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Cover Page Footnote

Yale Law School, J.D. expected 2005; Yale University, Ph.D. in Economics expected 2006. Special thanks to Amy Chua for her incredibly helpful comments. The author takes full responsibility for all errors.

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CRIMINAL JURISDICTION UNDER THE U.S.-KOREA STATUS OF FORCES AGREEMENT: PROBLEMS TO PROPOSALS

YOON-HO ALEX LEE*

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I. INTRODUCTION

Ever since the collapse of communism in the early 1990s, the United States has found maintaining global military presence increasingly difficult and its objective less clear. Not surprisingly, nations that once sought U.S. assistance and protection no longer feel the same level of threat from their neighbors. As we begin the twenty-first century, issues concerning terrorism, the world economy, and globalization have taken priority in foreign policy;

* Yale Law School, J.D. expected 2005; Yale University, Ph.D. in Economics expected 2006. Special thanks to Amy Chua for her incredibly helpful comments. The author takes full responsibility for all errors.

containing communism hardly appears to be the most urgent agenda.[1] The past decade and a half witnessed the demise of the Soviet Union, the fall of the Berlin Wall, and China's liberalization, leaving North Korea as the sole vestige of the Cold War. The primary mission of U.S. troops stationed abroad has mainly become that of peacekeeping, typically under the direction of the United Nations.[2] The overall size of the United States force permanently stationed abroad is currently being reduced accordingly.[3]

Meanwhile, this reduction of Cold War angst has partly given rise to, or has simply unveiled, more pronounced tensions between U.S. soldiers stationed abroad and the locals of host nations. These disputes often take the form of challenging the fairness of the bilateral agreements between the United States and the host nations that make explicit the legal rights and responsibilities of military forces (and often of the accompanying civilians as well) stationed on foreign soil. These agreements are commonly known as the Status of Forces Agreements (SOFAs). By and large, the contents of the SOFAs exhibit only slight variations from one host nation to another.[4]

Today 37,000 U.S. troops are stationed in South Korea alone.[5] While their presence has prevented North Korea from launching any significant attack on its counterpart, the relationship between South Koreans and the U.S. troops has not been one of complete

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1. *See* PAUL K. DAVIS & LOU FINCH, DEFENSE PLANNING FOR THE POST-COLD WAR ERA 13 (1993) (discussing United States defense planning in a report prepared for the Pentagon by the National Defense Research Institute). *Cf.* GENRIKH TROFIMENKO, THE U.S. MILITARY DOCTRINE 33 (1986) (providing an official Soviet discussion of United States military policy from the Cold War era).

2. *See* Sam C. Sarkesian & Robert E. Conner, Jr., *Conclusion: The Twenty-First Century Military*, *in* AMERICA'S ARMED FORCES: A HANDBOOK OF CURRENT AND FUTURE CAPABILITIES 420 (Sam C. Sarkesian & Robert E. Conner, Jr. eds., 1996) [hereinafter HANDBOOK OF CAPABILITIES]. For more information on peace-keeping mission, see also Steven G. Hemmert, Note, *Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction*, 17 B.U. Int'l L.J. 215, 227-239 (1999).

3. *See* Daniel J. Kaufman, *The Army*, *in* HANDBOOK OF CAPABILITIES, *supra* note 2, at 39.

4. Some of the topics covered are ordinary but nonetheless necessary to insure a smooth working relationship between the United States and the host nation. These include stipulations for the passport and visa requirements, personal income tax exemptions, etc. Other portions of the SOFA cut to the essence of sovereign power. Currently, the United States has negotiated SOFAs with ninety-two countries worldwide. For the complete list of SOFAs, see Status of Forces Agreements, *at* http://www.defenselink.mil/policy/isa/inra/da/list_of_sofas.html (last visited Oct. 3, 2003). For examples of recent disputes among locals in host countries and U.S. troops, see, e.g., Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67 (1992); and Kimberly C. Priest-Hamilton, Comment, *Who Really Should Have Exercised Jurisdiction over the Military Pilots Implicated in the 1998 Italy Gondola Accident?*, 65 J. AIR L. & COM. 605 (2000).

5. *See* S. Korea, US to Forge New Troop Pact, UPI, Dec. 28, 2000, LEXIS, Asiapc Library, UPI File.

harmony. Several recent, unrelated events have contributed to propagating anti-American sentiments among Koreans,[6] but perhaps no single event prompted a greater scale of protests and more conspicuous public displays of hostility from the Korean public than one particular tragic event last summer.

On June 13, 2002, a U.S. armored vehicle ran over two young Korean girls who were walking to a friend's birthday party.[7] The girls were crushed to death instantly. The incident happened in a village near Uijongbu, just 18 miles south of the border between North Korea and South Korea. The vehicle was part of a convoy traveling to a training exercise. Initially, the United States Forces in Korea (USFK) had no plan to prosecute the soldiers, calling it a mere accident. But thousands of Koreans organized mass protests and demanded that the U.S. military hand over Sergeant Mark Walker and Sergeant Fernando Nino, the two soldiers responsible for this incident, to face criminal charges in a South Korean court. The U.S. reluctantly charged the soldiers with "negligent homicide" in the deaths of the teenagers, and agreed to try them at a military tribunal. The Status of Forces Agreement[8] (the Korea SOFA) between the United States and South Korea granted primary jurisdiction to the United States over crimes committed by soldiers while on duty.[9] The Korean Ministry of Justice, for the very first time in the 36-year history of the Korea SOFA, requested that the United States waive its primary jurisdiction. The United States declined to surrender jurisdiction, insisting that "there was no such precedent."[10] Furthermore, Korean police were given very limited authority to investigate the case even though the Korea SOFA

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6. Over the past six years, a number of Koreans have been upset with the United States for: 1) the stringent economic policy imposed by the IMF and the U.S. Treasury during the 1997 East Asian Economic Crisis; 2) President George W. Bush's State of the Union speech in 2002 in which he labeled North Korea as a member of the "axis of evil"; and 3) the stripping of short-track speed skater Kim Dong Sung's gold medal at the Salt Lake City Olympic Games.

7. For more facts of this case, see Na Jeong-ju, *Activists Watch Talks on SOFA Revision in Anticipation*, KOREA TIMES, Dec. 11, 2002, *available at* http://times.hankooki.com (last visited Mar. 15, 2003); *Armitage Conveys Bush's Apologies*, KOREA TIMES, Dec. 11, 2002, *available at* http://times.hankooki.com (last visited Oct. 3, 2003); Sgt. Russell C. Bassett, *Tracked vehicle driver found not guilty in Korea*, ARMYLINK NEWS, Nov. 22, 2002 *at* http://www4.army.mil/ocpa/news/index.php (last visited Mar. 15, 2003); and Jeremy Kirk, *U.S. Soldier Pleads Innocent in Deaths of Two South Korean Girls*, STARS & STRIPES, Sept. 28, 2002, *available at* http://www.estripes.com (last visited Oct. 3, 2003).

8. Facilities and Areas and the Status of United States Armed Forces in Korea, July 9, 1966, U.S.-S.Korea, 17 U.S.T. 1677, 674 U.N.T.S. 16. [hereinafter The Korea SOFA].

9. *Id.* art. XXII, para. 3(a)(ii).

10. Kim Ji-ho, *U.S. Military Refuses to Relinquish Jurisdiction over American Soldiers*, KOREA HERALD, Aug. 8, 2002, *at* http://www.geocities.com/leavekorea/middleschool/8_8.htm (last visited Oct. 3, 2003).

explicitly grants this right to Korea.[11] Subsequently, the two soldiers were tried at separate military tribunals. Both were acquitted in a jury trial where the jury members were all U.S. citizens.[12]

Upon their acquittal, South Koreans wasted no time in organizing daily protests of unprecedented magnitude.[13] These included demonstrations by over 17,000 people, hunger strikes by Catholic priests camping right outside the U.S. embassy in Seoul, attacks on the Korean police who were guarding the U.S. army bases, and numerous candlelight vigils in memory of the two dead girls. In addition, countless civic groups are attempting to convince the Korean government to oust all U.S. troops immediately and prohibit permanent stationing of U.S. troops in the future. Even in America, Korean-Americans organized protests in front of the White House and attempted to deliver petitions signed by 1.3 million Koreans. These petitions — brought over to America by a delegation from South Korea — demanded that President George W. Bush publicly apologize for the girls' deaths, turn over jurisdiction in the case to Korean courts, and revise the Korea SOFA.[14] Then-President Kim Dae Jung, in his meeting with Deputy U.S. Secretary of State Richard Armitage, said, "I believe the SOFA can be applied so as to enable not only U.S. but also Korean officials to get involved in such accidents from the initial stage."[15] In the end, even the public apologies by President George W. Bush, Secretary of State Colin Powell, and Secretary of Defense Donald Rumsfeld were not enough to console the Korean public.

It is a curious fact that this incident, though tragic by any measure, should have resulted in such a large nationwide, coalition-building movement. This is especially alarming considering the relative mildness with which Koreans and the Korean media have reacted towards past offenses involving U.S. soldiers.[16] Some skeptics have hypothesized that the recent surge of strong anti-

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11. *Id.*; *see also* Korea SOFA, *supra* note 8, at art. XXII, para. 5.

12. Sgt. Russell C. Bassett, *Tracked Vehicle Driver Found Not Guilty in Korea*, ARMYLINK NEWS, Nov. 22, 2002 *at* http://www4.army.mil/ocpa/news/index.php (last visited Mar. 15, 2003).

13. *See, e.g.*, Na Jeong-ju, *Firebombs Hurled at Another U.S. Base*, KOREA TIMES, Nov. 28, 2002, *available at* http://times.hankooki.com (last visited Oct. 3, 2003).

14. *See* Yoo Chang-yup, *Prospects for SOFA Revision 'Not Bright,'* YONHAP NEWS, Mar. 14, 2003, *at* http://www.yonhapnews.co.kr/Engservices/3000000000.html (last visited Oct. 3, 2003).

15. *Armitage Conveys Bush's Apologies*, *supra* note 7.

16. *See GIs Murder of Girls Fuels Korean Anger*, THE PEOPLE'S KOREA, June 30, 2002, *available at* http://www.korea-np.co.jp (pk archives June 2002) (last visited Oct. 3, 2003) (describing how South Korea's media traditionally gives passive coverage of incidents with U.S. soldiers).

American protests may have been organized by political entrepreneurs with an eye towards strengthening the platform of then–presidential candidate, Roh Moo Hyun, who subsequently won the election in December of 2002.[17] Notwithstanding possible alternative political motivations behind the protests, calls for reforms of the Korea SOFA and in the U.S.-Korea relationship must not fall on deaf ears. Put simply, these situations have already significantly altered the relational dynamics between the two countries and continue to carry tremendous potential to shape the future of the geopolitics in the Korean peninsula.

South Korea has long been an important economic and political partner to the United States. Permanent stationing of U.S. troops in South Korea benefits not only South Korea but also the United States since it provides the necessary mobility, ease, and swiftness with which the United States can operate its troops in case of possible conflicts with North Korea, which is not a scenario we can completely discount. Especially with the current nuclear threat from North Korea, the United States cannot afford to jeopardize its relationship with South Korea. It would behoove the United States to moderate anti-American sentiments among South Koreans and maintain its strong bond with the Republic of Korea. The United States should seek to restore a healthy relationship between its soldiers and Korean citizens without substantially compromising the legal rights of its soldiers or its capacity to protect them.

The author is of the opinion that the outcomes of the trials of Sergeant Walker and Sergeant Nino are consistent with U.S. domestic law. However, discussing the jurisprudence behind the trials and justifying the outcomes are not the aims of this Article. Instead, it is an analysis of the Korea SOFA motivated by these recent events. While numerous articles have already been devoted to international bilateral agreements in general and specifically to the NATO SOFA, surprisingly few authors have examined the Korea SOFA and the problems arising from its peculiar

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17. *See, e.g.*, Chang Choon Lee, *With Whining Comes Little Respect*, JOONGANG DAILY NEWS, Jan. 17, 2003, *available at* http://joongangdaily.joins.com (last visited Oct. 3, 2003) (implying the effect of the protests on President Roh Moo Hyun's recent electoral victory); Anthony Spaeth, *Roh Moo Hyun Takes Center Stage*, TIMEASIA, Feb. 24, 2003. *available at* http://www.time.com/time/asia (last visited Oct. 3, 2003) ("South Korean President-elect Roh Moo Hyun won office in December by tapping into a rising tide of anti-Americanism."); Jeffrey Miller, *Reinventing Korea-US Alliance: What Lies Under the SOFA?*, KOREA HERALD, May 6, 2003, *available at* http://times.hankooki.com/lpage/nation/200305/kt2003050617401910590.htm ("continued demands for another SOFA revision from NGOs and other groups heat up...when groups seek to use any incident that is available in order to stir up public outcry to accomplish some political objective").

arrangement. A careful inspection of the agreement, a comparison of the document with other international treaties, and an assessment of the current interests of the United States and South Korea make clear why reform is in order. Therefore, this Article provides an in-depth analysis of the Korea SOFA and proposes some measures both the Korean and U.S. governments can take in order to improve their souring relationship. When appropriate, I will draw parallels from this case to clarify some of these issues, but the overall scope is intended to be more general.

The Korea SOFA covers a broad range of topics including tax liability, environmental regulations, and criminal and civil jurisdictions of the military. This paper primarily addresses the criminal jurisdiction element as described in Article XXII.[18] Part II presents the historical background and evolution of customs, agreements, and treaties in international law concerning jurisdiction of foreign nationals prior to the inception of the NATO SOFA[19] in 1951. Because a number of articles have already examined this subject extensively, this section is only a cursory summary. In Part III, I analyze both the NATO SOFA and the Korea SOFA, specifically focusing on the issues pertaining to foreign criminal jurisdiction and its waiver. An analysis of the NATO SOFA is appropriate since the Korea SOFA borrows heavily from its NATO counterpart, yet exhibits a stark contrast to it nonetheless. Several key additional clauses and phrases inserted in the Korea SOFA substantially compromise Korea's jurisdictional authority and differentiate it from that of the parties to the NATO SOFA. I particularly argue that the Korea SOFA is currently designed in a way such that the United States' jurisdiction over the crimes committed by its soldiers stationed in Korea encompasses almost all instances, leaving Korea uncharacteristically little power to prosecute U.S. soldiers except in dire situations. Part IV identifies several critical problems with the current version of the Korea SOFA. In addition to possible biases and preferential treatment resulting from the skewed allocation of criminal jurisdiction, equally problematic is the difference in the ways Koreans and Americans view and understand the rhetoric of the law. In Part V, I examine the perspectives of the United States and South Korea and suggest some positive modifications to the Korea SOFA that are not only consistent with the international standard but can also easily be implemented given the current framework. Although no realistic

18. In the NATO SOFA, *infra* note 19, criminal jurisdiction is included in Article VII instead.

19. North Atlantic Treaty; Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67. [hereinafter NATO SOFA].

measure can completely satisfy both sides, these modifications, I believe, will be a small step towards minimizing misunderstanding between the two parties and enhancing their relationship. Ultimately, the burden rests with both the Korean and U.S. governments. It is imperative that both nations recognize this as a serious problem, promote more communication, and approach it with more open-minded attitudes.

II. HISTORICAL BACKGROUND OF FOREIGN CRIMINAL JURISDICTION, THE NATO SOFA, AND THE KOREA SOFA

A. *Traditional Laws Governing Foreign Criminal Jurisdiction and the Military*[20]

The evolution of international law in this area owes much to the two major conflicts of the last century: World War I and World War II. Prior to the inception of the NATO SOFA, two competing paradigms had governed criminal jurisdiction of military troops stationed on foreign soil in the absence of any bilateral agreement between the parties involved.[21] The first principle, known as "the law of the flag," stipulated that a country allowing foreign troops to pass through its boundaries or to be stationed in it implicitly waived the exercise of its jurisdiction.[22] In contrast, the principle of "territorial sovereignty" gave the receiving State exclusive jurisdiction over members of foreign troops.[23] The latter doctrine was based on the idea that the sovereignty of the receiving State should be respected so as to allow for supreme jurisdictional interest over anything that happens on its territory. Although the prevailing practice of the United States during the first half of the twentieth century was "the law of the flag," it is widely accepted today that absent an explicit agreement, such as a SOFA, the doctrine of "territorial sovereignty" would apply.[24] In particular, the

20. For a more detailed history of criminal jurisdiction of foreign troops, see Daniel L. Pagano, *Criminal Jurisdiction of United States Forces in Europe*, 4 PACE Y.B. INT'L L. 189 (1992); Major Steven J. Lepper, USAF, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169 (1994); *see also* Priest-Hamilton, *supra* note 4.

21. Pagano, *supra* note 20, at 190.

22. *Id.*

23. *See* Wilson v. Girard, 354 U.S. 524, 529 (1957) (per curiam) ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.") In time of armed conflict, however, it is recognized that military forces in enemy territory, including occupied territory, are immune from jurisdiction of local law. *See* S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 13 (1971).

24. This is the case for instance with Mexico, because there is no SOFA between the United States and Mexico. *See* Lieutenant Colonel W. A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE, and the Rules of Deadly*

Treaty of Brussels, signed on March 17, 1948, recognized the principle of territorial sovereignty for offenses that violated the laws of the receiving State.[25]

B. *History of the NATO SOFA*[26]

After World War II, countries began to see the need to station their troops abroad on a more permanent basis in order to promote collective security among nations that shared the same interests. As the Warsaw Pact and Cold War tensions led NATO states to permanently station troops in other NATO states, it became necessary to draft explicit agreements addressing many potential problems associated with long term stationing of foreign soldiers. This led to the drafting of the NATO SOFA, which was signed on June 19, 1951. This agreement asserted the rights as well as the obligations of a visiting force stationed in a foreign state. The main distinguishing feature of the NATO SOFA was the assignment and sharing of criminal jurisdiction over foreign soldiers. Article VII apportioned the right to exercise jurisdiction on a reciprocal basis depending on the paramount interests of each state. Part III will examine more closely the details of this arrangement.[27]

The signing of the NATO SOFA marked the first time the United States even partly relinquished criminal jurisdiction of U.S. troops to foreign states.[28] Although subject to modification between individual states, the provisions contained in the NATO SOFA are generally applicable to all NATO troops stationed in other NATO states and provide the basic framework for the relationship between sending and receiving states. Because the NATO SOFA was intended to apply within the territory of all of the NATO states (including the United States), this agreement is completely reciprocal. Although the NATO SOFA has since become a model for similar agreements the United States has negotiated with other host nations, it remains to this day the only completely reciprocal SOFA to which the United States is a party.[29]

Force, 2000-NOV ARMY LAW. 1, 10 (2000) ("Despite the regular United States military presence in Thailand, the United States does not have a SOFA with Thailand that retains criminal jurisdiction for official acts of Department of Defense personnel.").

25. Pagano, *supra* note 20, at 198.

26. For a detailed discussion of the NATO SOFA see generally Pagano, *supra* note 20; Priest-Hamilton, *supra* note 4.

27. *See id.*

28. Colonel Richard J. Erickson, USAF (Ret.), *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. Rev. 137, 140 (1994); Major Steven J. Lepper, USAF, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169 (1994).

29. *Id.*

C. History of the Korea SOFA[30]

The Korea SOFA is an unintended byproduct of the Korean War of 1950. Prior to the war, South Korea sought technical military assistance from the U.S. Army and Coast Guard, and entered into an advisory agreement with the United States on January 26, 1950.[31] Under this agreement, the advisory team consisted of fewer than five hundred officers, "all members of the advisory team were [considered] members of the embassy staff, and hence [were] granted a [certain] degree of immunity."[32]

After the end of the Korean War (though many consider it still on-going), South Korea negotiated an agreement that governed the use of facilities by U.S. military members and their status (including jurisdictional) while in Korea. This treaty authorized the United States to station troops on Korean soil to prevent a repeat invasion by North Korea. "When this SOFA was first signed in 1966, South Korea was still rebuilding from the remnants of the war. Because U.S. forces were still securing the thirty-eighth parallel Seoul [might] not have been in a position to fully assert its interests."[33] Scholars have surmised that South Korea's dire post-war situation led to the country's willingness to agree to arrangements that were less than ideal and more stringent than the prevailing international norms, such as the NATO SOFA.[34] The Korea SOFA has only undergone a couple of revisions since then, but criminal jurisdiction did not play a key role in the most recent revision in 2001.[35]

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30. For a detailed history of the U.S.-R.O.K. SOFA see generally CSIS, PATH TO AN AGREEMENT: THE U.S.-REPUBLIC OF KOREA STATUS OF FORCES AGREEMENT REVISION PROCESS 2-5 (CSIS 2001) *available at* http://www.csis.org/isp/PathToAnAgreement.pdf; *see also* Jennifer Gannon, *Renegotiation of the Status of Forces Agreement Between the United States and the Republic of Korea*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 263 (2000).

31. *See* J. Holmes Armstead, Jr., *Crossroads: Jurisdictional Problems for Armed Service Members Overseas, Present and Future*, 12 S.U. L. REV. 1, 7 (1985).

32. *Id.*

33. Gannon, *supra* note 30.

34. *See, e.g.*, Armstead, *supra* note 31, at 7 ("Certainly the granting of immunity here to military families was an extraordinary occurrence. The external threat to Korean security was great when this agreement was negotiated and of course open conflict broke out shortly confirming the seriousness of the threat.").

35. *See* Gannon, *supra* note 30, at 268. "Article 30 of the Korea SOFA provides that '[e]ither Government may at any time request the revision of any Article of this Agreement, in which case the two Governments shall enter into negotiations through appropriate channels.'" *Id.* (quoting The Korea SOFA, art. XXX). The SOFA has been revised only twice since its creation in 1966: in 1991 and in 2000. *Id.* The most recent negotiation mainly addressed remedying environmental damages caused by U.S. troops in South Korea. *Id.* Former Korean president Kim Dae Jung urged Washington to "revise the treaty as quickly as possible to prevent a small minority of anti-American activists in Seoul from using the issue to...demand that all U.S. forces leave South Korea." *at* http://www.fed-soc.org (archived news 2000) (last visited October 6, 2003).

III. CRIMINAL JURISDICTION AND WAIVER UNDER THE NATO SOFA AND THE KOREA SOFA

A. General Jurisdiction

This section presents textual analyses and case law of criminal jurisdiction under the NATO SOFA and the Korea SOFA in conjunction with the Uniform Code of Military Justice (UCMJ). Ever since President Harry Truman signed the UCMJ into law in 1950, the United States has always maintained a separate justice system specially designed for the military.[36] The UCMJ is also the body of law that governs U.S. troops abroad. When the United States concludes a SOFA as a sending State with another nation, there are several relevant bodies of law that are applicable to a U.S. soldier committing an offense within the territory of the receiving State. These include the laws of the sending State, the UCMJ, and the SOFA. However, U.S. domestic law is still relevant for cases involving civilians accompanying these forces abroad. Article VII, Paragraph 1, stipulates the general assignment of criminal jurisdiction as follows:

> 1. Subject to the provisions of this Article,
>
> (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;
>
> (b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.[37]

According to this provision, the sending State has no jurisdiction over the civilian component since accompanying civilians are not subject to the military law of the United States. More importantly, there clearly will be overlaps in jurisdiction under this set-up. In

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36. *See generally* James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185 (2002) (explaining why we have a separate justice system); Major George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21 (2000).

37. NATO SOFA, *supra* note 19, at art. VII, para.1.

paragraphs 2 and 3, the NATO SOFA defines instances of exclusive and concurrent jurisdictions.

B. Exclusive Jurisdiction

Paragraph 2 delineates the instances of exclusive jurisdiction for each State as follows:

> (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
>
> (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.[38]

Three things are important here. First, the literal meaning of this paragraph is that when a soldier from the sending State commits a crime within the territory of the receiving State, the State whose law is not violated will have no jurisdiction over the person. This is sensible since an act permitted or pardoned by one State within its territory is expected to be permitted or pardoned by the same State *a fortiori* if it is carried out outside its territory. This paragraph, however, is rather narrow in its scope and turns out to have little practical bite. An oft-cited example of an exclusive criminal jurisdiction case is possessing chewing gum in Singapore. It is illegal to possess or trade chewing gum in Singapore,[39] but no such law exists in the United States. Since the United States has concluded an agreement nearly identical to the NATO SOFA with Singapore, the Singapore government has the sole authority to punish any U.S. soldiers possessing chewing gum in Singapore.

Likewise, U.S. military authorities have exclusive jurisdiction over any U.S. soldier who sleeps while posted as a sentry since this act is a strictly military offense under the UCMJ and not punishable under Singapore law. The extreme nature of these examples

38. *Id.* at art. VII, para.2.
39. Lepper, *supra* note 28, at 173.

demonstrates just how unusual these situations are. Indeed, most crimes — and certainly, as one would expect, most serious crimes — are punishable by both the sending and receiving States' laws, and would not be governed by this paragraph. Thus, in reality, situations subject to exclusive jurisdiction are quite rare.

Second, when instances of exclusive jurisdiction do arise, this paragraph provides no possibility of waiver requests from one State to the other. Consequently, however rare those situations may be, there will be instances where the sending State not only lacks jurisdiction but also authority to request waivers. The United States has traditionally been a sending State, and has sought, therefore, to further reduce the sphere of the receiving State's exclusive criminal jurisdiction by application of Article 134 of the UCMJ. This provision reads as follows:

> Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[40]

The practical use of this provision is unclear, but it is certainly designed to make many violations of local law a military violation of the UCMJ as well. An expansive reading of this article "can eliminate the receiving state's exclusive jurisdiction over...the armed forces of the sending state."[41] In short, the United States can, by means of Article 134, greatly curtail jurisdiction of the receiving State.

Finally, the paragraph clearly provides that exclusive criminal jurisdiction rests with the sending State only in cases of violations by the members of the military force and not in cases of offenses committed by the civilian components or dependents because civilian employees and dependents are not amenable to military courts under the UCMJ.[42] It means that, in general, criminal

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40. UCMJ, art. 134.

41. Pagano, *supra* note 20, at 207; *see also* Note, *Criminal Jurisdiction over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712 (1958) (discussing the effect of Article 134 of UCMJ).

42. The Supreme Court has held that civilian dependents accompanying service members

jurisdiction over the civilian component or dependents belongs to the receiving State by means of Paragraph 1. As we will see in the next section, this arrangement carries a further implication in the context of concurrent jurisdiction.

C. Concurrent Jurisdiction

Article VII, Paragraph 3 stipulates concurrent jurisdiction and a systematic allocation of primary jurisdiction to one of the two States:

> In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relationship to
>
> (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
>
> (ii) offences arising out of any act or omission done in the performance of official duty.
>
> (b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.
>
> (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.[43]

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overseas are not subject to trial by military tribunal. Reid v. Covert, 354 U.S. 1, 19 (1957) ("[Nothing] within the Constitution...authorizes the military trial of dependents accompanying the armed forces overseas.").

43. NATO SOFA, *supra* note 19, at art. VII, para. 3.

The general philosophy here is that the State with a greater stake in the offense should retain primary jurisdiction over the case. When offenses are directed solely against the property or security of the sending State, indeed, the receiving State has little interest in its prosecution. Furthermore, Clause 3(a)(ii) is consistent with U.S. domestic tort law involving offenses falling "within the scope of employment." In theory, this clause is necessary to ensure that the troops function efficiently and that the soldiers obey and carry out given commands without reservation. Meanwhile, any other offense can be characterized as an offense which 1) is directed against the property or security of the receiving State, or 2) does not arise in the performance of official duty. Obviously, the receiving State has an interest in controlling these acts in order to maintain an orderly society.

As mentioned above, Paragraphs 1 and 2 have already granted exclusive criminal jurisdiction over the civilian component of the military force. But Paragraph 3 explicitly takes away this exclusive criminal jurisdiction over the military force if the offenses are type (i) or (ii) offenses. This provides a specific gap in criminal jurisdiction over civilians and dependents of the members of the military who commit offenses solely against the property or security of the United States because neither U.S. domestic law nor the UCMJ applies to civilians in a foreign territory. Only recently was this gap closed when President Bill Clinton signed into law the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) on November 22, 2000.[44] Under this Act, conduct by military personnel and accompanying civilians abroad that would have been a felony under federal law — had the conduct occurred within the United States — becomes a federal crime. As a result, the receiving State's once exclusive criminal jurisdiction over the civilian component has now become only primary jurisdiction under MEJA. Accordingly, the civilian component of the military force is currently subject to a similar jurisdictional arrangement as the military force.[45]

Although the rest of the terms in this paragraph are reasonably clear, the NATO SOFA specifically left open the

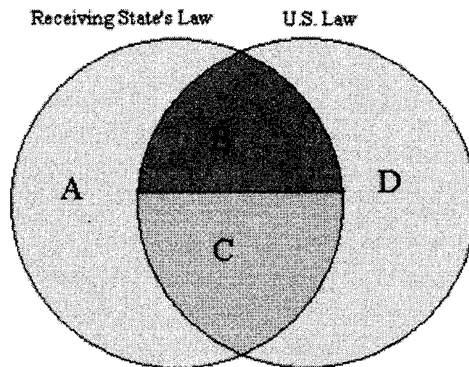
44. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, § 3261(a), 114 Stat. 2488 (to be codified at 18 U.S.C. § 3261). For the historical background of this statute, see Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad — A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001). The Act purports to apply the same punishment to crimes as if they were committed in the United States. Although the Act prohibits prosecution under the new statute in cases where jurisdiction lies with the receiving State, it also allows the Attorney General to waive this provision in some cases.

45. *See id.*

following questions: 1) what constitutes an offense arising in the performance of official duty, and 2) who has the final authority to decide this question? Naturally, the sending State will try to define the scope of official duty in its broadest sense to include as many acts as possible, whereas the receiving State would try to interpret this clause rather narrowly and expand its jurisdiction.[46] These questions have proved to be critical problems, and presently no definitive answers exist. Different host nations have adopted different agreements with the United States.[47]

Figure 1 is a diagrammatic representation of the allocation of criminal jurisdiction according to NATO SOFA Article VII, Paragraphs 2 and 3, assuming that there is a bright line test to determine the on-and-off-duty question. As shown above, when the United States acts as a sending State under the NATO SOFA, the bilateral agreement in practice does not equally apportion jurisdiction between the sending and the receiving States. Nevertheless, in comparison to other SOFA agreements, such as the Korea SOFA, the NATO SOFA still remains the fairest arrangement of sharing the sovereign prerogative. The agreement continues to

Figure 1. Diagrammatic Representation of Offenses Committed by U.S. Soldiers on Foreign Soil (The NATO SOFA Version)



A = Crimes that are punishable only under the receiving State's law
B = Crimes arising "while off duty" that are punishable under both the receiving State's law and the UCMJ
C = Crimes arising "while on duty" that are punishable under both the receiving State's law and the UCMJ
D = Crimes that are punishable only under the UCMJ (U.S. law)

1. *Intended Division of Jurisdiction:*
   Receiving State retains A+B, U.S. retains C+D
2. *Current Division of Jurisdiction Enforceable in Theory:*
   U.S. retains C+D+A (by incorporation of the UCMJ Article 134) + B (of particular importance to U.S.)
3. *Exercise of Jurisdiction in Practice:*
   U.S. retains C+D+ most of A + most of B; NATO countries can, however, choose to retain most of B.
4. Dependents are subject to the receiving State's exclusive criminal jurisdiction until 2000.

46. *See generally* Priest-Hamilton, *supra* note 4 (describing an instance of dispute over the interpretation of this phrase).

47. *Id.*

allow — on a formal level, at least — many of the NATO countries to retain the authority to enforce their primary jurisdiction if they wish to do so. As we shall see, this is more than can be said of the Korea SOFA.

D. Criminal Jurisdiction under the Korea SOFA

Article XXII of the Korea SOFA is the equivalent of Article VII of the NATO SOFA, but its substance differs from that of the NATO SOFA in three significant ways. First, Paragraphs 1(a), 2, and 3 have always applied to not only the "armed forces or civilian component" but also "their dependents."[48] Thus, Korea has never enjoyed exclusive criminal jurisdiction over the dependents of the military forces who commit offenses that are punishable under its law. Even before the enactment of the MEJA in 2000, the civilian component and their dependents, like the military forces, always enjoyed immunity from the criminal jurisdiction of Korea.[49] Surely, this difference is no longer of paramount importance since 2000, but it does signify an unusually generous arrangement for U.S. citizens in South Korea.[50]

Second, the Korea SOFA comes equipped with an addendum called the "Agreed Minutes" that compromises South Korea's position in several ways.[51] First of all, a modification to Article XXII, Paragraph 3(a) states that "a certificate issued by competent military authorities of the United States stating that the alleged offense...arose out of an act or omission done in the performance of official duty shall be sufficient evidence of the fact for the purpose of determining primary jurisdiction."[52] While putting an end to the problem of uncertainty in determining the scope of official duty, this amendment unilaterally assigns this authority to the United States and provides South Korea with no means to challenge the allegations of U.S. military authorities. Put simply, the United States reserves the right to delineate its primary jurisdiction as it sees fit.

48. Korea SOFA, *supra* note 8, at art. XXII, para. 2(a).
49. *Id.*
50. *See* Armstead, *supra* note 31.
51. Agreed Minutes to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, 17 U.S.T. 1768, 674 U.N.T.S. 163 (hereinafter Agreed Minutes).
52. *Id.* art. XXII, para. 3(a).

Third, and most critically, another modification states that Korea "will, upon the request of the military authorities of the United States pursuant to paragraph 3(c), waive their primary right to exercise jurisdiction under paragraph 3(b) except when they determine that it is of particular importance that jurisdiction be exercised by the authorities of...Korea."[53] This amendment effectively nullifies 3(b) because, in general, far more cases are found to be of *no particular importance* than are found to be of particular importance. Not surprisingly, U.S. authorities, as a rule, have always requested that Korea waive its primary jurisdiction,[54] and Korea has been bound by this addendum to hand over primary jurisdiction in almost all instances.[55] Figure 2 is a diagrammatic representation of the allocation of criminal jurisdiction according to the Korea SOFA and its "Agreed Minutes." To summarize, the most notable difference between the Korea SOFA and the NATO SOFA is that the former expressly restricts South Korea's primary jurisdiction to a distinct minority of cases while the latter gives due respect to the legal regimes of the receiving states. The U.S. policy reasons for maintaining such disparate agreements are not entirely clear, but the most probable answer is that the United States views the reciprocal arrangement of the NATO SOFA as an exception rather than a norm.

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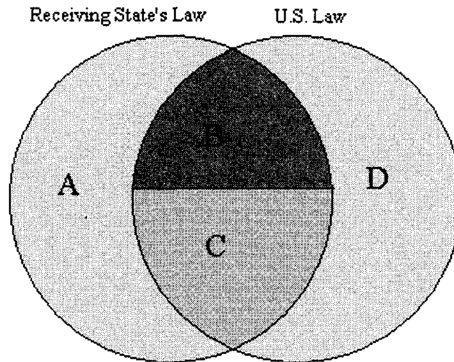
53. *Id.* art. XXII, para. 3(b).

54. *See* Pagano, *supra* note 20, at 207 ("The United States, in order to obtain the broadest possible jurisdiction, always requests waivers in cases involving individuals covered by NATO-SOFA.").

55. Although most countries within the NATO SOFA do not have this additional paragraph inserted, it has been suggested that the U.S. policy of requesting waivers of foreign criminal jurisdiction in cases regarding its military force "has led to the result that American forces are in fact 'extraterritorial' (and *de facto* following law of the flag principles), rather than subject to foreign criminal jurisdiction (with certain exceptions)." Maj. Mark R. Ruppert, Criminal Jurisdiction over Environmental Offenses Committed Overseas: How To Maximize and When To Say "No,", 40 A.F. L. REV. 1, 7 (1996).

Figure 2. Diagrammatic Representation of Offenses Committed by U.S. Soldiers on Foreign Soil (The Korea SOFA Version)



A = Crimes that are punishable only under the receiving State's law
B = Crimes arising "while off duty" that are punishable under both the receiving State's law and the UCMJ
C = Crimes arising "while on duty" that are punishable under both the receiving State's law and the UCMJ
D = Crimes that are punishable only under the UCMJ (U.S. law)

1. *Intended Division of Jurisdiction:*
   Receiving State retains A+B, U.S. retains C+D
2. *Current Division of Jurisdiction Enforceable in Theory:*
   U.S. retains C+D+A (by incorporation of the UCMJ Article 134) + B (unless of particular importance to Korea)
3. *Exercise of Jurisdiction in Practice:*
   U.S. retains C+D+ most of A plus most of B; unlike NATO countries, Korea *cannot* retain most of B.
4. Dependents have always been subject to identical jurisdiction.

IV. PROBLEMS WITH THE CURRENT ARRANGEMENT OF CRIMINAL JURISDICTION

The current form of the Korea SOFA poses numerous problems, and this section examines just a few of them. Admittedly, deconstructing the elements of a legal agreement and critiquing its arrangement are not terribly difficult matters. What is more challenging, and more meaningful, is suggesting workable solutions to mend these foibles. Therefore, it is necessary to distinguish the different levels of concern and decide which concerns can be addressed with realistic solutions. As a general matter, there are two categories of concern that are mutually independent: theoretical concerns and practical concerns. Theoretical concerns are moral, philosophical, or doctrinal problems that are associated with the current arrangement of the Korea SOFA, including problems such as how different people perceive justice and the law and whether the agreement violates any existing international legal norms. Some of these are problematic at an abstract level because they are at odds with political-philosophical ideas or with some established legal tradition. There may not be any workable solutions to some of these theoretical concerns, but it is nonetheless

necessary to point them out and recognize the fundamental issues at play.

On the other hand, practical concerns mainly arise in implementing or continuing to enforce this agreement. One immediate source for these concerns is document imperfections within the Korea SOFA that make it difficult for both countries to consistently adhere to the agreement. Another is the ambiance and current circumstances that govern the social dynamics between the Korean locals and the U.S. soldiers. Finding solutions to these practical concerns is often easier, and the suggestions in Part IV are just a few examples.

A. *Theoretical Concerns*

1. *Concern for Bias and Preferential Treatment*

The first question a person might ask regarding the SOFA criminal jurisdiction is, why does it have to be one country or the other? Indeed, the most obvious and inherent problem of any SOFA occurs in cases of concurrent jurisdiction, where, ultimately, only one of the two States gets to exercise its jurisdiction even though the offense may be of interest to both. There inevitably will be a concern for potential bias in the outcome.[56] Where jurisdiction is exclusive, the matter concerns only one State. But when an actor commits a crime that is punishable under both the sending and receiving States' laws, there is a conflict of interest: the sending State would naturally want to protect its soldier, whereas the receiving State would want to fully remedy any harm inflicted upon the involved party. In theory, having a universal arbiter or otherwise giving both parties a say, would yield the most equitable outcome.

The basis for this problem becomes clearer if we view nation-states as actors in the international political setting. Just as we expect individuals in a society to adhere to certain moral principles that are common to all men, so too, do we hope that nation-states obey analogous rules and respect other parties. One fundamental tenet of a civil society is that no man may judge his own case. The seventeenth century English philosopher, Thomas Hobbes, in *Leviathan* wrote, "there may arise a controversie between the party Judged, and the Judge; which...ought in Equity to be Judged by men agreed on by consent of both; *for no man can be Judge in his*

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56. *See, e.g.*, Major William K. Lietzau, *Using the Status of Forces Agreement to Incarcerate United States Service Members on Behalf of Japan*, ARMY LAW., Dec. 1996, 3 (1996) (discussing a case in Japan where the Japanese public felt the accused members of the U.S. military received preferential treatment under the SOFA).

own cause."[57] John Locke, too, extensively discusses this matter in his *Second Treatise on Civil Government*:

> Wherever any persons are who have not such an authority to appeal to, and decide any difference between them there, those persons are still in the state of nature...
>
> ...For the absolute prince is presumed to have both legislative and executive power in himself alone. For him there is no judge, no appeal lies open to anyone who may fairly and impartially decide from whose decision relief and redress may be expected of any injury of inconvenience that may be suffered from the prince or by his order.... For wherever any two men are who have no standing rule and common judge to appeal to on earth for the determination of controversies of right between them, there they are still in the state of nature....[58]

More than three centuries have passed since Locke and Hobbes, but this world has yet to construct a civil society of nations. No competent international institutions exist to address these problems. This shortcoming owes much to the current state of international law and international relations. Political scientists and philosophers have long argued that international relations are governed by anarchy. Subscribing to Locke's philosophy, Bertrand Russell stated that "[a] new international Social Contract is necessary before we can enjoy the promised benefits of government."[59] Another scholar commented that "international institutions are unable to mitigate anarchy's constraining effects on inter-state cooperation."[60]

The current state of foreign criminal jurisdiction is just the same. In an ideal world, a neutral party with an agreed-upon body of law would govern whenever serious crimes that concern both States occur. The closest solution we have today to such an institution is the International Criminal Court (ICC). At the time

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57. THOMAS HOBBES, LEVIATHAN 128 (Dutton 1976) (1651) (emphasis added).

58. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 45, paras. 90-91 (Lester DeKoster ed., William B. Eerdman's 1978) (1690).

59. BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 640 (Simon & Schuster 1972).

60. Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the New Liberal Institutionalism*, *in* THEORY AND STRUCTURE IN INTERNATIONAL POLITICAL ECONOMY 9 (Charles Lipson & Benjamin J. Cohen eds., 1999).

of this writing, however, the ICC has not yet fully blossomed. This is due in large part to the fact that the Bush administration "unsigned" the treaty that subjected the United States to the jurisdiction of the ICC.[61] Even if the United States were to ratify the Rome Statute and join the members of the ICC, it is highly improbable that the United States would nullify the existing SOFA arrangements with the countries that currently station U.S. troops. More importantly, the ICC was specifically designed to limit its jurisdiction "to the most serious crimes of concern to the international community as a whole."[62] Since a good majority of the offenses arising from U.S. soldiers fall somewhere between civil and criminal offenses, it is unlikely that they will fall under the jurisdiction of the ICC. Therefore, whether the United States should ratify the Rome Statute is an irrelevant question; regardless of the U.S. posture, the ICC in its current form would provide no satisfactory solution.

This concern for preferential treatment is indeed what prompted the enraged Koreans to demand a retrial of Sergeants Walker and Nino in a South Korean court. South Korea had absolutely no say in the outcomes of their trials. Naturally, however, this argument goes both ways: transferring jurisdiction to South Korea will merely beget another concern for bias, this time on the part of the United States. The United States has no more reason to trust the application of the Korean law to U.S. citizens than Korea has regarding the application of U.S. law to its cases. Unless the matter is approached with an eye towards equity, a renegotiation of the Korea SOFA that simply grants South Korea broader jurisdiction will be an equally dangerous resolution, and could provoke many Americans. In any case, as we saw in Part III, Congress passed Article 134 of the UCMJ to avoid precisely this problem; it has little intention to relinquish much of its jurisdiction. What is significant here is not whether any one State actually exercises jurisdiction with a specific bias *per se*; rather, the concern that the other party might be biased in the outcome of the case effectively undermines the trust between the States.

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61. The ICC was created on the basis of the Rome Statute, a treaty adopted in Rome on July 17, 1998. The Rome Statute now has 75 ratifications and 139 signatories. Ratification of the Treaty makes it part of a nation's body of law. Although the U.S. initially signed the Treaty on December 31, 2000, the Bush Administration declared that it would no longer consider the U.S. legally bound by that signature. The countries that have not ratified the Rome Treaty are not to be involved in decisions. *See* USA for the International Criminal Court, *at* http://www.usaforicc.org/index.html (last visited Mar. 20, 2003).

62. *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court*, Rome Statute for the International Criminal Court, art. V, § 1, U.N. Doc. A/Conf.183/9 (1998).

Unfortunately, jury trials further enhance this possibility of bias since jury members are all selected from the USFK and hence are all U.S. citizens.[63] The UCMJ "allows the accused in...court-martial to choose whether to be tried by a military judge or a panel of military members."[64] Panel members "must be active-duty U.S. military members who also are subject to the jurisdiction of the [UCMJ]."[65] In general, a jury trial is *a priori* "considered to provide a more sympathetic finder of fact than a judge."[66] Moreover, in cases involving nationals of both countries, nationalistic sentiments will also play a huge role. For civil or criminal cases arising within the territory of the United States, jury trials make sense because members of the jury are determining the verdict on someone who is accused of threatening the security of the very society to which they belong. Jury trials might be equally appropriate for cases that deal with U.S. soldiers stationed abroad who commit offenses that are directed solely against the property or security of the United States. But when U.S. men and women are given the responsibility of determining the verdict of U.S. soldiers who commit an offense against locals of a host nation, the host nation has reason to be concerned about the validity and fairness of the trial.

In the absence of any competent, impartial international institution to handle these matters, there can be no perfect solution. Nonetheless, there are obviously measures that the sending State and the receiving State can take in order to minimize this concern for bias as much as possible, and eliminating jury trials is one such measure.

2. *Gap in the Cultural Understanding of Justice and the Law*

Suppose we could completely eliminate all biases and implement a fault-proof system where all cases are judged fairly and objectively according to a relevant body of law. Another problem still arises from there being different notions of justice and legal righteousness among the citizens of different nations. Expressive

63. Bae Keun-min, *Jury Clears GI of Killing Korean Girls*, KOREA TIMES, Nov. 20, 2002 (quoting a Korean activist who described the court martial as "the trial of an accomplice by accomplices"), *available at* http://www.hankooki.com/times/200211/t2002112017242440110.htm (last visited Mar. 20, 2003).

64. United States Embassy Seoul, Republic of Korea, The June 13 Accident Q's and A's, *at* http://usembassy.state.gov/seoul/wwwh0501.html (last visited Mar. 18, 2003).

65. *Id.*

66. William C. Martucci et al., *Class Action Litigation in the Employment Arena: The Corporate Employer's Perspective*, 58 J. MO. B. 332, 333 (2002). *See generally* Eric Helland & Alexander Tabarrok, *Runaway Judges? Selection Effects and the Jury*, 16 J. L. ECON. & ORG. 306 (2000) (examining the effect of jury trials versus bench trials).

theory of law tells us that law is an expression of social values.[67] Conversely, individual values can be conditioned by a society's law. While justice and fairness are universally accepted concepts, how people in a particular society grow to perceive justice and fairness is inevitably intertwined with that society's law. For example, most Americans would not see much justice in prosecuting an individual for chewing gum, especially if their own soldier, who is stationed in Singapore specifically to protect that country, is being prosecuted. Likewise, most Koreans found it puzzling that nobody had to serve any jail time when an accident took away the lives of two of their own. But that is simply how the American criminal justice system works. For criminal liability, there needs to be evidence "beyond a reasonable doubt" of *mens rea*, even at the level of simple negligence. This is different from imposing civil liability, for which the American law requires only a "preponderance of evidence." This protection "reflects the goal of decreasing the chance of convicting an innocent person even at the price of increasing the chance that a guilty person may escape conviction."[68] American courts have repeatedly held that "it is a fundamental value determination of the American criminal justice system that it is far worse to convict an innocent person than to let a guilty person go free."[69] Other authorities have held similar views:

> What most significantly distinguishes the [criminal justice] system of one country from that of another is the extent and the form of the protections it offers individuals in the process of determining guilt and imposing punishment. [O]ur system of justice deliberately sacrifices much in efficiency and even in effectiveness in order to...protect the individual. Sometimes it may seem to sacrifice too much.[70]

As a result, any host nation that does not fully appreciate this system or adhere to such philosophy will have problems if the United States acquits its soldiers despite their apparent "crimes."

Without merging the two legal systems, there will always be some culture-induced discrepancy in people's understanding of

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67. *See generally*, Elizabeth S. Anderson, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

68. People v. Bull, 705 N.E.2d 824, 842 (Ill. 1998).

69. *See, e.g., id.*; *see also* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 1.6(c), at 45 (1984).

70. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 7 (1967).

justice. For the time being, the best course of action for the United States and South Korea is to promote more dialogue and educate the other party about how its legal system operates. Soon after the incident involving the sergeants, the U.S. Embassy in Seoul, Korea felt the need to fill out a Q&A form to defend the U.S. criminal justice system. In it, the U.S. Embassy clearly stated that in the U.S. judiciary system, "there is a distinction between holding someone 'criminally responsible' and being 'responsible.'"[71] This response probably did not win over many hearts, but it did serve as a starter in disseminating some information about the American criminal justice system to the Korean public.

3. *Discriminatory Treatment*

In concluding different versions of SOFAs with different countries, the United States is in fact treating countries with outright discrimination. The first two concerns discussed in this section pertain to all SOFA or bilateral agreements, but this one concerns the Korea SOFA in particular. The United States has explicitly granted more primary jurisdiction to the NATO countries than to South Korea.[72] Also as we noted, the NATO SOFA is currently the only fully reciprocal SOFA to which the United States is a party. Among the "lesser," non-NATO countries, such practice is probably perceived to be even more unjust than the typical American unilateralism. Viewed against the tradition of international law, this is a violation of the "laws of nature and of nations." Emer de Vattel, an 18th century international legal scholar, wrote the following:

> Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.[73]

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71. The June 13 Accident Q's and A's, *supra* note 64.

72. As it turns out, the Netherlands is another country with which the United States has a similar SOFA arrangement (with the Agreed Minutes) as it has with South Korea. *See* Stationing of United States Armed Forced in the Netherlands, North Atlantic Treaty, Nov. 16, 1954, 6 U.S.T. 103 (1954).

73. EMER DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED

The United States has not been explicit about its reasons for exercising different forms and standards of bilateral agreements with different countries; it merely alleges that the same arrangements will not always work because situations are inherently different for each host country.[74] If the differential treatment is predicated upon the understanding that South Korea's legal system is not as developed as those of NATO countries or otherwise not prepared to handle transnational legal problems, then the burden lies with the United States to prove that South Korea's legal system is indeed substandard because it is the United States that is discriminating. If this turns out to be the case, indeed, the burden will then rest with South Korea to improve the robustness of its legal system and bring it up to par with other NATO nations before demanding equal treatment.

Nonetheless, the justification the United States has given thus far for assigning broader criminal jurisdiction to itself is only because "it is the primary responsibility of the military authorities of the United States to maintain good order and discipline where persons subject to United States military laws are concerned."[75] This justification is clearly not specific to South Korea, and therefore, does not justify the U.S. discriminatory behavior. Unless the United States demonstrates an urgent need to exercise discrimination towards Korea, the current Korea SOFA violates the longstanding and well-grounded natural law doctrine of international law.

Certainly, countless unfair and discriminatory arrangements always exist among countries because politics always plays a role in these settings. For example, trade agreements (or sanctions) and visa requirements are never the same among different countries. On one hand, these issues may be equally problematic and must be addressed separately. On the other hand, the SOFA arrangements are in some ways more sensitive issues. Policy reasons are often much less clear with the SOFA arrangements, compared to international economic law or immigration law. Also, the SOFA arrangements directly concern crimes, prosecution, and damage measures occurring within the host country's territory, not just between the two countries. These issues impact the host country

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TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS lxiii (1797), *cited in* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 59 (Little, Brown & Company 1993).

74. *See* Song Hye-Min, *No More Empty Negotiations on SOFA,* THE ARGUS, ENGLISH NEWSPAPER OF HANKUK UNIVERSITY OF FOREIGN STUDIES, Sept. 1, 2000, *available at* http://maincc.hufs.ac.kr/~theargus/352/feature-2-3.htm (last visited Mar. 15, 2003) (explaining instances of unfair arrangements of the Korea SOFA compared to the agreements the United States has concluded with Japan or Germany).

75. Agreed Minutes, *supra* note 51, at art. XXII, para. 3(b)

much more visibly than economic competitive disadvantages or opportunities to immigrate. The main effect of SOFA arrangements is to strip the host country of its jurisdiction over those who cause disorder within its territory. In this state-of-nature world of nation-states, if "a small republic is no less a sovereign state," then its sovereignty must be given due respect.

B. Practical Concerns

1. *The Language, the Semantics, and the Ambiguities*

In implementing the Korea SOFA, several serious problems arise from the ambiguous language of the SOFA and the consequences governed by its semantics. This is a general problem for all SOFAs, including the NATO SOFA. It seems that whenever the legal consequences of a situation are reduced to interpreting phrases, the United States frequently takes the role of deciding and interpreting.

Like the "plain meaning" rule for domestic legislation, Vienna Convention Article 31(1) lays down a rule for interpreting the language of treaties: "A treaty shall be interpreted in good faith in accordance with *the ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose."[76] The crux of Article 31 is to use the text as agreed by the negotiators. The "ordinary meaning" rule is the current posture of the World Court and corresponds with the practice of interpreting state statutes in the United States.

Consider, for example, the phrase "sympathetic consideration" in Paragraph 3(c) of the Korea SOFA. The provision states that "the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver."[77] But there is no agreed-upon definition of sympathetic consideration. The party who has primary jurisdiction can always claim that it has given "sympathetic consideration" but has nevertheless decided to decline the waiver request and exercise its jurisdiction. Not only is the notion of sympathy vague, but there is also no way for the other party to check whether any serious consideration has been given or not. In other words, giving sympathetic consideration is not a procedure that can be monitored. Understandably, giving a rigid procedural guideline for giving "sympathetic consideration" is

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76. Vienna Convention, art. 31(1), *reprinted in* 63 AM. J. INT'L L. 875, 885 (emphasis added); *accord*, Restatement (Third), *infra* note 105, § 325(1) (discussing the Law of Treaties May 23, 1969).

77. The Korea SOFA, *supra* note 8, art. XXII, para. 3(c).

difficult; however, unless the parties agree on a set of criteria, this clause will be a mere gratuity that serves no ends.

In the absence of any definite and common understanding, Article 31(1) of the Vienna Convention offers little help. One can never be certain exactly what the framers of the Korea SOFA or the NATO SOFA intended, but whatever it is, the United States has yet to demonstrate its commitment to this provision. As noted above, the cases involving Sergeants Walker and Nino marked the first instances South Korea requested a waiver of jurisdiction, and the United States simply declined it by saying "there was no such precedent."[78] If the United States meant by that phrase that there has not been a precedent of the United States ever relinquishing its primary jurisdiction in any SOFA-like arrangement, then that is simply not true. Even in Japan, the United States has had to relinquish its jurisdiction at least twice. In 1957, a U.S. soldier was accused of murdering a Japanese woman.[79] The United States initially claimed that this arose out of an act or omission "done in the performance of official duty," but Japan disagreed.[80] Ultimately, the Department of Defense waived jurisdiction to the Japanese.[81] As recently as 1995, three American service members were accused of "premeditated kidnapping and rap[ing] of a twelve-year-old Japanese girl," and the United States elected to hand over its jurisdiction to Japan.[82]

If, on the other hand, the United States meant that in the history of the Korea SOFA there has never been any such precedent, then, of course, there is no precedent since South Korea has long respected the United States' right to primary jurisdiction and has discreetly chosen not to request any waiver in the past. But as long as the United States continues to decline to relinquish its jurisdiction, there will never be any precedent. Korea's passive behavior in the past should be an indication of the gravity of the matter when it does request a waiver; instead, the United States has chosen to cite the history of jurisdiction (or lack thereof) against Korea's case for waiver. Lacking a common understanding of the phrase "sympathetic consideration," Korea has opted to waive its jurisdiction in almost all instances, and the United States has opted never to waive its jurisdiction. It is probably safe to conclude that this is not what the framers had intended, thus the current practice violates the law of treaties.

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78. Kim Ji-ho, *supra* note 10.
79. *See* Wilson v. Girard, 354 U.S. 524 (1957).
80. *Id.*
81. Lepper, *supra* note 28, at 179.
82. Lietzau, *supra* note 56, at 3.

Second, deciding whether or not a soldier was "on duty" is also a problem. Under the Korea SOFA, the United States has reserved the right to determine the scope of employment of its soldiers.[83] Likewise, in a recent SOFA negotiation between the United States and the Philippines, the Philippine government wanted to have "Philippine courts make the final determination on whether or not an offender was acting within the scope of military duty when the offense was committed."[84] The United States refused to hand over this authority.[85] Regarding Korea SOFA cases, Choe Hun-Sik, a former SOFA advisor at the U.S. Army, remarked that while:

> American military authorities seem to have applied a concept analogous to, but somewhat broader than, what is called the common-law concept of 'scope of employment.' There appears to be a definite tendency, to extend the coverage of this provision as far as possible. Thus Korean authorities normally accept a determination on this issue as binding, when that determination is made in official duty certificate being issued by a general grade officer only upon the advice of a staff judge advocate or other legal officer unless the contrary is proved."[86]

Some angry Koreans have argued that Sergeants Walker and Nino were not on duty because "killing two girls" could not possibly have been their duty. This is an extremely narrow reading of the situation. By contrast, the United States could equally claim that "driving an armored vehicle" is part of their duty.

The United States has had problems of this kind with other host countries as well. For example, a recent tragedy in Italy echoes this dispute: in 1998, when a U.S. military jet that was participating in a low-level training mission violated the minimum altitude restriction, it consequently flew into and severed the cables supporting an Italian ski gondola, killing twenty passengers.[87] The United States claimed primary jurisdiction by asserting that "the jet was flying under the auspices of the alliance when the incident occurred," but the Italians argued that the flight was not a U.S. mission since "flying 3300 feet below the designated altitude floor"

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83. *See, e.g.*, Agreed Minutes, *supra* note 51.
84. Porrata-Doria, Jr., *supra* note 4, at 99.
85. *Id.*
86. Choe Hun Sik, *In SOFA Case: Offenses Arising in Performance of Official Duty*, KOREA TIMES, Jul. 29, 2002, *available at* http://times.hankooki.com (last visited Oct. 3, 2003).
87. Priest-Hamilton, *supra* note 4, at 605.

is not authorized by the United States.[88] The case rested with the United States.

2. *Discomforts in the Daily Life of the U.S. Soldiers Stationed in Korea*

There is at least one more significant problem if the United States were to refuse any further substantial revisions of the Korea SOFA and to insist that South Korea continue to respect the current arrangement. The recent events have not only upset many Koreans but also educated them about the skewed jurisdictional allocation of the Korea SOFA. Angry South Koreans are expressing their hostility towards U.S. soldiers in several different ways. Some shopkeepers are refusing to admit any Americans; some have explicitly put up signs that read "AMERICANS ARE NOT WELCOME HERE."[89] Others have chosen more direct ap-proaches, such as throwing fire-bombs at a U.S. military base.[90] If the United States were to refuse to allow any sincere revision, the daily lives of U.S. soldiers in South Korea will become increasingly difficult, and their safety might be put in danger. Meanwhile, any Korean citizen attacking U.S. soldiers would have to answer only to Korean courts since the United States has no jurisdiction over them. The more intransigent the United States remains in relinquishing primary jurisdiction in instances of concurrent jurisdiction, the more lenient and sympathetic the Korean court may be towards anti-American offenses. From this perspective, the United States would do well to respond genuinely to the calls for reform.

V. TOWARDS COMMON SOLUTIONS FOR REFORMING THE KOREA SOFA

A. *The Law of Treaties and Other Considerations*

The problems discussed in Part IV and the current ongoing public outcry in Korea provide compelling reasons to revise the agreement. But what issues must the United States and Korea consider before renegotiation? First and foremost, one must remember that a SOFA is negotiated between two *friendly* parties, not *hostile* parties. The focus is not, and should never have been, who has broader jurisdiction and who gets limited power. Instead, the two countries must remind themselves of the many different

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88. *Id.* at 605-07.

89. Michael Taylor, *Anti-Americanism All the Rage in South Korea*, ASIA TIMES, Dec. 20, 2002, *available at* http://www.atimes.com (last visited Oct. 3, 2003).

90. *See* Na Jeong-ju, *supra* note 13.

reasons they have in keeping a SOFA arrangement, in the first place, and then decide what the best arrangement must be in light of these issues.

Second, South Korea must understand that the United States will only be interested in revisions that somehow benefit the United States, either directly or indirectly Likewise, the United States must see that Korea wants revisions that will provide the Korean government more authority in these matters. Because neither party will agree to a revision that will seriously compromise its position, any proposed solution must consider both perspectives and their consequences; in the end, any renegotiation must achieve a *Pareto improvement*.[91]

Third, in formulating new agreements, it would be judicious for the two countries to obey the Law of Treaties of the 1969 Vienna Convention. Admittedly, taking into consideration the existing legal regimes of both countries is important, but the two countries can better avoid arbitrariness and future contentions by appealing to an international legal norm.

Finally, proposed solutions must not be purely theoretical in nature; they must be able to be implemented. For instance, one might plainly think that the best way to eliminate concerns for bias and preferential treatment is to have either no party or both parties exercise jurisdiction. But as we saw, if neither party should exercise jurisdiction, no institution in this world can fairly judge the matter. On the other hand, trying to devise a scheme that combines the laws of both States and has judges from both States presiding is quite impracticable. Thus, these are not really solutions that can be implemented given the current state of the world.

B. The U.S. Perspectives

The United States has at least four distinct interests to consider in these types of bilateral agreements: first, it must promote the efficiency of its military operations so as to conduct successful peace-keeping missions all over the world; second, it must seek to protect the rights and safety of its soldiers stationed abroad; third, it must maintain a sound relationship with the host nation; and fourth, it must consider the broader consequences of one SOFA revision to other SOFAs it has signed. Although these are all important interests the United States must balance and prioritize these interests somehow. Presently, the United States appears to rank these concerns in the order listed above. For example, in

91. A Pareto improvement is a bargaining solution which improves at least one party's position without harming any other party's position.

regard to the fourth concern, the United States can always claim that a particular arrangement with one country was contingent on that country's special circumstance or legal system.[92]

How would the United States look at the other three concerns? For over a decade, foreign policy outside terrorism management has not been a main agenda for the United States. Henry Kissinger notes this trend in his *Does America Need a Foreign Policy?*:

> Judging from media coverage and congressional sentiments...Americans' interest in foreign policy is at an all-time low.... The last presidential election was the third in a row in which foreign policy was not seriously discussed by the candidates. Especially in the 1990s, American preeminence evolved less from a strategic design than a series of ad hoc decisions designed to satisfy domestic constituencies while, in the economic field, it was driven by technology and the resulting unprecedented gains in American productivity. All this has given rise to the temptation of acting as if the United States needed no long-range foreign policy at all and could confine itself to a case-by-case response to challenges as they arise.[93]

Therefore, maintaining a harmonious relationship will probably take a backseat in light of the other objectives. Between the first two interests, efficient military operation will likely prevail since the United States has always had the option of declaring national security an "important government interest"[94] and applying the doctrine of military deference[95] to place the military operation before the protection of the rights of its soldiers.

But even in this ordering, circumstances can change to such an extent that it may be wise for the United States to give more care to its subordinate objectives. For instance, if the U.S.-Korea relationship should deteriorate to a degree where South Korea demands that the U.S. troops withdraw at once, then so long as the threat is credible, the United States should give more care to restoring a healthy relationship with South Korea than to the other goals.

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92. *See, e.g.*, NATO SOFA, *supra* note 19; UCMJ, *supra* note 40.

93. HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY?: TOWARD A DIPLOMACY FOR THE 21ST CENTURY 18-19 (Touchstone 2002).

94. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("No one could deny that under the test of Craig v. Boren...the Government's interest in raising and supporting armies is an 'important governmental interest.'") (citing Craig v. Boren, 429 U.S. 190 (1976)).

95. *See, e.g.*, U.S. v. O'Brien, 391 U.S. 367, 377 (1968) (concluding that Congress's power to regulate armies and navies is "broad and sweeping").

C. *The Korean Perspectives*

The host nation faces a different set of concerns. Most likely, Korea's objectives include the following in the order of significance: first, Korea must avoid any major military conflict with North Korea; second, Korea must maintain a strong bond with the United States; third, the Korean government must protect its citizens from crimes of U.S. troops, and when crimes do occur, the government must push for a fair judicial process; and fourth, the Korean government must realize that it is unfair to seek a bilateral agreement arrangement that does not mirror the arrangements it has with others.

Korea has traditionally placed its relationship with the United States above the protection of its citizens.[96] Several reasons explain this stance: South Korea is facing an imminent communist threat from North Korea, South Korea has never enjoyed hegemony, and it is not used to asserting its position. Nevertheless, the end of the Cold War and its economic boom over the past four decades has given more bargaining power to South Korea. For one thing, its military strength has grown significantly over the late twentieth century. The government has been requiring every able male to serve in the military for twenty-six months. For another, South Korea is a member of the Organization for Economic Cooperation and Development (OECD) and is a huge trade partner with the United States.

But for Koreans, there has also been a critical paradigm shift: if three decades ago a typical Korean young adult might have viewed the United States as South Korea's savior from North Korea's attacks, today a typical Korean young adult views the United States as a hurdle in reunifying with North Korea. Many believe that former President Kim Dae-Jung's "sunshine policy" has brought the two Koreas closer together.[97] The North-South summit in Pyongyang in June of 2001 was the first meeting ever to take place between the two governments.[98] At the 2002 Asian Games, held in Pusan, South Korea, the two Korean teams walked together with one flag. In June of 2003, North and South Korea connected railways across their heavily armed border, and linked the two countries for the first time in over fifty years.[99] Although the

96. *See generally GIs Murder of Girls Fuels Korean Anger*, *supra* note 16.

97. *See generally Kim Dae-jung Stresses Importance of 'Sunshine Policy'*, PEOPLE'S DAILY, Dec. 30, 2002, *at* http://english.peopledaily.com.cn (last visited Oct. 3, 2003).

98. Stephen W. Bosworth, *U.S.-Korean Relations After the Summit*, 25 FLETCHER F. WORLD AFF. 25 (2001).

99. *Koreas Connect After 50 Years*, CNN.COM, Jun. 13, 2003, *at* http://www.cnn.com/2003/WORLD/asiapcf/east/06/14/koreas.railway.ap/index.html (last visited June 18, 2003).

current nuclear crisis with North Korea does present a credible threat to South Korea, on the whole, North Korea is slowly beginning to show its willingness to converse with South Korea. Accordingly, the South Korean government is placing less emphasis on its relationship with the United States and increasing emphasis on claiming the rights and protection of its own citizens.[100]

D. Proposed Solutions

1. *Model the Korea SOFA more like the NATO SOFA by repealing the modifications in the "Agreed Minutes" to Paragraph 3(a), (b) and the immunity granted to the civilian component and dependents.*

The NATO SOFA is by no means a perfect arrangement,[101] but revising the Korea SOFA to resemble the NATO SOFA will mean that, at least, this bilateral agreement would now conform to an international norm accepted by most advanced nations. In doing so, the agreement should not limit primary jurisdiction of South Korea to only those cases that are of *particular* importance to South Korea, but rather to those cases that are *not of particular* importance to the United States. Make no mistake, it will still be in the interest of the United States to request a waiver in every instance. But by repealing this addendum, at a minimum, the two countries will be devising a seemingly more equitable agreement, and South Korea will no longer view the SOFA as just an old contract — completed under duress — to which it is helplessly bound under the doctrine of *pacta sunt servanda*.[102] From the United States' point of view, even with this modification, it may still succeed in waiver requests as it has frequently done with NATO countries.

The United States was quick to point out that South Korea, too, has concluded a SOFA-like arrangement with Kyrgyzstan in which South Korea retains primary jurisdiction over its soldiers regardless of whether crimes are committed *on or off* duty.[103] South Korea's arrangement with Kyrgyzstan is even more stringent to the receiving State than the Korea SOFA is to Korea. Thus if South Korea wants to present a strong case in reforming the Korea SOFA

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100. *See generally id.* (concluding that after the North-South summit, it is in the interest of the United States to work hard to maintain a sound relationship with South Korea).

101. *See generally* Pagano, *supra* note 20; Priest-Hamilton, *supra* note 4.

102. This principle, roughly translated to say that an "international agreement in force is binding upon the parties to it and must be performed in good faith," is restated in the U.N. Charter, art. 2, para.2 and in art. 26 of the Vienna Convention.

103. In March of 2002, South Korea struck a SOFA with Kyrgyzstan in order to support the anti-terror campaign in Afghanistan. *See* Yoo Chang-yup, *supra* note 14 ("South Korea has no clause in its SOFA to give jurisdiction to Kyrgyzstan whether incidents occur on or off duty."); *see also* The June 13 Accident Q's and A's, *supra* note 64.

it should first seek to revise its arrangement with Kyrgyzstan; otherwise, South Korea has the semblance of saying "do as we ask, not as we do."

This would also be consistent with the general principles of equity in international law. The World Court generally decrees that "he who seeks equity must do equity," and he who seeks fair or equitable treatment must come into court with clean hands.[104] For instance, "if a nation has been wronged, and its military commanders have violated the same law their nation seeks to enforce, the 'clean hands doctrine' may keep the complaining nation from getting relief for which it might otherwise be entitled."[105] Technically, the ICJ's unilateral compulsory jurisdiction is non-binding for most nations. Nonetheless, the clean-hands problem has had a long tradition in international law, and may still come up in the international setting.[106]

2. *Eliminate jury trials for crimes that concern both States or both nationals.*

As discussed above, the possibility of jury trials enhances the concern for bias and preferential treatment. Therefore, the United States should amend the UCMJ to curtail the soldiers' right to jury trial when matters concern both nations. Of course, this raises a concern that such policy would violate U.S. citizens' right to jury trial granted by the Seventh Amendment of the U.S. Constitution; nevertheless, people's fundamental rights have been compromised in the military. For example, in *Orloff v. Willoughby*, the U.S. Supreme Court concluded that "the military constitutes a specialized community governed by a separate discipline from that of the civilian."[107] Subsequently, in *Frey v. State of California*, the Ninth Circuit upheld the California National Guard's mandatory retirement policy despite its facial violation of the Age Discrimination in Employment Act.[108] In *Thomasson v. Perry*, the Fourth Circuit upheld the infamous "Don't Ask, Don't Tell" policy partly abridging a homosexual individual's right to freedom of

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104. Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 76-78 (Separate opinion of Hudson, J.); *See also* SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, 78 Recueil des Cours 9, 82 (1982); RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 (1987);Janis, *Equity and International Law: The Comment in the Tentative Draft*, 57 TUL. L. REV. 80 (1982).

105. George K. Walker, *Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, 37 NAVAL L. REV. 1, 30 (1988).

106. *Id.*

107. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)

108. *Frey v. State of California*, 982 F.2d 399 (9th Cir. 1993)

speech.[109] Robert Sherill went as far as to publish a book titled *Military Justice is to Justice as Military Music is to Music.*[110] If anything, the United States, with its history of military justice, is not in a position to claim that this right to jury trial cannot be withheld on the basis of its Constitution. Although it is always dangerous to suggest a proposal that further limits U.S. soldiers' fundamental rights by citing other instances of curtailed rights, in this particular instance, there are good reasons for banning jury trials when both nations have a stake in the offense.

3. *The United States should demonstrate its willingness to honor Paragraph 3(c) by waiving primary jurisdiction from time to time.*

The United States was not necessarily at fault in refusing to waive its primary jurisdiction and to hand over Sergeants Walker and Nino to be tried in a Korean court. With the entire Korean public sentiment and media against them, the two defendants would almost certainly have been convicted, whereas the United States probably had reason to believe that there was not enough evidence to convict them with criminal charges. Be that as it may, the U.S. military authorities certainly could have provided a better justification for denying Korea's waiver request than just saying that there has been no such precedent. It is precisely this lack of waiver history that has angered Korean authorities and public. The United States should begin making small concessions and waiving primary jurisdiction from time to time.

4. *Establish a standard for determining whether an offense occurred while on duty or off duty, instead of an ad hoc certificate method.*

As we saw, the inherent conflict of the two opposing interests of the sending and the receiving States frequently leads to different interpretations of official duty. The agreement needs to include a bright-line mechanism by which to make the official duty determination. The parties should be cautious about relying on ad hoc agreements, since those agreements will endure only as long as South Korea and the United States maintain a good relationship. A uniform approach will ensure that all parties are treated equally.

Although Korea is not a common law country, keeping a database of scenarios or precedents will provide a more robust

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109. *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996)

110. *See generally* ROBERT SHERILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (Harper & Row 1970).

approach to determining the scope of employment. This seemingly innocuous determination can be quite pivotal in the outcome of a case since it effectively decides which party is to have primary jurisdiction. Therefore, the United States and South Korea would do well to agree upon a clear guideline approved by the legal authorities of both States. At a minimum, such a system would serve to educate the Korean public about why certain decisions come out the way they do, and they will perhaps be less suspicious of arbitrary favoritism on the part of the United States.

5. *When cases concern both states, regardless of who has primary jurisdiction, the two states should have equal investigatory power.*

The State who does not have primary jurisdiction should, at least, be given the chance to present the strongest case it can prepare. This is particularly appropriate since Paragraph 5 specifically prescribes this. Allowing equal investigatory power will be one way to minimize the concern for bias and preferential treatment. Meanwhile, it serves an additional purpose: the more transparency is allowed, the more the authorities of one State can learn about how the other State's justice system functions. In the case at bar, had the Korean authorities been granted more investigatory power, the trial might or might not have reached different outcomes. But more importantly, the Korean authorities would have learned the level of evidence required to establish criminal negligence is "beyond a reasonable doubt."

VI. CONCLUSION

Just as the conclusions of World War I and II brought about the virtual erosion of "the law of the flag" and led to a paradigm shift in how we view international law, the end of the Cold War has changed the geopolitical environment of the modern era. Law must evolve through time in order to reflect the varying social circumstances and expectations. The purpose of a SOFA is to share the sovereign prerogative between the receiving and the sending states. SOFA agreements should embody the participating parties' intentions to find a balance between the rights and obligations of the U.S. troops on foreign soil, the United States, and the Korean government.

More than a year has passed since the tragic incident of Uijongbu, and a lot has occurred in the meantime. In October 2002, North Korea confessed that it had been developing nuclear weapons. It came as a devastating blow to both the United States and South Korea. With the Bush administration refusing to sign a non-

aggression treaty with North Korea, there is a real possibility of a war between the United States and North Korea. Tensions remain high in the Korean peninsula. Newly-elected President Roh Moo-Hyun, who originally rode to electoral victory with anti-American slogans, paid a visit to the United States in May of 2003. In his summit meeting with President George W. Bush, he stressed the importance of having the United States as a close ally. In a public message, President Roh stated that "the next fifty years of the Korea-U.S. alliance would be even more precious and meaningful than before."[111] The past twelve months gave both countries a chance to think about their priorities, and at the moment, both the United States and South Korea undoubtedly recognize the importance of keeping the U.S. troops in the peninsula all the more. Still, the Korean public continues to insist on SOFA reforms.

It would be rather unfortunate if these recent developments mask the necessity for meaningful SOFA reforms. At the same time, the lesson from the Uijongbu incident is that no SOFA — no matter how carefully drafted and revided — will serve its purpose unless all parties honor their commitment to sharing and believe their interests have been properly balanced. Dialogue between the parties is essential to this end. South Korea and the United States should begin their renegotiation process by making small concessions and having more frequent communication. Neither country benefits from the spread of anti-American sentiments; likewise, neither country will benefit from unilateral behavior. The upcoming renegotiation process may define a new standard of bilateral treaties and may very well mark a new chapter in the history of international law.

111. Choi Won-gyu, *Roh Pays Homage to U.S. War Dead*, CHOSUN ILBO, May 22, 2003, *available at* http://english.chosun.com (last visited Oct. 3, 2003).