

Comments and Observations on the ILC's Topic of "Subsidiary Means for the Determination of International Law"

Republic of Korea

1. Introduction

The Republic of Korea wishes to express profound gratitude for the first report and the detailed work of the Special Rapporteur, Mr. Charles Jalloh. The Republic of Korea has no doubt that the work of the Commission will clarify Article 38, paragraph 1(d) of the Statute of the International Court of Justice (ICJ) and looks forward to future developments on this topic.

2. Response to the International Law Commission's Request

- (a) **decisions of national courts, legislation and any other relevant practice at the domestic level that draw upon judicial decisions and the teachings of the most highly qualified publicists of the various nations in the process of determination of rules of international law, namely: international conventions, whether general or particular; international custom, as evidence of a general practice accepted as law; and the general principles of law recognized by the community of nations;**

Article 6, paragraph 1, of the *Constitution of the Republic of Korea*¹ states, "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea." This provision acknowledges the significance of international law within the legal system of the Republic of Korea.

Korean courts regard customary international law as being equivalent to "the generally recognized rules of international law." Therefore, customary international law is applied

¹ Available at https://elaw.klri.re.kr/kor_service/lawView.do?hseq=1&lang=ENG.

domestically to cases immediately without requiring any implementing legislation, in accordance with Article 6, paragraph 1 above.

In practice, Korean civil, criminal, and administrative courts have recognized restrictive immunity,² the political offense exception to extradition,³ and the territorial principle⁴ as customary international law, and therefore applicable in the Republic of Korea.

To date, there have been no instances where the Constitutional Court of Korea has directly applied any rules of customary international law. However, the Court stated that they could not deem that guaranteeing the right to conscientious objection was established as customary international law in the *Conscientious Objector Case*⁵, concerning the *Establishment of Homeland Reserve Forces Act*.⁶ Such assessment was reiterated in another decision⁷ regarding the *Military Service Act*.⁸

There has been no occasion where Korean courts have utilized the teachings of highly qualified publicists in the process of determining rules of international law.

² Supreme Court of Korea, Decision of 17 December 1998, 97Da39216; Seoul High Court, Decision of 12 November 2023, 2021Na2017165.

³ Supreme Court of Korea, Decision of 22 May 1984, 94Do39.

⁴ Seoul Administrative Court, Decision of 29 October 1998, 98Gu6561.

⁵ Constitutional Court, Decision of 30 August 2011, 2007Hun-Ka12, 2009Hun-Ba103(consolidated), English version(summarized) is available at [Case Search](#).

⁶ Available at https://elaw.klri.re.kr/kor_service/lawView.do?lang=ENG&hseq=18150.

⁷ Constitutional Court, Decision of 28 June 2018, 2011Hun-Ba379 and 27 other cases (consolidated), available at [Case Search](#). In this case, the Constitutional Court of Korea, after conducting balancing test, ruled that Article 5, paragraph 1, of the *Military Service Act*, which does not stipulate an alternative service system for conscientious objectors, violates the *Constitution of the Republic of Korea*. Following this decision, the Supreme Court of Korea recognized conscientious objection as a "justifiable ground to refuse military service" articulated in Article 88, paragraph 1, of the *Military Service Act*. (Supreme Court of Korea, Decision of 1 November 2018, 2016Do10912)

⁸ Available at https://elaw.klri.re.kr/kor_service/lawView.do?lang=ENG&hseq=39201

(b) statements made in international organizations, international conferences and other forums, including pleadings before international courts and tribunals, concerning subsidiary means for the determination of rules of international law

- (i) During the consideration of the Commission's report by the Sixth Committee at its 78th session in 2023, the Republic of Korea delivered a statement⁹ with the following key points.

First and foremost, the Republic of Korea showed its respect for the decisions of international courts and tribunals, which are crucial for the protection of the rule of law in international relations. At the same time, the Republic of Korea pointed out the absence of the doctrine of *stare decisis* in international law. It advised the Committee to adopt a cautious and balanced evaluation approach, considering the possibility of differing judgments on the same issue by various forums. The Republic of Korea cited, as an example, the divergent opinions in the ICJ's judgment on the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, in which the powerful dissenting opinion characterized the majority's stance as being "disquieting."

- (ii) At the Sixty-First Annual Session of the Asian-African Legal Consultative Organization (AALCO) in 2023, the Republic of Korea made remarks¹⁰ with the following key points:

The Republic of Korea recognized the important, subsidiary role of international court decisions in determining rules of international law. Nonetheless, it stressed the need to carefully assess each decision based on specific criteria, as outlined in Draft Conclusion 3. The Republic of Korea called for a cautious approach to attributing weight to international court decisions. Citing ICJ's judgment in the aforementioned *Nicaragua v. Colombia* case as an example, the Republic of Korea pointed out instances where divergent reasoning and significant dissent highlighted the complexities of relying on such decisions as subsidiary

⁹ The full text is available at https://www.un.org/en/ga/sixth/78/pdfs/statements/ilc/31mtg_rok_3.pdf

¹⁰ The full text is available at <https://www.aalco.int/Final%20Verbatim%2061st%20AS%202023%20as%20on%2021.03.2024.pdf>, p.125-126.

means for determining rules of international law. The Republic of Korea suggested minimal reliance on controversial decisions, especially for States not directly involved in the cases, emphasizing the nuanced interpretation required to apply the principles of international law.
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