Legal Control over Environmental Offenses Committed by the U.S. Military Activities in Korea*

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I. Introduction

According to customary international law and the judicial decision of the Permanent Court of International Justice, Lotus case, activities of a foreign nation within the territory of a host nation are governed by host nation law unless there is an agreement otherwise between nations.[1] Status of Forces Agreements(SOFA) have constituted such an agreement whereby the U.S. has agreed only to respect, but not generally be bound by, host nation law regarding the U.S military activities overseas. Most SOFA including SOFA with Republic of Korea (ROK or South Korea) and bilateral supplementary agreements were drafted in an age when environmental issues were hardly considered and thus reflect an absence of any specific provisions concerning compliance with host nation environmental laws. It has been pointed out as one of

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1) J. Brierly, The Law of Nations, 6th ed.(London, Oxford, 1963) p.60., Restatement (Third) of Foreign Relations Law §§ 401-03 (1986) The Lotus Case, P.C.I.J. Report, 1927, Series A, No 10, pp. 18-19.

legal problems of SOFA.[2] These critics and public concerns on environmental issues have led negotiation for amendment of SOFA and resulted in amendments to "Agreed Minutes"and establishment of "Memorandum of Special Understanding on Environmental Protection" in 2001.

The Agreed Minutes article III adds a new paragraph regarding basic policy of environmental protection in military activities in Korea. It also confirms the U.S military policy to respect relevant South Korean environmental laws, regulation, and standards. Furthermore, "Memorandum of Special Understanding on Environmental Protection"declares environmental protection and prevention of pollution on facilities and in the communities adjacent to the U.S. military bases. It also regulates governing standards, information sharing and access, environmental performance, and environmental consultation briefly. The word "respect" is, however, very vague and problematic in that it implies less than full immunity from host nation law yet is not equivalent to obey. Compliance in specific contexts with host nation law on a particular subject has often been the subject of controversy and debate.[3]

SOFA is silent regarding any obligation to remediate environmental contamination caused by the U.S. military operations.[4] While SOFA relievesthe U.S. of any

2) Jang Hie Lee, "A draft Revision of the Korea-USA SOFA regarding Criminal Jurisdiction and Areas & Facilities", Anam Law Review, Vol.18, No 0, 2004, p. 1, Jae Ho Sung, "Review of the Status of Forces Agreement between the Republic of Korea and the United States, Criminal Jurisdiction of the SOFA between the Republic of Korea and the United States" Seoul International Law Review, Vol.5, No 2, 1998, p 35, Seung Hwan Choi, Eun Joo Park, "Recent Cases Relating to the SOFA between the Republic of Korea and the United States", Seoul International Law Review, Vol 5, No 2, 1998, p.53,.

3) Chae, Young Geun, "The U S Environmental Policy at Oversea Military Bases", Environmental Law Review, vol. 25 no. 1(2003, 9) p 101, Bu-Chan Kim, "Legal Status of US Army in Korea and Its Legal Problems", Law and Society, vol.2, 1990, p. 153

4) There is a notable exception is in the Republic of Panama

"to take all measures to ensure insofar as may be practicable that every hazard to human life, health and safety is removed from any defense site or a military area of coordination or any portion thereof, on the date the United States Forces are no longer authorized to use such site. Prior to the transfer of any installation, the two Governments will consult concerning: (a) its conditions, including removal of hazards to human life, health and safety, and (b) compensation for its residual value, if any exists."

Agreement in Implementation of Article IV of the Panama Canal Treaty Between the United States of America and The Republic of Panama with Annexes, Agreed Minute and Exchange of Notes, 7 Sept.

obligation to restore property provided for its use to its original condition upon return, SOFA Article IV SOFA with NATO includes a waiver of claims by the host-nation, under certain circumstances, for damage to host-nation property made available for the use of the U.S. military.[5] When the 1993 Revisions to the German Supplementary Agreement (SA) becomes effective, the U.S., for the first time, become obligated to "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."[6] Nevertheless, that obligation is specifically subject to SOFA claims provisions, residual value, and "the availability of funds."[7]

Consistent environmental pollution around U.S. military bases, such as oil spill to ground water and soil contamination by petroleum, have raised public concerns on more strict and regulated legal system for the U.S. military environmental pollution control.[8]

Green Korea United ("GKU"), a South Korean environmental non-governmental organization, alleged that the Eighth U.S. Army Mortuary dumped four hundred and eighty 475ml bottles of embalming fluid into the Han River, Seoul's main water supply, on February 9, 2000. GKU supported this allegation with documents, photos, and other materials received from US civilian employees.[9] The embalming fluid contained methanol and formaldehyde which GKU claims cause cancer and birth defects. The U.S., on the other hand, asserted that the diluted formaldehyde posed no health hazards. In response to this incident, GKU and a South Korean non-governmental organization called the National Campaign for the Eradication of Crimes by U.S. Troops staged protests in front of the Eighth U.S. Army Complex. The United States eventually offered an apology after admitting that the embalming fluid had in fact been released into the river. The apology did not quell the resentment of many South

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1977 (entry into force for the US on 1 Oct. 1979), Article. IV, para. 4

5) NATO SOFA, Article VIII, para. 1, 1993 Revision of the German Supplementary Agreement, Article 41, para 3.(a) and art 41, para 4.

6) 1993 Revision of the German Supplementary Agreement, Article. 63.

7) Id.

8) Chae, Young Geun, supra note 3 p. 103.

9) See USFK Secretly Dumped Toxic Chemicals Into Han River, Civic Group Claims, The Korea Herald, July 14, 2000, available in 2000 WL 21233222

Korean environmental groups.

As a matter of fact, the environmental pollution control system of the U.S. forces oversea is not limited only by SOFA. Besides of SOFA, environmental compliance obligation of U.S. forces overseas come from the U S. environmental legislation, U S federal rules and regulations such as the Uniform Code of Military Justice (UCMJ), Presidential executive order and Department of Defense rules, regulation and directives, as well. These rules and regulation play a critical role as criminal and administrative law for the U.S. army in abroad. Even though these laws and regulations are not able to work as controlling acts in Korean courts, they must give environmental compliance obligation to the U.S. forces abroad in the U S. federal Court of Justice.

II. U.S. Federal Environmental Laws and Extraterritoriality Problems

The federal government of the United States has a comprehensive environmental law regime. The United States is one of the first nations in the world to have created a legal regime designed to protect its environment[10] A study of the applicable federal laws is appropriate here because some of them directly pertain to the actions of all federal agencies, including the military. Therefore, the U.S. domestic environmental laws are one element in the U.S. government's overseas environmental law formula.[11]

Applying domestic legislation abroad, however, poses the special problem of extraterritoriality. Congressional legislation is presumed to apply only within the territorial jurisdiction of the United States, unless, "language in the relevant act gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control" which is known as the Foley doctrine.[12] The federal legislation at issue in Foley

10) Roger W. Findley, Daniel A. Farber, Environmental Law, 5th Ed (St. Paul, Minn, West Group,1999) p 35; David Hunter, James Salzman, Durwood Zaelke, International Environmental Law and Policy(New York, Foundation Press, 1998) p.167

11) Chae, Young Geun, supra note 3 p 104

12) EEOC v. Arabian Am. Oil Co, 499 U S. 244, 248 (1991) (citing Foley Bros v Filardo, 336 U.S. 281, 285 (1949))

provided that overtime compensation was due for any work in excess of an eight-hour workday. The plaintiffs claimed overtime pay for work performed in Iraq and Iran. The United States Supreme Court has ruled that the federal law did not apply extraterritorially to the plaintiffs. The Court reasoned that federal legislation applies only within the territory of the United States unless there is a clear Congressional intent that the law is to apply extraterritorially. The Court articulated two rationales for the strict rule in the Foley case.[13] First, Congress is assumed to legislate primarily with domestic concerns in mind. The second rationale is that the presumption is intended to avoid encroachment on foreign sovereignty and the resulting creation of international discord.[14]

A review of the major environmental statutes reveals that these statutes are generally designed to cover pollution occurring within the territory of the U.S.. For example, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) defines the "environment" as "any surface water, ground water, drinking water supply, land surface or subsurface strata or ambient air within the United States or under the jurisdiction of the United States," and requires the President to adopt a National Contingency Plan that addresses releases or threatened releases "throughout the United States."[15] The Clean Water Act's (CWA) objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and defines covered navigable waters as "waters of the United States."[16] The Clean Air Act's (CAA) purpose is "to protect and enhance the quality of the Nation's air resources," and sets up an elaborate scheme using air quality control regions in the U.S.[17]

However, a controversy remains as to the extraterritorial application of National Environmental Protection Act, or "NEPA" which has been called America's Magna Carta for natural resources management.[18] The NEPA, the first environmental law in the U.S,

13) Foley Bros. v Filardo, 336 U.S. 281, 285 (1949)
14) Id.
15) Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. ㎜ 9601(8) and 9605(a)(8)(A)
16) Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) and 1362(7).
17) Clean Air Act, 42 U.S.C. § 7401(b) and 7407
18) NEPA 42 U.S.C. §§ 4321-4370d.

requiresthe preparation of an environmental impact statement (EIS) before major Federal actions significantly affecting the quality of the human environment commence s.[19] As one court noted that NEPA "was designed explicitly to take account of impending as well as present cases in this country and in the world as a whole,"[20] NEPA contains some sweeping language in the statute to propose its possibility of the extraterritorial application For example, "harmony between man and his environment," "eliminate damage to the environment and biosphere," "restoring and maintaining environmental quality to the overall welfare and development of man," and "recognizing the worldwide and long-range character of environmental problems".[21]

Environmental Defense Fund (EDF) v. Massey, raises the possibility that NEPA does not raise any extraterritorial issues In Massey, the EDF sought to enjoin the National Science Foundation (NSF) from incinerating food wastes at the U.S. research facility at McMurdo Station in Antarctica.[22] EDF argued that burning the garbage would produce a significant effect on the environment, and therefore that the NSF had violated NEPA by failing to prepare an EIS before using the incinerator. The Massey court held that NEPA applied to the NSF's actions in Antarctica. The court gave two reasons for its holding. First, Antarctica had a unique status-it had no sovereign and it was the subject of substantial United States control.[23] Second, and more important, NEPA applied to the NSF's burning of food wastes because the decision-making process occurred primarily within United States borders.[24] The latter rationale is known as the "headquarters theory."[25] The court found that NEPA was designed to regulate the decision-making processes occurring in the United States, where federal agencies make their decisions. Under Massey, an analysis of the applicability of NEPA should not focus on where the impacts of the decision occur, but on where the

19) NEPA, 42 U S C § 4332(c)

20) City of Los Angeles v NHTSA, 912 F 2d 478, 491 (D.C Cir 1990)) (emphasis added) recited in Karen A. Klick, "The Extraterritorial Reach of NEPA's EIS Requirement After Environmental Deffense Fundv Massey" The American University Law Review", vol 44, 1994, p.241

21) 42 U.S.C. § 4332(2)(C).

22) Environmental Defense Fund v Massey, 986 F.2d 528, 529 (D.C. Cir. 1993).

23) Id. at 533-34

24) Id. at 531.

25) It is different with "effect theory" in extraterritorial issue because Massey case raises does not raise any extraterritorial issues.

deliberation takes place.[26]

However, later that same year, the Federal District Court for the District of Columbia held that NEPA did not apply to U.S. Navy installations in Japan. In NEPA Coalition of Japan v. Aspin, the plaintiffs argued that the Department of Defense was required to prepare EISs for its military bases in Japan.[27] Deviating from the Massey precedent, the court distinguished Japan from Antarctica, emphasizing the intrusive nature of applying NEPA in Japan and the potential negative impacts on U.S. foreign policy.[28] The Aspin court held that if the Department of Defense was required to prepare EISs, the court would be encroaching on political territory that is reserved to the executive branch. The Court reasoned: "Plausible assertions have been made that EIS preparation would impact upon the foreign policy of the United States."[29]

The issue of whether an EIS was required for a major federal action abroad was addressed in Executive Order (E.O.) 12,114.[30] The order specifically exempts federal agencies from conducting an EIS-type procedure for major federal actions significantly affecting the environment of a foreign nation, unless that foreign nation is not participating with the U.S. or not otherwise involved with the action.[31] However, EDF v. Massey created something of an exception to E.O. 12,114. Therefore, extraterritorial application of NEPA still has potential to U.S. military activities oversea causing environmental damages.

III. Uniform Code of Military Justice

Under the SOFA provisions outlining concurrent criminal jurisdiction, the United States holds the right to exercise criminal jurisdiction over those persons subject to the military law of the United State. The Uniform Code of Military Justice (UCMJ) is a classic application of such military law.[32] Article 5 specifies that "this chapter

26) Id. at 531-35
27) NEPA Coalition of Japan v. Aspin, 837 F. Supp 466 (D.D.C. 1993).
28) Id. at 467.
29) Id at 468
30) Exec. Order No. 12,114, 44 Fed. Reg. 1957, (1979) [hereinafter E.O. 12,114]
31) Id. at para. 2-3(b)
32) Uniform Code of Military Justice, 10 U.S.C. § 801-946

applies in all places," as Congress clearly intended to make it extraterritorial. Convening a court-martial in a foreign country clearly constitutes an exercise of extraterritorial jurisdiction by the U.S. At one time the military did not have jurisdiction over offenses committed off an installation and by civilian authorities, if an offense was not service- connected however, this limitation has since been eliminated. And now, jurisdiction over U.S. military forces is determined by a "status test."[33] This test allows us to establish subject matter jurisdiction over an offense committed anywhere, depending solely on an accused's status as a member of the U.S. armed forces.[34] The locus of the crime and its connection to the armed services and its mission makes no difference as to UCMJ jurisdiction, albeit successful prosecution of military members stationed overseas for environmental offenses still depends on using a punitive article of the UCMJ.[35]

Article 92, clause 3, of the UCMJ provides for criminal liability for dereliction of duty. The elements of the offense include: (a) that a person had certain duties; (b) that the person knew or reasonably should have known of the duties; and (c) that the person was willfully or through neglect or culpable inefficiency derelict in the performance of those duties. A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service. Actual knowledge of a duty need not be shown if the person reasonably should have known of his duties, which may be demonstrated by, for example, regulations and training.[36]

Article 109 of the UCMJ may afford the U.S. a basis for military jurisdiction for environmental offense. Article 109 provides for criminal liability for willfully or recklessly wasting or spoiling or otherwise willfully and wrongfully destroying or damaging any property other than military property of the U.S.. The property referred to includes any real property not owned by the U.S.; wasting or spoiling refers to acts of voluntary destruction or permanent damage such as cutting down trees; and damagingrefers to any damage and must be done intentionally and contrary to law,

33) Mark E. Eichelman, "International Criminal Jurisdiction Issues for the United States Military", Army Law. vol 23, 2000, p. 23.
34) United States v. Solorio, 483 U.S. 435 (1987).
35) Mark E. Eichelman,, supra note 33, p 24
36) Uniform Code of Military Justice, 10 U.S.C. 892, cl.3

regulation, lawful order, or custom. Of particular application to environmental offenses committed on or off an installation is the provision regarding damage to real property (the host nation owns the installation, and real property off the installation is owned by a host nation or subordinate government or private person).[37]

Two cases in Germany involving oil dumped into storm drains resulted in Article 15.[38] This procedure provides a commander authority to nonjudicially punish members in her command for violations of the punitive articles of the UCMJ. The offender has the right to request a trial by court-martial to consider the charges. One incident at Hahn Air Base was charged under Article 92(2) for a violation of a military housing regulation. The other incident, off Rhein-Main Air Base, was charged as a violation of Article 109, damage to real property. The other case involved an Air Force officer stationed at Ramstein Air Base, Germany. In 1992, this officer was in charge of a vehicle convoy during a training deployment on the German autobahn and ordered the fuel in a poorly running vehicle to be drained into a sewer drain. His conduct was aggravated by the fact his subordinates had informed him that this was against German law, and was further aggravated by his order to surround the vehicle with other military vehicles to obstruct the public's view. The disposition of the case is a classic study in the problems experienced in applying the UCMJ to environmental offenses overseas. No regulations existed proscribing this conduct that would allow for a prosecution under Article 92(1) or (2). As to Article 92(3), the German Final Governing Standard(FGS) would have established a duty not to drain fuel into a sewer, but it was not yet effective, and the base Staff Judge Advocate (SJA) concluded that the OEBGD standards had not been given the training and command emphasis to establish the officer's knowledge of those standards. Articles 134(2) and 109 were considered, but there was insufficient command interest in proceeding with Article 15 nonjudicial punishment and in fully determining whether the conduct violated German environmental law. The German authorities did inquire about thedisposition of the case (an administrative written counseling) only after an American subordinate of the

37) James E. Landis, "The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States' Overseas Environmental Policies", Naval Law Review, vol. 49, 2002, p. 99,

38) UCMJ, nonjudicial punishment 10 U.S.C 815

offender informedthe Germans of the incident.[39]

VI. The Federal Executive Orders and Federal Rules and Regulations

As early as the Carter Administration, there was general concern about the environmental consequences of federal agency actions overseas.[40] In 1979, President Carter issued Executive Order 12,114, which imposed a limited form of NEPA compliance on agency actions abroad.[41] Executive Order 12,114 requires consideration of environmental impacts in federal decision making overseas. Although the order did not export the requirements of NEPA overseas, it furthered the purpose of that Act by creating NEPA-like environmental impactanalysis requirements applicable to specific categories of "major federal actions . . . having significant effects on the environment outside the geographical borders of the United States, its territories and possessions. "[42] Depending on the category of impact, the order requires decision-makers todocument their consideration of environmental impacts through the use of environmental impact statements, studies, and reviews.[43] Specific actions are exempted, and agencies are authorized to establish additional categorical exclusions.[44] However, it has been construed as not applying to most of our military forces overseas, because it requires an EIS-type environmental review only if foreign nations are not participating with the U.S. or otherwise not involved in the action. Specifically, "participation" by another nation is undefined therefore, almost any official involvement by host nation officials could block preparation of an EIS.[45]

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39) Mark R Ruppert, "Criminal Jurisdiction Over Environmental Offenses Committed Overseas How to Maximize and When to Say "No"", The Air Force Law Review, vol 40, 1996 pp 39-40.

40) James E Landis, supra note 33, p 101

41) Exec. Order No 12,114, 44 Fed Reg 1957, (1979)

42) Id para 1-1,2-1

43) Id. para 2-4(a),5(a)

44) Id. at para 2-5(c). The order provides that " agency procedure may provide for categorical exclusions . as may be necessary to meet emergency circumstances, situations involving exceptional foreign policy and national security sensitivities and other such special circumstances."

The Executive Order 12,114 required further implementation by federal agencies, and Department of Defense implementation occurred through Department of Defense Directive 6050.16.[46] Department of Defense Directive 6050.16 generally implements the following procedures for environmental executive agents (EAs): (a) identify host nation environmental standards (including those specifically delegated to regional or local governments for implementation) and the enforcement record of such laws and standards to determine their applicability to Department of Defenseinstallations, (b) identify and review applicable environmental standards from base rights agreements and Status of Forces Agreements; (c) compare host nation law applicable to U.S. forces with baseline guidance to be developed from U.S. environmental law requirements, and (d) draft and publish mandatory standards for environmental compliance incorporating the stricter of either host nation environmental law or the baseline guidance.[47] Department of Defense Directive 6050.16 has led to the creation of baseline and country-specific environmental compliance standards.

In 1992, the Department of Defense adopted the Overseas Environmental Baseline Guidance Document (OEBGD)[48] to begin implementing the mandates of the Department of Defense Directive 6050.16. The OEBGD contains specific environmental compliance criteria based on U.S environmental laws to be used by EAs in developing "final governing standards"[49] to be used by all Department of Defense installations in a particular host nation.[50] Furthermore, the OEBGD provides that, unless inconsistent with applicable host nation law, base rights, SOFAs, or other international agreements, the baseline environmental guidance shall be applied by U.S. forces overseas when

45) General Accounting Office, Improved Procedures Needed for Environmental Assessments of U.S Actions Abroad 10 (1994).

46) Department of Defense Directive 6050 16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Military Installations (1991) (on file with the Office of the Deputy Assistant Secretary of Defense (Environment))

47) Department of Defense Directive6050.16, at paras. C.1 and C 2.

48) DEPARTMENT OF DEFENSE ENVTL OVERSEAS TASK FORCE, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (1992) [hereinafter OEBGD].

49) These are defined as "country-specific substantive provisions, typically technical limitations on effluent, discharges, etc., or a specific management practice, with which installations must comply" OEBGD at 102.

50) Id

host nation environmental standards do not exist or provide less protection to human health and the natural environment than the baseline guidance.[51]

The OEBGD and final governing standards contain standards for the following: air emissions; drinking water; wastewater; hazardous materials; solid and hazardous waste, medical waste management; petroleum, oil and lubricants; noise; pesticides; historic and cultural resources; endangered species and natural resources; polychlorinated biphenyls; asbestos; radon; environmental impact assessments; spill prevention and response planning; and underground storage tanks.[52] The OEBGD and final governing standards apply to Department of Defense installations overseas, but not to ships, aircraft, and operational and training deployments off the installation.[53]

V. Conclusion

The main hurdle in seeking to apply the environmental regulations established by Congress to the U.S. bases in Korea is determining whether the U.S. domestic laws can be enforced outside the territorial jurisdiction of the United States. The traditional policy against applying domestic laws overseas is motivated by a desire not to infringe on the sovereignty of the nation hosting the U.S. activity. This rationale is mitigated when the host country's laws are substantially similar to U.S. laws and when the host country does not object to the application of U.S. laws in place of their own laws. Moreover, the international law principle of non-discrimination encourages the application of the strictest regulation of activities that can cause environmental harm, in recognition of the potentially irreparable destruction that can occur.

Initially, Aspin might appear to be the most relevant precedent when seeking to apply federal NEPA to U.S. military activities in Korea. The primary concern of the Aspin court was that by requiring the Department of Defense to prepare EISs, the Court would risk intruding upon a long standing treaty relationship, thereby infringing on Japanese sovereignty. However, under Massey, NEPA requirements cannot infringe on the sovereignty of the Korea if the federal action exclusively affects U.S.

51) Id.
52) Mark R. Ruppert, supra note 38, p. 101
53) Id.

operations. In other words, when Korea is not participating with the U.S. or not otherwise involved with the action, where was addressed in Executive Order (E.O.) 12,114, the U.S. military in Korea cannot be exempted from conducting an EIS-type procedure for major federal actions significantly affecting the environment of Korea. Since the concerns over State sovereignty and separation of powers are not present in the issue surrounding U.S. liability for environmental harms to the Korea, Massey remains the controlling authority. The Masseycourt cited to several situations in which the presumption against extraterritoriality is weak. The presumption is weak in cases where the United States exerts substantial control over the region at issue.[54]

The potential application of punitive provision to derelictions by military members for environmental matters seems obvious. However, before the OEBGD and final governing standards, specificity was lacking and justifiably criticized. Vague and broad pronouncements by the President in E.O. 12,088 could not serve as the basis for a specific, articulable duty for purposes of the UCMJ Article 92(3). In addition, obligation in the SOFA Agreed Minutes requiring the United Stateforces to "respect"host nation law is much too vague -- absent a military regulation implementing some specific provision of the SOFA -- to constitute the basis of a dereliction of duty prosecution under Article 92. The OEBGD and the first attempts by the U.S. at minimum substantive compliance standards based on U.S. law would have been a promising source of the duty necessary to prosecute environmental offenses under Article 92(3), but for the following language: "This document does not create any rights or obligations enforceable against the U.S., Department of Defense, or any of its services or agencies, nor does it create any standard of care or practice for individuals."[55] Such language seems curiously at odds with the Department of Defense 's OEBGD policy "to be on the forefront of environmental compliance and protection."[56] Compounding this problem in the OEBGD is the incorporation of boilerplate exculpatory language into some of the final governing standards (FGS).

One wonders whether this language, which may preclude the use of Article 92(3) for

54) Massey, 986 F.2d at 531-35 (citing ARAMCO, 111 S.Ct at 1230, Sierra Club v. Adams, 578 F.2d 389 (D.C Cir. 1978), People of Enewetak v. Laird, 353 F. Supp. 811 (D Haw. 1973)).
55) OEBGD, at 1-3
56) Id.

dereliction of duty on the basis of OEBGD or certain FGS noncompliance, was intentional or an oversight. Its apparently nonbinding nature evidently led the U.S. Military to take the position that OEBGD and FGS standards are not "legal requirements" for purposes of funding overseas environmental compliance.

A recommended starting point to make the UCMJ a useful tool for protecting environment would consist of the removal of exculpatory language from the OEBGD and all FGSs, enactment of punitive general regulations concerning the most frequently violated FGS standards (possibly matching the standards in which host nation authorities are most interested), and the actual implementation of the comprehensive training regimen called for in FGSs. Finally, U.S. military commanders must use the UCMJ in appropriate cases to handle environmental offenses if the U.S. wishes to defend and preserve its policy of maximizing criminal jurisdiction in this sensitive area.

소병천

주한미군 환경사범(Environmental Offenses by the U.S.F.K)

한미행정협약(Status of Forces Agreements(SOFA))

미국연방환경법(U.S. environmental legislation, U.S. federal rules and regulations)

미국 군형법(Uniform Code of Military Justice (UCMJ))

미국 행정규칙 및 지침(Presidential executive order and Department of Defense rules, regulation and directives)

[抄錄]

주한미군의 환경사범에 대한 법적인 규제에 관한 연구

소병천*

주한 미군의 환경범죄 내지 환경파괴 행위는 그 피해 주민의 반미감정을 불러일으켜 전통적인 혈맹관계에 있던 한미관계를 어렵게 하는 여러 요소 중 하나가 되고 있다. 주한미군의 환경범죄 행위는 한미간의 주둔군지위협정(Status of Forces Agreement)에 의해 규율 되어야 하지만 현 주둔군지위협정은 환경관련 조항을 두고 있지 않고 단지 환경보호에 관한 특별양해각서(*Memorandum of Special Understanding on Environmental Protection*)를 통해 기본적인 선언만을 취하고 있을 뿐이다. 환경보호에 관한 특별양해각서는 실질적인 구속력이 약하여 주한미군의 환경침해사범에 대한 효과적인 규제를 기대 할 수 없는 실정이다. 따라서 본 논문은 국제법인 SOAF 외에 국내법적으로 특히 미국의 국내입법으로 주한미군의 환경침해사범을 규제할 수 있는 방안을 강구하고자 한다. 본 논문에서 검토하는 것은 미국 연방 환경 법률로서 주한미군에게 적용될 수 있는 법들을 고찰하고 이에 대한 미 법원의 입장을 알아보며 미 연방정부의 명령인 대통령령에 의해 해외미군에 적용되도록 만들어진 환경규정과 구체적인 지침 및 주한미군에게 적용되는 군법 중 환경 관련 규정 역시 간략히 검토한다. 이중 미 연방환경법률은 논란의 소지는 있지만 주한미군의 환경범죄를 직접적으로 규제하는 근거법으로 사용될 수 있으며 이와는 별도로 미군형법 및 미 행정규정들은 주한미군의 환경사범에 적용될 수 있다는 점을 부각시킨다. 그리고 현재 이러한 관점에서 제기되어 현재 진행되고 있는 외국의 재판에 꾸준한 관심을 기울일 필요가 있다.

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