pdf](http://archive.defense.gov/home/features/2010/0610_dadt/Quick_Reference_Guide_Repeal_of_DADT_APPROVE_D.pdf).

<sup>62</sup> *The Legal Treatment of Homosexuals in the Armed Forces of Europe*, OXFORD UNIV. PUBLIC INTEREST LAW SUBMISSION 1, (Sept. 10, 2003), <http://www2.law.ox.ac.uk/opbp/GaysinMilitaryFinal%20Submission.pdf>.

<sup>63</sup> Morris, Scott. *Europe Enters a New Millennium with Gays in the Military while the United States Drowns in Don’t Ask, Don’t Tell: Twin Decisions by the European Court of Human Rights*, AM. U. J. GENDER SOC. POL’Y & L 9, no. 2, 424, 427 (2001).

<sup>64</sup> *The Legal Treatment of Homosexuals in the Armed Forces of Europe*, *supra* note 62, at 16-17; Jenny Gesley, *60 Year Anniversary of the German Compulsory Military Act*, LIBRARY OF CONGRESS (July 21, 2016), <https://blogs.loc.gov/law/2016/07/60-year-anniversary-of-the-german-compulsory-military-service-act/> (Conscription in the German Federal Republic was in place from July 21, 1956 to July 1, 2011).

<sup>65</sup> *The Legal Treatment of Homosexuals in the Armed Forces of Europe*, *supra* note 62, at 2.

<sup>66</sup> *Id.* at 2; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, art. 1 (Nov. 4 1950), ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 12 October 2018].

<sup>67</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 66, at art 8.

(continued...)

sexual orientation and sexual activity were a “direct interference with the applicants’ right to respect for their private lives.”<sup>68</sup>

The ECtHR concluded that the U.K. government did not offer convincing and weighty evidence that the inclusion of LGBT persons in the forces would damage morale and, thus, operational effectiveness, and did not justify the interference with the applicants’ right to privacy.<sup>69</sup> On the contrary, the ECtHR held that the U.K. government’s position was based solely upon negative attitudes ranging from “stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues.” The Court found that there was no sound evidence that consensual same-sex sexual conduct threatens unit cohesion or poses security risk.<sup>70</sup>

In response to the *Smith* decisions on September 27, 1999, the U.K. government repealed its ban on January 12, 2000.<sup>71</sup> Germany soon followed suit in December 2000.<sup>72</sup>

### C. *Peru*

Article 269 of the Military Justice Code of the Republic of Peru, which had prohibited same-sex sexual activity within the military, has been held by that country’s highest court to be unconstitutional.<sup>73</sup> Article 269 of Peru’s Military Justice Code included a prohibition on conduct similar to that proscribed by Article 92-6. Specifically, the first paragraph of Article 269 provided that a soldier who carried out “indecent acts or acts against nature with a person of the same-sex, within or outside the military premises, will be punished with expulsion from the Army if he is an officer, or with prison if he is a troop soldier.”<sup>74</sup> The second paragraph of the provision dealt with the use of violence, threats, or abuse of authority as aggravating factors.<sup>75</sup>

The Peru Constitutional Court held in June 2004 that the provision was unconstitutional on several grounds.<sup>76</sup> First, the Court pointed to the fact that Peru’s Constitution explicitly limits the scope of military justice and laws limiting one’s freedom to his own sexuality exceed that scope.<sup>77</sup> Second, the Court found that Article 269 violated the right to equality by punishing “indecent” acts only when committed between those of the same-sex, without any reasonable basis.<sup>78</sup> And third, the Court held that Article 269 violated the equality principle by prohibiting only same-sex sexual acts, while other kinds of

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<sup>68</sup> *Smith v. United Kingdom*, 29 Eur. Ct. H.R. 493, 523 (2000); *Lustig-Prean v. United Kingdom*, 29 Eur. Ct. H.R. 548, 573 (2000).

<sup>69</sup> The U.K. government supported its argument by a report produced by the Homosexuality Policy Assessment Team (HPAT), which was established by the Ministry of Defence to conduct an internal assessment of the armed forces’ policy on homosexuality. The HPAT was composed of a very small sample proportion of the Ministry of Defence civil servants and representatives of the three services. *Smith*, 29 Eur. Ct. H.R. at 514; *Lustig-Prean*, 29 Eur. Ct. H.R. at 564.

<sup>70</sup> *Smith*, 29 Eur. Ct. H.R. at 501, 524, 533-36; *Lustig-Prean*, 29 Eur. Ct. H.R. at 554, 574, 583-86.

<sup>71</sup> The Legal Treatment of Homosexuals in the Armed Forces of Europe, *supra* note 62, at 7 and 10.

<sup>72</sup> The Legal Treatment of Homosexuals in the Armed Forces of Europe, *supra* note 62, at 15-16.

<sup>73</sup> *Sentencia 0023-2003-AI/TC, Constitutional Tribunal of Peru (9 June 2004): Procedural Posture*, INTERNATIONAL COMMISSION OF JURISTS (June 9, 2004), <https://www.icj.org/sogicasebook/sentencia-0023-2003-aitc-constitutional-tribunal-of-peru-9-june-2004/>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

(continued...)

sexual acts on military premises were not prohibited.<sup>79</sup> Following the Court’s decision, LGBT service members are allowed to serve on an equal basis in the military.<sup>80</sup>

#### **D. Ecuador**

In 1998, the Republic of Ecuador enacted Article 117 of the Rules of Military Discipline,<sup>81</sup> which provided that an officer who engages in “acts of homosexuality” must be discharged, on grounds of either “misconduct or professional incompetence.”<sup>82</sup> Article 117 was similar to Article 92-6 in its enforcement, as it discriminated against those in the military based on sexual orientation, but was repealed in 2016 following the decision by the Inter-American Court of Human Rights (“IACtHR”) in *Flor Freire v. Ecuador*.

On August 30, 2002, the Inter-American Commission on Human Rights (“IACHR”) received a complaint about the military discharge of Homero Flor Freire, an Ecuadorian service member for an alleged disciplinary infraction, specifically, alleged same-sex sexual conduct in the dormitories of a military base.<sup>83</sup> On November 4, 2013, IACHR concluded that the State of Ecuador violated rights enshrined by the American Convention of Human Rights (“ACHR”), which the country had ratified in 1997.<sup>84</sup> Ecuador, in turn, was recommended to (1) make full reparations to Flor Freire, (2) publicly recognize that Flor Freire was discharged in a discriminatory manner, (3) adopt measures so that officers in the army are not subject to discrimination based on sexual orientation, (4) ensure that those in the army and in the courts of law in the military jurisdiction are aware of inter-American standards and Ecuadorian domestic law regarding non-discrimination based on sexual orientation and (5) adopt measures to guarantee due process rights to those who are tried by courts in military disciplinary proceedings.<sup>85</sup>

Following Ecuador’s failure to comply with the IACHR’s recommendations, the IACHR submitted Flor Freire’s case to the IACtHR.<sup>86</sup> In November 2016, the court also found the enforcement of Ecuador’s military law to have violated the ACHR.<sup>87</sup> The IACtHR found that Ecuador’s military law treated “homosexual acts” differently without an objective and reasonable justification, and therefore discriminated based on sexual orientation, a protected characteristic under Articles 1.1 and 2 of the ACHR.<sup>88</sup> Furthermore, according to the court, the law did not respect Flor Freire’s honor and dignity, which is protected under Article 11 of the ACHR, as the disciplinary sanctions imposed on him were discriminatory in nature and distorted the public’s perception of him.<sup>89</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *LGBT Rights in Peru*, EQUALDEX, <https://www.equaldex.com/region/peru>.

<sup>81</sup> *CASO FLOR FREIRE VS. ECUADOR*, CORTE INTERAMERICANA DE DERECHOS HUMANOS (Aug. 31, 2016), at pp. 19-20, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_315\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_315_esp.pdf).

<sup>82</sup> *INTER-AMERICAN COURT: ECUADOR DISCRIMINATORILY DISCHARGED SOLDIER FOR SEXUAL ORIENTATION*, INT’L JUSTICE RES. CTR. (Nov. 14, 2016), <https://ijrcenter.org/2016/11/14/inter-american-court-ecuador-discriminatorily-discharged-soldier-for-sexual-orientation/>.

<sup>83</sup> *REPORT NO. 81/13*, ORG. OF AM. STATES (Nov. 4, 2013), at p. 1, <http://www.oas.org/en/iachr/decisions/court/12743FondoEn.pdf>.

<sup>84</sup> *Id.* at p. 43.

<sup>85</sup> *Id.*

<sup>86</sup> *INTER-AMERICAN COURT: ECUADOR DISCRIMINATORILY DISCHARGED SOLDIER FOR SEXUAL ORIENTATION*, *supra* 82.

<sup>87</sup> *Id.*

<sup>88</sup> *CASO FLOR FREIRE VS. ECUADOR*, *supra* 81, at p. 4.

<sup>89</sup> *INTER-AMERICAN COURT: ECUADOR DISCRIMINATORILY DISCHARGED SOLDIER FOR SEXUAL ORIENTATION*, *supra* 86.

(continued...)

Article 117 was repealed and LGBT service members are allowed to serve on an equal basis in the Ecuadorian military.<sup>90</sup>

#### **IV. Conclusion**

In reviewing Article 92-6, Human Rights Watch urges the Constitutional Court to take into account the Republic of Korea's international legal obligations and comparative examples from other countries that have eliminated similar provisions to Article 92-6 in their military codes during its deliberations. Like other tribunals before it, this Court should guarantee that those obligations are met by ensuring the decriminalization of consensual same-sex sexual conduct in the military and that the Republic of Korea's military laws grant and protect the rights of lesbian, gay, bisexual, and transgender persons in the military to enable equal service by all.

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<sup>90</sup> *LGBT Rights in Ecuador*, EQUALDEX, <https://www.equaldex.com/region/ecuador>.