Refugee Status Determination Procedure and Recent Trends of Refugee Issues in Japan

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I. Introduction

About a quarter of a century has passed since Japan acceded, in 1981, to the Convention relating to the Status of Refugees, adopted in 1951 (hereinafter referred to as 1951 Convention), and the Protocol relating to the Status of Refugees, adopted in 1967 (hereinafter referred to as 1967 Protocol. Refugee Convention is sometimes used below as a generic term to refer to the 1951 Convention and the 1967 Protocol.).

Japanese attitude towards refugees has consistently been negative and therefore has been criticized from within and outside Japan. Although we can see some positive changes, including the first amendment of the legislation concerning refugees since Japan's accession to the Refugee Convention, lawyers who are involved in refugee cases are still struggling to improve refugee determination system and the situations of refugees and asylum seekers in Japan.[1]

Given these circumstances, in this report, I give an overview of Japan's refugee status determination system through basic data, introduce the amended legislation of refugee status determination, and finally, examine the latest situations of refugees and asylum seekers1 and the challenges they face.

II. Overview

i. Statistics

Since its accession to the Convention until the end of 2004, over a period 23 years, Japan has recognized 330 out of a total of 3,544 applicants.[2] Although the percentage of recognition of refugee status might appear not to be very small, it is evident, for the following two reasons, that this is not the case. Firstly, considerable number of people who have been recognized as Convention refugees are Indochinese

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1 In this report, the word "an asylum seeker" is used to refer a person who seeks protection as a Convention refugee, including a person who has been denied refugee status in the initial procedure and the appeal procedure but still seeks protection in the court procedure and others, and the word "a refugee applicant" is used to refer a person whose case is pending in the initial procedure or the appeal procedure.

2 Press Release by the Ministry of Justice (Feb. 27, 2004), *available at* http://www.moj.go.jp/.

refugees. Not a few of them are people who had already been granted resettlement in Japan by a political decision of the Japanese government but applied for refugee status seeking the protection provided exclusively for Convention refugees.[3] In contrast, Japan granted only one person refugee status per year in the mid 1990s. Secondly, as evident from the small number of applicants, most of refugee applicants are considered to be people who seriously fear persecution rather than people who abuse refugee status recognition system. In fact, there is no merit in "abusing" refugee recognition procedure, considering the fact that asylum seekers are given almost no right even if they apply for refugee status and that the possibility of being recognized as a refugee is tremendously low.

ii. Refugee Status Determination System and its Problems

a. Refugee Status Determination System

With its accession to the Refugee Convention, Japan changed the Immigration Control Act into the Immigration Control and Refugee Recognition Act (hereinafter referred to as Immigration Act) and provided for the determination system of refugee status under the Act in 1982.

Under the system, the Ministry of Justice has the legal authority to decide refugee status in the initial procedure and the appeal procedure. The actual procedure is as follows.

A. Initial Procedure

A foreigner who is going to apply for refugee status submits the form of application for refugee status at a Regional Immigration Bureau. Once an application is processed, a Refugee Inquirer, designated by the Minister of Justice to inquire into facts regarding recognition of refugee status, conducts interviews of the refugee applicants. Other than conducting interviews, it is unknown to what extent Refugee Inquirers actually inquire into the facts of individual cases, for example, in terms of collecting country information. After the inquiry is complete, documents of the refugee applicant are sent to the head office of the Immigration Bureau along with the opinion of the Refugee Inquirer as well as that of the head of the Regional Immigration Bureau to which the Refugee Inquirer belongs. Refugee applicants are

3 In fact, the ratio of recognition of Indochinese refugee applicants is surprisingly high. According to a survey, from 1982 to 1987, the numbers of refugee status applicants whose nationalities were Vietnam, Cambodia, and Laos were 370, 144 applicants out of which were recognized as convention refugees.

not informed of these opinions and how much these opinions are given weight in the determination of refugee status is completely unclear. The process after documents are sent to the head office of the Immigration Bureau is also unknown. It is known that the head office of the Immigration Bureau sometimes conducts a separate inquiry in individual cases and in some cases the result of the inquiry has an important effect on the refugee status determination.[4] However, refugee status applicants are not given opportunities, even during the appeal procedure, to examine all the information that the head office of the Immigration Bureau has in connection to his/her case, nor are given opportunities to explain or rebut information developed after the case was transmitted to the head office of the Immigration Bureau. Such a procedure tends to lead to not only unfair but also inaccurate determinations.[5] Finally, the Director of the Immigration Bureau determines refugee status in almost all cases, instead of the Minister of Justice.[6] The applicant is given a written decision. If the applicant is recognized as a refugee, no reason is written in the decision. If the applicant is denied refugee status, the decision includes reasons to refuse his/her refugee status. However, in most cases, it is unlikely that applicants can know the actual reasons for rejection through the decision notice because the reasons stated are very brief (the written decision is one piece of paper, including, at the most, several lines that describe the reason(s) for rejection.).

Representation by lawyers is not allowed in the initial procedure.

B. Appeal Procedure

If an application is declined, the applicant may file an appeal of the findings. The appeal system had been criticized because of its inefficiency. Appellants must file their appeals with the Minister of Justice, the same person as one who decides refugee status in the initial procedure. The following processes remained almost the same as those of the initial procedure, except that representation by lawyers is

4 *See* Statement by Prime Minister Junichiro Koizumi in the Diet (the 154 session) in responding to questions relating to Convention refugee recognition system in Japan by the House of Representatives member Tetsuji Nakamura, *supra* note 20.

5 For instance, in one of the cases I dealt with, an applicant was refused recognition of refugee status partly because "there is no persecution for the reason of race based on the relevant information including documents issued by UNHCR." In response to my request to show us "documents issued by UNHCR" at the appeal procedure, the Refugee Inquirer replied that he did not know what documents they were because the head office of the Immigration Bureau collected them and therefore he did not possess them.

6 According to Homusho Bunsho Kessai Kitei [Instruction for Approval on Documents of the Ministry of Justice], the Minister of Justice decides only "important cases" and the Director of the Immigration Bureau decides "general cases."

allowed in the appeal procedure. However, the appeal system was partially amended by the revision of the Immigration act, as described later.[7]

b. Inherent Problems in the System

Experts have pointed out the following underlying problems in the system.

A. Inadequate Expertise

Refugee Inquirers have been criticized for their lack of expertise in refugee issues. This is a natural consequence stemming from the short-term assignment and its non-independence from the Immigration Services. The term of office of Refugee Inquirers, who are appointed by Immigration Inspectors, is usually for two or three years. They are transferred from a section dealing with immigration control and go back to different section after their term. As of July 1, 2002, the number of Refugee Inquirers was 44, out of which only 4 persons were full-time Refugee Inquirers (the rest of them are concurrently engaged in work as Immigration Inspectors.)[8] Although the Immigration says it gives sufficient training to Refugee Inquirers, some staggering cases have been reported. In one case, the Refugee Inquirer did not know the phrase "a particular social group," which is one of the most basic technical phrases in the refugee recognition. In yet another case, the Refugee Inquirer misunderstood "Taliban" as a name of an ethnic group, not a name of a regime.[9]

B. Non-Independence from the Immigration Services

Another problem is that services relating to refugees is completely incorporated into the immigration services and is not independent from it. The system wherein immigration officers who have been trained to deal with immigration matters concurrently hold a post relating to refugee matters inevitably has a risk that fair refugee status recognition is obstructed by the immigration control.[10]

C. Lack of Transparency

7 If an appeal is also declined, the applicant may seek judicial review of the decision with a District Court. There is no provision in the Japanese administrative law which limits judicial review to specific cases, for example, cases where points of law or material facts are at issue.

8 Written statement by the Prime Minister Junichiro Koizumi in the Diet (the 154 session) in responding to questions related to Convention refugee recognition system in Japan by the House of Representatives member Tetsuji Nakamura (Aug. 27, 2002), *available at* http://www.shugiin.go.jp/itdb_shitsumon.nsf/html/shitsumon/b154195.htm.

9 Survey by the Japan Lawyers' Network for Refugees ("JLNR").

10 In *Z v. Minister of Justice*, the Tokyo District Court criticized the attitude of the Refugee Inquirer who interviewed the plaintiff that the Refugee Inquirer treated the plaintiff with the skepticism that his application was false and concluded that such skepticism was one factor which led to wrong denial of his refugee status. *Z v Japan* (Tokyo District Court, Apr. 9, 2003).

Lack of transparency is unfortunately one of the characters of the Japanese refugee system. First, as explained earlier, the process of recognition after the case is sent to the head office of Immigration Bureau is not made public. As a result, refugee applicants are deprived of opportunities to effectively prove their eligibility of refugee status. As they have no way of knowing which points the Minister of Justice (the Immigration Bureau in practice) has doubts regarding their eligibility of refugee status or the credibility of their claims, they cannot clarify those crucial points or obtain effective legal support to strengthen their claim. Second, substantial reasons for recognition or denial are not clear because reasons written in the decision statement are too brief. Finally, as lawyers are not allowed to attend interviews of applicants in the initial procedure, what actually happens in the first procedure, especially in interviews, is also almost completely unknown. This hinders improvement of the quality of refugee status determination because it makes it impossible for outsiders to know what is going on inside and therefore makes it difficult for outsiders to understand what is problematic and what should be done.

III. Recent Amendment of the Legislation Concerning Refugee Determination System

i. Background and Outline of the Amendment

On May 8, 2002, the so-called "Shenyang incident" occurred. The incident took place in Shenyang, China. Five people from North Korea ran into the Japanese Consulate to seek asylum, but were forcefully taken away by armed Chinese police officers who had entered the site of the Japanese Consulate. During this occurrence, a Japanese Consulate officer just stood at the gate, merely picked up a Chinese police officer's cap, and literally did nothing to prevent the North Korean people from being taken away from the site. This incident made a great impact on most Japanese. Subsequently, it was also disclosed that the Japanese Ambassador had instructed the Japanese embassy officers to "kick out" people who had escaped from North Korea and entered the Japanese embassy.[11] This so-called "Shenyang incident" triggered criticism toward Japan's negative stance on asylum seekers among Japanese and brought momentum toward a reform of Japanese policy regarding refugees. Thus, sections of the Immigration Act dealing with refugee issues was amended last year

11 Kyodo News, May 10, 2002.

for the first time since Japan's accession to the Refugee Convention, and the amendment was executed this May.

The main points of the amendment are: a) abolition of the 60-day Rule, b) introduction of the system of refugee examination counselors, c) creation of the system for permitting provisional stay.[12]

ii. Abolition of 60-day Rule

Under the previous Immigration Act, there was a rule called "60-day rule" which, in principle, obligated refugee applicants to submit applications for refugee status within 60 days after the day of landing in Japan. Since the introduction of refugee status recognition system, many Convention refugees had been denied recognition of refugee status because of this rule. The amendment abolished this rule which experts regard as a positive change.

iii. Introduction of the Refugee Examination Counselors System

The amendment also reviewed the appeal system, which had been criticized for its ineffectiveness. Through the amendment, refugee examination counselors were newly introduced "for the purpose of increasing equity and neutrality in the refugee recognition procedure", according to the Ministry of Justice. Refugee Examination Counselors, appointed by the Minister of Justice, participate in the appeal procedure as third parties. The Minister of Justice shall consult with the Refugee Examination Counselors although they do not have authority to decide refugee status.

iv. Creation of the System for Permitting Provisional Stay

Under the previous system, the refugee recognition procedure was completely separated from the deportation procedure, and therefore refugee applicants who did not have status to stay in Japan were subjected to deportation procedure while their refugee recognition procedures were being carried out. The amendment partially solved this problem by permitting provisional stay to refugee applicants who satisfy certain conditions. However, "permission of provisional stay" is not a status to stay per se and refugee applicants who are permitted provisional stay are not allowed to work.

IV. Current Situation and Challenges

i. Limited and Biased Recognition

12 There are other revised points such as stabilization of the legal status of non-nationals with no status to stay who have been recognized as refugees.

As mentioned earlier, the number of refugee recognition is extraordinarily small in Japan. In addition, few refugee status applicants except Indochinese and Burmese applicants have been granted refugee status. For example, in 2002, the major nationalities for refugee status applications were Burma (Myanmar), Turkey, Iran, and China, in decreasing order.[13] According to the statistics of United Nations High Commissioner for Refugees (UNHCR), the worldwide percentages of refugee status recognition of applicants who have these nationalities are not low.[14] Nevertheless, five out of six people who were recognized as refugees in the initial procedure in Japan in 2002 were Burmese.[15] That is, only one person, other than Burmese, was recognized as a refugee in the initial procedure last year. For instance, of the 334 refugee status applications by Kurds whose nationality is Turkish that have been filed from 1999 to 2003, none of them have been granted refugee status.[16] These numbers trigger a reasonable doubt that not a few bona fide refugees have been unfairly rejected their refugee status.

On the other hand, it should be noted that many denials of refugee status have been reversed at the judicial review. For example, the Lawyers' Group for Burmese Refugees, to which I belong, received seven cases at the Tokyo District Court in 2004 and won all of the cases. This fact also shows that the Immigration Bureau unfairly excludes bona fide refugees from refugee status.

ii. Lack of Asylum Seekers' Right of Subsistence

Asylum seekers in Japan are virtually deprived of right of subsistence. Even if a refugee applicant is permitted provisional stay, the applicant cannot work. Although there is a financial support system for refugee applicants by an extra-governmental organization, the total amount of money allocated to the system is too little to cover all refugee applicants.[17] In addition, once the administrative

13 Press Release by the Ministry of Justice, *supra* note 2.
14 Table 8 of Asylum Applications and Refugee Status Determination by Origin, 2002, 2002 statistics on asylum-seekers, refugees and others of concern to UNHCR, *available at* http://www.unhcr.ch/static/statistics_2002/asr02-dr2-Table8.pdf. This table shows that in 2002 7,314 Chinese applicants were recognized as refugees, 21,729 Chinese applicants were rejected, 5,397 Iranians were recognized, 12,747 Iranians applicants were rejected, 4,280 Turkish were recognized and 24,654 Turkish were rejected.
15 Press Release by the Ministry of Justice, *supra* note 2. The Ministry of Justice does not publish the nationality of people who were recognized as refugees at the objection procedure.
16 Takeshi Oohashi, Situation of Kurds whose nationality is Turkish in Japan (Mar. 31, 2004) (on file with author). Only two of them have been granted special permission to stay.
17 For instance, in 2000, only 25 refugee applicants out of 216 refugee applicants who applied for refugee status that year received the support.

procedures of an applicant are over and his/her case is brought to court, there is no available financial support system for such applicant. Considering the fact that many denials of refugee status by the Minister of Justice are reversed by the judicial review, this is a serious problem.

Under such situation, it is clear that refugee applicants cannot live without working, and the Immigration Bureau have tolerated labor in practice. However, such an attitude has been changed more severely. A Burmese refugee applicant whose case was pending at the Tokyo District Court was detained this January because he had been working.[18] This was the first case where an asylum seeker was detained because the person was engaged in labor. He is still being detained now. However, how could anyone in the same condition as he possibly live without working?

Furthermore, as we will see the next paragraph, in Japan, especially in Tokyo, detection of non-nationals with no legal status to stay has become more and more serious. Recently, 10 people such as executives and managers working for a company were arrested because the company hired 11 non-nationals without legal status to stay including refugee applicants.[19] Since then, it has become more difficult for refugee applicants with no status for residence to find jobs.

Almost all developed countries that are parties to the Refugee Convention allow refugee applicants to work or otherwise give financial support.[20] In contrast, the present Japanese policy implies that asylum seekers should live on air. Such inhuman attitude is impermissible.

iii. Toughened Detection and Long-Term Detention

a. Detection

In Japan, especially in its capital, Tokyo, detection of non-nationals who do not have status to stay has been strengthened.[21] It is no exaggeration to say that

18 A group of lawyers who deal with refugee cases, to which I also belong, has brought his case to court to claim for the withdrawal of his detention.
19 Yomiuri Newspapers, July 12 2005.
20 Refugee Assitance HeadQuarters of the Foundation for the Welfare and Education of the Asian People, Report of the Research on Reception Centers et al., for Refugee Recognition (Asylum) Applicants in European Countries (March, 2003), *Id*, Report of the Research on Support Systems et al. for Convention Refugees and Refugee Recognition (Asylum) Applicants in Spain, Portogal and Italy (April, 2004).
21 This tendency has become evident especially since "the Joint Statement on intensifying measures against illegal staying non-nationals in the capital, Tokyo, by the Immigration Bureau, the Tokyo Regional Immigration Bureau, the Tokyo Metropolitan Government, and the Tokyo Metropolitan

nowadays policemen question every foreigner who "seems" to stay illegally. Once they find that the foreigner has no status to stay, they arrest the foreigner in principle. Refugee applicants are also sometimes arrested because basically the policemen do not treat refugee applicants differently from other overstays or illegal entrants. Such situation wherein refugee applicants are arrested is one example of the worsened situation concerning asylum seekers, because until recently, refugee applicants had not been arrested.

b. Detention

Once refugee applicants are arrested, they are transferred to the Immigration at some point. In most cases, deportation orders are issued for them, and once deportation order is issued, the Immigration Bureau can detain a foreigner without any time limit until deportation is executed. If a foreigner files a lawsuit with the court, the Immigration Bureau permits provisional release at some point. However, permission of provisional release is totally discretionary and it is not rare that a foreigner is detained for over a year.

iv. Problems with Practice of the New Appeal System

It is a progress that third parties have become involved in the refugee recognition procedure, albeit partially. However, the amendment is far from enough in that the Ministry of Justice still holds the ultimate authority to decide on refugee status. Another problem is that there are few experts in refugee law among the Refugee Examination Counselors who have been appointed by the Minister of Justice.

Furthermore, the most urgent issue in the new appeal system is its practice. By introducing the system of the Refugee Examination Inquirers, the Immigration Bureau is planning to change the actual procedure. That is, the Immigration will not conduct interviews to appellants, which were previously conducted for as long as couple of days maximum or at least for half a day under the previous appeal system. On the other hand, the Immigration Bureau stubbornly refuses to disclose any document collected in the initial procedure, including written records produced by Refugee Inquirers of what refugee applicants stated in the interviews. As a result, appellants' lawyers have to prepare for the appeal procedure without any background document, because, as mentioned earlier, lawyers are not permitted to represent

Police Department. The Joint Statement is available at http://www.metro.tokyo.jp/INET/OSHIRASE/2003/10/20dah400.htm.

refugee applicants or attend their interviews at the initial procedure. It is impossible to make the appeal procedure effective under this situation. Hence, the Japan Lawyers' Network for Refugees (JLNR),[22] a voluntary group of lawyers who deal with refugee issues, notified the Immigration Bureau of boycotting the procedure until it accepts to disclose documents collected at the initial procedure.

V. Conclusion

Thus, though the first amendment of the legislation regarding refugee determination system was carried out, substantial improvement is yet to be seen and Japan's refugee status determination system is still in an infant stage. In fact, we see situations of asylum seekers worsening in some points. Hence, lawyers who deal with refugee issues will keep fighting to obtain better protection for Convention refugees and endeavor to construct a proper Refugee Status Determination System in Japan.

22 JLNR was founded in 1997 for the purpose of information exchange among lawyers who deal with refugee issues. Lawyers who belong to JLNR have dealt with all cases in which applicants were recognized as refugees, and as far as I know, lawyers fully supported them.

Call for Global Struggle Against Multinational Corporations

Haruki Fukuchi
Japanese Workers' Committee for Human Rights
NGO in special consultative status with the Economic and Social Council of the UN

My name is Haruki Fukuchi. I am not a lawyer. About five years ago I retired from the People's Life Finance Corporation,[1] and I'm a pensioner now. Because of unjust discrimination in the form of unfair labor practices against me for my labor union activities during my working years, I went to court and currently I'm in the 19th year of litigation, which is now in the Supreme Court.

But I'm not here to tell you specifically about my case. As the deputy director-general of the Japanese Workers' Committee for Human Rights I have participated in the struggles of many workers, and I found that when business entities which include transboundary companies — that is, multinational corporations — cross national borders, they ignore laws and infringe the human rights of workers in the affected countries. Today I want to call for joint struggle against this situation.

UN High Commissioner for Human Rights Louise Arbour visited Japan in November 2004, and in a speech called attention to the problem of multinational corporations. She noted that when speaking of the connection between human rights and economic development, we must determine the human rights responsibilities of non-state economic actors, and that there are vital issues regarding the human rights-related roles and responsibilities of business entities which include transnational companies. She also spoke of the Global Compact proposed by Secretary-General Annan.

In an address at the World Economic Forum in 1999, Secretary-General Annan proposed the Global Compact and urged business leaders to accept universal principles in the areas of human rights, labor standards, and the environment. As of February 2005, participating organizations worldwide number 1,981. On February 23, 2004 Mr. Annan attended a meeting held by Nippon Keidanren, where he asked that business leaders support the Global Compact and make a definite commitment to its principles, but only 28 Japanese companies have signed on, and there is no participation from leading companies.

To my knowledge, cases in which multinationals have been taken to court over labor disputes in Japan include Hilton Hotels, Nestlé, AIG Star Life Insurance (ALICO Japan), and Showa Shell Sekiyu.

The problem shared by all these cases is that perhaps owing to susceptibility to outside pressure, it is almost impossible to win in court, and even if victory is barely achieved, it does not lead to a resolution of the dispute. This is because Japanese branches of multinationals have no one in authority. They can do nothing without orders from the home country or home office. Something else common to these cases is that treatment of workers involves widespread human rights abuses that are probably impossible in the companies' home countries.

1 A semi-government corporation which lends money to small and medium enterprises and to individuals.

In that light, what about the actions of major Japanese corporations operating in South Korea, China, Southeast Asia, and other parts of Asia? I had an opportunity to find out a little about the Citizen Watch Co., which is based in Tanashi City. Citizen built a factory in South Korea and hired local workers at low wages. When wages rose due to the groundswell in the South Korean labor movement, Citizen suddenly closed that factory and moved operations to China. I presume that in China the company hired farmers who migrated to the city, and pays them low wages. In the resulting labor dispute, the Korean workers who lost their jobs came to Japan and presented their demands at Citizen's home office in Tanashi. I went there in their support.

Although the home office listened to their demands, officials gave the evasive answer that they would "take action after getting detailed information on the local situation." The home office just doesn't issue directives to responsibly resolve the dispute.

Although one cannot at all make a positive assertion from these examples, I think it's possible to make the following point.

Business entities which include transnational companies take advantage of the non-globalized weakness of workers and citizens by coolly violating workers' human rights if they are in other countries, and profit by doing it. Should problems emerge, they avoid responsibility with evasive excuses such as "The home office is responsible," or "The problem has to be solved locally."

Japanese companies are said to cause pollution by exporting pollution to other parts of Asia and discharging untreated effluent from local factories.

It is hard to believe that companies which dump waste outside are protecting human rights inside. It makes more sense to imagine that while polluting outside, they repress human rights inside through worker exploitation. It seems to me that anti-Japanese feelings smolder under such conditions.

There were widespread anti-Japanese demonstrations over the issues of differing perceptions of history and Japan's attempt to become a permanent UN Security Council member. And in Japan efforts to amend the constitution have been accelerated.

To have an accurate perception of history, Japan has to affirm to other Asians that it will completely abide by its constitution, but the current government is heading toward constitutional amendment. They want to change Article 9 and make the Self-Defense Forces official. One imagines that other Asians will wonder if Japan will invade again.

Japanese companies come and set up operations, emit pollution, repress the human rights of those who are hired — and maybe even the Japanese military will come. I think these feelings are behind the anti-Japanese demonstrations.

Even when business crosses national borders, international human rights conventions are supposed to be applicable everywhere on the planet. We have to make business entities which include transnational companies abide by these conventions.

I shall close by proposing that to advance peace and human rights, we the people join hands across national borders and together struggle against the multinational corporations.

多国籍企業に対しグローバルな闘いを進めよう

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国連経社理特別協議資格ＮＧＯ
JAPANESE WORKERS' COMMITTEE FOR HUMAN RIGHTS
NGO in special consultative status
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私は、福地春喜と申しまして、法律家ではありません。一市民であり、５年前に国民生活金融公庫(*) を定年退職し、今では年金生活者です。在職時代に、労働組合活動をしたが故の不当な差別（不当労働行為）を受けたため、裁判となり、今なお 19 年目の法廷闘争を続けています。現在、最高裁判所で係属中です。

ところで、私はここで裁判の中味を訴える予定はありません。国際人権活動日本委員会の事務局次長として、多くの労働者の闘いに参加してきたのですが、私は、国境を越えた企業を含む企業体、すなわち多国籍企業が、国境を超えると法を無視して、それぞれの国の労働者の人権侵害をしていることを知りました。この現実に対して、共同して闘って行こう、と訴えたいのです。

さて、 2004 年 11 月、国連の人権高等弁務官ルイーズ・アルブールさんが来日されました。彼女は、講演のなかで、´国境を越える企業´についても問題提起されました。「人権と経済的発展の課題のつながりを語るとき、私たちは国家ではない経済的行為者たちの人権責任を明らかにする必要があります。」「国境を越える企業を含む企業体の人権のうえでの役割と責任に関する重要な問題があります。」と。そして、アナン事務総長の提唱したグローバルコンパクトにふれられました。

1999 年、アナン国連事務総長は、世界フォーラムで「グローバルコンパクト」（Global Compact）を提唱し、経済界のリーダーに人権・労働基準・環境の分野での普遍的な原則を受け入れるよう呼びかけました。2005 年２月現在、世界では 1981 団体参加しています。2004 年２月 23 日、同事務総長は、日本経団連主催の会合に出席し、財界リーダーが、グローバルコンパクトを支援し、その諸原則に

対する明確なコミットメントを約束するよう求めましたが、日本は28社にとどまり、リーディングカンパニーと称されるようなところは参加していません。

現在、日本国内で多国籍企業を相手に争議（裁判）をしているところは、私の知っている範囲では、次のようなところがあります。

ヒルトンホテル，ネッスル，ＡＩＧスター生命（アリコジャパン），昭和シェルなど。

ここに共通している問題は、外圧に弱いというか、なかなか裁判で勝てないこと、辛うじて裁判で勝っても争議の解決には至らない、ということです。日本支社には権限のある人がいないので、解決に至らないわけです（本国・本社からの指令がないと何もできない）。労働者に対する仕打ちは、およそ本国ではできないような人権侵害が蔓延していることも共通しています。

然らば、アジア（韓国，中国，東南アジア等々）に進出している日本の（大）企業は、現地でどのようにしているであろうか。田無市に本社があるシチズン社に関して、私は若干知り得る機会を得ました。シチズン社は、韓国に工場を作り、現地の労働者を低賃金で雇い、生産をしていました。韓国での労働運動が昂揚して、賃金が上昇してきたら、シチズン社はいきなり韓国工場を閉鎖して、工場を中国に移してしまったのです（察するに、中国で農民籍の都市流入者を低賃金で雇ったのであろう）。失職した韓国の労働者らは争議となり、日本に来て、田無市での本社要請行動を行いました。この要請行動に私は支援に出かけたのでした。

本社は要請に応じたものの、「現地から詳しく状況を聞いたうえで対処する」とのことで、逃げ口上でした。責任もって争議を解決するよう本社から指令を出すようにはなかなかならないのです。

上述程度の事例から断言は全くできないことですが、次のような問題提起はできるのではないでしょうか。

国境を越える企業を含む企業体は、労働者・市民側がグローバル化していない弱点を突いて、およそ本国ではできないような労働者いじめ（人権侵害）を、国境を越えると平気で行い、収益をあげ、問題が顕在化しても、やれ本社の責任だ、やれ現地で解決を、と言い逃れて、責任回避している、と。

公害問題では、日本企業はアジア各地に公害を輸出し、また進出した現地工場では廃水をタレ流して、公害が発生しているといわれます。

外にタレ流している企業が、内にあっては労働者の人権を守っているなどとは到底考えられません。外では公害問題、内では人権弾圧（労働者をこき使っている）と想像するのが自然です。反日感情はこうした状況のなかでくすぶっている、と私は察しています。

歴史認識問題やら安保理常任理事国入り問題やらで、反日デモが広範囲に起こ

りました。そして日本国内では改憲の動きがスピードアップしてきています。

歴史認識を正確にするなら、アジアの人々に対して、日本国憲法を「守り通す」と言い切ることになるものでしょう。なのに、日本の現政権は、改憲の方向です。憲法９条を変えて、自衛軍を創設するという。アジアの人々からすれば、また日本が侵略してくるのか、と思えてくると想像するものです。

現に、日本の企業が進出してきて、公害発生、雇われれば人権弾圧、はては日本軍がやってくるようになるのではないか。この感情が反日デモの背景だと思うものです。

国際人権条約は、国境を越えようが、地球上どこにあっても適用されるものであるはずです。国境を越えた企業を含む企業体に対して、この条約を守らせるようにしようではありませんか。

最後に、私は平和・人権の向上のために、国境を越えて私たち市民（people）が手を結び、多国籍企業に対して、共同の闘いを進めようと呼びかけて、終わりといたします。

（＊）国民生活金融公庫（Peoples' Life Finance Corporation ）
＜中小企業向け政策金融を行う政府関係特殊法人＞
a semi-Government corporation; lending money for smaller enterprises
and peoples

Lawsuit Against Troop Deployment to Iraq Opens Way to the Right to Peaceful Coexistence in Asia

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1. Article 9 of the constitution and SDF deployment to Iraq

(1) After going through the catastrophic aggression and damage of World War 2, Japan guaranteed the right of the Japanese to live in peace and declared peaceful coexistence with the peoples of the world, especially those of Asia, in the Preamble to its new postwar constitution: "We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want." Article 9.1 says, "The Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes," while Article 9.2 provides that for that purpose Japan will not maintain war potential or recognize the right of belligerency of the state.

Tohoku University Professor Miyoko Tsujimura comments on the significance of this, saying, "Being the first in the world to anticipate what might be called the modern form of pacifism, Japan's constitution guaranteed the renunciation of war, no military force, and the right to live in peace. This right to live in peace is known as 'a third- or fourth-generation human right,' and is a 'new human right' of the 21st century" (Nihon Hyoronsha, *The Constitution*, p. 102).

(2) But the Self-Defense Forces Act was enacted in 1954 on the occasion of the Korean War, and the Ground, Maritime, and Air Self-Defense Forces (SDF) were created with the mission of "protecting Japan against direct and indirect aggression to preserve Japan's peace and security." Over the ensuing 50 years the SDF have been criticized for violating the constitution because they correspond to "war potential" under Article 9.2, but the government has continued taking an "exclusively defense-oriented posture" which holds that it is constitutional to maintain a self-defense capability that is "the minimum needed for self-defense." To maintain this posture the government has pledged to the citizens that, among other things, it bans overseas deployments, will not exercise the right of collective self-defense, and will strictly observe the three non-nuclear principles. In principle this has not changed. The Gulf War occasioned the Peacekeeping Operations Law, under which SDF minesweepers were sent to the Persian Gulf in 1991, and SDF troops were sent to Cambodia in 1992, but it was nevertheless not anticipated that heavily armed land forces would be deployed.

(3) But in July 2003 Prime Minister Koizumi succeeded in passing the "Special Measures Law on Implementing Humanitarian Reconstruction Support Activities and Security Support Activities in Iraq (Iraq Special Measures Law)," and on December 8 the Cabinet approved the "Basic Plan for Measures Pursuant to the Iraq Special Measures Law." The government began SDF deployment that month and Ground SDF deployment in January 2004. Ground SDF troops carried recoilless rifles, portable antitank guns, and other heavy weapons, formulated rules of engagement, and made ready for action. In view of the constitutional principles in Article 9.2, under the the Iraq Special Measures Law, SDF deployment is limited to "noncombat zones," but the current Iraq situation clearly shows that this requirement is not met.

Participation in the coalition was supposedly on June 28, 2004 when sovereignty was transferred back to Iraq, but the government had said participation was impossible because it would mean exercising the collective right of self-defense.

Owing to this situation, the pacifism and people's right to live in peace under Article 9 are moribund.

2. Minowa's determination and the cooperative response of lawyers

(1) As part of the above sequence of events, in January 2004 the order to deploy went to the Ground SDF advance unit, consisting mainly of members of the GSDF Northern Army's 2nd Division, headquartered in Asahikawa, Hokkaido. Mr. Noboru Minowa, a former Liberal Democratic Party (LDP) Diet member representing Hokkaido filed a lawsuit for an injunction on SDF troop deployment to Iraq. Minowa was 80 years old at the time. He had served a total of eight terms and 23 years for the ruling party in the House of Representatives, holding important posts including minister of posts and telecommunications, parliamentary vice minister of defense, chairperson of the House of Representatives Special Committee on Security, chairperson of the LDP Defense Committee Subsection, and assistant secretary-general. As such, he has personified the constitutional interpretation of "exclusively defense-oriented posture" and defense policy (he left the Diet in 1990).

(2) From the time minesweepers were sent to the Gulf War, Minowa has continued to insist that the SDF cannot be sent abroad except "When the prime minister considers it necessary to defend the nation against armed aggression from the outside, or when there is a clear and imminent danger of an armed attack" (Self-Defense Forces Act, Article 76.1), and that Japan practices "diplomacy without bloodletting." With the sending of troops to Iraq, Minowa decided to file the lawsuit due to a strong sense of crisis and mission.

When Minowa found out that the Japan Federation of Bar Associations and the Sapporo Bar Association oppose the contingency legislation and troop deployment to Iraq, he asked for their cooperation. Like-minded lawyers responded, and 109 lawyers — which is more than one-fourth of all the lawyers in Hokkaido — became volunteer counsels.

At the first conference of lawyers Minowa spoke of his resolve: "I'm dedicating the rest of my life to stopping the overseas deployment of the Self-Defense Forces." Kiyohiko Koike, former director of the Defense Agency's Bureau of Education and Training (currently mayor of Kamo City in Niigata Prefecture) came to lend encouragement. This illustrates the serious situation facing pacifism in postwar Japan.

3. Other lawsuits

Led by the Minowa lawsuit in Hokkaido, another lawsuit was filed in Nagoya this February. Several additional actions brought the number of plaintiffs to over 3,000, making it the biggest citizen lawsuit ever. One of the plaintiffs is Naoto Amagi, who was the ambassador to Lebanon when the US and UK launched their attack on Iraq, and was as much as sacked for expressing to the authorities his opposition to Japan's support for the war.

The Tokyo lawsuit started in March. Its plaintiffs include a person who was detained in Iraq in April 2004, billed by the Japanese government for rescue costs when arriving back in Japan after being released, and suing for confirmation of no debt owed the government.

In April the Osaka lawsuit was filed. With well-known culturati such as Minoru Oda and Shunsuke Tsurumi in the lead, it has developed into a citizen lawsuit of over 4,000 plaintiffs. Two Iraqis living in Iraq are plaintiffs in an additional action.

In May citizens filed a troop deployment injunction lawsuit in Shizuoka Prefecture, and in July there was the filing in Osaka of a suit for an injunction on fund disbursement for troop deployment. On August 6, the anniversary of the Hiroshima atomic bombing, a lawsuit was filed in Yamanashi Prefecture. Plaintiffs in the Yamanashi lawsuit include NGO workers who had worked in Iraq. They claim that Japan's entry into the war infringed their rights by making it hard for them to conduct their activities.

In December lawsuits were filed in Utsunomiya City, Tochigi Prefecture, and Sendai City in Miyagi Prefecture. Especially notable is the Sendai lawsuit because 40% of the lawyers belonging to the Sendai Bar Association are counsels. In addition to the injunction lawsuit there is another filed by local citizens who, on the grounds of unconstitutionality, demand the return of public funds used by the mayor when attending a send-off party for SDF personnel. In 2005 there were more troop deployment injunction lawsuits: Okayama in January and Kumamoto/Kyoto in March, bringing the total to 13 suits in 11 courts. These are now Japan's largest-ever class-action suits. It is an indication of the earnestness of the citizen-sovereigns, who do not want to be the wrongdoers in a war of aggression against Iraq, and who feel they must do something to defend Article 9.

4. Characteristics and significance of the lawsuits

(1) Modern development of pacifism and the right to live in peace

Constitutional lawsuits had previously been filed over SDF overseas deployment. Injunction lawsuits at the time of the Gulf War on sending minesweepers and on disbursing war costs of $9 billion (which later ballooned to $13 billion) were filed in five places: Tokyo, Osaka, Fukuoka, Kagoshima, and Nagoya. Other lawsuits concern the unconstitutionality of sending troops to Cambodia (Osaka), the unconstitutionality of peacekeeping operations (Tokyo, Nagoya), the unconstitutionality of Golan Heights peacekeeping forces (Tokyo, Osaka), and the unconstitutionality of the Terrorism Special Measures Law (to support the US attack on Afghanistan). In all there are over 10.

These lawsuits are pioneering initiatives which pressure the courts to make constitutional judgments, while giving new significance to the right to live in peace as recognized by Sapporo District Court in the Naganuma Nike Missile Base lawsuit, which ruled that the SDF are unconstitutional. But sending troops to Iraq differs greatly from previous overseas deployments.

First, the form of "war" or "international dispute" has changed greatly. 9/11 served as the occasion for President Bush to shift "the fight against terror" into "war," which morphed from a concept of confrontation between nations into a concept that came to include all kinds

of conflicts by international terrorist organizations, and by ethnic, religious, and political groups. In that sense sending SDF troops to Iraq is certainly participation in a new "war."

Second, the situation developed in a way that no one had anticipated: the heavily armed SDF are sent to Iraq without any connection to Japan's defense, and participates in the coalition. Even Noboru Minowa, who was known as a hawkish politician, took action in anger, asking, "When did the government change its view?" This is a serious crisis for constitutionalism and the rule of law.

Third, emphasis in previous lawsuits has been on the use of the citizens' taxes and their rights to not be a part of war and to not be a wrongdoer. But Japan was named as an object of attack by those who perpetrated the Madrid train bombing, and in Iraq there have been five hostage victims and six deaths from attacks, for a total of 11 people sacrificed already. Thus in relation to Iraq troop deployment, the right to not be killed and the right not to be a victim have also become real issues, and the mutual nature of "not killing" and "not being killed" under conditions of war has ironically come to the fore.

(2) Awakening the role of the judiciary in constitutionalism

With these serious constitutional violations happening before our eyes, the courts — which are supposed to be the protector of the constitution and guardian spirit of constitutionalism — face demands from all parts of the country to exercise the authority invested in them, yet they do not use it, and do nothing about these unconstitutional acts. Therefore they are abandoning their duty. Especially once a war starts, protecting the human rights of each individual becomes meaningless. We would like judges to squarely address the special significance and character — which we hold to be a right-of-resistance character — of this key human right, which is on a totally different plane from individual human rights violations and the remedying of those violations. We think that seeking constitutional judgments on the right to live in peace is actually none other than the doctrine of how judges should act under constitutionalism.

This March Fukuoka District Court (Kiyonaga Kamekawa, judge) ruled that Prime Minister Koizumi's official visit to Yasukuni Shrine violated the separation of church and state provision of the constitution's Article 20. The grounds for the judgment concluded thus: "This shrine visit was conducted without sufficient debate on the constitutionality of visits to Yasukuni Shrine, and there were subsequent visits as well. In view of this situation, it is highly possible that the same act would be committed repeatedly if the courts were to avoid judgments on constitutionality. This court therefore rules as written above in the belief that judging the constitutionality of said visit is its duty."

(3) Establishing the right to live in peace (peaceful coexistence) for the inhabitants of East Asia

This March 23 there was an additional action by 32 people in the Hokkaido lawsuit, and among the plaintiffs is a Korean resident in Japan who is "co-representative of the Hokkaido Association for Action to Square Accounts for Japan's Postwar Responsibility." This is how he describes the motivation for his participation in the lawsuit.

"The view of peace that has entrenched itself in Japanese society seems to be a view in which individuals wish only to save themselves from hurt. I would say there is no home in Japan for the idea that not hurting others is also peace. So that is perhaps the reason for saying things such as there's no choice but to hurt others if it means saving oneself from hurt, that is, benefiting the national interest. But active pacifism is when both oneself and others

are not hurt. That is the right to live in peace.

"It is US military strategy that determines peace for people in East Asia. South Korea has also sent troops. So Japan sending troops overseas is not simply a matter of the SDF going to Iraq. It's an issue for all of East Asia. So why, despite that, is solidarity among all the peoples of East Asia impossible? If solidarity were possible, we could chip away at the US military strategy and progressively destroy the framework which leads to war. If only the peoples of East Asia could build a framework for fellowship and solidarity. This may not be much, but I want to make people think."

I firmly believe that these lawsuits coincide perfectly with the Proposal for Action in Northeast Asia by the Global Partnership to Prevent Armed Conflict (adopted at United Nations University in Tokyo on February 2, 2005).

東アジアの平和的共存権への道を切り開くイラク派兵差止訴訟

イラク派兵差止訴訟
全国弁護団連絡会事務局長
北海道訴訟弁護団事務局長
弁護士　佐藤　博文

1　憲法９条と自衛隊イラク派兵

(1)　わが国は、第２次世界大戦における加害及び被害の惨禍を経て、戦後新憲法の前文で「日本国民は、恒久の平和を念願し、人間相互の関係を支配する崇高な理想を深く自覚するのであつて、平和を愛する諸国民の公正と信義を信頼して、われらの安全と生存を確保しようと決意した。われらは、平和を維持し、専制と隷従、圧迫と偏狭を地上から永遠に除去しようと努めてゐる国際社会において、名誉ある地位を占めたいと思ふ。われらは、全世界の国民が、等しく恐怖と欠乏から免かれ、平和のうちに生存する権利を有することを確認する」と、日本国民の平和的生存権の保障、そして全世界の国民（特にアジア諸国）との平和的共存を謳った。これを受けて、憲法第９条は「国権の発動たる戦争と、武力による威嚇又は武力の行使は、国際紛争を解決する手段としては、永遠にこれを放棄する」と定め（１項）、その目的達成のために戦力の不保持と交戦権の否認を定めた（２項）。

この意義について、辻村みよ子東北大教授は「日本国憲法は、世界に先んじて、いわば平和主義の現代的あり方を先取りする形で、戦争放棄・戦力不保持と平和的生存権を保障した。この平和的生存権は、『第３世代ないし第４世代の人権』といわれ、２１世紀的な『新しい人権』の１つである」と述べる（日本評論社『憲法』102頁）。

(2)　ところが、朝鮮戦争を機に、1954年自衛隊法が制定され、「わが国の平和と安全を保つため、直接侵略及び間接侵略に対し、わが国を防衛すること」を任務とする陸海空自衛隊が創設された。以後50年間、自衛隊は憲法９条２項の「戦力」に該る憲法違反であると批判されてきたが、政府は「自衛のための必要な最小限度」の自衛力の保持は合憲であるとする「専守防衛」の立場を取り続けてきた。政府は、「専守防衛」の内容として、海外派兵の禁止、集団的自衛権の不行使、非核三原則の遵守などを国民に約束し、その建前は現在も変わらない。湾

岸戦争を機に、PKO 法が制定され、1991 年に自衛隊掃海艇のペルシャ湾派遣、1992 年にカンボジア派遣が行われたが、それでも重装備の陸上部隊が派遣されることなど想定外だった。

（3）　しかるに、小泉首相は、2003 年 7 月、「イラクにおける人道復興支援活動及び安全確保支援活動の実施に関する特別措置法（イラク特措法）」を成立させ、同年 12 月 8 日「イラク特措法に基づく対応措置に関する基本計画」を閣議決定して、同月中に自衛隊を、翌 2004 年 1 月から陸上自衛隊の派遣を開始した。陸上自衛隊は、無反動砲、個人携帯対戦車砲など重装備の武器を携行し、交戦規則を定めて臨んでいる。イラク特措法は、憲法 9 条 2 項の戦力不保持・交戦権否認の建前から、自衛隊派遣は「非戦闘地域」に限定されることになっているが、現在のイラク情勢がその要件を満たさないことは明白である。

2004 年 6 月 28 日には主権委譲に伴い多国籍軍への参加としたが、多国籍軍への参加は従来政府が集団自衛権行使に該らないとしていたことである。

こうして、わが憲法 9 条の平和主義と日本国民の平和的生存権は、瀕死の事態に立ち至っている。

2　箕輪氏の決意と弁護団の呼応

（1）　以上の経緯の中で、2004 年 1 月、北海道の旭川市に司令部を置く北部方面第 2 師団を中心とする陸上自衛隊に派遣命令が出されたとき、北海道選出の元自民党代議士箕輪登氏が、自衛隊のイラク派兵を差し止める訴訟を提起した。箕輪氏は、この時 80 歳だった。通算 8 期 23 年間、政権党の衆議院議員を務め、この間に郵政大臣、防衛政務次官、衆議院安全保障特別委員会委員長、党国防部会副部会長、副幹事長などを歴任し、「専守防衛」の憲法解釈、防衛政策を体現してきたのだった（1990 年引退）。

（2）　箕輪氏は、湾岸戦争の掃海艇派兵の時から、「わが国に対する外部からの武力攻撃が発生した事態又は武力攻撃が発生する明白な危険があると認められる場合」（自衛隊法 76 条 1 項）以外に、自衛隊を国外に出すことはありえない、わが国は「血を流さない外交」であると訴え続けてきた。今般イラク出兵という事態に至り、強い危機感と使命感の下に、提訴を決意したのである。

箕輪氏は、日本弁護士連合会や札幌弁護士会が有事法制やイラク派兵に反対していることを知り、弁護士会に協力を求めてきた。弁護士有志

がこれを受けて、北海道内の弁護士の 4 分の 1 を越える、109 名の弁護士が「手弁当」で代理人となった。

第 1 回弁護団会議で、箕輪氏は「自分の残された命を自衛隊の海外派兵を止めさせるために捧げる」と決意を語った。これには、小池清彦元防衛庁教育訓練局長（現新潟県加茂市長）が激励に駆け付けた。この光景は、戦後日本の平和主義がいかに深刻な事態にまで至ったかが分かる。

3　訴訟の全国的展開

北海道の箕輪訴訟が先駆となり、2 月には名古屋で訴訟が提起された。数次にわたる追加提訴で原告数は 3 千人を越え、かつてなく大きな市民訴訟に発展している。原告の 1 人に、米英のイラク開戦時にレバノン大使として日本の戦争支持に反対の意見を具申して事実上解任された天木直人氏がいる。

3 月には東京訴訟が始まった。原告には、2004 年 4 月にイラクで拘束され、解放されて帰国後に日本政府から請求された救出費用の債務不存在確認訴訟も含まれている。

4 月には、小田実、鶴見俊輔氏ら著名文化人が先頭にたち、現在原告数千名を超える市民訴訟に展開している大阪訴訟が提起された。追加提訴の中には、イラク在住のイラク人 2 人も原告になっている。

5 月には静岡で派兵差止訴訟が、7 月には大阪で派兵「費用支出」差止の訴訟が提起された。8 月 6 日の広島原爆投下の日には、山梨で訴訟が提起された。山梨訴訟には現地イラクで活動をしていた NGO 職員も原告となり、日本の戦争参加により活動困難となった権利侵害を訴えている。

12 月には、栃木県宇都宮と宮城県仙台で訴訟が提起された。特に仙台訴訟は、仙台弁護士会所属の弁護士の 4 割が代理人となり、派兵差止訴訟のほかに自衛隊員の壮行会に出席した市長の公費負担が憲法違反だから返還せよという住民訴訟も存在する。

2005 年に入ってからは、岡山（1 月）、熊本・京都（3 月）でも派兵差止訴訟が提起され、現在では 11 裁判所に 13 の訴訟が係属している。こうして今や日本で最大規模の集団訴訟となっている。イラク侵略戦争の加害者になりたくない、憲法 9 条を守るために何とかしなければならないとする、主権者の熱意の表れである。

4　訴訟の特徴と意義

（1）　平和主義・平和的生存権の現代的展開

今までも自衛隊の海外派兵を巡る憲法訴訟は起こされてきた。湾岸戦争時における掃海艇派遣、戦費90億ドル（後に130億ドルまで膨脹）支出の差止訴訟は、東京、大阪、福岡、鹿児島、名古屋の全国5カ所で提起された。さらには、カンボジア派遣違憲訴訟（大阪）、ＰＫＯ・違憲訴訟（東京、名古屋）、ゴラン高原ＰＫＯ違憲訴訟（東京、大阪）、テロ特措法（米軍のアフガニスタン攻撃の支援）違憲訴訟など、10を超える。

これらの訴訟は、自衛隊が憲法違反だと判断した長沼ナイキ基地訴訟・札幌地裁判決が認めた平和的生存権に、新しい意味づけを行いつつ憲法判断を迫った先駆的な取り組みだった。しかし、イラク派兵は、従前の海外派兵とは大きく事態を異にする。

第1に、「戦争」あるいは「国際紛争」の形態が著しく変容した。9・11米国同時テロを契機に、ブッシュ大統領は「テロとの闘い」を「戦争」に転嫁し、戦争を国家対国家の対立概念から、国境を超えたテロ組織や民族的、宗教的、政治的集団による一斉の紛争が「戦争」概念に含まれるようになった。この意味で、自衛隊のイラク派兵は、新しい「戦争」への参加に他ならない。

第2に、重装備の自衛隊が「わが国防衛」とは関係なくイラクに派遣さえ、多国籍軍にまで参加するという、誰もが想定していなかった事態にまで進んだことである。かつて、タカ派政治家と言われた箕輪氏までが「いつ政府は見解を変えたのか」と怒って、立ち上がったのである。立憲主義、法の支配の重大な危機である。

第3に、マドリッドの列車爆破テロ事件で犯人が攻撃対象として日本を名指しし、イラクでは人質被害者5名、襲撃による死亡が6名と、既に11名もの犠牲者を出すに至るなど、従前の訴訟では、血税の使い道と日本国民として「戦争に加担しない権利」「被害者とならない権利」に力点がおかれてきたが、イラク派兵では「殺されない権利」「被害者とならない権利」も現実のものとなり、戦争状態における「殺されない」「殺さない」という相互性が、皮肉にも顕在化したことである。

（2）　立憲主義における司法の役割を覚醒させること

前述した深刻な違憲状態を目の当たりにし、憲法の番人、立憲主義の守護神であるべき裁判所が、その付託された権限を行使するよう全国津々浦々から求められているのに、それを行使せず、違憲行為を放置することは、その職責の放棄である。特に、戦争はいったん開始されれば個々人の人権保障は無意味と化す。個別的な人権侵害とその救済の問題とは全く次元を異にする、人権の中の人権であることの特別な意義と性格――これを我々は抵抗権的性格と主張している――ついて、裁判官には真っ正面から取り組んでほしいと考えている。我々は、平和的生存権に関する憲法判断を求めることは、実は「立憲主義下における裁判官論」に他ならないと考える。

本年3月、福岡地方裁判所（亀川清裁判長）は、小泉首相の靖国神社公式参拝を憲法20条政教分離違反と断じた。判決理由の末尾は以下のように締めくくられている。

「本件参拝は、靖国神社参拝の合憲性について十分な議論も経ないままなされ、その後も参拝が繰り返されてきたものである。こうした事情に鑑みるとき、裁判所が違憲性について判断を回避すれば、今後も同様の行為が繰り返される可能性が高いと言うべきであり、登載板書は、本件参拝の違憲性を判断することを自らの責務と考え、前記のとおり判示する。」

（3）　東アジアの住民の平和的生存権（＝共存権）の確立

北海道訴訟は、今年3月22日、32人が追加提訴し、その原告の中に「日本の戦後責任を清算するために行動する北海道の会・共同代表」の在日韓国人2世の方がいる。彼は本件訴訟参加の動機を次のように述べる。

「日本社会に定着している平和観は、おそらく自分だけが傷つけられたくないという平和観ではないか。他者を傷つけないことも平和であるという考え方が定着していないのではないか。だから、自分たちの生存が傷つけられないために、つまり国益のためには、他者を傷つけることも止むを得ないという言い方が出てくるのだろう。そうではなく、自分も他者も傷つけないというのが積極的平和主義で、それが平和的生存権なんです。

東アジアの住民の平和を規定しているのはアメリカの軍事戦略だ。韓国も派兵している。だから日本の海外派兵は単に自衛隊がイラクに行ったというだけには止まらない東アジア全体の問題だ。それなのにどうして東アジア全体の民衆が連帯できないのか。それが出来れば、アメリカの軍事戦略を少しでも崩し、戦争に進んでいく枠組みを壊していけるのではないか。東アジアの民衆が交流と連帯の枠組みを作っていけたら。その一石をささやかでも投じたい。」

本訴訟は、武力紛争予防におけるグローバル・パートナーシップＧＰＡＣ東北アジア地域行動提言（2005年2月2日東京・国連大学にて採択）とも完全に合致するものであると確信する。

The US Cleanup Responsibility at Military Bases Designated to be Returned to Korea

Young-geun Chae
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I. Introduction

In December 2004, the National Assembly of Korea approved the ratification of two agreements[1] under which US Forces Korea will relocate many of its installations scattered throughout Korea including the relocation of its headquarters from Yongsan Seoul to the Pyongtaek area, south of Seoul. The relocation is set to be completed by 2008. The United States will return more than 43,670 acres of land to the Korean government. In response the Korean government will grant 2,973 acres to the US Forces for new facilities in the Pyongtaek area.

In the process of negotiation, the two parties did not make much consideration on the environmental problems at the installations and areas to be returned. As a result, the agreements do not include thorough environmental provisions. The agreements do not clarify the responsibility of the United States concerning the cleanup of any contamination it may have caused at the installations. Instead, the agreements adopted a provision that the two parties shall act in accordance with "the SOFA and relevant agreements." However the SOFA and relevant agreements are very unclear at best and very lenient at worst about the US environmental responsibility of remediation.

On May 30, 2003 the SOFA Joint Committee reached an agreement on "the Procedures for Environmental Survey and Remediation of Contamination in Facilities and Areas Designated to be Granted or Returned." According to the agreement, 1 year before the scheduled return, the US and Korean governments will undertake an exchange of site information, site inspection, and review of the inspection for 105

[1] The full title of these agreements are "Agreement Between the Republic of Korea and the United States of America on the Relocation of United States Forces From the Seoul Metropolitan Area"(hereinafter referred as "the Yongsan Relocation Plan") and "Agreement Between the Republic of Korea and the United States of America Amending the Agreement Between the Republic of Korea and the United States of America for the Land Partnership Plan of March 29, 2002"(hereinafter referred as "the Land Partnership Plan 2004"). Earlier in March 2002, the governments of the United States and Korea had agreed to the Land Partnership Plan under which the two parties outlined the timetable for the return of 28 installations.

days. If contamination is revealed, the US government will remedy the contamination at the facilities and areas to be returned.

It can be assumed that the United States will remedy any contamination that "poses a known, imminent and substantial endangerment to human health." This standard is very unclear and more lenient than the US and Korean environmental standards concerning cleanup. The procedures both parties have agreed to follow are also too limited and 105 days is too short to investigate the contamination. The time schedule for remediation is also too limited to complete a full and acceptable cleanup. Even if the investigation uncovers serious contamination, the remedy will have only 260 days within which to be finished before the United States hands the sites back to Korea. The costs associated with the cleanup of serious contamination can be astronomical. Without the US government's budget, any decent cleanup is hardly possible. Accordingly, the planned schedule for cleanup is deceptive.

Even if the SOFA and relevant agreements do not provide clear provisions concerning environmental responsibility, it is certain that the US Forces has a duty to comply with environmental laws as they are generally applied in Korea. Also the "Polluter Pays Principle" is a common norm under the international law and in domestic law of Korea and the United States. Therefore, if it is true that the US Forces have caused a serious environmental contamination that exceeds threshold levels, it is thus liable for compensation and cleanup. During the consultation process, Korean government officials should insist that the US Forces should undertake its responsibility.

II. The US Military Forces in Korea

1. The US Military Forces in Korea and Base Relocation Plan

US military forces have been stationed in Korea since 1953, when the Korean War was paused based on Article IV of the Mutual Defense Treaty between Korea and the US.[2] The US forces have since stayed in Korea to prevent expansion of communism and to protect South Korea from continued threats from hostile North Korea. The US Military Forces deployed some 37,000 soldiers across 41 installations at 80 sites nationwide in Korea and a total of 59,979 acres have been granted by the

[2] "the Republic of Korea grants, and the United States of America accepts, the right to dispose United States land, air and sea forces in and about the territory of the Republic of Korea as determined by mutual agreement." Art. IV the Mutual Defense Treaty between the Republic of Korea and the United States of America (1953)

Korean government.[3] Since the ceasefire agreement that halted the Korean War, South Korea has relied heavily on the presence of US military forces for its security. During the 1950s and 1960s Korea was also dependent on the United States for economic aid. As a result of this dynamic between the United States and South Korea, the US Forces in Korea had dominant bargaining power over the counterpart of Korean government.[4]

The two governments agreed on the Yongsan Relocation Plan and the Land Partnership Plan in 2004. Under these agreements, the US will close and return 34 installations and training areas scattered throughout South Korea as well as various facilities in Yongsan, Seoul including the headquarters of the US Forces. Most of the returns were scheduled to be completed by 2008 except the installations of US Army Division II in Paju city. The US Forces at the closing bases will be moving or merged at the facilities newly constructed near Pyongtaek, south of Seoul. The scale of the returned bases is larger than 43,670 acres and in return the Korean government will grant the US 2,973 acres of lands for new facilities. Once all the plans are completed, the number of US Forces installations in Korea will be reduced to 17 and most of them will be consolidated in the Pyongtaek area.

The agreements to relocate are results of the changes in US military policy and the international circumstances. After the end of the cold war era, the threat of communism ceased to exist and threats from the withering North Korea also became less significant. Also the development of new technology in military weapons and available information of enemies no longer demands a large number of soldiers and heavily armed forces. The US military has also started to reduce the number of soldiers in mainland USA starting from the 1980s.[5] Similarly, the US government planned to reduce the number of soldiers in US Forces Korea. The US government also rewrote its military strategy in foreign countries. Under the changed policy, the role of US Forces Korea was not only to prevent war on the Korean peninsula, but also the maintenance of peace in northeast Asia.[6] In pursuit of the changed role, scattered

[3] Department of Defense U.S.A, Base Structure Report (A Summary of DoD's Real Property Inventory), Fiscal Year 2004 Baseline.

[4] For a brief history of the US-Korean relationship, refer to Youngjin Jung & Jun-shik Hwang, Where Does Inequality Come from? An Analysis of the Korea-United States Status of Forces Agreement, 18 Am. U. Int'l L. Rev. 1103, 1109-12 (2003).

[5] Jessica K. Reynolds, Military Base Closure Oversight via Environmental Regulations: Replacing Judicial Review of Closure Decisions and Methods With Comprehensive Redevelopment Mechanisms, 4 Alb. L. Envtl. Outlook 40, 41 (1999)

[6] Jaejeong Seo, The US 1-4-2-1 Military Strategy and Readjustment of US Forces, Human Right and Justice, September 2004, p. 25 (in Korean) (referring Ministry of National Defense, Result of the Second Meeting of Future of the ROK-US Alliance Policy Initiative, MND News Release, June 5, 2003, p.2)

US bases in Korea were not judged to be effective, thus, the decision was made to consolidate the military installations. The US government also wanted to improve the shabby infrastructure of US Forces Korea.[7] The government of South Korea also wanted the land to be returned because of the nation's shortage of land as well as repeated troubles between the local citizens and the US Forces. The rapid urbanization in Korea destroyed the buffer zones between the US installations and the Korean villages and brought various problems between citizens and some US Forces service personnel. The return of the vast areas of land was welcomed by both the local governments and citizens.

2. Environmental Condition of the US bases

The U.S. Military Forces have been stationed for more than 50 years in South Korea. Due to the lack of environmental compliance during the previous decades, environmental contamination at US military bases is serious. The results of joint environmental inspections at US bases have never been published by the joint committee. The Ministry of Environment of the Korean Government performed an inspection at the US base returned in 2003, but the government refused to reveal the results. The soil and groundwater sampled at the Camp Libby, Camp Isabel, and Camp Aims, which were returned in the early 1990s, turned out to be contaminated by heavy metals such as lead and cadmium.

There were many news reports that soils and groundwater inside or outside of many U.S. bases were contaminated resulting from illegal disposal or leakage of the hazardous substances such as petroleum and unused weapons. Environmental problems latent in the U.S. bases are abundant and environmental contamination at U.S. bases is not unique to Korea alone. In mainland USA the Department of Defense undertook procedures to close and relocate military bases during the 1990s.[8] Hundreds of military installations were found contaminated and needed cleanup efforts.[9] The necessary remedial action took many years and the US government was not able to finish the base closure plan as it was scheduled. According to a report, the government

[7] GAO Report to Congressional Commiittees, Defense Infrastructure-Basing Uncertainties Necessitate Reevaluation of U.S. Construction Plans in South Korea, GAO-03-643, July 2003.
[8] Reynolds, *supra* fn.5.
[9] Robert M. Howard, Redeveloping the Department of Defense's Inventory of Contaminated "Government-Owned Contractor-Operated" Facilities, 12 Fordham Envtl. Law J. 1, 16 (2000)

had spent 8.3 billion dollars already and needed another 3.6 billion dollars to finish the job.[10] However many expect the total amount to surpass that total as well.

The U.S. bases in the Philippines were also found to be seriously contaminated.[11] The US returned Clark Air Force base and the Navy base at Subic Bay in 1992. Groundwater at these sites later was found to be contaminated with various hazardous substances such as mercury, nitrate, propylbenzene, dieldrin, and lead. And in the soil at Clark Air Force base, various hazardous substances such as jet fuel, benzene, pesticides, petroleum, and PCBs were found. The US General Accounting Office reported to the Congress that the cleanup of those sites would cost as much as a "Superfund." Another report says it will cost as much as 1 billion dollars.

The environmental conditions at the closed military bases in the US mainland and the Philippines help us predict the potential contamination at the bases to be returned to Korea. Regardless of their location, the US bases are operated according to the same standards established by the Department of Defense of the US government.[12] Outside the US, the environmental contamination is predictably more serious than that at US domestic bases because the US Military Forces overseas usually ignore or knowingly violate the environmental standards.[13]

III. Relevant Provisions on Environmental Responsibility

According to the LPP and Yongsan Relocation Plan, the governments of Korea and the United States emphasize the importance of environmental protection and agree to protect the natural environment and human health and to remedy contaminated areas in accordance with the SOFA and relevant agreements.[14] The two agreements do not

[10] L.A. Times, April 10, 2005, "Sweeping Up a Military-Grade."
[11] A Toxic Legacy Abroad-The military has polluted in ways that would be illegal in the United States, The Boston Globe November 15, 1999.
[12] Ted H. Shettler, Reverberations of Militarism: Toxic Contamination, the Environment, and Health, 1 Med. & Global Survival (1995).
[13] The Boston Globe, *supra* fn.11.
[14] The Agreement for the Land Partnership Plan(2002) Art. III. 7 reads: "Recognizing and acknowledging the importance of environmental protection in the implementation of the LPP, the Parties agree that the US return of facilities and areas to the ROK, the ROK grant of areas and replacement facilities to the US, and other LPP actions including those necessary to protect the natural environment and human health and to remedy contaminated areas shall be in accordance with the SOFA and relevant agreements." The Agreement on the Relocation of USF from the Seoul Metropolitan Area(2004) Art. 2 ph.8 also reads: "Recognizing and acknowledging the importance of environmental

clearly state the amount of responsibility that the US must take for damage to the environment. Instead, they leave environmental concerns to the SOFA and other relevant agreements. However, the SOFA and other relevant agreements fall far short of clarity and sufficiency for environmental cleanup.

1. SOFA

The relationship between the US Forces and the government of Korea follows the Status of Forces Agreement between the US and Korea (hereinafter Korea SOFA). The Korea SOFA was established in 1966 and revised in 1991 and 2001. It does not include any environmental provision. Instead SOFA Article IV reads: "1. The Government of the Unites States is not obliged, when it returns facilities and areas to the Government of the Republic of Korea on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate the Government of the Republic of Korea in lieu of such restoration. 2. The Government of the Republic of Korea is not obliged to make any compensation to the Government of the United States for any improvements made in facilities and areas or for the buildings and structures left thereon the expiration of this Agreement or the earlier return of the facilities and areas." This article was adopted when the SOFA was signed in 1966 and has never been amended. The US government insists that this article applies to environmental contamination as well and that the US government is not responsible for any remediation or compensation for environmental contamination.

However, the subsequent agreements impose limited environmental responsibility on the US. The 2001 Amendment to the Agreed Minutes to SOFA adopted an environmental provision that the US Forces will respect Korean environmental laws. Article III Ph.2 reads: "the United States Government recognizes and acknowledges the importance of environmental protection in the context of defense activities, ... commits itself to implementing this Agreement in a manner consistent with the protection of the natural environment and human health, and confirms its policy to respect relevant Republic of Korea Government environmental laws, regulations, and standards." In 2001, the two governments also produced the

protection in the implementation of this Agreement, the Parties agree that the US return of facilities and areas to the ROK, the ROK grant of the use of areas and replacement facilities to the US, and other relocation actions including those necessary to protect the natural environment and human health and to remedy contaminated areas shall be in accordance with the SOFA and relevant agreements."

Memorandum of Special Understandings on Environmental Protection. The Memorandum provides that "the Government of the United States confirms its policy to promptly undertake to remedy contamination caused by United States Armed Forces in Korea that poses a known, imminent and substantial endangerment to human health; and to consider additional remedial measures required to protect human health." These subsequent agreements are conforming parts of SOFA and legally enforceable with SOFA.

However the US government has agreed only that they will "respect," not "comply" with Korean environmental laws.[15] Even if the two governments agreed to establish relatively stringent environmental governing standards, those standards do not have a legal enforcement mechanism. The Environmental Governing Standards is supposed to be revised every two years, but have never been revised since they were established in 1998.

The agreement also lacks environmental cleanup standards. The standard "a known, imminent, and substantial endangerment to human health" is too lenient and falls short of the domestic standards of the US and Korea. According to the Soil Protection Act of Korea, when 16 designated hazardous substances such as cadmium, copper, arsenic, mercury, lead, chromium(+6), zinc, nickel, fluorine, Phosphorus, PCB, cyanide, phenol, oil(except animal/vegetable oil), and organic solvents are found in excess of threshold levels designated by the law, the polluter is liable for the cleanup and compensation for any loss caused by the contamination. Once contamination by hazardous substances surpasses threshold levels, hazards are presumed and neither the government nor victims have to prove the existence of any substantial endangerment to human health or environment.

2. Agreement on Procedures for Environmental Survey and Consultation on Remediation

On May 30, 2003 the SOFA Joint Committee reached an agreement on "Procedures for Environmental Survey and Consultation on Remediation for Facilities

[15] This choice or vocabulary is suspicious and baseless because the US Executive Order reads differently. "The head of each Executive agency that is responsible for the construction or operation of Federal facilities outside the United States shall ensure that such construction or operation complies with the environmental pollution control standards of general applicability in the host country or jurisdiction." E.O. 12088 at paras. 1-801 (1978).

and Areas Designated to be Granted or Returned." The Korean government refuses to publish this document. According to the government brief, the US and Korean Governments will begin the 105-day procedures of exchange of information, environmental inspection, and review of inspection on the facilities and areas 1 year before the scheduled return or grant of new facilities and areas. If contamination is discovered, the US and Korean governments will remediate following the procedures in the returned or granted facilities and areas. The two governments also agreed to publish the result of investigations and the results of consultations among the committee on consent.

For the Yongsan Relocation Plan, the two countries agreed to follow the procedure above.[16] Prior to the return of facilities and areas, environmental actions and consultations as agreed in the document above will be planned and executed. The completion of such environmental procedures may be deferred if special conditions are mutually agreed to facilitate the relocation.

105 days is too short for US and Korean officials to finish a meaningful environmental survey. The US forces have been stationed in Korea for more than 50 years and the facilities and areas to be returned total than 43,670 acres. The vast area is returned concurrently during a short period of time. The Korean government has not kept an eye on the inside the US bases for more than 50 years, making it almost impossible for it to figure out the history of the usage of the bases within such a short period of time. The shortage of personnel and expertise at the Department of Defense of the Government of Korea concerning the environmental investigation is another hurdle for the reasonable investigation. The plan to finish all environmental surveys within 105 days is implausible. The real intent of the parties is highly suspicious.

The time schedule for the remedy is also extremely limited. Even if the investigation uncovers a serious contamination, the ensuing remedy has only 260 days within which to be finished. The costs of cleanup of serious contamination can be astronomical. Without the US government's budget any decent cleanup is hardly possible. Accordingly the planned schedule for cleanup is deceptive. 260 days of

[16] The Memorandum for the Joint Committee under the Yongsan Relocation Plan 4.e reads: "Prior to the grant or return of facilities and areas, environmental actions and consultations as agreed in reference 1.f will be planned and executed. The completion of such environmental procedures may be deferred if special conditions are mutually agreed to facilitate the relocation." 1.f reads: "Joint Environmental Information Exchange and Access Procedures, with Tab A (Procedures for Environmental Survey and Consultation on Remediation for Facilities and Areas Designated to be Granted or Returned), approved by the SOFA Joint Committee on 30 May 2003."

cleanup may be far short of a timeframe necessary to clean up serious contamination. Also the agreement is quiet on the standards for the cleanup

A Memorandum[17] made by the subcommittee for the Yongsan Relocation Plan preserves the possibility of delay. The memorandum provides "prior to the return of facilities and areas, environmental actions and consultations as agreed in reference 1.f. will be planned and executed. The completion of such environmental procedures may be deferred if special conditions are mutually agreed to facilitate the relocation."

The US government is opposed to publishing the results of site inspections and even the exact contents of the agreed procedure itself. The intent of the US government is suspicious. Under the US domestic law, CERCLA, the government is obliged to announce the results of site inspections and the decisions of remedial design to the public and give them an opportunity to comment. The government then has to consider the citizens' comments before finalizing remedial action. This process of citizen participation is also applied to the military bases. The participation of the state and local government is also guaranteed. The US position to keep the process secret is against the people's fundamental right to know. Any procedures undertaken by the US and South Korea that do not allow citizen participation are against the Constitution and the appropriate administrative procedures.

IV. Suggestions

The serious contamination problem at US military bases has been uncovered in mainland USA, the Philippines and Germany. However the US government's treatment of the problem was extremely different in each region. The US government cleaned up the bases thoroughly in the mainland, spending billions of dollars. On the contrary, the US government did not make any reparations in the Philippines. In Germany, the US government has been paying a significant amount of money for environmental remediation.[18]

The US government has taken a hypocritical position on environmental matters at its military bases by establishing strict environmental standards for the military and legal enforcement measure within US territory, but on the contrary, not at overseas US

[17] The "Ad Hoc Subcommittee for the Yongsan Relocation Plan under the Republic of Korea and the United States Joint Committee, Status of Forces Agreement" reached an agreement and made a memorandum. (Hereinafter referred to as "Subcommittee Memorandum")

[18] The Boston Globe, *supra* fn. 13.

military bases. The US looks at the environmental problems it creates overseas from a diplomatic point of view. As long as the diplomatic relationship between the US and its host country does not worsen as a result of its stance on cleaning up environmental contamination at US military bases, the U.S. will not take any environmental problems seriously.

The US government refused to remedy contamination in the Philippines for the reason that the two countries do not have a legal document for the obligation to remedy. In Korea, the US government is also trying to avoid environmental responsibility by insisting that all the written documents that were agreed to do not impose any legal obligation on them. According to their argument, all the wording in the agreements was just a meaningless pretension to look conscientious about environmental protections. This is no more than a mockery of the Korean people. In comparison, the US government entered into the 1993 supplementary agreement with Germany under which the US government obliged itself to bear the costs of assessing, evaluating, and remedying environmental contamination which it caused.

Such insufficient environmental provisions agreed upon by the US and Korean governments were the result of unbalanced bargaining power. The Korean government lacks a willingness to be strong with the US because it is it is heavily dependent on the US Forces for its security. However, the presence of the US bases in Korea is of mutual interest. The relocation of the US bases and the reduction of US soldiers are also based on changes of the US military policy in the world. The "Polluter Pays Principle" is a worldly accepted international norm. The US cannot be an exception. The Korean government must request, as a right, proper environmental remediation for contamination at US bases on Korean soil.

SOFA Article IV exempts the US government's obligation to restore the facilities and areas to their original condition. The clause, however, should not be interpreted as exempting the US from responsibility for cleanup of the contamination caused by their activity. In the future, the provision should be revised to include and clarify the US's responsibility to remedy environmental contamination or compensate for the cost of inspection and remediation.

The Agreement on LPP and the Yongsan Relocation Plan is also lack in clarity of US environmental responsibility. The standards for the procedure and methods of the environmental investigation and cleanup are too lenient for the US Forces. The shortage of environmental provisions should be thoroughly discussed at joint committee meetings. The procedures and objectives of the site survey must be clearer. Whether Korean standards will be applied or whether US standards will be applied must be

decided. The number of hazardous substances under US law is larger than that under Korean law. Also, the results of investigations must be explained to the public and they must be allowed to comment on it.

Before the return of the bases, the Korean government should request that the US Forces provide documents on operations at the bases as well as about land usage. The US Forces have been stationed in Korea for more than 50 years. Without accurate information about how land at the bases was previously used, a proper environmental site inspection cannot be performed. The 105-day limitation should be discarded and the investigation procedure must be done according to a timeframe that allows for a proper environmental inspection.

The standards for the cleanup must be in accordance with at least Korean law because the standards of cleanup according to Korean law are much more lenient than that in US law. If the hazardous substances designated under the Soil Protection Act have been found to be above threshold levels at the bases which are to be returned, the contamination should be cleaned up by the US forces. Further, the contaminated sites should be cleaned up to at least the threshold level. The Soil Protection Act of Korea follows a two tier standards based on the usage of the land. Standard for land Type A is strict and applicable to the lands used as agricultural farms, schools, river, or other private residences. The standard for land Type B is less strict and applicable to the lands used as the factories, roads or railroads. The US bases to be returned should be cleaned up in consideration of the future use of the sites. Many local governments plan to transfer those returned sites to parks or government office towns. For those purposes, the standard for land Type A will apply.

The Korean government should bear in mind that once the US Forces returns the facilities and areas to the Korean government, it will be hard to make the US Forces clean up the contamination. Then, the Korean government will become solely responsible for the cleanup. The Korean Government has already experienced the heavy burden of cleanup, but it seems the US government is better aware of the significance of the burden of cleanup. The relocation fits with current US national interest, but the entire burden of the relocation will be on Korean citizens in the end.

返還되는 駐韓美軍基地에서의 環境淨化문제

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I. 서론

용산기지이전협정안과 연합토지관리계획(Land Partnership Plan, LPP)개정협정안이 2004년 12월 9일 국회의 비준동의를 통과하였다. 과거 50년이 넘는 세월동안 미군기지로 묶여 있던 방대한 토지가 우리의 손에 다시 돌아온다는 시각에서 미군기지의 반환에 대해서는 긍정적인 여론이 많았다. 그러나 용산기지이전비용의 부담문제에 관해서는 격렬한 반대의 소리도 있었다.

이러한 긍정론과 비용부담에 대한 반대의 목소리 아래 정작 보다 중요할 수도 있는 환경오염에 대한 정화책임 문제가 충분히 다루어지지 못한 채 조약이 비준동의 되었다. 용산기지이전협정과 연합토지관리계획협정으로 인하여 수천만평의 미군공여지가 우리 정부에 반환된다. 과거 50년이 넘는 기간 동안 미군은 미군에 공여된 기지에서 각종 무기와 장비 등을 운용하며 심각한 오염을 야기해 왔다. 미국이 야기한 환경오염의 정화책임은 매우 무거운 부담이 될 수 있다. 미국이 그 부담을 지지 않는다면 결국 그 부담은 우리정부와 국민이 지게 된다. 미군기지의 반환과 이전문제를 전담하고 있는 국방부는 이미 심각하게 오염된 토양의 정화책임이 매우 무겁다는 것을 실제 경험한 바 있다. 그럼에도 불구하고 국방부는 기지이전협정체결의 협상과정에서 환경정화문제를 충분히 고려하지 않았다. 한미양국은 연합토지관리계획협정이나 용산기지이전협정의 본문에 미군의 환경정화책임을 명확히 하지 아니하였고 기존에 존재하는 SOFA와 관련 협정에 따른다는 정도로 타협하였다.

미군의 기지 반환에 따르는 책임과 관련하여 한미SOFA 제4조는 미국이 원상회복의무를 지지 않는다고 하고 한국정부도 미국에 대하여 미군의 주둔으로 상승한 잔여 가치에 대해 보상할 의무를 지지 않는다고 정하고 있다. 미국정부는 동조항을 미군에 의한 환경오염의 원상회복 의무까지도 면제한 것으로 보고 있다. 그럼에도 불구하고 한국정부의 발표에 의하면, 2003년 체결된 '환경오염의조사와치유에관한합의'에 따라 기지반환 이전에 한미정부는 합동으로 반환대상 기지를 조사하고 미군측에 책임이 있는 오염에 대해서는 미국의 부담으로 치유한 후 반환하기로 하였다. 그러나 정부가

발표한 환경치유에 관한 양국의 합의사항의 주요내용을 보면 환경오염의 정밀한 조사와 엄격한 치유·복원과는 거리가 멀다.

미군이 자신이 야기한 심각한 환경오염에 대하여 복원책임을 져야 함은 환경법의 일반원칙이나 국제법 원리에 비추어 당연하다. 그러나 한미간에 체결된 SOFA와 그 부속문서들에는 이러한 원칙들이 명확히 수립되어 있지 못하다. 미국정부는 이와 같이 한국에 불리하게 체결된 조약 및 합의문서들을 이용해 반환되는 기지의 환경정화책임을 회피하려는 입장이다. 한국정부는 이러한 미국의 숨은 의도를 올바르게 이해하고 한미간에 체결된 각종 합의서의 애매모호한 규정들은 일반적인 환경법원칙과 국제법 원리에 비추어 해석하고 미국에 대해 정당하게 환경정화책임을 부담할 것을 요구하여야 한다.

한국정부는 기지반환관련 협의에서 오염지역의 정화문제를 우선순위에 두어야 하고 미군이 수행해야할 정화의 절차와 기준을 명확히 해야 한다. 반환기지의 환경조사를 철저히 하기 위해서는 '환경오염의조사및치유에관한 합의서'에서 정한 기간을 연장해서 환경조사에 임해야 하며 국내의 인적 물적 시설을 총동원해야 하며 경험 많은 미국의 컨설팅회사를 참여시키는 것도 배제하지 말아야 한다. 오염의 조사결과와 정화계획에 대하여 민간에 공개하고 의견을 수렴하여 정화조치를 수행하도록 해야 한다. 그리고 지방자치단체의 참여도 널리 보장해야 한다. 또 장기적으로는 한미SOFA의 관련 규정들을 개정하여 미군의 국내 환경법준수의무와 환경오염조사 및 정화비용에 대한 부담 원칙을 명확히 하는 것이 필요하다.

본고에서는 미군의 환경정화책임에 관한 한미SOFA의 주요 내용과 기타 관련 합의문건등의 내용을 분석하고 그 문제점을 지적하고자 한다. II에서는 용산기지이전협정과 연합토지관리계획협정의 내용을 살펴보고 잠재적인 환경문제의 심각성을 지적한다. III에서는 한미SOFA와 기타 관련 합의문건에 나타나 있는 미국의 환경책임의 내용에 대하여 살펴보고 문제점을 지적한다. IV에서는 반환되는 기지에서의 미군의 환경정화책임을 묻기 위해 필요한 사항을 다시 한번 강조한다.

II. 주한미군기지의 반환과 환경문제

1. 주한미군기지의 반환

용산기지이전협정안과 연합토지관리계획개정협정안에 대한 국회비준

동의안이 통과된 이후 미군기지의 반환이 본격화되고 있다. 용산기지이전협정과 연합토지관리계획개정협정에 따르면 2008년 12월 31일까지 미국은 용산기지를 포함한 전국에 산재한 미군공여지 약 5,167만평을 반환하고 대신에 우리는 용산기지와 2사단 및 기존 LPP용 부지로 평택지역에 총 349만평 그리고 평택외 지역에 13만평의 땅을 미국측에 새로이 공여하게 된다. 주한미군 재배치 계획이 완료되는 시점의 한국측 공여지는 현재 7,320만평의 34% 수준인 2,515만평으로 줄고 기지 숫자도 현재 41개에서 17개로 축소 운영된다. 국방일보에 보도된 바에 의하면 2005년 6월 현재 LPP가 명시한대로 11개의 기지가 이미 폐쇄되었다.[1]

2. 미군기지의 환경오염 문제

미군기지내의 환경오염에 대한 정부의 공식적인 조사는 아직까지 공개된 바 없다. 환경부는 녹사평역 기름유출 사건과 2003년에 반환된 미군기지에 대한 자체 환경오염조사를 벌였지만 미군쪽의 '보도 규제' 요청을 이유로 자료 공개를 거부하고 있다.[2] 과거 1990년대 초 미군이 반환한 미군부대 기지내의 환경오염실태에 관하여 국립환경연구원이 조사한 바에 따르면, 토양오염이 심각한 것으로 이미 드러난 바 있다. 국립환경연구원이 캠프 이즈벨, 캠프 리비, 캠프 에임즈 등 1992년에 미군이 철수한 지역내의 토양과 지하수오염 실태를 조사한 바에 따르면, 납과 카드뮴 등 중금속에 의한 오염이 심각한 것으로 나타났다.[3]

그러나 시민단체들의 노력으로 주한미군기지와 그 주변의 심각한 오염은 이미 여러 차례 보도된 바 있다. 2002년 한 해 동안 용산기지 안에서만 4건의 기름유출 사건이 발생했으며 용산기지 주변에서도 2001년 1월 녹사평역의 집수정 등에서 지하수 오염이 발견되었고 서울시는 유류 성분에 의한 것임을 확인하였다.[4] 2002년 12월 남영동 메인포스트 담 바로 밑, 도

1) 국방일보 2005-06-03.

2) 환경부는 2003년 국회 국방위 박양수 의원(민주)의 국감자료 요구에 대한 서면답변을 통해 "녹사평역의 등유 유출 원인에 대한 추가조사와한·미연합토지관리계획(LPP) 협정에 따라 가장 먼저 반환될 2개 서울 용산 아리랑택시와 오산 베타사우스 미군기지에 대한 환경오염 실태조사를 국내연구기관에 의뢰해 실시했으나 모든 문서의 공개는 미군쪽과 합의해 제공하기로 돼있어 제출할 수 없다"고 밝혔다. 한·미 합동조사단의 한국쪽 실무대표인 윤성규 환경정책국장은 "똑같은 시료를 채취해 각각 자국 연구기관에서 분석한 보고서를 지난 8월 서로 교환했으나 미군쪽에서 한·미행정협정(소파)을 근거로 보도자료 등 외부 공개는 상호 합의때만 허용할 것을 요청해 받아들였다"며 "한·미 전문가회의에서 협의가 끝난 이후에나 조사 결과 보고서를 공개할 수 있을 것"이라고 밝혔다. 한겨레신문 2003년 9월 23일자 참조.

3) 최승환, 주한미군기지로부터의 환경오염피해에 대한 법적 구제, 서울국제법연구 제4권 제2호 83, 86(1997).

4) 서재철, 용산 미군기지반환에 따른 환경문제 대책, 월간 환경과 에너지 2003년 6월호 57쪽.

로 지하 1.7m 지점에서 용산구청 하수도 개량공사 도중 기름으로 보이는 액체 10리터가 시민단체에 의해 확인되어 언론에 공개되었다.[5]

미군기지의 환경오염문제는 비단 우리나라만의 문제가 아니다. 미국 본토에서도 1988년 이후 수많은 군기지들이 폐쇄 또는 재배치되는 과정에서 심각한 환경오염문제가 드러났다. 미국 본토에서는 1988년부터 1995년에 이르기까지 네 단계에 걸쳐 451개 기지의 폐쇄 및 재배치 계획이 수립되었다. 해당 기지들 가운데 205개의 기지가 환경정화가 필요한 것으로 나타났고 오염된 지점은 약 5,300여 지점으로 나타났다.[6] 국방부는 이들 기지들의 폐쇄 및 재배치를 6년 안에 끝마치는 것을 목표로 하였으나 환경오염의 조사와 정화는 그 보다 훨씬 오랜 기간이 소요되므로 국방부의 군기지폐쇄 일정에 환경정화문제가 가장 커다란 장애요소가 되었다. 미의회 일반회계조사국에 따르면 1998년까지 폐쇄대상 군기지의 정화에 90억달러가 넘는 자금이 소요되었다고 한다.[7]

필리핀의 경우 1992년에 반환된 Clark 공군기지와 Subic Bay 해군기지에서 특히 심각한 환경오염이 나타났다.[8] 이들 반환된 지역의 지하수 조

5) 한겨레신문 2002년 12월 10일자 사회면. 환경연합 조사결과 1.7m 지점에서 채취한 액상시료는 96퍼센트 경유이고 석유계 총탄화수소가 평균 16,486mg/kg이 검출되어 기준치의 8.2배, 토양오염 대책기준의 3.3배를 초과한 것으로 밝혀졌다. 휘발성 독성물질인 크실렌도 검출되었다. 그리고 2003년 12월 의정부의 한 미군부대인근에서도 기름오염사실이 밝혀진 바 있다. 함께사는길 2003.1 70쪽. 시민단체인 녹색연합의 주장에 따르면 1990년부터 지난 [2002년] 3월까지 발생한 총 41건의 미군기지내 환경오염사건을 분석한 결과, 한미간 '연합토지관리계획'(LPP)에 따라 미군측이 반환 예정인 28개 기지 중 11곳이 환경오염사건을 일으킨 것으로 확인됐다고 밝혔다. 기름유출의 경우, 경기 파주 캠프 에드워드가 2회, 원주의 캠프 롱과 캠프 이글이 각각 3회와 2회로 나타났으며 부산의 캠프 하야리아와 대구의 캠프 워커는 각각 기름유출과 석면오염이 발생한 것으로 나타났다. 녹색연합은 이에 따라 기름유출로 인한 토양오염과 중금속 및 각종 환경오염이 예상되는 파주, 동두천, 군산, 대구 등 9개 지역 13개 기지를 '환경오염 의심지역'으로 규정하고 이 지역은 물론 반환예정 기지 주변과 기지내의 토양오염 및 지하수 오염 등에 대해 정부가 즉시 종합적인 환경평가에 나설 것을 촉구했다. 한국일보 2002.4.8일자 기사.

6) Robert M. Howard, Redeveloping the Department of Defense's Inventory of Contaminated "Government-Owned Contractor-Operated" Facilities, 12 Fordham Envtl. Law J. 1, 16 (2000).

7) National Security and International Affair Division, U.S. General Accounting Office, Military Bases: Status of Prior Base Realignment and Closure Rounds 3, 4658 (Dec. 1998)(위 Robert M. Howard의 논문에서 재인용). 미국에서 유해물질로 심각하게 오염된 시설들중 미국 연방정부 소유의 시설들만 정화하는데 4000억달러가 소요될 것으로 전망되고 그 중 가장 심각한 곳은 무기를 제조하는 군사시설이 있던 Colorado의 Rocky Mountain 탄약창으로 이곳을 정화하는데만 120억달러가 넘게 소요될 것이라고 한다. Burt Hubbard, Toxic Cleanup Dwarfs DIA Cost; Time Delays Adding To $12Billion Price Tag To Be Paid by Taxpayers, The Denver Rocky Mountain News, Mar. 29, 1998, at 4A.

8) 필리핀의 경우, 미군이 철수한 직후, 인근에서 발생한 화산폭발로 가옥을 잃은 주민들이 철수한 미군기지에 들어가 생활을 하기 시작하였다. 이들은 반환된 기지에서 지하수를 끌어올려 식수로 사용했는데, 오염된 지하수를 사용한 주민들 사이에 질병이 만연하였다.(정화조치 이전에 주민사용 금지) 필리핀 하원은 1999년 9월, 미국이 해당지역을 정화해 줄 것을 요구하는 결의안을 채택한 바 있다. 미군이 철수하고 난 필리핀의 경우 필리핀 당국에 의해 오염지역의 문제가 처리되어야 하나 필리핀의 경우 기술적 능력이 부족한 상태이다. 미국의 협조가 요구되지만 미군은 필요한 협조를 제공하고 있지 않다. The Boston Globe, A Toxic Legacy Abroad, The military has polluted in ways that would be illegal in the United States, 1999. 11. 15일자 기사 참조.

사 결과, 수은(Mercury), 질소(nitrate), 벤젠(Propylbenzene), 살충제인 딜드린(dieldrin), 납 등이 허용기준 이상 발견되었다. 그리고 1997년 미국의 환경컨설팅회사의 Clark 미공군기지 주변의 토양조사 결과, 제트연료, 벤젠, 농약, 기름, 그리고 PCB 등으로 오염되었음을 밝혀냈으며 유해폐기물이 지하수를 오염시킬 수 있음을 지적하였다.[9] 필리핀의 오염상태와 관련하여 미국의회 일반회계감사국이 제출한 1992년도 보고에 의하면 필리핀의 두기지를 정화하는 데에는 미국의 오염지역정화에 제공된 막대한 정화비용 정도의 비용이 소요될 것이라는 군당국의 견해를 인용한 바 있고 또 다른 전문가에 의하면 10억달러에 이를 것이라고도 한다.[10] 독일의 경우에도 미군부대의 환경오염문제가 심각하여 미 국방부는 상당한 예산을 독일내 미군기지의 정화에 사용하고 있다.

미국본토를 비롯한 타국에 주둔한 미군기지의 오염실태는 우리나라의 미군기지의 오염실태를 추측할 수 있게 한다. 왜냐하면 군기지의 운영과 활동이 대개 일반적인 국방부 기준에 따르기 때문이다.[11] 따라서 미국본토나 필리핀등 해외기지에서 진행된 폐쇄기지의 오염실태는 우리에게 중요한 자료를 제공한다.[12] Boston Globe지 기사에 의하면 해외미군기지는 접수국의 환경기준을 따르는 것이 일반적이나 많은 경우 접수국의 환경기준이 존재하지 않거나 존재하더라도 미군은 그러한 기준을 무시하거나 알면서도 위반하는 경우가 대부분이라고 하였다.[13]

III. 미국의 정화책임

1. 한미SOFA상의 미군의 환경책임

주한미군기지의 반환시 미군의 정화책임의 소재와 관련하여 중요한

9) Id.

10) Id.

11) "지난 수십년간 거의 모든 미국의 군사시설의 임무는 군 인력과 계약자들로 하여금 유해한 독성물질의 사용을 필요로 하였다" Ted H. Shettler, Reverberations of Militarism: Toxic Contamination, the Environment, and Health, 1 Med. & Global Survival (1995); 또한 J. Martin Wagner & Neil A.F. Popovic, Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free from Contamination and Expolosives, 38 Va. J. Int'l L. 401, 425 (1998) 참조.

12) "1990년도 12월에 공표된 미국정부의 한 조사보고서에 의하면 당시 서독주둔 미군이 야기시킨 모든 토양 및 수질오염을 정화시키는데 30억달러가 소요되는 것으로 판명되었는데, 미국 및 독일환경법규가 미군기지내에서도 비교적 엄격히 준수되는 것으로 알려진 독일과 달리 한국의 경우 주한미군기지 및 주변의 환경오염을 정화하는데 '천문학적 비용'이 소요되리라 본다." 최승환, 주한미군기지와 환경오염: 미국정부의 국가책임과 피해자의 법적 구제(미발표논문)중에서.

13) The Boston Globe (주 8).

조항이 한미SOFA 협정본문 제4조이다. 동조에 의하면, "1. 합중국 정부는 본 협정의 종료 시나 그 이전에 대한민국 정부에 시설과 구역을 반환할 때에 이들 시설과 구역이 합중국 군대에 제공되었던 당시의 상태로 동 시설과 구역을 원상회복하여야 할 의무를 지지 아니하며, 또한 이러한 원상회복 대신으로 대한민국 정부에 보상하여야 할 의무도 지지 아니한다. 2. 대한민국 정부는 본 협정의 종료 시나 그 이전의 시설과 구역의 반환에 있어서 동 시설과 구역에 가해진 어떠한 개량에 대하여 또는 시설과 구역에 잔존한 건물 및 공작물에 대하여 합중국 정부에 어떠한 보상도 행할 의무를 지지 아니한다."[14] 기지 반환시 미국은 원상회복의무를 지지 않으며 한국도 미군이 남긴 잔존가치물에 대하여 보상할 의무를 면제하고 있다.

미국정부는 동 조항이 환경복원책임을 포함한 원상복구책임을 면제한 것으로 보고 있다.[15] 즉, 미군이 설치한 각종 기지의 시설의 잔존가치와 미군의 원상복구책임을 맞바꾼 것으로 보고 있다.[16] 미군은 동규정에 근거하여, 완전한 환경복원 책임이나 반환 후 드러나는 오염의 정화비용에 대한 배상책임을 부인할 것으로 보인다.

이에 대해 동규정은 "'기지자체'에 대한 원상회복 또는 손해배상 의무를 면제시켜준 것이지 기지로부터의 환경오염배출로 인해 기지주변의 환경 및 주민에 손해를 끼친 경우까지 동 의무를 면제시켜준 것은 결코 아니다. 일반 국제법상 각국은 자국관할내의 위험한 활동으로 인해 타국의 영역이나 재산 및 사람이 부당한 피해를 입는 것을 방지할 의무가 있는데, 이러한 초국경간 환경오염피해에 대한 국가의 방지의무는 국제 판례상, 국제 관습법상, 조약법상 확립된 국가의 기본적 의무"라고 보는 견해도 있다.[17]

동규정은 NATO-독일SOFA의 내용과 매우 다르다.[18] NATO-독일추

14) 동조항은 한국과 일본의 SOFA에 모두 규정되어 있다.

15) Richard A. Phelps, Environmental Law for Overseas Installations, 40 A.F.L.Rev. 49, 58(1996). SOFA 환경 분과위원회 미군측 위원장도 언론 인터뷰에서 이를 인정하고 있다. "(질문) 용산 기지가 한국 정부에 반환된 후에 오염사실이 발견되었을 경우 오염을 치유하고 그 비용을 부담할 것인가 (답변) 한미 SOFA 제4조에 언급된 것처럼 미군은 원상복원과 비용부담 의무가 없다. 이는 양국 정부의 합의사항이고 이를 따라야 한다." 2004년 12월 6일, 세계일보, SOFA 환경 분과위원회 미군측 위원장 윌슨 대니얼 대령 주한미군 사령부 공병참모부장.

16) Margaret M. Carlson, Environmental Diplomacy: Analyzing Why the U.S. Navy Still Falls Short Overseas, 47 Naval L. Rev. 62, 82 (2000).

17) 최승환 (주 3) 104쪽. 미국이 국제환경법상 오염원인자로서 책임을 져야 한다는 논의에 대해서는 최승환 (주 3) 93쪽 이하; J. Martin Wagner & Neil A.F. Popovic (주 11) 436쪽 이하 참조.

18) 국방부와 외교통상부의 관계 당국자의 견해에 의하면, 일본과 독일이 미국과 체결한 SOFA와 비교해 볼 때 우리나라의 SOFA가 불리하지 않고 오히려 앞서 있다고 주장한다. "환경과 관련해서는 우리가 독일이나 일본 SOFA 보다 앞서 있는 면이 많은 것으로 보인다. 우선 관련 규정의 형식면에서 한국과 독일이 SOFA와 불가분의 일체인 합의문서에 구속력 있는 환경조항을 두고 있는 반면, 일본은 SOFA와는 별도로 선언적 성격의 환경관련 공동선언을 두고 있다. 가장 큰 차이점으로는 불용 토지를 반환하거나 용도변경을 할 경우, 한미

가합의서에 의하면 미군은 미군에 의해 야기된 환경오염의 평가, 분석, 그리고 복원비용을 미군이 부담한다고 규정하고 있다.[19] 이 비용부담의무는 SOFA 청구권조항을 통해서, 잔존가치와의 상계를 통해서, 또는 미군의 회계예산절차나 비용조달에 따른 직접지불방법으로 충족될 수 있다고 규정함으로서 구체적인 실현방법까지 제시하고 있다. NATO-독일SOFA에 따르면 독일은 미군의 주둔 후 남은 잔존가치에 대한 보상책임을 부담하고 미군은 독일의 기준에 따른 환경복구비용을 부담한다는 것을 명확히 하고 있다.

한미SOFA의 경우도 2001년 부속문서의 개정과 새로운 합의문서의 채택을 통해 변화가 감지되었다. 즉, 한미SOFA합의의사록 제4조의 내용과 '환경보호에관한특별양해각서'의 내용은 기존 한미SOFA 협정본문 제4조의 내용을 부분 수정한 것으로 보인다. 2001년 한미SOFA합의의사록 제4조에 따르면 "합중국에 의하며 또는 합중국을 위하여 합중국의 경비로 건립되었거나 건축된 모든 이동 가능한 시설 및 시설과 구역의 건축, 확장, 운영, 유지, 경호 및 관리와 관련하여, 합중국에 의하여 또는 합중국을 위하여 대한민국으로 도입되었거나 또는 대한민국에서 조달된 모든 비품, 자재 및 수용품은 계속 합중국의 재산으로 되며 또한 대한민국으로부터 반출시킬 수 있

SOFA에는 반환 대상 부지에 대한 합동 실사를 할 수 있도록 하고 있지만, 미일SOFA와 미독SOFA에는 합동실사 규정이 없다는 것을 참을 수 있겠다."(김기조, 주한미군과의 SOFA, 그 회고와 전망-주일미군, NATO(주독)미군과 비교하면서-, 외교 제67호, 125, 133 (2003.11)); "한국과 독일이 합의문서에 구속력 있는 환경조항을 두고 있다. 독일은 미군의 독일법령 준수를 규정하고 있으며, 한국은 합의의사록에 환경보호의 중요성을 인식하고 한국정부의 환경법령을 존중한다는 조항을 두고 있으며 별도의 양해각서를 채택하고 있다. 반면에 일본은 SOFA 본문의 규정이 없고, 환경오염 위험에 대해 상호 협의하고 미국의 오염제거 정책을 확인한다는 법적 구속력이 없는 공동선언을 채택하고 있다. 그러나 가장 큰 차이점은 불용토지를 반환하거나 용도변경을 할 경우, 한미SOFA에는 반환 대상부지에 대한 합동실사를 할 수 있도록 규정하고 있지만, 미일SOFA, 미독SOFA에는 합동실사 규정이 없다는 점이다. 이렇듯 미국이 전 세계 80여개 국과 맺고 있는 SOFA 중 가장 앞서 있다고 알려진 미일, 미독SOFA와 비교하더라도 한미SOFA는 전반적으로 대등한 수준이라고 말할 수 있다."(안광찬, SOFA 문제의 본질과 개선방향, 한국군사 제16호,171,176 (2003)). 이들은 법의 존재형식에 있어서의 차이와 한미당국의 합동실사 규정을 예로 들면서 한미SOFA가 다른 미군주둔 국가가 맺은 SOFA에 비해 우수하다는 주장을 펴고 있으나, 미국의 해외환경정책은 이미 SOFA 규정과 관계없이 접수국에서 일반적으로 적용되는 환경법규를 최대한 반영한다는 것이므로 일반적이고 추상적인 SOFA 환경규정은 큰 의미를 갖지 못한다. 그리고 오염의 치유와 관련하여 독일의 경우, 미군의 정화비용에 대한 책임을 명문으로 규정하고 있으므로 독일정부는 미군의 정화책임을 공식적으로 물을 수 있으며 사후에라도 독일은 반환기지를 실사하여 책임을 물을 수 있으므로 반환이전 합동실사 여부는 큰 의미가 없다고 하겠다. 더욱이 한국과 미군당국이 맺은 '환경오염조사치유에관한합의서'에 의하면 한미합동조사를 105일이내에 마친다고 정하고 있어 합동조사가 오히려 환경오염 조사를 졸속으로 마침으로서 잘못하면 미국의 정화책임을 한국정부가 나서서 완화해주는 결과가 될 수 있다.

19) NATO-독일추가합의서 제63조 문항8bis.(a): "A force or a civilian component shall in accordance with this paragraph bear costs arising in connection with the assessment, evaluation and remedying of hazardous substance contamination caused by it and that exceeds then-applicable legal standards. These costs shall be determined pursuant to German law as applied in accordance with paragraph 1 of Article 53 or, where applicable, in accordance with Article 41 or 52. The authorities of the force or of the civilian component shall pay these costs as expeditiously as feasible consistent with the availability of funds and the fiscal procedures of the Government of the sending State." (강조를 위해 밑줄 추가됨)

다"고 규정하고 있다. 즉 한미SOFA협정본문 제4조와 달리 미국은 "이동 가능한(removable)" 모든 시설 및 비품에 대하여 미군의 재산임을 분명히 하였다. 그리고 '환경보호에관한특별양해각서'에서는 "주한미군에 의하여 야기되는 인간건강에 대한 공지의 급박하고 실질적인 위험을 초래하는 오염의 치유를 신속하게 수행하며, 그리고 인간건강을 보호하기 위하여 필요한 추가적 치유조치"를 검토한다고 규정하였다. 이러한 변화들을 통해 한미SOFA도 NATO-독일SOFA의 규정에 보다 근접하게 되었다.[20]

개정SOFA에 따른다면 미군은 기존 기지의 가치있는 시설들을 가급적 모두 철거하여 미군이 계속 사용하도록 한다는 것이다. 동규정에서 "이동가능한"(removable)의 개념이 해석의 여지가 있으나 반환후 미군이 남겨놓는 시설들의 잔존가치는 매우 적어질 것이 분명하다. 도로나 건물, 지하저장탱크, 지하시설 등이 주요 잔존물건이 될 것인데 우리가 미군이 떠난 부지를 계속 군사시설로 사용하지 않는 한 위의 잔존 물건은 우리에게 아무런 잔존가치가 남지 않을 것이다. 특히 용산이나 부산의 하야리아기지의 경우 공원으로 사용한다고 가정하면 미군이 남긴 시설물들은 모두 철거되어야 할 것이므로 우리에게 오로지 막대한 비용만 초래하게 될 뿐이다. 따라서 미국이 자신들이 설치하고 남겨놓는 미군시설의 잔존가치를 이유로 막대한 환경오염 정화책임을 전면 부인하는 것은 설득력이 없다.

2. 용산기지이전협정과 개정된 한미연합토지관리계획협정상의 환경정화책임 규정

2002년 3월에 체결된 연합토지관리계획협정 제3조는 "연합토지관리계획의 이행에 있어서 환경보호의 중요성을 인식·인정하면서, 당사국은 미국이 시설과 구역을 한국에 반환하고, 한국이 구역 및 대체시설을 미국에 공여하며, 자연환경 및 인간건강을 보호하고 오염된 구역을 치유하는 데 필요한 그 밖의 연합토지관리계획상의 조치가 주한미군지위협정 및 관련 합의에 따라 이루어지는데 합의한다"고 정하고 있다. 당시 존재했던 관련 합의는 2001년에 합의된 '환경보호에관한특별양해각서'이다. 동양해각서에서는 우선 미국의 환경정책 및 환경기준과 한국에서 일반적으로 집행되고 적용되는 한국의 환경법령 중에서 보다 엄격한 기준에 따라 2년마다 또는 수시로 검토 보완하는 환경관리기준(Environmental Governing Standard, EGS)을 만들

20) 그러나 미군당국은 이러한 SOFA후속문서의 법적 구속력을 인정하지 않고 있다. (필자가 미군 담당자와의 인터뷰에서 확인)

고,[21] 환경관련 정보를 공유하고 강화하며 환경공동조사를 위하여 한국측의 미군기지 출입절차를 마련하며,[22] 미군측은 정기적으로 환경관리평가를 실시하고 주요 오염을 제거하고, 우리측은 미군의 건강에 영향을 끼치는 외부의 주요 오염에 적절한 조치를 하도록 하는 규정을 두었다.

더 나아가서 2003년 5월 30일 한미 양국은 SOFA 합동위원회 특별회의를 열고 반환예정인 미군기지의 '환경오염조사및치유에관한합의서'에 서명했다.[23] 합의서에 따라 한-미 양쪽은 주한미군의 반환·공여지에 대해 반환 및 공여예정일 1년 이전에 공동으로 기초정보의 교환 및 실사, 환경조사의 실시, 조사결과의 검토 등 3단계에 걸쳐 105일 동안 환경조사를 실시한다. 1단계(30일)에는 대상기지의 환경상태에 관한 기초자료를 상호 제공, 검토하며 한미 공동 현장방문을 실시하며 여기에 지방자치단체의 환경담당공무원을 동행하도록 하였다. 2단계(60일)에는 SOFA 환경분과위원회에서 정밀조사 일정 등을 협의하며 정밀조사계획을 작성하고 검토한다. 한미 공동으로 시료를 채취하고 분석한다. 한국측은 환경관리공단 등 용역업체가 이를 시행하도록 하고 미측은 자체시설에서 분석하도록 한다. 3단계에는 조사결과 보고서를 교환하고 검토하며 미래 부지사용 계획과 일정표를 제공한다. 이 조사에서 오염 사실이 확인되면 기지반환의 경우에는 미국 쪽이, 기지 공여의 경우에는 한국 쪽이 오염을 치유하게 된다. 환경오염의 치유수준, 방법,

21) 환경보호에관한특별양해각서 환경관리기준: "대한민국 정부와 합중국 정부는 환경관리기준(EGS)의 주기적인 검토 및 갱신에 협조함으로써 환경을 보호하기 위한 노력을 계속한다. 이러한 기준은 관련 합중국의 기준 및 정책과 주한미군을 해함이 없이 대한민국 안에서 일반적으로 집행되고 적용되는 대한민국의 법령중에서 보다 보호적인 기준을 참조하여 계속 개발되며, 이는 새로운 규칙 및 기준을 수용할 목적으로 환경관리기준을 2년마다 검토함으로써 이루어진다. 합중국정부는 새로운 규칙 및 기준을 수용할 목적으로 환경관리기준의 주기적 검토를 수행하는 정책을 확인한다. 검토사이에 보다 보호적인 규칙 및 기준이 발효되는 경우, 대한민국 정부와 합중국 정부는 환경관리기준의 갱신을 신속히 논의한다." 2001년 '환경보호에관한특별양해각서'에 따르면 동 환경관리기준은 미국의 환경기준과 한국의 환경기준 중에서 보다 환경보호적인 기준을 택하여 매년 2년마다 또는 수시로 개선하기로 하였지만 주한미군이 1997년 이후 환경관리기준을 개선한 것으로 보이지 않는다. (본인이 2003년 환경부 정책총괄과로부터 입수한 환경관리기준은 여전히 1997년판이었다.)

22) 환경보호에관한특별양해각서 정보공유 및 출입: "대한민국 정부와 합중국 정부는 주한미군지위협정 제28조에 의하여 설치된 합동위원회의 체제를 통하여 대한민국 국민과 합중국 군인 군속 및 그들의 가족의 건강 및 환경에 영향을 미칠 수 있는 문제에 관한 적절한 정보를 교환하기 위하여 공동으로 작업한다. 시설 및 구역에 대한 적절한 출입은 합동위원회에서 수립되는 절차에 따라 이루어진다. 대한민국 정부와 합중국 정부는 합동위원회의 환경분과위원회를 통하여 1953년 상호방위조약하에 대한민국에서의 방위활동과 관련된 환경문제를 정기적으로 계속 논의한다. 환경분과위원회는 정보교환을 위한 분야, 시설 및 구역에 대한 한국 공무원의 적절한 출입, 그리고 합동실사 모니터링 및 사고후속조치의 평가를 검토하기 위하여 정기적으로 회합한다." 한미SOFA 합동위원회는 2002년 1월 18일 「환경정보공유 및 접근절차」를 발효시켰다. 주한미군과 지방자치단체간 연락체계를 구성하여 환경오염사고에 신속하고 효율적으로 대응하고 후속조치를 취하는 절차를 마련하였다. 그리고 미군기지 반환과 대체부지 공여에 따른 환경문제 해결을 위한 정보공유, 공동 조사등의 절차를 마련하였다.

23) 한-미 주둔군지위협정(소파) 합동위원회의 한국 쪽 위원장인 심윤조 외교통상부북미국장과 미국 쪽 위원장인 랜스 스미스 주한미군 부사령관이 서명했다. 외교통상부와 환경부에 따르면 동합의서의 전문은 한미 합동운영절차 5조에 의하여 양국간의 합의 없이는 전문 공개가 불가능하다는 한다.(2004년 8월5일 외교통상부 공식홈페이지를 이용한 질의에 대한 2004년 8월 10일자 답변, 환경부 정책총괄과의 8월 10일자 이메일답변)

사후관리방안 등에 관해서는 한미SOFA 환경분과위원회에서 추후 협의하여 치유조치를 실시하도록 한다. 언론 또는 대중에 대한 정보 배포는 양측 환경분과위원장의 승인이 있는 경우에 가능하도록 하였다.[24]

2004년 12월 비준동의를 거친 LPP개정협정과 용산기지이전협정에서는 위의 연합토지관리계획협정 제3조와 환경오염조사및치유에관한합의서의 내용을 다시 확인하였다. 즉 양국은 위 '환경오염조사및치유에관한합의서'가 정한 절차에 따라 기지의 반환과 이전을 수행하기로 하였다.

2. 해외기지의 환경정화에 관한 미국방부의 정책

미군이 철수하거나 기지재배치를 위해 접수국에 반환하는 미군기지에 대해서 취해야 할 환경치유는 미국방부지침 4715.8[25]에 정해져 있다. 반환대상 해외주둔기지의 복구에 관한 미국방부의 일반적인 입장[26]은 매우 제한적이다. 즉, "미군에 의한 오염으로 인해 야기된 인간의 건강과 안전에 대한 공지의 급박하고 실질적인 위험"[27]에 대하여 복구를 하는 것을 원칙으로 하고 있다. 그러나 미국방부는 어떠한 경우가 "인간의 건강과 안전에 대한 공지의 급박하고 실질적인 위험"인가에 대해 침묵함으로써 해당 부대 사령관에게 폭넓은 재량권을 부여하고 있다. 그러나 동규정이 '공지의'(known) 단어를 사용한 것으로 볼 때 반환대상 기지에 대한 심도있고 많은 비용이 소요되는 조사를 실시할 필요가 없는 것으로 해석될 수 있다.

복구정도는 환경오염이 더 이상 인간의 건강과 안전 그리고 환경에 급박하고 실질적인 위험을 내포하지 않는 상태에 이르게 된 상태가 될 때까지이다.[28] 미군당국은 이와 같은 위험에 바탕한 기준을 마련하고 있다. 물론, 각 지역 주둔

24) 연합뉴스 2003-5-30,

25) DOD Instruction 4715.8, Environmental Remediation for DOD Activities Overseas.

26) 미국방부는 1998년 2월 국방부지침4715.8(DOD Instruction 4715.8)을 마련하였다. Phelps (주 15) 77쪽 이하; Carlson(주 16) 99쪽 이하 참조.

27) "The DoD Components shall take prompt action to remedy known imminent and substantial endangerments to human health and safety due to environmental contamination that was caused by DoD operations and that is located on or is emanating from a DoD installation or facility." DOD Instruction 4715.8. § 5.1.1. 한미SOFA환경양해각서의 경우, "contamination caused by United States Armed Forces in Korea that poses a known, imminent and substantial endangerments to human health"로 규정되어 있어 인간의 건강에 미치는 위해에 대해서만 적용하고 있어 위 DOD Instruction 4715.8 의 규정에서 포함하고 있는 "안전"("safety")가 빠져 있어 더욱 범위가 좁다.

28) "Projects designed to remedy an imminent and substantial endangerment are considered complete when the contamination no longer poses an imminent and substantial endangerment to human health, environment, and safety. Commanders have the discretion to make risk-based decisions on how to carry out the remediation, ranging from institutional responses, such as restricting access, to more permanent remediation." DOD Instruction 4715.8. § 5.4.3.

군 사령관의 재량하에 그 이상 복구조치를 취할 수도 있다고 하고 있다. 그리고 복구조치는 기지의 반환 이후에도 계속될 수는 있지만 반환이전에 합의한 액수 이상의 비용을 지불할 수는 없다는 것이다. 그리고 별도의 '국제법상의 의무'가 없거나 '정치적인 필요'에 의하지 않는 한, 접수국의 요구에 의한 추가적인 복구조치는 접수국의 비용으로 충당하도록 한다는 것이 미국방부의 입장이다.[29]

미 연방의회의 예산지원이 없는 한, 정화를 위한 모든 비용은 군사시설의 일반운영예산으로부터 나온다.[30] 해외주둔기지에서의 환경보호체재에 대한 자금측면의 부족함은 의회에 그 책임이 있다.[31] 충분한 자금이 없는 가운데 일선 부대의 지휘관들과 환경집행기관(Environmental Agent, EA)는 SOFA나 환경관리기준이 담고 있는 추상적이고 모호한 규정들을 이용하여 책임을 회피함으로써 비용을 절감할 수 밖에 없다.

미국은 실제로 접수국과 체결한 개별SOFA규정이나 접수국과의 외교적 관계를 고려해 차별적인 환경정화 노력을 해외에서 기울이고 있다. 참고로 1999년도를 예를 들면 미국방부는 1억 6천5백만달러를 해외환경분야에 지출하기로 계획하였다. 그중 90%는 환경기준 준수와 관리에 사용하고 그 나머지를 오염지역의 정화에 사용할 계획이라고 하였다. 이는 전세계 해외주둔기지를 정화하는데 고작 1,650만달러를 사용하기로 계획했다는 것을 의미한다. 이는 미국 국내의 오염기지를 정화하는 데 국방부가 사용하는 한 해

29) "Remediation beyond that specified in paragraphs 5.1.1, through 5.1.3., above, may be undertaken by the host nation using its own resources during U.S. occupancy of the installation or facility. The DoD Components shall encourage such remediation and cooperate with host-nation efforts by providing the information specified in section 6., below, and appropriate access to contaminated sites, subject to operational and security requirements." DOD Instruction 4715.8. § 5.1.4. "Such remediation may be completed after return of the installation or facility to the host nation, but shall be limited to the essential elements in a remediation plan approved by the DoD Component before return. If remediation will continue after return, to ensure consistency among DoD Components before finally approving a remediation plan, the appropriate DoD Component shall consult with the DoD Environmental Executive Agent, if any. 4715.8. § 5.2.1.1. 미 국방부의 입장은 완전한 정화책임을 해외에서 일률적으로 부담하기 보다는 극히 부분적으로 책임을 지는 것을 원칙으로 하고 그 이상의 정화책임에 관해서는 개별 접수국과의 '외교적 관계' 또는 '정치적 필요'를 고려해 개별적으로 대응하겠다는 것이다. 미국정부는 세계 각국에 위치한 자국의 해외기지의 환경오염이 심각한 것으로 드러나고 정화책임을 부인하는 미국에 대한 비판적인 여론이 해외 뿐만 아니라 미국내에서도 일자 환경문제를 미국의 안보와 직결되는 중대한 문제로 보고 이와 같이 일부이나마 복구책임을 지겠다는 유화적인 태도를 취하게 된 것이다.

30) Carlson, (주 16) 100쪽. 해당 기지의 사령관이 환경문제에 대한 대처를 결정하게 되는데 그들은 정화비용을 미의회가 제공하지 않은 만큼 환경정화를 하기 위해서는 일반운영예산을 사용할 수 밖에 없게 되는데 이는 군사훈련 또는 군수조달품을 줄이고 환경정화조치를 해야 하는 결과를 의미한다. 즉, 그들의 군인들을 위험하게 하면서 환경정화를 할 수 밖에 없게 되므로 일선 사령관들은 환경정화의 필요성을 인식하더라도 정화조치를 충분히 취하지 못하게 되는 것이다.

31) 1995년 미국 연방의회는 국방부가 요구한 것보다 4억달러나 적게 예산배정을 하였고 배정된 예산에서 다시 3억 달러를 취소하였다. 1996년예산에서는 국방부가 요구한 것보다 2억달러나 적게 예산배정하였다. 각각의 경우, 국방부 시설들은 의회의 이러한 조치와 국방부의 지침에 따라 예산사용의 우선순위를 변경하였다. Carlson(주 16) 논문 100-101쪽.

자금 17억 2천만달러의 약 1%에 불과하다.[32] 미국방부가 해외환경분야에 지출하는 금액 중 가장 많은 부분이 독일에서 사용되었다. 캐나다의 경우,[33] 지난 1996년 미군이 철수한 기지에 대해 환경오염의 정화를 요구하였고 이에 대해 미국방부는 법적 책임이 없다고 주장하였다. 그러나 그 후 미국방부는 태도를 바꾸어 캐나다정부에 1억달러를 지원하기로 합의하였다.[34]

3. '환경오염의조사및치유에관한합의서'와 SOFA 관련규정의 문제점

1) 지나치게 짧은 합동조사기간

동합의서 따르면 반환예정일로부터 1년 이전에 환경오염조사를 공동으로 시작하여 105일 이내에 기초정보의 교환 및 실사, 환경조사, 환경조사의 검토를 마친다고 한다. 국방부에 따르면 반환지 및 공여지의 오염조사 절차는 1단계(30일)에 환경상태에 관한 기초정보를 제공하고, 2단계(60일)에 현장에서 시료를 채취하고 분석하며, 3단계(15일)로 조사결과보고서를 교환한다고 한다.[35] 미군이 주둔한지 50년이 지난 현재 그 동안 미군기지내에서 행해져온 각종 활동에 관한 서류 및 자료를 수집하고 담당자들과 서면 또는 인터뷰를 통해 군기지의 운영실태를 이해하는데 만도 많은 시간이 소요된다. 정밀한 기초정보의 분석을 통해 오염예상지역을 파악하고 오염예상지역에 대한 시료채취분석이 이루어져야 한다. 기초정보의 수집과 분석을 겨우 30일안에 마친다는 것은 이후의 환경조사 역시 허술하게 될 가능성이 높다. 미군이 과거 시행한 환경처리업무의 자료들을 면밀히 서면조사하고 환경관련 책임자들과 인터뷰를 하여 오염이 의심되는 장소들 탐문하여 그러한 의심지역들을 정밀조사하고 오염의 가능성을 세밀히 조사해야 한다. 미국의 경우, 오염지역의 조사에만 여러 해가 걸리기도 한다. 미군의 이전시 환경자료를 모두 넘겨 받아 부대의 운용과 환경오염실태를 올바로 파악할 수 있도록 해야 한다. 미군이 기지를 반환할 경우 미군에 의해 운영된 기지 안에서의 폐기물 발생현황, 폐기물처리실태, 유해물질 관리실태 등에 관한 모든 자료를 넘겨 받아야 한다.[36] 더욱이 당장 올해부터 2008년까지 미군이 반환

32) Boston Globe (주 8).

33) Boston Globe (주 8).

34) 이러한 합의에 관해 1998년도 미국방부가 미의회에 제출한 서한에 따르면 캐나다의 경우 미국과 국경을 접하고 있으며 미국과 오랜 역사적 우호관계에 있는 나라에 대한 특별사례이며 다른 나라를 위한 선례가 될 수 없다고 하였다. The Boston Globe(주 8) 참조.

35) 국방부 국방시설본부 web-site http://www.mnd.go.kr/ 참조.

하는 지역이 5천만평이 넘는 현실에서 환경오염조사를 수행할 기관의 인력과 전문성부족으로 인하여 짧은 기간안에 환경오염조사를 제대로 수행할 것은 기대하기 힘들다.

2) 정화기간의 부족

그리고 반환예정일로부터 1년 이전에 105일 동안 환경조사를 하여 치유여부를 결정한다고 하였다. 만약 합의서가 정한 치유대상이 되는 오염이 발견되어 치유키로 한다면 동합의서는 최대한 260일 동안 환경치유를 한 후 반환하겠다는 것으로 추론된다. 치유가 필요하다고 결정한 기지에 대해 오염의 정도에 상관없이 260일안에 치유를 마치겠다는 점 또한 졸속으로 정화를 마치겠다는 것과 다름없다. 오염의 조사와 치유에 대한 계획을 수립하는데 만도 오랜 시간이 소요된다. 심각한 오염지역의 정화에 소요되는 비용은 막대하기 때문에 주한미군의 일반예산 만을 가지고는 불가능한 경우가 일반적일 것이다. 우리 군도 심각한 토양오염을 경험한 바 있다. 우리 군은 1991년 부산 문현동에 소재한 제2정비창을 폐쇄하고 부지를 민간에 매각하였으나 부지가 심각하게 오염된 것으로 드러나 군에서 책임을 지고 정화조치를 민간에 의뢰하였고 정화기간은 총 2년 8개월이 소요되었으며 정화비용으로 122억원을 지출하였다.[37] 우리가 직접 경험한 바에서 알 수 있는 것처럼 오염된 토양의 정화에는 많은 시간과 비용이 소요된다. 심각한 오염이 드러나는 경우 막대한 정화비용은 해당 부대 자체의 운영비용으로는 도저히 감당할 수 없게 된다. 그러한 경우 미국방부는 특별히 예산편성을 하여 의회로부터 승인을 받아 집행하여야 하므로 여러 해가 소요될 것이다. 그러므로 반환하는 기지의 정화를 일률적으로 1년안에 끝마친다면 반환기지의 환경오염문제는 올바르게 정화되지 않은 채 한국에 반환될 가능성이 매우 높다.

36) 필리핀의 경우, 미군이 기지를 반환한 후, 1997년 필리핀 정부에 의해 조사가 이루어 졌다. 미군은 철수하며 필리핀 당국에 1000쪽 분량의 환경관련 자료를 전달했다고 한다. 그러나 전문가에 의하면 그 분량의 정보는 존재하는 자료의 극히 일부분에 불과하다고 한다. 미국의 엔지니어가 필리핀 상원에서 진술한 바에 의하면 Subic 해군기지에서 작성된 기록들은 웬만한 중간크기 창고를 채우고도 남을 정도일 것이라고 한다. 기지에서 일했던 근로자들의 증언에 의하면 유해 폐기물을 무단 방류하거나 매립지에 무단 매립하였다는 증언들이 잇달았으며 이와 관련된 자료들은 미군당국에 의해 대부분 폐기되었음이 밝혀졌다. 일찍이 주필리핀 미군해군기지의 환경담당관은 하수처리시설과 유해물질저장창고를 건설할 것은 군당국에 권고하였지만 그러한 권고들은 군 당국에 의해 무시되었던 것으로 드러났다. 또한 Subic 기지에서는 많은 군수품들이 소각되었는데 그러한 소각의 찌꺼기를 어떻게 처리했는지에 관한 기록이 남아있지 않다고 한다.Boston Globe (주 8) 기사 참조.

37) 국방부, "부산 문현지구 토양복원 사례", 뿐만 아니라 부지의 매수자가 제기한 손해배상소송에서 패소하여 175억원에 대한 배상책임을 감수하여야 하였다. 2003. 부산고등법원, 2004나2229 손해배상(기) 2004. 8. 12. [제1심 부산지방법원 2001기합13573].

미국의 실례를 보면 오염된 토양과 지하수를 복원하는데에는 오랜 기간과 엄청난 비용이 소요되는 것을 알 수 있다. 미국의 군기지폐쇄재배치법(the Base Closure and Realignment Act, BCRA)에서는 군기지의 폐쇄하고 그로부터 6년 이내에 폐쇄된 기지의 환경조사를 마치도록 규정하였다. 따라서 적어도 폐쇄로부터 6년 이내에는 정화작업이 시작되어야 하나, 오염지역의 분석과 정화계획의 연구와 수립에만 6년 모두 소요되는 일이 드물지 않다.[38] 정화에 소요되는 비용 또한 막대한 데, 1995년에 폐쇄된 146개의 기지 중 33개의 기지를 정화하는 비용으로만 20억달러가 소요되었다고 한다.[39]

환경오염의 정도가 정확하게 결정되게 되면 정화비용의 추산은 의례 증가하게 마련이고 정화의 완료시점도 의례 훨씬 후로 늦춰지게 마련이다. 토지가 과거 민간용으로 사용되었건 군사용으로 사용되었건 정화조치가 실제로 상당히 전개되지 않는 한 오염의 정도를 정확하게 평가하기란 매우 어려운 것이기 때문이다. 군사용 토지의 경우, 오염물질이 무엇이냐에 따라 그 문제가 더 심각해 질 수 있다. 오염물질이 군수품세정제나 핵탄두 등이 관련된 경우라면 문제는 훨씬 심각할 수 있다. 이러한 오염물질의 정화에는 매우 많은 비용과 시간이 소요된다.

3) 조사결과의 공표와 정화기준 및 방법의 공개

환경부나 외교부는 반환되는 기지의 합동조사결과와 '환경오염의조사및치유에관한합의서' 전문을 공개하지 않고 있다. 한국 정부는 한미 합동운영절차 5조를 근거로 미국측 대표가 비공개를 요청해와 이를 수용해 공개하지 않는다고 한다. 미군이 반환할 예정인 미군기지는 무려 5천여만평이 이르고 상당부분 공원이나 농지 등의 용도로 민간의 사용에 제공될 것으로 보인다. 따라서 반환예정지의 정화에 관한 문제는 국민의 생명과 안전에 관계된 문제로서 국민은 알 권리가 있다. 따라서 정부가 반환되는 기지의 합동조사결과와 한미간의 합의서 전문을 공개하지 않는 것은 헌법과 공공기관의정보공개에관한법률의 취지에 반한다고 하겠다.

환경부나 외교통상부가 주장할 만한 공개거부의 사유라면 비공개대상정보를 규정한 공공기관의정보공개에관한법률 제9조 제1항의 제1호와 제2호 정도가 될 것이다. 제1호는 "다른 법률 또는 법률이 위임한 명령(국회규칙

38) Jessica K. Reynolds, Military Base Closure Oversight via Environmental Regulations: Replacing Judicial Review of Closure Decisions and Methods With Comprehensive Alternative Redevelopment Mechanisms, 4 Alb.L.Envtl.Outlook 40 (1999).

39) Id.

대법원규칙 헌법재판소규칙 중앙선거관리위원회규칙 대통령령 및 조례에 한한다)에 의하여 비밀 또는 비공개 사항으로 규정된 정보"를 비공개대상정보로 정하고 있다. 법률의 효력을 가지는 한미SOFA가 과연 여기서 말하는 '법률'에 해당하는지가 문제이고 한미합동운영절차가 과연 '법률이 위임한 명령'에 해당되는지 문제이다. 정보공개법은 정보공개를 원칙으로 삼고 있으므로 예외조항은 좁게 해석되어야 할 것이다. 조약은 법률에 해당한다고 하더라도 위 한미합동운영절차가 비공개대상이 될 수는 없다. 왜냐하면 한미SOFA는 그 어느 규정에서도 합동위원회가 특정사항을 비밀로 할 수 있다는 규정을 두고 있지 않다. 그리고 '법률이 위임한 명령'이란 대법원 판례에 의하면, "법률의 위임규정에 의하여 제정된 대통령령, 총리령, 부령 전부를 의미한다기보다는 정보의 공개에 관하여 법률의 구체적인 위임 아래 제정된 법규명령(위임명령)"을 의미한다고 본다.[40] 따라서 한미SOFA에서 정보공개에 관하여 구체적인 위임규정을 두고 있지 않고 단순히 한미 합동위원회의 사무에 관한 포괄적인 위임에 근거해 한미합동운영절차를 마련했다면 설령 그곳에서 특정사항을 공개하지 않기로 정했다 하더라도 정보공개법상 비공개대상 정보는 될 수 없다고 하겠다. 그리고 동법률 제9조 제2호에서는 "국가안전보장·국방·통일·외교관계 등에 관한 사항으로서 공개될 경우 국가의 중대한 이익을 현저히 해할 우려가 있다고 인정되는 정보"를 비공개대상정보로 정하고 있다. 과연 폐쇄되어 반환되는 기지의 환경정화 계획이나 환경오염 조사결과의 공표가 국가의 중대한 이익을 현저히 해할 우려가 있다고는 볼 수 없다. 그러므로 한국정부가 미군의 반대를 이유로 반환되는 미군기지의 환경오염상태에 대한 조사결과나 정화계획에 대하여 공개를 거부하는 것은 법적 근거가 없다.

미국의 경우에도, 미국정부는 오염지역의 정화계획을 수립하면 정화계획의 개요와 분석내용을 공공에 공표하고 시민들의 의견수렴을 거친 후 그 의견을 고려하여 최종 계획을 수립한 후 다시 공공에 공표한 후 정화작업에 들어가도록 정하고 있다.[41] 그리고 또한 제반 정화조치의 과정에 지방자치단체가 적절하게 참여할 수 있도록 하고 있다.[42] 미국의 관련법인 CERCLA가 정하고 있는 시민의 참여 절차는 군기지의 정화에 있어서도 동일하게 적용된다.[43] 따라서 미군이 한국 정부에 대하여 기지의 환경조사결

40) 대법원 2003.12.11선고 2003두8395.

41) U.S.C. s.9617.(a),(b).(2000).

42) U.S.C. s.9621(f)(2000).

43) DOD Instruction 4715.7., F. 6. "Conduct public participation in a manner consistent with the requirements of the Comprehensive Environmental Response, Compensation, and Liability

과와 환경오염의 조사 및 치유방안에 관하여 비공개를 요청하는 것은 분명히 미국의 법에 위반되는 것이고 법적 근거 없는 것이다.

4) 정화의 기준과 방법

우리 정부가 미군과 협의하에 환경정화에 나설 때 활용할 수 있는 기준은 토양환경보전법상의 토양오염우려기준이다. 미군주둔기지의 경우 토양환경보전법상의 '가'지역으로 보아야 하는가 아니면 '나'지역으로 보아야 하는가? 가지역의 경우란 지적법에 의한 지목이 전·답·대·과수원·목장용지·임야·학교용지·하천·수도용지 및 사적인 지역이고 나지역이란 지적법에 의한 지목이 공장용지·도로·철도용지 및 잡종지인 지역을 말한다. 현재 미군에 공여된 지역의 지목은 알 수 없으나, 토양환경보전법의 입법목적에 비추어 해석을 해야 할 것이다. 즉, 토지의 용도에 따라 토양오염의 허용한계를 달리하려는 취지에 비추어 반환되는 미군기지의 경우, 반환후 어떠한 용도로 사용할 것인가에 따라 정화의 기준을 정해야 할 것이다. 즉, 반환후, 민간에 넘겨 농경지로 사용하도록 하거나 공원으로 조성하려고 하는 경우 '가'지역으로 보아 가지역의 우려기준 이내로 오염물질을 정화하도록 하고, 반면 공장 등 산업시설로 사용하려고 할 경우 '나'지역으로 보아 나지역의 우려기준을 정화의 기준으로 삼도록 하는 것이 필요하다.

V. 결론

해외주둔기지의 정화에 관한 미국의 입장은 미군이 주둔하고 있는 국가와 최대한 정치적으로 해결한다는 입장이다. 미국이 현재까지 접수국에 반환한 기지의 정화사례를 보면 유럽과 캐나다 등 선진 우방국과 필리핀 한국 파나마 등 후진국 접수국에 대하여 이중적인 입장을 보여 왔다. 필리핀의 경우 1992년 반환된 수빅만의 해군기지와 클라크 공군기지의 경우 매우 심각한 오염사실이 보도되었음에도 불구하고 아무런 정화조치도 하지 않았고 재정 및 기술지원 의사를 보이고 있지 않다. 2000년 7월 필리핀 정부가 미국정부에 '전 군사기지에 대한 환경정화에 대한 환경협력 요청'을 하였으

Act(CERCLA), the National Contingency Plan, and other applicable laws and regulations by ensuring timely public access to information, opportunity for public comment on proposed activities, and consideration of public comments in the decision-making process. Establish Technical Review Committees(TRC) or Restoration Advisory Boards(RAB) that include representatives of the community, in accordance with the Deputy Under Secretary of Defense(Environmental Security) Memorandum (reference(s))." (밑줄은 강조를 위해 추가됨)

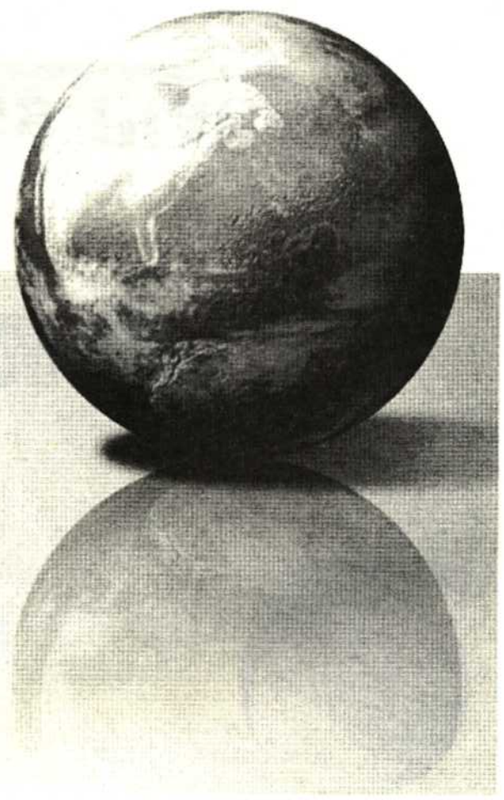
나 미국 정부는 지금까지 당시 MBA(Military Bases Agreement)에 기지철수 후 환경정화에 관한 부분이 포함되어 있지 않으므로 기지 정화에 관한 책임이 없다고 주장하고 있다. 1999년 반환한 파나마기지의 경우도 마찬가지이다. 미국은 한국에서도 우월한 교섭력을 이용하여 환경정화책임을 부인하려고 한다. 미국은 한미간에 체결된 SOFA와 그 부속문서들에서 미국의 환경정화책임을 명확히 인정하고 있지 않다. 이와 대조적으로 캐나다에서 미국은 미군기지를 반환하면서 오염사실이 드러나자 1억달러를 정화비용으로 지불하기로 캐나다 정부와 합의한 바 있다. 또한 미군당국은 독일의 오염지역을 조사하고 매년 기지의 정화비용으로 적지 않은 금액을 예산에 반영하고 있다. 1999년 7월에 이루어진 독일 '라인마인협정'에서는 기지를 반환한 뒤 3년 이내에 확인되는 환경파괴도 주유럽미공군이 복구할 책임을 명시하였다. 이 협정은 복구비용의 대금지불방법과 부담해야 할 복구비용 액수까지 구체적으로 정하고 있다. 또 복구해야 할 환경파괴의 내용에 대해 무단방류한 기름, 금이 간 유류탱크, 위험물 저장탱크 등으로 구체적으로 정해 놓고 있다.

한국정부는 한미간에 체결된 각종 합의서의 애매모호한 규정들을 일반적인 환경법원칙과 국제법 원리에 비추어 해석하여 미국정부를 설득하여야 한다. 미군이 자신이 야기한 심각한 환경오염에 대하여 복원책임을 져야함은 환경법의 일반원리나 국제법원칙에 비추어 당연하다. 한국정부는 미국과의 외교적 관계를 고려해 미국에 대하여 법적인 대응을 할 수 없다 하더라도 정치적 외교적 노력을 통해서도 미국이 오염시킨 환경오염에 대해서는 한국의 토양환경관리법이 정한 바에 따라 미국이 정화책임을 충실히 이행하도록 요구해야 한다.

한국정부는 기지반환관련 협의에서 오염지역의 정화문제를 우선순위에 두어야 하고 미군이 수행해야할 정화의 절차와 기준을 명확히 해야 한다. 반환기지의 환경조사를 위해서는 '환경오염의조사및치유에관한합의서'에서 정한 기간을 연장해서라도 환경조사에 임해야 하며 인적 물적 시설을 총동원해야 하며 경험 많은 미국의 컨설팅회사를 참여시키는 것도 배제하지 말아야 한다. 오염의 조사결과와 정화계획에 대하여 민간에 공개하고 의견을 수렴하여 정화조치를 수행하도록 해야 한다. 그리고 지방자치단체의 폭넓은 참여도 보장해야 한다. 또 장기적으로는 한미SOFA의 관련 규정들을 개정하여 미군의 국내 환경법준수의무와 환경오염조사 및 정화비용에 대한 부담원칙을 명확히 하는 것이 필요하다.

An Introduction to the Activities of the National Human Rights Commission of Korea

human rights for all



National Human Rights Commission of Korea

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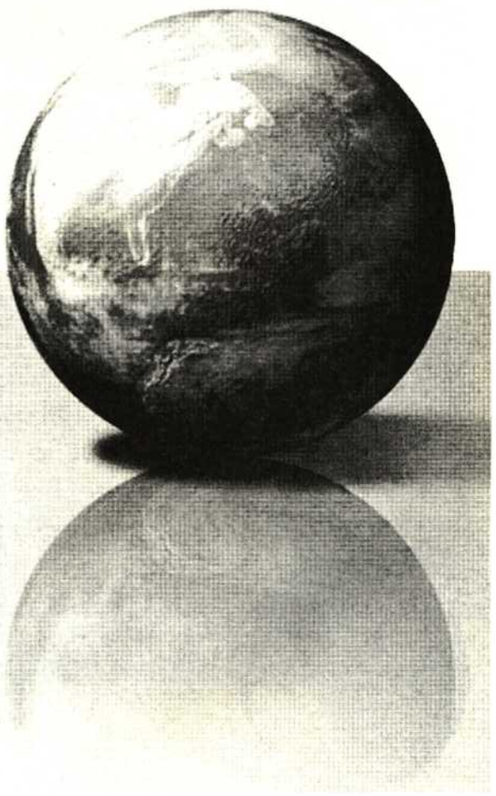
I. General Information



1. Purpose of Establishment

Safeguard of the basic order
of democracy

NHRCK

Protection of inviolable,
fundamental human rights of
all individuals

Embodiment of
human dignity and worth

2. History

International Process

- 1960~ UN recommends states to establish National Institutions
- 1978 Geneva Guidelines established
- 1991~93 Paris Principles established

Domestic Process

- 1993 NGOs call for the establishment of a NI
- 1997 presidential candidate, Kim Dae-jung pledges to establish a NI
- 1998 Conflicts over the "institution" proposal of the Ministry of Justice and the "national organ" proposal of the ruling party
- 1999~2001 Conflict between NGOs and the Ministry of Justice over issues on status and power of the institution
- 2001 The National Human Rights Commission Act promulgated (5.24), enters into force (11.25)

3. Characteristics

Independent

Does not belong to administrative, legislative or judicial bodies

Comprehensive

Has comprehensive jurisdiction including all human rights

Quasi-judicial

Investigates and attempts remedy of human rights violation

Quasi-international

Implements international standards domestically

National Human Rights Commission of Korea

4. Major Functions

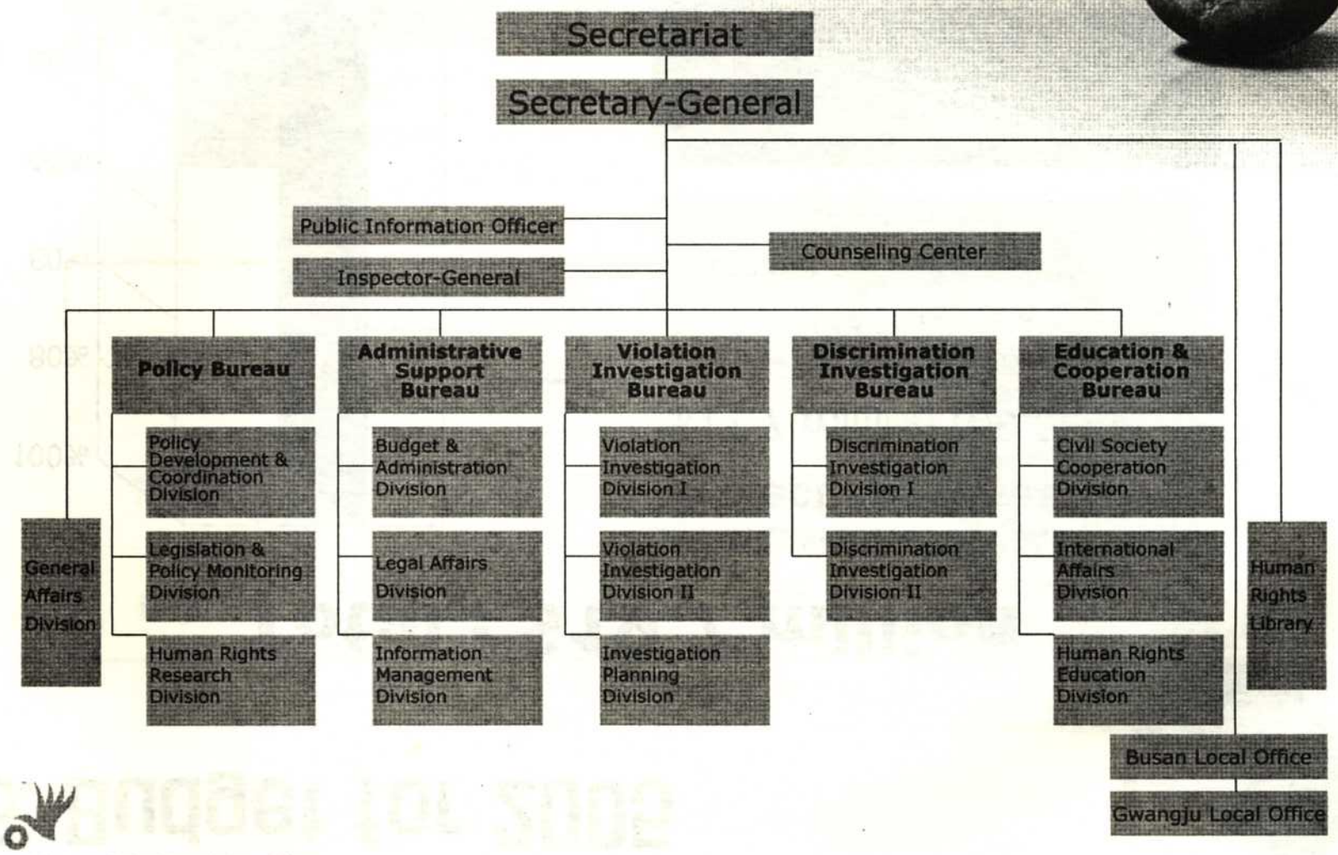
- research on human rights laws and policies
- **policy recommendations** and presentation of opinions concerning human rights issues
- **investigation and remedy of human rights violations or discrimination**
- human rights **education**, raising public awareness, and monitoring the status of human rights
- **cooperation** with domestic and international human rights groups and organizations

National Human Rights Commission of Korea

5. Organization – Commission

National Human Rights Commission of Korea

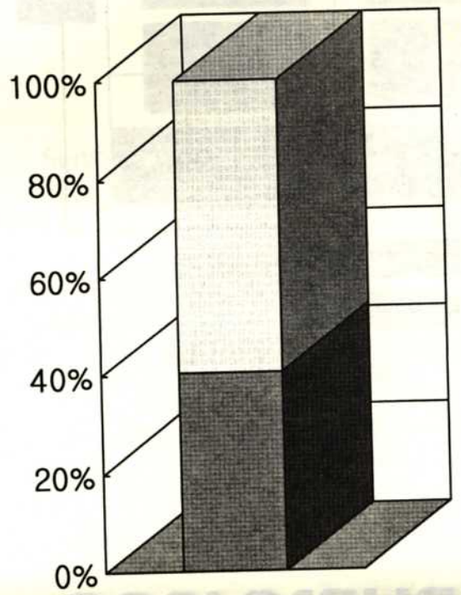
– Secretariat



National Human Rights Commission of Korea

6. Budget for 2005

Total : $19.7 million



Project expenses

$11.7 million (59.3%)

- basic project expenses (33.1%)
- major project expenses (26.2%)

Payroll

$8 million (40.7%)

7. Overview of Complaints filed, Counseling, & Referrals

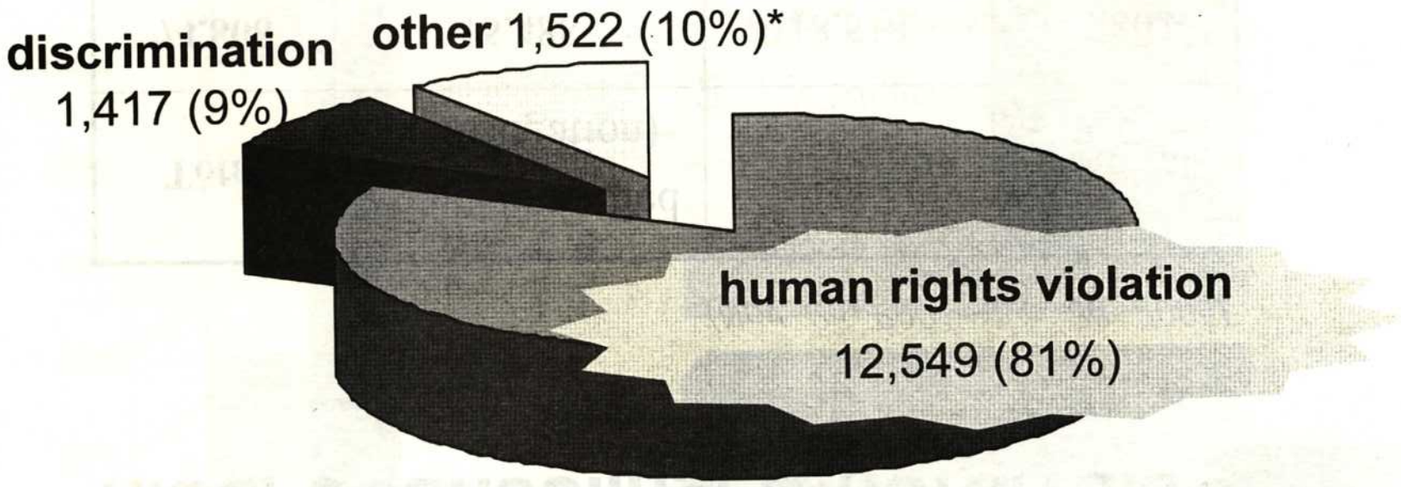
(Nov. 26, 2001~Jun. 30, 2005)

Total	Complaints filed (investigation)	Counseling	Referral
74,808	15,488	18,518	40,802
100%	20.7%	24.8%	54.5%

8. Complaints Received

Total: 15,448 complaints

(Nov. 26, 2001~Jun. 30, 2005)

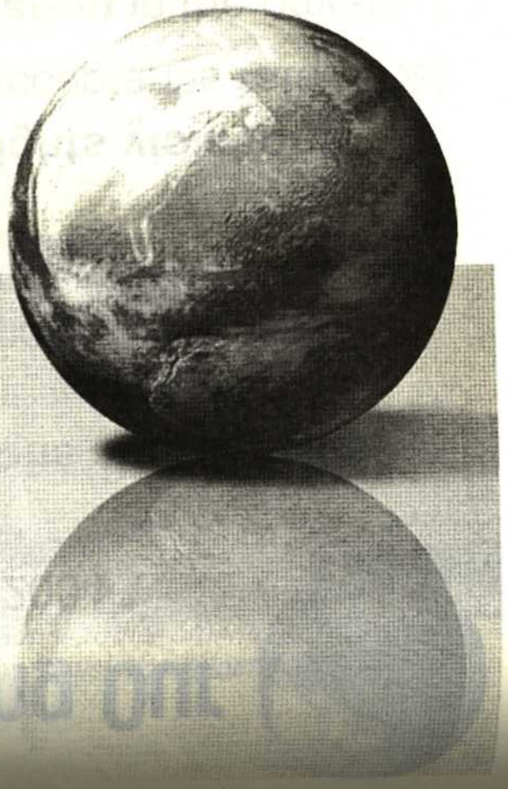


**Other includes human rights violations by private individuals, corporations, other organizations, infringement of property rights, or violations related to laws/institutions, legislation/litigation, etc.*

9. Major Activities during Our First 3 Years from 2001 to 2004

- Recommendations to improve **regulations and policies** (acceptance rate 79%)
  - 41 cases of regulation amendments, 9 cases of domestic performance in implementing international conventions, 32 cases of policy amendments
- Recommendations to amend **human rights violations** committed by government authorities (acceptance rate 95%)
- Recommendations to amend **discrimination** in the private sector (acceptance rate 79%)

II. Business Plan for 2005–2007



1. Goals for 2005 – 2007

improve social rights	• reinforce protection of socially vulnerable groups such as children, women, senior citizens, farmers, the poor, etc. ※ the NHRCK aimed at improving civil & political rights in its first three years
establish system to prevent human rights violation	• strengthen public awareness raising, human rights education activities
bolster cooperation with NGOs	• strengthen collaboration with human rights NGOs

2. Revision of the NHRC Act

- **The NHRC Act revised on July 29, 2005**
  - **Integrating the gender discrimination redress function of the Ministry of Gender Equality into the Commission**
  - **Establishing regional branch offices of the Commission**
    - Increased accessibility, prompt investigation and remedy, human rights education throughout the country
    - Established in Busan and Gwangju

➢ Exploring the consolidation of investigation and remedy of other types of discrimination that are currently functions of other ministries into the Commission

3. National Action Plan (NAP)

Finalizing a Recommendation of the Draft Five-year National Action Plan for the Protection and Promotion of Human Rights

- **The Commission will recommend policy tasks for each area, including:**
  - **civil/political rights**
  - **economic/social/cultural rights**
  - **discrimination against minority groups**
  - **human rights education, and**
  - **strengthening civil society and international cooperation**

➢ Final NAP recommendation is scheduled to be submitted by the end of 2005

4. Social Rights Issues

- **Active involvement in addressing pending issues regarding the socially vulnerable groups**
  - Drafts of recommendations for the protection of socially vulnerable groups such as children, women, the elderly, farmers, the urban poor, and irregular workers.
  - Propose policies regarding gender, disability, and employment

- **Expansion of field research on social rights**
  - Focused research on human rights regarding social rights
  - Research on housing problems, child care situation under the age of 8 of households below poverty line

5. *Policy* Alternatives on Pending Issues

1. Military Human Rights Reform

- Improving administration of justice
- Strengthen investigation of human rights violations
- Strengthen human rights education

2. Research DPRK Human Rights

- Collect and analyze materials from both home and abroad
- Collect information through interviews with North Korean defectors
- Provide a practical solution for reforming human rights for North Korean defectors