

Korea

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1 From Your Own Country, Is There a Unique Perspective of International Law?

Korea's experience in international relations is rather unique in the sense that Korea emerged not only from Japanese colonialism, but also from a war-torn country to become an Asian power. Some significant international legal issues include those which resulted from the Japanese occupation of Korea as well as from the Korean War.

1.1 *The Legacy of Colonialism*

The historical fact that Japan ruled and controlled Korea from 1910 to 1945 caused many international law issues, some of which have still not been settled, between Korea and Japan. The most critical and fundamental question, among others, is whether the Japanese ruling over Korea was based on the grounds of international law.

In particular, the validity of the two treaties—the treaty of 1905,¹ which deprived Korea of its diplomatic sovereignty, and the annexation treaty of 1910²—have been the subject of much controversy. Upon Korea's signing the Treaty on Basic Relations with Japan in 1965³ to normalize diplomatic relations, the two countries tried to solve unsettled legal issues by concluding additional treaties such as the Agreement on the Settlement of Problems Concerning Property and Claims,⁴ Agreement concerning Cultural Assets and Cultural Cooperation,⁵ and Agreement concerning the Legal Status and Treatment

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1 Eulsa Neungyak [Japan-Korea Protectorate Treaty of 1905], Japan-Korean Empire, Nov. 17, 1905.

2 Hanil Byeonghap Joyak [Japan-Korea Annexation Treaty], Japan-Korean Empire, Aug. 22, 1910.

3 Hanil Gibon Joyak [Treaty on Basic Relations], Japan-S. Kor., June 22, 1965, 583 U.N.T.S. 33.

4 Hanil Jaesan Mit Cheonggugwon Munje Haegyeolgwa Gyeongjehyeomnyeoge Gwanhan Gyeoljeong [Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-Operation], Japan-S. Kor., June 22, 1965, 583 U.N.T.S. 173.

5 Munhwajae Mit Munhwahyeomnyeoge Gwanhan Ilbongwa Hangukgan Hyeopjeong [Agreement on the Art Objects and Cultural Co-Operation], Japan-S. Kor., June 22, 1965, 584 U.N.T.S. 49.

of the Korean Residents in Japan.⁶ Without any success, the issue on legality or legitimacy of Japan's ruling over Korea under international law was never solved and rather ended up with vague provisions in the treaty, which, in turn, raises a matter of interpretation until the present time.

1.2 *International Legal Issues Arising from the Korean War and Inter-Korean Relations*

Armed conflicts that occurred on the Korean Peninsula in the early 1950s have raised a number of important legal issues under international law. The Korean War poses many legal issues, especially related to international humanitarian law, such as the legal characteristic of the armed conflict, the applicability of the rules of engagement, and the legal meaning of a longstanding ceasefire. As North Korea launched an armed attack against South Korea on June 25, 1950, a series of resolutions were adopted by the U.N. Security Council (UNSC Res. 82,⁷ UNSC Res. 83,⁸ UNSC Res. 84,⁹ UNSC Res. 85).¹⁰ It was the first time the U.N. Security Council had authorized the use of force since its inception in 1945, and members of the United Nations acted collectively to repel aggression.

As a veto by then Soviet Union was frequently used to block numerous Security Council initiatives during the Korean War, the U.N. General Assembly adopted a resolution known as "Uniting for Peace" (UNGA Res 5/377),¹¹ which stated that if the Security Council fails to exercise its primary responsibility to act as required to maintain international peace and security due to a lack of unanimity of the permanent members, the General Assembly should take over to keep the impetus for peace.

While a Military Demarcation Line was drawn on land at the time the Inter-Korean Armistice Agreement¹² was signed on July 27, 1953, such Demarcation Line did not extend into maritime areas. The seaward extension, known as the Northern Limit Line (NLL), which was drawn by U.N. Commander General Mark Clarke in 1958, has remained contentious and caused confrontations

6 Ilbonguge Geojuhaneun Daehanminguk Gungminui Beopjeok Jiwiwa Daeue Gwanhan Hyeopjeong [Agreement on the Legal Status and Treatment of the Nationals of the Republic of Korea Residing in Japan], Japan-S. Kor., June 22, 1965, 584 U.N.T.S. 3.

7 S.C. Res. 82 (June 25, 1950).

8 S.C. Res. 83 (June 27, 1950).

9 S.C. Res. 84 (July 7, 1950).

10 S.C. Res. 85 (July 31, 1950).

11 G.A. Res. 377 (v), Uniting for Peace (Nov. 3, 1950).

12 Military Armistice in Korea and Temporary Supplementary Agreement, N. Kor.-S. Kor., July 27, 1953, 4 U.S.T. 234.

between the two Koreas as the NLL was not officially part of the Armistice Agreement.

Some key inter-Korean issues, among others, include statehood and recognition, as well as the legal characteristics of the agreements signed by the two Koreas. An issue arises from the provision of the Constitution of the Republic of Korea, which stipulates that the territory of the Republic of Korea shall consist of the whole Korean Peninsula,¹³ while the two Koreas were respectively admitted to the United Nations at the same time.

The U.N. membership issue raised a legal question as to whether the Republic of Korea recognized North Korea as a state. The issue gets more complicated as a question also arises as to the legal characteristic of the Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between the South and the North¹⁴ (known as the Inter-Korean Basic Agreement), signed in 1991, which recognizes that the relationship between the two Koreas is not a relationship as between states, but rather a special one constituted temporarily in the process of unification.

1.3 *Law of the Sea*

Situated at the center of the Northeast Asian Seas, the waters that surround three sides of Korea are important for economic, military, and strategic concerns. Such concerns embrace a wide range of maritime issues, including maritime delimitations and competition for marine resources. Korea has engaged in important legal matters pertaining to the Law of the Sea that are of vital importance, especially in relation to maritime delimitation in zones established by the U.N. Convention on the Law of the Sea.¹⁵ There remains the issue of maritime delimitation due to overlapping claims over the continental shelf with the neighboring countries, such as between Korea and China in the West Sea and between Korea and Japan in the East Sea.

The contribution on the part of Korea in relation to maritime issues includes its active engagement in international efforts to protect marine safety and the marine environment. Since Korea joined the Convention on the International Maritime Organization,¹⁶ Korea, as a Category A Council member with the

13 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 3 (S. Kor.).

14 Nambuk Saiui Hwahaewa Bulgachim Mit Gyoryu.Hyeomnyeoge Gwanhan Habuiseo [Agreement on Reconciliation, Non-aggression and Exchanges and Cooperation Between the South and the North], N. Kor.–S. Kor., Dec. 13, 1991, <https://peacemaker.un.org/en/node/8999>.

15 U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

16 Convention on the International Maritime Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 3.

largest interest in providing international shipping services, has been leading the development of maritime technology, such as e-navigation, eco-friendly vessels, and autonomous vessel technology.

1.4 *Democracy and International Human Rights Law*

The development of human rights in Korea is closely related to the development of democracy in Korea achieved through the mass protest against dictatorship and military regime from the 1960s to the 1980s. With the development of democracy in Korea since the early 1990s, Korea began to accept major international human rights treaties, ratifying the International Covenant on Civil and Political Rights (ICCPR)¹⁷ and its Protocol¹⁸ in 1990, and the International Covenant on Economic, Social and Cultural Rights¹⁹ in 1990.

Since then, Korea became a party to major international human rights treaties in the following dates, such as the Convention on the Rights of the Child (1991),²⁰ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995),²¹ the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2004),²² and the Convention on the Rights of Persons with Disabilities (2009).²³ In 2001, the National Human Rights Commission was established as a national human rights advocacy institution along with several truth and reconciliation commissions to investigate human rights violations under previous authoritarian regimes.

One of the recent human rights issues includes the right to conscientious objection to military service. Conscientious objection has been a topic of much debate in Korea for decades, especially in cases involving Jehovah's Witnesses. The Supreme Court and the Constitutional Court have consistently affirmed the punishment of conscientious objectors under Korea's Military

17 International Covenant on Civil and Political Rights, Dec. 19, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171.

18 Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

19 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

20 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

21 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, T.I.A.S. 94-1120.1, 1465 U.N.T.S. 85.

22 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, T.I.A.S. 13094, 2173 U.N.T.S. 222.

23 Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

Service Act.²⁴ However, in 2018, the Constitutional Court held that the Korean law that did not recognize conscientious objection was not consistent with the Constitution. In the same year, the Supreme Court ruled that conscientious objection was justifiable under the Military Service Act.

2 What Has Been Your Country's Contribution to the Development of International Law?

Before 1948, Korea did not have a chance to contribute to the development of international law. At the time, the European-oriented international law began to regulate the inter-state relationship of East Asian nations, which accepted international law. Western international law scholars questioned whether Korea was a member of the international community as a sovereign state, and some did not recognize other East Asian countries aside from Japan, such as Korea, China, and Siam, as subjects of international law.

Korea could not contribute to the development of international law under such circumstances, especially when the nation went under the colonial rule of Japan as soon as it opened its door to the West, resulting in the Japanese annexation. Upon gaining independence from Japan on August 15, 1945, Korea was finally placed in a position where it could contribute to the development of international law.

However, due to how armed conflicts between the two Koreas destroyed most of the economic systems in the country, Korea experienced hardship, which prevented it from participating in any meaningful activity to contribute towards the development of international law.

Under this difficulty, however, a noticeable Korean state practice in terms of developing international law emerged, namely, the "Declaration by the President on Sovereignty of Adjacent Ocean"²⁵ (also known as the "Peace Line Declaration"). The declaration stated that Korea has sovereignty over all the natural resources, minerals, as well as marine products within a certain distance of water, including the ocean floors and the continental shelf near the Korean peninsula.

24 Military Service Act (S. Kor.), translated in Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/main.do (search required).

25 Syngman Rhee, Injeop Haeyange Daehan Jugwone Gwanhan Seoneon [Proclamation of Sovereignty Over Adjacent Seas] (Jan. 18, 1952), https://db.history.go.kr/id/dh_024_1952_01_18_0020.

The declaration also allocated maritime sovereignty to Korea far beyond the internationally recognized territorial limits. According to the order of international law at the time, unilateral declarations and measures by Korea could be understood as a violation of international law, infringing upon the right to fisheries in international waters.

Korea's such measures, however, can be viewed as pioneering, taking the lead in the changes of the maritime law, influenced by the United States President's Continental Shelf Declaration,²⁶ High Sea Fishery Declaration,²⁷ and the Latin American countries' contention on the expansion of the oceanic jurisdiction.

In the United Nations Law of the Sea Conference in Geneva in 1958, Korea, based on the purpose of the said Declaration, took a position emphasizing the special interests on fisheries of coastal states adjacent in international waters and stood against those countries that proposed freedom of fishing on the High Seas.

The Peace Line Declaration²⁸ expanded the notion of Exclusive Fisheries Zone to Asian regions and subsequently contributed to the establishment of the Exclusive Economic Zone. However, Korea's contention of sovereignty over the continental shelf was not accepted by the international community.

Armed conflicts in Korea in the early 1950s also affected the development of international law. For example, the United Nations, with the absence of the Soviet Union, jointly identified North Korea as an aggressor and implemented a resolution under the U.N. Security Council to provide assistance to South Korea. Due to the absence of the Soviet Union, the legal effect of the resolution was questioned based on the interpretation of Article 27 of the U.N. Charter.²⁹ Since then, the U.N. has held that an absence or abstention of a permanent member of the U.N. Security Council does not have an effect on the approval of the resolution by the U.N. Security Council.

The U.N. General Assembly adopted a resolution (377(v) of 1950) of "Uniting for Peace"³⁰ in order to avoid the Soviet Union's veto against a resolution as a response to the armed conflicts in the Korean peninsula. Through this resolution, a special session of the General Assembly, called "Special Emergency

26 Proclamation No. 2667, 10 Fed. Reg. 12303 (Sept. 28, 1945).

27 High Seas Fishing Compliance, 16 U.S.C. §§ 5501-5509 (1995).

28 Rhee, *supra* note 25.

29 U.N. Charter art. 27(3) ("Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.")

30 G.A. Res. 377 (v), Uniting for Peace (Nov. 3, 1950).

Session,” was formed, and the Interim Committee established in 1947 became meaningless.

After the armistice agreement was concluded, the repatriation of prisoners of war became an issue, and the concerned parties handled this matter in a way that respected the individual wishes of each prisoner of war. Such practice led to the insertion of Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War, which prescribes that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities,” which does not include the forced repatriation of prisoners of war who do not wish to be sent back to their country.³¹

The Korea–Japan Agreement of Joint Southern Continental Shelf Development of 1974³² was influenced by the 1969 decision of the International Court of Justice on North Sea Continental Shelf Cases that perceived the continental shelf as an extension of the dry land,³³ which enabled Korea and Japan to jointly explore and develop natural resources in surrounding waters where the claims of sovereignty between Korean and Japan have been overlapped.

This Agreement has been viewed as one of the most important attempts for joint development by putting an end to an issue of sovereignty over disputed waters. The initiative was also a key example that contributed to the development of international law by creating an international model for joint development in the continental shelf—the first example which derived a consensus on the joint development based on the recommendation of the International Court of Justice (ICJ) decision in 1969.³⁴

Furthermore, this Agreement is also viewed as putting great significance on the development of maritime law by setting a precedent of an implementation of the obligation to negotiate under general international law and a precedent of implementation of negotiation duties under Article 83(3) under the United Nations Convention on the Law of the Sea (UNCLOS).³⁵ Other than this, the

31 Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

32 Agreement Concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, Japan–S. Kor., Jan. 30, 1974, 1225 U.N.T.S. 113.

33 North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, at 22 (Feb. 20).

34 *Id.*

35 U.N. Convention on the Law of the Sea, *supra* note 15, art. 83(3) (“[T]he States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement”).

Agreement was a model of taking a tentative measure under the same article, being a model for a duty of cooperation under Article 123 of the UNCLOS.³⁶

As a full-fledged member of the international community, Korea gives more statements and activities in meetings and forums related to international law, and Korea's contribution to the development of international law has become a common practice. To give a couple of examples, during the meeting in Rome for the establishment of the ICC, there were conflicting views on the system of acceptance of the ICC jurisdiction: one view was to adopt a method based on state's consent, and the other view was to recognize automatic jurisdiction as to the crimes that fall under universal jurisdiction. Amid this controversy, Korea proposed that the ICC should recognize jurisdiction if at least one of the following countries—country of origin of crimes, country of detention, country of defendant's nationality, or country of plaintiff's nationality—is either a State Party to the Rome Statute or has accepted the ICC jurisdiction. This proposal was not accepted in the ICC statute, but was supported by many countries with an appraisal for an excellent compromise and was evaluated as contributing to a final agreement to jurisdiction.

Another example is that, during the negotiation process of amending 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),³⁷ Korea contributed to making an amended SUA Convention in line with the existing order under the international law of the sea. In particular, Korea has been appraised for drawing a compromise of inserting to the final protocol understanding that the definition of "related material" contained in the U.N. Security Council resolution of 2004³⁸ can be used in relation to the meaning of dual-use material.

Other than these, it has been also pointed out that Korea has contributed, through civil organizations and the victims themselves, to saving victims of military sex slaves and to raising public awareness in the international community that sexual violence during the war is as intolerable a crime as the massacre of prisoners of war or torture.

36 *Id.* art. 123 ("States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention").

37 Int'l Maritime Org. [IMO], *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, LEG/CONF.15/21 (Nov. 1, 2005).

38 S.C. Res. 1540 (Apr. 28, 2004).

3 How Would You Evaluate Korea's State Practice of International Law?

Due to historical and geopolitical reasons, South Korea faces inherent limitations in its reliance on the interpretation and application of international law. The intricate entanglement of factors, such as the complex relationship with Japan rooted in the colonialization of the Korean Peninsula, the enduring dynamics of inter-Korean and the U.S.–Korea relations post-Korean War, economic interdependence, and the evolving significance of the Sino-Korean relations, reflects the multifaceted nature of South Korea's international landscape. The adept management of these highly dynamic bilateral relationships is directly linked to the nation's survival. Moreover, given South Korea's position as a member of the international community as well as the U.N., a clear interpretation and application of international law in navigating multilateral relations is vital. The recent security cooperation among South Korea, the U.S., and Japan in response to the North Korean nuclear threat and participation in the global supply chain vis-à-vis China and Russia both function as significant variables.

Of the East Asian countries, namely North Korea, Japan, China, and Russia, South Korea's distinction as the sole country that actually undergoes periodic regime changes through democratic processes serves as a valuable asset to the country. It also serves as a source of resilience for South Korea in the face of tumultuous global politics between major powers. To effectively manage this national asset, particularly as a nation that is primarily engaged in bilateral diplomacy over multilateral diplomacy, South Korea must possess a comprehensive understanding of current issues and a clear awareness of the disparities between domestic and international law and politics.

Then what criteria and orientation does South Korea employ in interpreting and applying international law in the face of complex national issues? Have policy alternatives based on such interpretations been appropriately executed? Going further, can South Korea lead in shaping international norms? Korea's fundamental perception of the Korea–Japan relations, including the 1965 Treaty on Basic Relations between Japan and the Republic of Korea,³⁹ is the illegality of the Japanese colonial period and the invalidity of the series of treaties that justified the colonialization. This can be observed from the decisions of the Constitutional Court and the Supreme Court regarding the comfort women and forced labor issues during the Japanese colonial period, as

39 Hanil Gibon Joyak, *supra* note 3.

well as the continued conflict between Korea and Japan over the sovereignty of Dokdo, which is recognized as one of the first territories taken from Korea in Japan's quest to annex the entirety of the Korean peninsula. With a positivist approach being the prevailing method of interpretation for contemporary international law, there is a significant gap between the international legal assessment and the historical judgment of the legality or invalidity of the treaties concluded during Japan's colonization of Korea.

The September 19th Comprehensive Military Agreement,⁴⁰ a supplementary agreement to the "September Pyongyang Joint Declaration"⁴¹ adopted by then President Moon Jae-in and North Korean leader Kim Jong Un at the Pyongyang Summit on September 19, 2018, was anticipated to become a point of contention for the Yun Seok-yeol administration due to fundamental differences in perceptions regarding the inter-Korean relations. As expected, it has recently become a subject of controversy, particularly regarding the core issue within the Comprehensive Military Agreement,⁴² which concerns the asymmetry of the designated maritime cessation of hostile acts zone. This is fundamentally linked to diverging perceptions of the Northern Limit Line (NLL) in the West Sea and the undetermined maritime boundaries in the Five West Sea Islands between North and South Korea. This is another instance where changes in administrations have influenced the interpretation and application of international law regarding the need for a stable management of maritime order on the Korean Peninsula.

International law provides the legal foundation for diplomatic relations in international affairs. While diplomacy in accordance with international law is ideal, the pursuit of national interests in diplomatic endeavors may not always align with international legal principles. However, in diplomacy, even major powers tend to invoke or present international legal arguments despite their limited persuasiveness, rather than outright denying or challenging international law. Therefore, for foreign relations decisions that are based on diplomatic policies of a regime, post-regime change domestic political judgments must be limited, since regimes are always subject to change. Moreover, such

40 Yeoksajeogin Panmunjeom Seoneon Ihaengeul Wihan Gunsu Bunya Habuiseo [Agreement on the Implementation of the Historic Panmunjom Declaration in the Military Domain], N. Kor.-S. Kor., Sept. 19, 2018, <https://www.ncnk.org/resources/publications/agreement-implementation-historic-panmunjom-declaration-military-domain.pdf>.

41 9Wol Pyeongyanggongdongseoneon [Pyongyang Joint Declaration of September 2018], N.Kor-S.Kor., Sept. 19, 2018, https://www.mofa.go.kr/eng/brd/m_5476/view.do?seq=319608.

42 Agreement on the Implementation of the Historic Panmunjom Declaration in the Military Domain, *supra* note 40.

judgments should especially avoid employing domestic legal standards recklessly. In other words, any attempts to alter pre-existing international relations already shaped by international law after a regime change require careful consideration. In a different context, the recent remarks by a Nobel laureate during his visit to South Korea, highlighting the divergent cycles between scientific development and electoral processes, underscore a noteworthy point.

Given the historically Eurocentric nature of traditional international law and its use as a tool for unfair dominion over non-European regions, it is challenging to transform traditional international law into a universal law that contributes to the genuine interests and justice of all humanity. From this perspective, it is imperative for Korea to emphasize the need to interpret and apply international legal norms in a post-colonial era that genuinely reflects the interests of all to resolve the current issues between Korea and Japan. This involves understanding the historical facts and untangling the intricacies of the victimization that occurred during Japan's annexation of Korea. In essence, this can be understood as "the application and understanding of international law from a Korean perspective."

However, the issue is whether this "application and understanding of international law from a Korean perspective" will be adopted as an international norm. Scholars from third-world countries, including newly independent countries, have critiqued the legal principles set forth by contemporary international legal institutions that uncritically permit past imperialistic states' indiscriminate territorial expansion, particularly in the context of territorial disputes. Such critiques, as seen through positivist and functionalist judgments, have not received much sympathy from within the international law academy—moreover, there is currently no compelling alternative discourse being put forth. Therefore, overcoming the duality of acknowledging the need to advocate for the legitimacy of applying international law from a Korean perspective and recognizing the inevitable limitations that may arise in this process is expected to serve as an alternative in addressing Korea's historical issues. However, concerns remain regarding the potential lack of success in this endeavor.