

Comments (domestic laws and judicial precedents, etc.) of the Republic of Korea on specific issues requested by the International Law Commission

A. Protection of the atmosphere

The Republic of Korea has enforced several domestic laws relevant to the protection of the atmosphere. Enforced in August 1990, the "Clean Air Conservation Act" aims to prevent air pollution which causes harm to people and the environment, and manage and preserve the atmospheric environment in a proper and sustainable manner, thereby enabling all people to live in a healthy and comfortable environment.

In accordance with this Act, the Minister of Environment shall install measuring networks and constantly/ monitor the levels of air pollution under conditions determined by Ordinance of the Ministry of Environment to ascertain the actual conditions of air pollution and climate/ecosystem-changing substances nationwide. This Act also prescribes the role of the Government to participate positively in international efforts such as the exchange of environmental information and technologies with other nations, and establishment of policies for research and surveys, recovery and recycling, and development of substitutes among others to cut the emissions of climate/ ecosystem-changing substances.

Also, the Government shall make endeavors to cooperate with relevant nations for the prevention of damage caused by yellow dust in accordance with this Act. This Act also deals with "the Regulation of Emissions of Air Pollutants in Places of Business", "the Regulation on Emission of Air Pollutants in Living Environment", and "the Regulation of Exhaust Gases from Automobiles, Ships."

Other relevant domestic legislations include "Special Act on the Improvement of Air Quality in Seoul Metropolitan Area" and its Enforcement Decree enacted in 2005, "Framework Act On Low Carbon, Green Growth" and its Enforcement Decree enacted in 2010, "Act on the Promotion of Development and Distribution of Environment-Friendly Automobiles" and its Enforcement Decree enacted 2014. In a broader framework, "Natural Environment Conservation Act" and its Enforcement Decree also have specific provisions regarding the protection of the atmosphere.

In January, 1992, the Republic of Korea enacted "Act on the Control, Etc of Manufacture of Specific Substances for the Protection of the Ozone Layer", to enforce the Vienna Convention for

the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer, in a bid to control the production and use of specific substances, promote the development and use of alternative substances, curb emission levels and promote rationalization in use of the specific substances

According to these relevant domestic legislations, domestic courts of the Republic of Korea promote the protection of the atmosphere through rigorous regulations on emission of air pollutants, which serves as a precondition for permission of business, and regard negligence as a violation of these regulations.

B. Identification of customary international law

(a) Official statements before legislatures, courts and international organizations

Not available

(b) Decisions of national, regional and sub-regional courts

The followings are cases in which customary international law were asserted in courts of Korea. Courts of Korea have determined the existence of customary international law, but these judgments do not specify the method to identify the rules of customary international law and the types of evidence for establishing such law in detail. However, when reviewing the following judgments, Korean Judges presumably refer to relevant treaty provisions or legislation, and rulings of other states

① Supreme Court Decision 97Da39216 Sentenced on Dec. 17, 1998 / Seoul High Court Decision 2004Na43604 Sentenced on Jan. 21, 2009

In determining the rule of customary international law on judicial jurisdiction over commercial activities of a foreign State in the Korean territory, Supreme Court of Korea ruled as follows

According to the rule of customary international law, sovereign acts of States are exempted from the jurisdiction of other States in principle, but it cannot be regarded as international law or international customs that judicial acts of States are exempted from the jurisdiction of other States

② Busan District Court Decision 2000GaHap7960 Sentenced on Feb. 2, 2007

In determining whether Mitsubishi has responsibility under international law to compensate for the damage from the forced labor mobilized for the Japanese corporation during the Japanese rule in Korea, Busan District Court ruled as follows.

The Plaintiff claimed that Mitsubishi violated the anti-slavery norm under the customary international law, the ILO Forced Labor Convention of 1930 (No. 29), and the Nurnberg Principles. Therefore, Mitsubishi is responsible for the damages from these breaches of international law.

In the ILO Forced Labor Convention of 1930 (No. 29) and Nurnberg Principles, there is no provision on whether an individual can claim compensation directly against the State responsible for crimes against humanity or the companies responsible for forced labor. The prohibition of slavery is generally accepted as jus cogens. Nevertheless, there is no evidence to identify the existence of the customary international law under which victims of slavery can file compensation claims directly with violators.

③ Seoul Civil District Court Decision 84GaHap5303 Sentenced on Sep. 25, 1985

In determining whether a State can have civil jurisdiction over foreign States, Busan District Court ruled as follows:

A State is not subject to foreign jurisdiction in international customs. Therefore, a State cannot exercise its jurisdiction over a foreign state unless the diplomatic privileges are exempted under the relevant treaties or the foreign state waives its privileges. Even if there is willingness or likelihood of relaxing the principle of state sovereign immunity, recently, the domestic laws or judgments of many States do not recognize jurisdictional immunities of States in certain cases exercising their judicial jurisdictions, but such tendencies cannot be the evidence to prove the status of the customary international law.

C. Information about digests and surveys on State Practice in the field of international law

Not available

D. Protection of the environment in relation to armed conflicts

The relevant domestic legislations of the Republic of Korea concerning the protection of environment in relation to international or non-international armed conflicts are as follows. According to the "Act on National Defense and Military Installations Projects", permission and reporting to install emission facilities under Article 23 of the Clean Air Conservation Act, and permission and reporting to do an act in a forest protection area under Article 9 (2) of the Forest Protection Act, and revocation of designation as a forest protection area under Article 11 of the same Act are required in order to gain approval for action plans for national defense and military installations projects. Also, national defense and military facility installation projects should have permission and authorization in accordance with the "Environmental Impact Assessment Act." This Act aims to promote the pleasant and safe livelihood of people by promoting environmentally friendly projects and enabling sustainable development through advance assessment and investigation of environmental impacts from the projects when making and executing the plan of operation for such projects subject to the assessment of environmental impacts. According to this Act, national defense and military facility installation projects are subjected to the "Strategy Environmental Assessment"

"Agreement under Article 4 of the Mutual Defense Treaty between the Republic of Korea and the United States of America, Regarding Facilities and Areas and the Status of Forces Agreement (hereinafter referred to as SOFA)," initially signed in 1966, did not have any provisions concerning protection of the environment. However, reflecting the increasing concern over the environment, in particular, with regard to the environmental contaminations deriving from the U.S. military bases, environmental provisions were affixed to the sub-agreements of SOFA in 2001. In addition, the Memorandum of Special Understandings on Environmental Protection (the 2001 Memorandum) was adopted. This Memorandum explicitly states a policy to remedy contamination that presents "known imminent and substantial endangerment" to human health.

The Republic of Korea has the "Rules on the Service of Military Personnel" prescribed by a Presidential Decree, and this Decree imposes obligations on military personnel to protect the natural ecosystem and environment and set up measures to prevent environmental pollution in discharging their duties. Also, a commander shall regulate and supervise emission of pollutants from the compounds and educate and guide military personnel to protect the environment. According to Article 6 of the Constitution of the Republic of Korea, treaties duly concluded and promulgated that under the Constitution, the generally recognized rules of international law shall

have the same effect as the domestic laws of the Republic of Korea. Thus, as a State party to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), a basic rule prescribed in Article 35 (3) which prohibits employing methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment, and the specific provision of Article 55 regarding "the Protection of the Natural Environment" applies to the Republic of Korea¹

¹ Article 55 – Protection of the natural environment: 1 Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2 Attacks against the natural environment by way of reprisals are prohibited

E. Provisional application of treaties

Except cases of the provisional application of multilateral treaties in general circumstances, our government has consented to the provisional application of the Free Trade Agreement (FTA) between the Republic of Korea, of the one Part, and the European Union and its Member States, of the other part

Article 15 10

5 (a) "This Agreement shall be provisionally applied starting on the first day of the month following the date on which the EU and Korea have notified each other of the completion of their respective relevant procedures"

For the provisional application of the Korea-EU FTA, the same procedure required to effectuate treaties has been taken. In the Republic of Korea, the treaty-making power lies in the President (Constitution of the Republic of Korea, art 60)². On the other hand, the National Assembly of the Republic of Korea shall have the right to consent to the conclusion and ratification of important treaties (Constitution, art 73)³.

The legal effect of this provisional application is also the same as the effectuation of the FTA. After the FTA was applied provisionally, there was no additional action required for the effectuation of the said FTA. Likewise, the "Additional Protocol to the Free Trade Agreement between the Republic of Korea, of the one part, and the European Union and its Member State, of the other part, to take account of the Accession of Croatia to the European Union" signed on March 2014 has also provisionally been applied.

² Article 73 The President shall conclude and ratify treaties, accredit, receive or dispatch diplomatic envoys, and declare war and conclude peace

³ Article 60 (1) The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security, treaties concerning important international organizations, treaties of friendship, trade and navigation, treaties pertaining to any restriction in sovereignty; peace treaties, treaties which will burden the State or people with an important financial obligation, or treaties related to legislative matters

F. Crimes against humanity

Act on Punishment, ETC. of Crimes under Jurisdiction of the International Criminal Court

Article 9 (Crimes against Humanity)

(1) Any person who has killed another person by making an extensive or systematic attack directed against any civilian population in connection with the policies of the State, organizations or institutions to commit such an attack shall be punished by the death penalty or imprisonment for life or for no less than seven years

(2) Any person who commits any of the following acts by making an extensive or systematic attack directed against any civilian population in connection with the policies of the State, organizations or institutions to commit such an attack shall be punished by imprisonment for life or for no less than five years

1 Intentionally inflicting on the population living conditions of life, inter alia, the deprivation of access to food and medicine, calculated to bring about the destruction of part of such population,

2 Enslaving people,

3. Deporting or forcibly transferring the residents from the area in which they are lawfully present in violation of international laws;

4 Imprisoning the residents or otherwise depriving them of physical liberty in violation of international laws,

5 Torturing a person in the custody or under the control of the accused by inflicting grievous pain or sufferings physical or mental on such a person without any justifiable grounds,

6 Committing rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparable gravity,

7 Depriving a member or a group of the collectivity of his/her fundamental human rights or restricting his/her fundamental human rights on political, racial, national, ethnical, cultural, religious, gender or other grounds recognized as impermissible under international laws,

8 Committing any of the following acts with the authorization, support or acquiescence of the State or a political organization, with the intention of removing a person from the protection of the law for a prolonged period of time

(a) Arresting, detaining, abducting or kidnapping (hereinafter referred to as "arrest, etc.") a person

and refusing to give information or providing incorrect information on the facts regarding his status, identity, whereabouts, etc

(b) Refusal by a person who is obliged to give information as stated in Item (a) regarding the duty to provide such information and to withhold incorrect information,

9 Other inhumane acts causing grievous sufferings or injury either physical or mental in any way other than those listed in subparagraphs 1 through 8.

(3) A member of a racial group who commits any act referred to in paragraph (1) or (2) with intent to maintain a regime of systematic oppression and domination over any other racial group or groups shall be subject to the punishment stipulated in each of such paragraphs

(4) Any person who causes death of others by committing any act listed in any subparagraph of paragraph (2) or any act referred to in paragraph (3) (limited to acts listed in any subparagraph of paragraph (2)) shall be subject to the punishment stipulated in paragraph (1)

(5) Any attempt to commit a crime provided for in any of paragraphs (1) through (3) shall be punished

[This Article was Wholly Amended by Act No 10577, Apr 12, 2011]

Article 3 (Scope of Application)

(1) This Act shall apply to any Korean national or foreigner who commits a crime provided for in this Act within the territory of the Republic of Korea

(2) This Act shall apply to any Korean national who commits a crime provided for in this Act outside the territory of the Republic of Korea

(3) This Act shall apply to any foreigner who commits a crime provided for in this Act on board a vessel or aircraft registered in the Republic of Korea, while outside the territory of the Republic of Korea

(4) This Act shall apply to any foreigner who commits a crime provided for in this Act against the Republic of Korea or its people outside the territory of the Republic of Korea

(5) This Act shall apply to any foreigner who commits the crime of genocide, etc. outside the territory of the Republic of Korea and resides in the territory of the Republic of Korea

Article 6 (Non-Applicability of Statute of Limitations)

The crime of genocide, etc. shall not be subject to the prescription for public prosecution provided for in Articles 249 through 253 of the Criminal Procedure Act and Articles 291 through 295 of the Military Court Act and the prescription for execution of judgment of the guilty provided for in Articles 77 through 80 of the Criminal Act

[This Article was Wholly Amended by Act No. 10577, Apr 12, 2011]

Article 18 (Consideration of Elements of Crimes in Statute of International Criminal Court)

Where necessary for the purposes of Articles 8 through 14, the elements of crimes adopted by the Assembly of States Parties to the Statute of the International Criminal Court on September 9, 2002, may be taken into consideration in accordance with Article 9 of the Statute of the International Criminal Court

[This Article was Wholly Amended by Act No. 10577, Apr. 12, 2011]

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