Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement

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WHERE DOES INEQUALITY COME FROM?
AN ANALYSIS OF THE KOREA-UNITED STATES STATUS OF FORCES AGREEMENT

YOUNGJIN JUNG* & JUN-SHIK HWANG**

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INTRODUCTION

On June 13, 2002, a U.S. armored vehicle ran over two thirteen-year-old Korean girls near the Twin Bridges training area, about
fifteen miles north of Seoul, South Korea. Both victims died on the spot. According to the Status of Forces Agreement ("SOFA") between the Republic of Korea ("South Korea") and the United States, which sets out the two countries' respective jurisdiction over offenses U.S. service members commit in South Korea, the right to try the two U.S. soldiers manning the armored vehicle belonged to U.S. military authorities. South Korea's Ministry of Justice requested waiver of such right, which the U.S. authorities rejected. A U.S. court martial found both of the accused not guilty of negligent homicide in November 2002.

Although the United States awarded compensation to the victims' families, and U.S. President George W. Bush, the Commander in Chief of U.S. forces in Korea, and the two soldiers involved offered

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** Deputy Director, Ministry of Foreign Affairs and Trade of the Republic of Korea; LL.B., Seoul National University. Opinions and conclusions in this paper are solely those of the authors. They do not necessarily reflect the views of the Korean government.


2. See id. (explaining that the U.S. soldiers could neither hear nor see the two young girls before they struck them).


4. See Jae-Hyeok Choi, USFK Jurisdiction Waiver Requested for First Time, CHOSUN ILBO, July 10, 2002 (Eng. ed.) (reporting that the United States was unlikely to grant the request because the two men were on duty at the time of the accident and had already been charged with vehicular manslaughter), available at http://english.chosun.com (last visited Mar. 29, 2003). This is the first time Korea has requested such waiver. Id.

5. See Controversy Continues Over U.S. Court Martial Verdict, KOREA TIMES, Nov. 25, 2002 (on file with the author).
public apologies, the Korean populace did not receive the verdict well. A large crowd gathered in candlelight vigils, partly to condemn the acquittal of the U.S. soldiers. Some Korean activists questioned the verdict and called for the soldiers to be tried under the Korean legal system. A large number of people developed the perception that an element of unfairness in the SOFA was largely responsible for what they thought was an unfair verdict.

“Revision of SOFA” has become one of the most popular slogans in the demonstrations. Crimes by U.S. service members and, by extension, the Korea SOFA have increasingly become a controversial issue in Korea, and the accident that killed the two girls served as a catalyst for the recent explosion of such popular demands. Many critics have regarded the SOFA as an expression of the unequal relationship between Korea and the United States. To

6. See Kirk, supra note 1 (stating that that President Bush, several four-star generals, and the two sergeants who were charged with the girls’ deaths released public apologies following the incident).

7. See Woo-San Jeong, Candle Lit Rally Commemorates Schoolgirls, CHOSUN ILBO, Dec. 15, 2002 (Eng. ed.) (reporting that 56,000 people nationwide attended candlelight demonstrations to commemorate the two school girls), available at http://english.chosun.com (last visited Mar. 29, 2003). In Seoul, 40,000 people gathered to support the “People’s Movement for the Amendment of the SOFA.” Id.


9. See Jae-Ho Sung, Criminal Jurisdiction of the SOFA Between the Republic of Korea and the United States, 5 SEUL INT’L L. J. (1988) (discussing various aspects of the Korea SOFA with focus on criminal jurisdiction); Chu-Young Chang, Civil Claims Clause: Problems and Proposals for Revision, in Special Issue: Review of the Status of Forces Agreement Between the Republic of Korea and the United States, 5 SEOUL INT’L L.J. (1988) (arguing that the Korea SOFA has elements of unfairness and inefficiency); see also JANG-HIE LEE ET AL., A STUDY ON THE STATUS OF FORCES AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA (2000) (explaining the history and legal implication of the Korea SOFA); Gwyn Kirk & Carolyn Bowen Francis, Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia, 15 BERKELEY WOMEN’S L.J. 229, 256 (2000) (stating that even in cases where there is concurrent jurisdiction between the United States and the host country, there is an “inequality of bargaining power”). Therefore, “individual case
their eyes, the acquittal of the two U.S. soldiers is just another example that clearly shows the need to revise the agreement.

In fact, the United States has concluded a great number of SOFAs, approximately eighty to date, with many different states,\textsuperscript{10} such as the NATO states, Japan, and South Korea.\textsuperscript{11} The United States has been deploying its armed forces in foreign territories for various reasons, and the typical method to define the legal status of U.S. forces stationed abroad is to enter into a SOFA with the receiving state.\textsuperscript{12} Although the SOFAs that the United States has concluded with other states seem to be framed in a similar way, the receiving states have different reasons for allowing U.S. forces to stay in their territories. European NATO states, Japan, and Korea have different historical and political contexts for receiving U.S. forces. It is safe to say that such differences in historical backgrounds and political ties affect the debates surrounding the construction and application of legal instruments such as SOFAs. It is quite natural that the legal regime should evolve towards a system that keeps abreast of changing political situations because every legal regime is embedded in political contexts. A strict legal formalism should carry less weight in all aspects of SOFAs, including its promulgation and application. It is time to take a hard look at the practical and political dynamics of SOFAs. Therefore, in order to analyze the Korea SOFA in a proper perspective, it is necessary to understand the history and

\textsuperscript{10} See Colonel Richard J. Erickson, \textit{Status of Forces Agreements: A Sharing of Sovereign Prerogative}, 37 A.F. L. REV. 137, 143-44 (1994) (providing a full list of the countries that have a formal SOFA with the United States).


\textsuperscript{12} See Erickson, \textit{supra} note 10, at 140-41 (noting that SOFAs define that status of U.S. forces in "friendly states" stationed during peacetime, they do not authorize the use or presence of those forces).
characteristics of the political relationship between Korea and the United States.

This paper examines the Korea SOFA, which currently has caused more controversies than any other such agreements. It begins by delving into the creation of the Korea SOFA in light of Korea’s modern history, and then deals with controversies over its provisions on criminal jurisdiction and process. In conclusion, it will suggest that the Korea SOFA is, in general, more impartial than critics argue and that real problems with the Korea SOFA lie in its actual application, rather than the agreement’s content.

I. THE MAKING OF THE SOFA BETWEEN KOREA AND THE UNITED STATES

A. HISTORICAL BACKGROUND

In the early 1900s, Japan annexed Korea by force, and when the United States defeated Japan in 1945, the Alliances discussed the liberation of Korea.13

In the aftermath of the Second World War, the United States and the Soviet Union assumed control over Korea’s southern and northern parts, respectively.14 The 38th Parallel that severed the Korean peninsula symbolized the beginning of the Cold War between two conflicting ideological camps—democracy and communism.

In the southern part of Korea, the “Republic of Korea” was established with the support of the United Nations (“UN”) in 1948.15 The new Korean government concluded an interim agreement with


15. See NAT’L HISTORY COMPILATION COMM., supra note 13, at 387-423 (describing how United Nations supported the establishment of the Korean government and how the communists in the North objected to U.N.’s involvement).
U.S. forces, which conferred exclusive criminal jurisdiction upon the latter over all offenses committed by its members. The agreement, however, was terminated soon after U.S. forces returned home in 1949.  

North of the 38th Parallel, Kim Il-sung set up a communist government with the help of the Soviet Union. Kim Il-sung and his friends in Moscow had "taken at face value" the pronouncements of U.S. officials that had placed Korea outside the American defense line. Kim Il-sung persuaded the Soviet leaders to back up his plan to take over the whole peninsula, and on June 25, 1950, North Korean tanks crossed the 38th parallel, beginning the Korean War.  

To the disappointment of North Korea and the Soviet Union, however, the United States and other states promptly sent their forces to protect the South. The Soviet Union's absence from the UN Security Council Meeting at that time made the swift international action against North Korea's aggression possible. The United States and its allies allocated a great deal of military resources to win the war, because they saw the Korean peninsula as a critical front in the fight against communism.


18. See Henry Kissinger, Diplomacy 475-76 (1994) (quoting General Douglas MacArthur as saying "our line of defense runs through the chain of islands fringing the coast of Asia"). Secretary of State, Dean Acheson, also made pronouncements to the same effect. Id.

19. See Levi, supra note 14, at 210-15 (detailing the initiation of the North Korea's attack on South Korea).

20. See Kissinger, supra note 18, at 477 (explaining the United States' intervention in the Korean conflict).


22. See Kissinger, supra note 18, at 476 (arguing that the United States' concern about the global spread of communism significantly effected its decision to send troops to Korea).
During the war, South Korea and the U.S. concluded an agreement on the status of U.S. forces. Given the circumstances, the agreement was the product of the Korean government’s accommodation of most of the requests by the United States.\textsuperscript{23}

The Korean War ended with the Armistice Agreement, signed at Panmunjom, about thirty miles north of Seoul, on July 27, 1953.\textsuperscript{24} South Korea and the United States entered into the Mutual Defense Treaty in the same year, which signaled the beginning of permanent stationing of U.S. forces in Korea.\textsuperscript{25} According to Article IV of the treaty, South Korea “grants, and the United States accepts, the right to dispose United States land, air and sea forces in and about the territory” of South Korea,\textsuperscript{26} but not vice versa.\textsuperscript{27} The term “mutual” in the Mutual Defense Treaty did not carry much weight because the essence of the treaty was the United States’ commitment to the defense of South Korea against its Northern enemy.\textsuperscript{28}

The present Korea SOFA was concluded in accordance with the Mutual Defense Treaty in 1966, more than a decade after the end of the war.\textsuperscript{29} Although the war was over, South Korea was still afraid of a repeat attack by the North, and it desperately needed outside help, especially from the United States, for economic development and

\textsuperscript{23} See JANG-HIE LEE ET AL., supra note 9, at 21; DAE-SUN KIM, supra note 16, at 367-68 (stating that this agreement was based on the absolute immunity of U.S. forces from Korean jurisdiction).

\textsuperscript{24} See Levie, supra note 14, at 223-24 (reporting that negotiations for an armistice began on July 10, 1951, but the armistice discussions were adjourned in May, 1952). In the meantime, Stalin died on March 5, 1953, and the Soviet leaders became more occupied with internal politics than with the war in Korea. Id. at 224. This led to the conclusion of the Armistice Agreement. Id.


\textsuperscript{26} Id. art. IV.

\textsuperscript{27} Id.

\textsuperscript{28} See KISSINGER, supra note 18, at 476 (explaining the reasoning behind the United States’ military presence in South Korea).

\textsuperscript{29} DAE-SUN KIM, supra note 16, at 368 (explaining how South Korea and the United States agreed on the conclusion of the Korea SOFA).
military security. The presence of U.S. forces in Korea was perceived as an essential element for South Korea's security.

Since the 1960s, South Korea has undergone political and economic change. Initial rapid growth of the economy was achieved at the expense of democracy and human rights under successive military regimes. In the mid 1980s, however, pro-democracy movements, driven mainly by students, forced the government to agree to democratic reforms and more civil freedom. After the election of Kim Young-sam as President in 1993, the military was completely cut off from political power, and civil democracy finally prevailed in South Korea.

Such developments in the South, however, had little effect on the alleviation of the inter-Korean tension. Although representatives of the two Koreas signed the Basic Agreement on Reconciliation, Non-aggression, and Exchanges and Cooperation Between South and North Korea in December 1991, the nuclear crisis of 1994, which was ignited by the North's withdrawal from the Non-Proliferation Treaty ("NPT") and International Atomic Energy Agency

30. See Kirk & Francis, supra note 9, at 231-33 (stating that the United States stationed troops in Korea in hopes of stabilizing the area).

31. HAK-JOON KIM, THE KOREAN WAR: CAUSES, EFFECTS, DEVELOPMENTS, AND ARMISTICE 359-60 (1997) (stating that Korean people strongly approved the presence of U.S. forces, based on results of opinion polls conducted in the 1950's and 60's).

32. KYONG-SOOK CHO, UNDERSTANDING OF MODERN HISTORY OF KOREA 322-25 (2001) (explaining that the military regimes pursued economic development by low labor costs and state-controlled financial system).


34. See id. at 136 (noting that in his early days in office, President Kim Young-Sam took total civilian control of the military, and dismantled an organization of politics-oriented military officers inside the army).

35. See SEONG-HO, THE THEORY OF SPECIAL RELATIONSHIP BETWEEN SOUTH AND NORTH (1995) (stating that this Basic Agreement provides for, among others, recognition of each other’s political system, non-interference in the internal affairs of each other, non-use of force against each other, peaceful resolution of disputes, and promotion of exchanges and cooperation in various fields such as economy, science and technology).
showed that there was still a Cold War in the Korean peninsula. The conclusion of Agreed Framework between the United States and North Korea resolved the conflict, but the communist regime of North Korea still remains a threat to South Korea and its principal ally, the United States.

President Kim Dae-jung, after his inauguration in 1998, pursued the policy of reconciliation and cooperation toward North Korea, which was more widely known as the "Sunshine policy." Its purpose was to help the North reconstruct its devastated economy and to establish political reconciliation between the two Koreas. It resulted in the historic summit talk between the two Koreas in 2000. However, North Korea recently caused another conflict with the IAEA, raising international concerns over the security and peace in East Asia.

Since the end of the Korean War in 1953, U.S. forces in Korea have contributed to the national security of South Korea and have played a vital role in its economic development. The respect and affection of Koreans for America has been high, but the Korean

36. See David Sloss, It's Not Broken, So Don't Fix It: The International Atomic Energy Agency Safeguards System and the Nuclear Nonproliferation Treaty, 35 VA. J. INT'L L. 841, 865-70 (1995) (noting that North Korea had refused to comply with its safeguards obligations under the NPT, and this raised concerns that North Korea was seeking the capability to manufacture nuclear weapons).

37. See id. at 870-73 (stating that the Agreed Framework provided for measures to bring North Korea into full compliance with its NPT obligations, such as "freezing" its graphite-moderated reactors and related facilities that could be used to produce materials of nuclear weapons). In return, the United States agreed to organize an "international consortium to finance and supply" light-water reactor power plants. Id.


40. See Young-Tae Yim, 50 Years of the Republic of Korea, in THE OCTOBER REVITALIZING REFORMS TILL THE GOVERNMENT OF PEOPLE 163 (1998) (describing how during the Kwang-ju Massacre, staged by the Korean military commanders in May 1980, the citizens of Kwang-ju believed that the U.S. military
public has become more aware of, and disappointed by, the serious crimes U.S. service members have committed in South Korea, and the unsatisfactory measures the Korean government has taken in line with SOFA to address such crimes. South Korea and the United States revised the Korea SOFA in 1991 for the first time. The United States and South Korea agreed to the second revision in 2001. By revising the SOFA twice, the Korean government was relieved of a little bit of public pressure to improve the Korea SOFA.

This brief sketch of Korea's modern history explains why the Korea SOFA has generally been framed to favor the U.S. forces, namely because Korea has depended on America for its very survival. For this reason, the United States has had a fundamental advantage in terms of bargaining power in the making and revision of the SOFA. In addition, American distrust of the Korean justice system, which the military dictatorship had controlled, may have encouraged U.S. forces to extend jurisdictional power as much as possible within the SOFA system.

B. MAJOR AMENDMENTS CONCERNING CRIMINAL JURISDICTION: 1991 AND 2001

The "law of the flag," which was the basis for the agreement concluded during the Korean War between South Korea and the United States, gave foreign forces absolute immunity from territorial jurisdiction. This agreement governed the status of U.S. service vessels appeared to be near the west coast to help them resist the South Korean army).

41. See James Brooke, First of 2 G.I.'s on Trial in Deaths of 2 Korean Girls Is Acquitted, N.Y. TIMES, at A9 (describing how South Korean activists protested a U.S. military court's acquittal of Sgt. Fernando Nino for hitting and killing two Korean girls with an Army vehicle). A group of activists pledged to continue demonstrating "until justice is done." Id.

42. See DAE-SUN KIM, supra note 16, at 369 (explaining the backgrounds of negotiations between two countries to revise the Korea SOFA).


44. See id. at 110 (defining the law of the flag as a principle by which military forces are not subject to the host nation's jurisdiction); see also Adam B. Norman, The Rape Controversy: Is A Revision of the Status of Forces Agreement with Japan
members in South Korea even after the Mutual Defense Treaty was concluded at the end of the war in 1953. The SOFA replaced this agreement on July 9, 1966, which marked a departure from the law of the flag. Korea and the United States have amended the Korea SOFA twice since its conclusion in 1966.

The first amendment was agreed to on February 1, 1991. The most important aspect of the amendment was the repeal of the so-called “automatic waiver” clause. This clause requested the Korean government notify U.S. military authorities of its intent to exercise jurisdiction over crimes that fell within its primary jurisdiction within fifteen days after the occurrence of such crimes. In other words, Korea presumably waived its primary jurisdiction unless it communicated its will to proceed with proper criminal process. Therefore, it was easy for South Korea to use the waiver in favor of U.S. forces. Once the automatic waiver was done away with under the first revision, the United States was required to make a request for the waiver, to which Korea should give sympathetic consideration in cases where it has primary jurisdiction.

On January 18, 2001, the Korea SOFA was revised for the second time in response to concerns over environmental damage by U.S.

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Necessary?, 6 IND. INT’L & COMP. L. REV. 717, 731 (1996) (stating that the law of the flag was dominant in most World War I agreements because the United States believed that subjecting fighting forces to another country’s jurisdiction would constrain the military’s ability to discipline its soldiers).

45. See Young-won Kim, supra note 43, at 111 (stating that the agreement concluded during the Korean War gave considerable favors to U.S forces in Korea).

46. See DAE-SUN KIM, supra note 16, at 368 (explaining the legal implications of the Korea SOFA in terms of general international law).

47. See id. at 369 (stating that the automatic waiver clause was one of the most important evidences of how unfair the Korea SOFA was before revisions).

48. See Jae-Ho Sung, supra note 9, at 46 (explaining the operation and effects of the automatic waiver clause in the Korea SOFA).

49. See Korea SOFA, supra note 3, art. XXII, para. 3(c) (providing that the state who has primary jurisdiction “shall give sympathetic consideration to a request from the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance”).
military activities and increasing crimes committed by U.S. armed forces members in Korea.\(^{50}\)

II. IS THE INEQUALITY THEORY VALID?:
REEXAMINATION OF THE KOREA SOFA

Several purposes of the SOFA have been identified. Given the uncertainty of the customary international law on visiting foreign forces, states generally rely on the SOFA to clarify and to stabilize the legal status of foreign service members.\(^{51}\) In terms of bilateral or multilateral state relations, the objective of a SOFA is to “share the sovereign prerogative” between the two states and develop a comprehensive agreement based upon each states’ interests and needs.\(^{52}\) Another main aspect of SOFAs is to guarantee basic individual rights and liberties of service members.\(^{53}\)

These purposes are correlative with one another, but their relative importance may vary. As U.S. lawmakers pursued a policy of

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50. See Jennifer Gannon, Renegotiation of the Status of Forces Agreement Between the United States and the Republic of Korea, 2000 COLO. J. INT’L ENVT’L. L. & POL’Y 263, 263-64 (2000) (describing the pressures that the Korean government placed on the U.S. government to renegotiate the SOFA and the implications of its subsequent revision); see also Young-won Kim, supra note 43, at 112-14 (stating that during the second revision, the two countries concluded a Memorandum of Special Understandings on Environmental Protection). As for the issues of criminal jurisdiction, Korea was allowed, inter alia, to maintain custody of the accused or to have earlier transfer of custody over certain heinous crimes, as the case may be. Id.

51. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 375 (5th ed. 1998) (discussing how the NATO SOFA provides a structure for dealing with the military jurisdiction problem); see also Erickson, supra note 10, at 140 (explaining that the primary purpose of a SOFA is not to immunize forces from criminal sanctions, but rather apply military laws which take into consideration status, custom, and military requirements).

52. See Erickson, supra note 10, at 140 (explaining that SOFAs are only effective instruments when both parties to the agreement understand the purpose of sharing the sovereign prerogative and believe that their interests are adequately represented).

53. See Norman, supra note 44, at 734 (stating that SOFAs “retrieve jurisdiction for the United States,” which preserves the constitutional rights of a serviceman who is serving in a foreign country).
maximizing jurisdiction to the greatest extent possible and protecting the due process rights of U.S. service members, the possibility of offending the sovereign sentiment of the receiving states has become higher.

South Korea, as a beneficiary of U.S. military aid, has been vulnerable to U.S. pressure. The general superiority of influences the United States has enjoyed as a superpower may be reinforced in the context of military and political patronage within specific regions such as South Korea. Also, the tensions that continue in the Korean peninsula even after the end of the Cold-War era have made it impossible to reduce Korean dependence on U.S. military support.

Consequently, some critics advance the argument that the Korea SOFA is an unequal agreement. This argument especially focuses on the provisions of the agreement related to criminal jurisdiction and the processes concerning crimes U.S. service members commit in Korea.

54. See Major Mark R. Ruppert, Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say No, 40 A.F. L. REV. 1, 8 (1996) (explaining that this desire to maximize jurisdiction stems from the Senate Resolution on the NATO SOFA). Adopted on July 15, 1953, this resolution called for a compulsory waiver request in cases where the offender’s commander believed that the serviceman’s rights would not be fully constitutionally protected. Id.

55. See Kirk & Francis, supra note 9, at 251 (asserting that none of the countries in East Asia is in a position to negotiate with the United States as an equal partner).

56. See id. at 269-70 (stating that countries, such as South Korea, rely on the U.S. military’s assistance in maintaining their national security).

57. See Brownlie, supra note 51, at 619-20 (discussing unequal treaties in the context of the Vienna Convention). Communist states advanced the proposition that treaties that are not based upon sovereign equality were void. Id. Examples of such unequal treaties are the ones by which weak countries provide a wide range of economic privileges or military installations with foreign powers. Id. The Vienna Convention on the Law of Treaties, however, does not include inequality among the grounds for invalidating treaties, and it is widely regarded as not forming the principle of positive law. Id.

58. See Jae-Ho Sung, supra note 9, at 36; see also Kirk & Francis, supra note 9, at 270 (stating that some women’s organizations in East Asia argue that the fact that the SOFA governs soldiers’ criminal conduct leads to confusing and inconsistent results).
There are several criteria to measure the equality of legal mechanisms embodied in certain international agreements. One of them is customary or general international law. As sources of international law, treaty and customary law are basically equal in their legal status and effect, and a newly concluded treaty supersedes existing customary law unless the existing rule is jus cogens. Therefore, it is possible that state parties may alter some equitable principles of customary or general international law by agreeing on a treaty in favor of one or several parties with stronger bargaining power. In this respect, customary or general international law may be useful in discussing the inequalities embodied in the Korea SOFA.

The criterion critics more widely adopt is the NATO SOFA. The NATO SOFA has become a global standard after which other SOFAs are modeled. Moreover, it is perceived that the relative bargaining power of European NATO states against the United States is generally greater than that of East Asian states, and provisions similar to those of the NATO SOFA seem to be able to


60. See id. at 56-57 (describing the hierarchical relationship between customary international law and treaties and explaining in which situations one overrides the other).

61. See id. at 57-58 (explaining that a treaty should be considered void if it violates basic principles of international law). This principle is codified in Article 53 of the Vienna Convention on the Law of Treaties. Id. This Article provides that a treaty is void if it “conflicts with a peremptory norm of international law,” which is a “norm accepted and recognized by the international community.” Id. at 57.

62. See Jae-Ho Sung, supra note 9, at 48, 50; see also Dae-Sun Kim, supra note 16, at 372-78.

63. See Erickson, supra note 10, at 141 (stating that although it was not intended as such, the NATO SOFA has become a worldwide standard). When negotiating a SOFA, the United States seeks to receive comparable or greater protection for its forces than that embodied in the NATO SOFA. Id.

64. See Steven G. Hemmert, Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction, 17 B.U. Int'l L.J. 215, 226 (1999) (explaining that the NATO SOFA is one of the few reciprocal SOFAs and that few nations outside of NATO could exercise jurisdiction over their own forces within the United States).
avoid criticism.\textsuperscript{65} To many South Koreans, the SOFA between neighboring Japan and the United States also serves as a criterion.\textsuperscript{66}

With the standards mentioned above in mind, attention will now be paid to the unequal treaty argument about the criminal jurisdiction and process provisions in the Korea SOFA.

\textbf{A. SHARING OF CRIMINAL JURISDICTION IN THE SOFA}

As a preliminary issue, it is necessary to examine the distribution of criminal jurisdiction in the Korea SOFA. The Korea SOFA is based on two types of jurisdiction, exclusive and concurrent. An identical framework is found in the NATO SOFA.\textsuperscript{67} Article XXII of the Korea SOFA provides that the U.S. military authorities have the right to exercise exclusive jurisdiction over members of U.S. armed forces "with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of the Republic of Korea."\textsuperscript{68} This exclusive jurisdiction applies to Korean authorities in the same way with respect to offenses by the U.S service members that are punishable by Korean law but not by U.S. law.\textsuperscript{69} In cases where the right to exercise jurisdiction is concurrent, the authorities of Korea have primary jurisdiction, but an exception exists in relation to offenses committed solely against the property or security of the United States or solely against another U.S. armed forces member, and offenses arising out of any act or

\begin{itemize}
\item \textsuperscript{65} See Young-won Kim, \textit{supra} note 43, at 124-25.
\item \textsuperscript{66} See Jae-Ho Sung, \textit{supra} note 9, at 48-50; see also Young-won Kim, \textit{supra} note 43, at 112, 124-25.

\item \textsuperscript{67} See Hemmert, \textit{supra} note 64, at 222 (explaining that under exclusive jurisdiction, the sending state retains jurisdiction over criminal offenses committed by members of the force). Under concurrent jurisdiction, the sending and receiving states share jurisdiction, with one state retaining primary jurisdiction. \textit{Id.} The state with primary jurisdiction has the ability to waive that jurisdiction or choose not to prosecute a given offense. \textit{Id.}

\item \textsuperscript{68} Korea SOFA, \textit{supra} note 3, art. XXII, para. 2(a).

\item \textsuperscript{69} See \textit{id.} art. XXII, para. 2(b) (providing that "Korean authorities have the right to exclusive jurisdiction over members of the United States armed forces or civilian component, and their dependents, with respect to offenses, including offenses related to the security of the Republic of Korea, punishable by its law but not by the law of the United States").
\end{itemize}
omission done in the performance of official duty.\textsuperscript{70} Also, the state retaining primary jurisdiction should "give sympathetic consideration to a request from the other state for a waiver of its right in cases where that other state considers such waiver to be of particular importance."\textsuperscript{71}

This provision is certainly not to be regarded as unequal in that it is basically the same as the relevant provision of the NATO SOFA. The comparison with the customary international law standard, however, might produce somewhat of an equivocal outcome, since the state of customary law concerning foreign forces on the territory of friendly nations is unclear in itself.\textsuperscript{72}

In practice, foreign forces had enjoyed complete immunity from a given receiving state’s territorial jurisdiction until the 1950s, and this practice was based on the customary international law doctrine of the law of the flag.\textsuperscript{73} Two factors justified the law of the flag doctrine. First, military commanders could more effectively monitor and control their own troops, and second, it is presumed that an army should apply its own military law to be able to maintain military discipline during movements across foreign soil.\textsuperscript{74} The \textit{Schooner Exchange v. McFadden}\textsuperscript{75} case contains dicta explaining the essence of such a principle. Jurists have adopted this famous case to support

\textsuperscript{70} See \textit{id.} art. XXII, para. 3(a), (b) (enumerating the instances where the United States retains jurisdiction and the cases where Korea can exercise jurisdiction).

\textsuperscript{71} See \textit{id.} art. XXII, para. 3(c).

\textsuperscript{72} See BROWNLEI, \textit{supra} note 51, at 373-75 (discussing how different writers have approached the subject of visiting forces). Some writers apply principles discussed in dicta in the \textit{Schooner Exchange} case, while others examine the subject in light of the NATO SOFA and other bilateral agreements. \textit{Id.}

\textsuperscript{73} See Hemmert, \textit{supra} note 64, at 218 (explaining that from the time when the \textit{Schooner Exchange} case was decided in 1812 to the 1950s, with the receiving state’s consent, the sending state was completely immune to criminal prosecution on foreign soil).

\textsuperscript{74} See \textit{id.} at 218-19 (explaining that the law of the flag was widely accepted internationally, based largely upon this reasoning).

\textsuperscript{75} 11 U.S. (7 Cranch) 116 (1812) (holding that an American citizen could not assert a claim of ownership over a French ship docked in U.S. port).
various, even conflicting, opinions on sovereign immunity and the status of military forces of friendly foreign troops.76

In *Schooner Exchange*, Chief Justice Marshall established the rule that “a country is implied to waive the exercise of its jurisdiction when it allows foreign troops to pass through its boundaries.”77 The law of the flag’s use is on the decline as more states become parties to SOFAs, such as the NATO SOFA, which allows the receiving state to exercise jurisdiction over certain categories of offenses members of foreign forces commit.78 Quite a few commentators suggest that today the receiving state should have complete jurisdiction over foreign troops inside its territory without an express waiver of jurisdiction through an agreement.79 Therefore, the sending state needs to conclude SOFAs in order to retain a certain amount of control over its own forces stationed abroad.80

However, there are some other ways to interpret the current state of law. First, there is authority supporting the view that the allocation of jurisdiction of the NATO SOFA may pass into customary international law.81 A court of the receiving state that does not have a SOFA in effect with the sending state might find it necessary to declare it had no jurisdiction over offenses by members of foreign forces arising out of official duty. Moreover, one commentator suggests that the most satisfactory principle today is found in Justice

76. See BROWNLIE, supra note 51, at 373 (asserting that the *Schooner Exchange* case “has been used to support a variety of propositions about immunities of armed forces”).


78. See Hemmert, supra note 64, at 220 (describing how NATO SOFA provides a basis for similar bilateral agreements involving the United States). The NATO SOFA eliminated many of the problems and the inconsistent policies associated with stationing troops on foreign soil. Id.

79. See id. (stating that the United States adopts the view that in the absence of a waiver, the receiving state has full jurisdiction over troops on its territory during peacetime).

80. See id. at 221 (explaining that under the modern view, SOFAs are necessary to ensure that the sending state maintains jurisdiction over its forces).

81. See BROWNLIE, supra note 51, at 375 (stating that in the foreword to Lazareff’s, *Status of Military Forces Under Current International Law*, Professor Baxter expresses the viewpoint that the NATO SOFA may become custom).
Marshall's words advocating for the implied waiver of jurisdictional power with the focus on the need to secure the integrity and efficiency of military troops.82

Different writers have different opinions on the modern principles of customary international law concerning the subject, and much depends on different circumstances and conditions in each case contemplated. In a hypothetical situation where there were no SOFAs regulating jurisdiction over the offenses by service members of the U.S forces in Korea, it would be difficult to expect Korean courts to exercise jurisdiction based on the principle of territorial sovereignty without any regard to the existence of official duty situations or the purpose of the presence of the U.S. forces. Therefore, it cannot be easily said that the jurisdiction system in the SOFA is an alteration of customary law for the United States' benefit.

Even though the SOFA jurisdiction system is different from customary law, what matters more is that, as mentioned earlier, it is almost the same as the provisions in other SOFAs, such as the NATO SOFA. The NATO SOFA rejected the law of the flag to the receiving states' advantage, which showed the concession on the part of the exporters of troops.83

These considerations may explain why criticism of the Korea SOFA is focused on criminal process provisions, rather than the distribution of criminal jurisdiction.

82. See id. at 374 (suggesting that Justice Marshall's opinion in the Schooner Exchange case is the most satisfying in explaining immunity). Marshall based his concept of immunity on an implied waiver by the receiving state. Id.

B. PROVISIONS ON CRIMINAL PROCESS AND RECIPROCITY

1. Transfer of Custody and Certain Serious Crimes

The most controversial issue in the Korea SOFA was Article XXII, which stipulates as to the custody of the accused members of the U.S. forces. The SOFA provided that custody should remain with U.S. military authorities until the completion of all judicial proceedings and until Korea requested the transfer of custody.

Korea and the United States revised this custody provision in the second amendment of the Korea SOFA in January 2001. Now, an accused member of the U.S. forces over whom Korea is to exercise jurisdiction remains in U.S. military custody until Korea "indicts" him. In fact, according to the Agreed Minutes to the SOFA, this

84. See Young-won Kim, supra note 43, at 116.
85. Korea SOFA, supra note 3, art. XXII, para. 5(c). Article XXII states:
The custody of an accused member of the United States armed forces or civilian component, or of a dependent, over whom the Republic of Korea is to exercise jurisdiction shall, if he is in the hands of the military authorities of the United States, remain with the military authorities of the United States pending the conclusion of all judicial proceedings and until custody is requested by the authorities of the Republic of Korea. If he is in the hands of the Republic of Korea, he shall, on request, be handed over to the military authorities of the United States and remain in their custody pending completion of all judicial proceedings and until custody is requested by the authorities of the Republic of Korea.

Id.


87. See id. (replacing the original treaty language to require that custody "shall remain with the military authorities of the United States until he is indicted by the Republic of Korea"); see also Jaime M. Gher, Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to be Learned from the United States—Japan Agreement, 37 U.S.F. L. REV. 227, 239 (2002) (noting that the Japan SOFA contains a similar provision).
provision applies only to twelve categories of serious crimes, such as murder and rape. 88

The South Korean government explains that these twelve categories are the most serious crimes U.S. service members have committed in the past ten years, and other relatively less serious crimes do not necessitate the transfer of custody at the time of indictment. 89 On the contrary, critics believe that the custody provisions of the SOFAs thwart and abrogate the host nation's investigative and prosecutorial rights. 90 Further, it is argued that the United States' efforts to frustrate prosecution have actually resulted in an increase in the number and severity of crimes by American troops in foreign territory. 91

In the case of the NATO SOFA, the sending state may retain custody of an accused until the final resolution of the criminal case. 92 In this respect, the Korea SOFA confers more rights on the receiving state than the NATO SOFA does, which makes the former less "unequal." In light of customary or general international law,

88. The categories of cases in which the custody is transferred to Korea at the
time of indictment include:
murder, rape (including quasi-rape and sexual intercourse with a minor under
thirteen years of age), kidnapping for ransoms, trafficking in illegal drugs,
manufacturing illegal drugs for the purposes of distribution, arson, robbery
with a dangerous weapon, attempts to commit the foregoing offenses, assault
resulting in death, driving under the influence of alcohol, resulting in death,
fleeing the crime scene after committing a traffic accident resulting in death,
offenses which include one or more of the above-referenced offenses as lesser
included offenses...

Amendments to the Agreed Minutes of July 9, 1966 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, Jan. 18, 2001, U.S.-S. Korea
[hereinafter Amended Agreed Minutes] (amending the Agreed Minutes of the
original Korea SOFA), available at
23, 2003).

89. See Young-won Kim, supra note 43, at 117.

90. See id. at 235, 239.

91. See id. at 239 (arguing that this criticism was made with regard to the
situations in Japan, but the same logic could apply to Korea).

92. See Gher, supra note 87, at 235 (explaining that this abrogation of a host
country's rights is often a contentious point in judicial disputes).
however, it is clear that the SOFA provision on custody of the accused gives major privileges to U.S. service members because, if not for such a provision, international law would grant the receiving state the right to take immediate custody and prosecute under its law.93

Therefore, the question of whether the custody provision of the Korea SOFA satisfies the criteria of "inequality" is met with equivocal answers; it does not in terms of the NATO SOFA, but it does in terms of customary international law.

2. Double Jeopardy and Asymmetric Appeal Rights

Double jeopardy is defined as a constitutional guarantee "against second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense."94 The asymmetric appeal rights attached to the double jeopardy principle is what distinguishes the Korea SOFA from other SOFAs: other SOFAs do not provide for asymmetric appeal rights.95

Under the U.S. Constitution, the Fifth Amendment introduced the double jeopardy principle, of which the relevant part provides, "nor shall any person be subject for the same offence to be twice put in

93. See id. (discussing the fact that the NATO SOFA and other agreements modeled after it are specifically designed to protect Americans by securing custody).

94. See Black's Law Dictionary 491 (6th ed. 1998) (defining double jeopardy); Major Steven J. Lepper, A Primer on Foreign Criminal Jurisdiction, 37 A.F.L. Rev. 169, 177 (1994) (discussing that although the double jeopardy principle in domestic laws is used to prevent the multiple prosecution of the same offense by "the same sovereign," the principle reflected in SOFAs also limits prosecution by different sovereigns); Carl Edman & Cynthia E. Richman, Double Jeopardy, 89 Geo. L.J. 1439, 1467-68 (2001) (highlighting that the double jeopardy clause prohibits use of the dual sovereignty doctrine, which allows separate sovereigns with distinct sources of power to bring successive prosecutions for the same criminal act); see also NATO SOFA, supra note 11, art. VII, para. 8 (providing in part, "[t]he NATO SOFA provides that, where an accused has been tried by the authorities of one contracting party and has been acquitted, or convicted and is serving, or has served, his sentence, or has been pardoned, he may not be tried again for the same offense within the same territory by another contracting party"); Korea SOFA, supra note 3, art. XXII, para. 8 (providing for the same principle in a similar way).

95. See Young-won Kim, supra note 43, at 119.
jeopardy of life or limb. . . ."96 There are many essential values that justify the Double Jeopardy Clause. First of all, it protects against needless "embarrassment, expenses, and psychological trauma."97 The Double Jeopardy Clause also preserves the finality of judgments and prevents unreasonably burdensome government activities because constant jeopardy of re-prosecution is likely to oppress individuals.98 Asymmetric appeal rights, one aspect of the American double jeopardy principal, refer to the fact that "criminal defendants may appeal convictions, but prosecutors have highly attenuated rights to appeal acquittals."99 In the United States, the government may not appeal an acquittal if it would warrant a retrial.100 Limitation of prosecutorial rights of appeal is not without adverse effects,101 but it does protect the integrity of the justice system by reducing false conviction errors and litigation costs.102 This asymmetry is quite different from other countries.103 Many other countries have principles similar to the double jeopardy of the United States, but differ in the way they protect individuals from the threat of repeated prosecution.104 Most civil law countries allow a prosecutor to appeal

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96. See U.S. CONST. amend. V (protecting against unreasonable searches and seizures, adopted in 1791).
98. See id. (using U.S. Supreme Court decisions to outline the underlying protections against double jeopardy).
100. See Costa, supra note 97, at 188 (examining the effects of barring subsequent prosecution through the double jeopardy clause).
102. See Khanna, supra note 99, at 343 (studying the effects of limiting asymmetric appeal rights).
103. See Costa, supra note 97, at 182-83 (comparing protections afforded by various nations).
104. See id. (suggesting that most civil law countries define double jeopardy as res judicata or non bis in idem).
errors of law and questions of fact. In Korea, Article 13 of the Constitution provides, in part, that no citizen may be punished twice for the same offense. As a civil law country, Korea adopts the position that prosecutors may appeal an acquittal without violating the double jeopardy principle.

Under the Korea SOFA, however, in any case the Korean authorities prosecute, the prosecution cannot appeal a judgment of "not guilty" or an acquittal, nor any judgment which the accused does not appeal, except upon grounds of errors of law. Here, the appeal rights are asymmetric in that the Korean prosecution cannot appeal an acquittal except upon grounds of errors of law, while U.S. service members prosecuted by the Korean authorities have the right to appeal a conviction or sentence. This asymmetry, which is close to the American interpretation of the double jeopardy principle, seems to perfectly satisfy the inequality criteria discussed earlier. As for the customary or general international law criterion, were it not for the Korea SOFA, the Korean prosecution would have a right to appeal in line with Korean criminal rules because, under the territorial principle of state jurisdiction, Korea could apply its own

105. See id. at 190 (detailing the non bis in idem policies and protections afforded by various civil law countries).

106. See S. KOREA CONST. art 13, para. 1 (translation supplied by present authors) (providing an English translation of the Korean Constitution that uses the phrase "nor shall be placed in double jeopardy," but the original Korean text does not include the term "double jeopardy"), available at http://www.ccourt.go.kr/preamble/english.asp (last visited Mar. 27, 2003).


109. See Amended Agreed Minutes, supra note 88, art. XXII, para. 9 (expanding on Article XXII paragraph nine, listing the protections afforded to one when prosecuted by the Korean government).

110. See id. (providing that the accused can request a "re-examination of the evidence, including new evidence and witnesses, as a basis for new findings of fact by the appellate court").
criminal laws on its soil.111 Clearly, U.S. service members are given privileges that no other ordinary foreigners or locals possess in Korea. Comparison with the NATO SOFA also results in the same conclusion. Nothing in the NATO SOFA denies prosecutors of the receiving states the right to appeal.112

As far as the asymmetry of appeal rights is concerned, the Korea SOFA seems to fit the unequal treaty criticism.113 On the contrary, the provision of asymmetric right of appeal could help to secure the rights of U.S. service members in South Korea. It also might encourage the Korean prosecution to do a better job because it is given only one shot at obtaining a conviction at the initial trial114 pertaining to serious crimes involving members of the U.S. forces. Nevertheless, it is true that the provision of the asymmetric appeal rights runs against the sovereign prerogative of South Korea to follow within reasonable limits its own legal determination embodied in its legal system. Suggesting a more practical evaluation of the provision, Korean officials say that, in Germany and Japan, which are parties to the SOFAs without asymmetric appeal rights, the local prosecutions of both countries have never actually used such appeal rights in criminal cases where they had the primary jurisdiction over the accused U.S. service members in their territories.115 It may be that realistic issues of sovereignty have not yet arisen out of the provision.

111. See BROWNLIE, supra note 51, at 303 (discussing various international law doctrines).

112. See Young-won Kim, supra note 43, at 119 (stating that the Korea SOFA contains the provision of asymmetric appeal rights that is not found in the NATO SOFA).

113. See Jae-Ho Sung, supra note 9, at 51 (arguing that the Korea SOFA is unfair because it confers upon members of U.S. forces the rights that other SOFAs do not).

114. See Khanna, supra note 99, at 343 (arguing that, in addition, having only one opportunity to obtain a conviction may increase aggregate litigation costs and the possibility of a false conviction).

115. See Young-won Kim, supra note 43, at 119 (arguing that the asymmetry of appeal rights contained in the Korea SOFA is hardly an issue in light of actual application).
3. Non-reciprocal Agreement

Attention is often paid to the fact that the NATO SOFA is a rare reciprocal agreement.\(^\text{116}\) The NATO SOFA applies to foreign forces on the U.S. territory, while the Korea SOFA has no application for Korean armed forces members staying on American soil. Of course, Korea has no military forces or installations deployed in the United States in the same way that the United States does in Korea. Therefore, the Korea SOFA applies only to U.S. forces in Korea.\(^\text{117}\)

It is said that such non-reciprocity is based upon the assumption “that foreign troops will automatically receive a fair trial in American courts.”\(^\text{118}\) This assumption, in turn, is evidence that the United States is not “playing fair” and perceives itself superior to other nations.\(^\text{119}\) The fact that the NATO SOFA is reciprocal while SOFAs with South Korea and Japan are not appears to demonstrate that the United States is prejudiced against Asian nations.\(^\text{120}\) Due to these inconsistencies, many suggest the United States should revise these SOFAs to contain a reciprocity provision.\(^\text{121}\)

\(^{116}\) See Gher, supra note 87, at 236 (underscoring the role of the NATO SOFA as a “world standard” for all SOFAs); see also Norman, supra note 44, at 738-39 (citing one unique aspect of the NATO SOFA as its guaranteed protection of Miranda rights); Erickson, supra note 10, at 152 n.45 (explaining that the reciprocity of SOFAs are related to their nature as executive agreements or treaties in the sense of U.S. constitutional law).

\(^{117}\) See Norman, supra note 44, at 738 (pointing out that the Japan SOFA is also a non-reciprocal agreement).

\(^{118}\) See id. at 739 (suggesting that some critics demand reciprocity because it is “presumptuous” to assume that foreign troops will be guaranteed a fair trial in the American legal system).

\(^{119}\) Gher, supra note 87, at 241.

\(^{120}\) Id.

\(^{121}\) See Norman, supra note 44, at 738-39 (stating that the United States should make the SOFA with Japan reciprocal in order to promote the nations’ security relationship and show equality between the two parties); see also Gher, supra note 87, at 253 (arguing that the United States-Japan SOFA should be made reciprocal because there is no valid reason why such rights should only be given to European nations).
When it comes to the Korea SOFA, however, it is doubtful that the non-reciprocity status is of any significance. The official title of the Korea SOFA is “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 the United States Armed Forces in the Republic of Korea.”

According to Article IV, Korea grants, and the United States accepts, the right to “dispose” the U.S. forces in and about the territory of Korea as determined by mutual agreement. The two countries agreed to the deployment of U.S. forces in Korea, but not vice versa. The experiences of the Korean war and continuing threat from communist North Korea explain the non-reciprocity with regard to the deployment of forces. It is quite difficult to contemplate the need for Korean forces to be stationed on American soil in the way U.S. forces are stationed in Korea, thus making a reciprocal Korea SOFA hardly serves any purpose. To make the Korea SOFA reciprocal, one must first not only change the Mutual Defense Treaty allowing non-reciprocal deployment of forces, but also change the entire situation and history related to the military alliance between Korea and the United States, making evident that non-reciprocity can hardly be seen as an issue, at least in relation to the Korea SOFA.

C. WAIVER OF PRIMARY JURISDICTION

It is known that the United States adopted the policy of maximizing jurisdiction over its service members accused of crimes

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122. See Kirk & Francis, supra note 9, at 231 (reasoning that since World War II, the employment of U.S. forces in Korea has been mainly for the protection of Korea).
123. Korea SOFA, supra note 3.
124. See Mutual Defense Treaty, supra note 25. art. IV.
125. See Kirk & Francis, supra note 9, at 232 (stating that there are “ninety-five U.S. bases and approximately 37,000 U.S. troops” in Korea).
126. See id. (describing the current protectionist relationship between the United States and South Korea).
127. See id. at 231-33 (explaining that the presence of U.S. troops in Korea are generally focused on the goals of stabilizing and protecting South Korea).
128. See id. (depicting the history and reasoning behind the U.S. military presence in Korea).
in host countries to the greatest extent possible.\textsuperscript{129} In cases where the receiving state has the primary right of jurisdiction, U.S. military authorities seek to secure jurisdiction by requesting a waiver as provided in the SOFA.\textsuperscript{130} The United States always requests a waiver in cases covered by the NATO SOFA.\textsuperscript{131} The policy of seeking a waiver takes different forms: for example, the agreement with Germany establishes an automatic waiver of Germany's primary right, but, at the same time, gives Germany the right to recall the waiver under certain circumstances.\textsuperscript{132} Under the current Korea SOFA, "the authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other States for a waiver of its right in cases where that other State considers such waiver to be of particular importance."\textsuperscript{133} This provision of "sympathetic consideration" is found in almost every SOFA the United States has entered into.\textsuperscript{134} Waiver mechanism may be justified by comity and mutual trust.\textsuperscript{135} Granting a requested waiver means trying and punishing the offenders under the justice system of the requesting party, but it does not mean immunizing them.\textsuperscript{136}

However, the trouble with the waiver provision of the Korea SOFA is two-fold because, first, Korea has waived its right to a greater extent than other receiving states have.\textsuperscript{137} According to statistics of the 1990s, Korea's rate of actual exercise of jurisdiction

\begin{itemize}
\item \textsuperscript{129} See Ruppert, supra note 54, at 8 (stating that this U.S. policy stems from a resolution the U.S. Senate passed on the NATO SOFA).
\item \textsuperscript{130} See id. at 8-9 (explaining the U.S. policy formulated by the U.S. Senate's resolution and how the policy is implemented).
\item \textsuperscript{131} See Pagano, supra note 77, at 208.
\item \textsuperscript{132} See Ruppert, supra note 54, at 9 (explaining that Germany may recall the waiver when interests in the administration of justice require that Germany have jurisdiction).
\item \textsuperscript{133} Korea SOFA, supra note 3, art. XXII, para. 3(c).
\item \textsuperscript{134} Jae-Ho Sung, supra note 9, at 45.
\item \textsuperscript{135} Young-won Kim, supra note 43, at 117 (explaining that the special characteristics of the sovereignty affect application of legal principles).
\item \textsuperscript{136} See Pagano, supra note 77, at 207 (describing the system of waiver under the NATO SOFA).
\item \textsuperscript{137} Jae-Ho Sung, supra note 9, at 47; JANG-HIE LEE ET AL., supra note 9, at 107.
\end{itemize}
was, on average, 3% out of all criminal cases over which it had the primary right of jurisdiction. In other words, Korea handed over almost 97% of such cases to U.S. military jurisdiction at the request of a waiver. It is true that many states "have acceded to U.S. requests for waivers in a significant number of cases," but only Germany seems to match Korea in this respect. The U.S. military authorities suggest that American success in securing waivers results from the confidence other countries have in the U.S. military justice system, and also from the perception that that U.S. military authorities deal more firmly with offenders than local courts do. It is not clear, however, that such explanations could apply to the situation in Korea because Korea may give more importance to the fact that U.S. service members in their country are there to protect its people from a possible attack by North Korea. Even in cases where Korea actually exercised its jurisdiction, it granted special pardon to quite a few of the convicted not long after they started serving their time. Secondly, it is often suggested that a U.S. court martial conviction in a foreign country results "in more lenient sentences than criminal trials in the United States."

138. See JANG-HIE LEE ET AL., supra note 9, at 107 (reporting that the rate of actual exercise of jurisdiction was 3% in 1998 and it dropped to 2.8% in 1999).

139. Id.

140. Ruppert, supra note 54, at 7.

141. DAE-SUN KIM, supra note 16 (comparing different states hosting U.S. forces in terms of the rate of waiver of primary jurisdiction).

142. See United States Army Europe, & Seventh Army International Affairs Division, Recall Rate, Ten-Year Analysis: 1977-1986 (1986), noted in Captain Robin L. Davis, Waiver and Recall of Primary Concurrent Jurisdiction in Germany, in 1988-MAY THE ARMY LAW 30, 33 (1988) (stipulating that German public prosecutors and courts are growing more confident in the U.S. military justice system).

143. See NATIONAL CAMPAIGN FOR ERADICATION OF CRIMES BY U.S. TROOPS IN KOREA (S. Korea) (reporting that in many criminal cases involving U.S. service members, Korean judges have taken into consideration the fact that accused soldiers have contributed to the national defense of Korea as a member of the U.S. forces), at http://usacrime.or.kr/frame-SOFA.htm (last visited Feb.18, 2003).

144. See Seung-Hwan Choi & Eun-joo Park, Recent Cases Relating to the SOFA Between the Republic of Korea and the United States, 5.2 SEOUL INT’L L.J. 60 (1998) (stating that such pardons are granted to ordinary local prisoners as well as convicted American soldiers).

145. Gher, supra note 87, at 240.
when the United States secures jurisdiction by waivers, the resulting punishments are “a slap on the wrist” that cannot deter criminal offenses of U.S. service members.\textsuperscript{146}

Serious crimes U.S. service members have committed have often galvanized strong public protest in Korea.\textsuperscript{147} The perception that the authorities of both states respond unsatisfactorily to such crimes must operate behind public anger.\textsuperscript{148}

D. OFFICIAL DUTY


One of the most controversial issues of the NATO SOFA is the question of what constitutes “an act or omission done in the performance of official duty.”\textsuperscript{149} The Korea SOFA also includes the same provision, and hence, the same controversy: U.S. military authorities have the primary right to exercise jurisdiction over U.S. armed forces members in relation to offenses arising out of any act or omission done in the performances of official duty.\textsuperscript{150} There are two general issues in the interpretation of this official duty provision: “(1) when does an offense arise out of an act or omission done in the performance of official duty; (2) who has the right to make this determination?”\textsuperscript{151}

On the first issue of the scope of official duty, negotiators who participated in the making of the NATO SOFA advanced a variety of

\textsuperscript{146} Id. at 254 (explaining that U.S. service members who are found guilty “generally only receive non-judicial punishments or court martials”).

\textsuperscript{147} See Kirk & Francis, supra note 9, at 257 (describing incidences where crimes U.S. soldiers committed in Korea caused public protests).

\textsuperscript{148} See id. at 258 (reporting that women’s groups in Korea argue that the Korean government should ensure that U.S. troops who commit crimes in Korea are severely punished or, at a minimum, ensure that they do not escape punishment).

\textsuperscript{149} Priest-Hamilton, supra note 83, at 622.

\textsuperscript{150} Korea SOFA, supra note 3, art. XXII, para. 3.

\textsuperscript{151} JOSEPH M. SNEE & A. KENNETH PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION 46 (1957).
Italy, for example, proposed additional qualifications such as “within the limits” of official duty. Belgium “wished to reserve judgment in respect to cases in which the victim was a national of the receiving State.” It seemed that states that would predominantly act as receiving parties preferred a narrower standard to secure wider territorial jurisdiction over foreign armed forces members. The United States wanted the concept not to be unduly limited because the military authorities should have control over the application of military law and regulations to the performance of official duty in order to maintain military discipline. The United States, as a major sending state, has not pursued any concise explanation of the scope of official duty in the application of the NATO SOFA. The NATO states have failed to produce any agreed definition. Because the NATO SOFA provides no guidelines, jurisdictional conflicts may arise when an offense is committed by a member of the sending state’s armed force in the receiving state, seemingly during the performance of official duty.

The two most common opinions discussed within NATO are the “opposing explanations represented by Italy and the United States.” Italy advocates a strictly defined concept by adopting the

152. See id. at 46-48 (describing the different definitions of what constitutes “official duty” proposed by NATO members).
153. Id. at 47.
154. Id. at 46.
155. See Lepper, supra note 94, at 176 (explaining the differing opinions between those states that would receive foreign troops and those that would provide such troops).
156. Id.
157. See SNEE & PYE, supra note 151, at 47 (describing the American military authorities’ undefined position on the issue of what constitutes a service person’s “official duty”).
158. See Lepper, supra note 94, at 176 (stating that the NATO states were unable to agree upon a definition of “official duty” and to this day a definition still does not exist).
159. See Priest-Hamilton, supra note 83, at 624 (holding that differences in national definitions of “official duty” will cause conflicts in situations of concurrent jurisdiction).
160. Id.
phrases "within the limits of that official duty." The United States, however, consistently adheres to the position that any act or omission incidental to the performance of official duty falls within the official duty category. Neither of the two explanations supports the out-of-date theory that regarded all acts done by officials while they were on duty as official acts.

While SOFAs do not usually define the concept of official duty, the Korea SOFA is an interesting exception. It includes additional provisions on the meaning of the performance of official duty both in the Agreed Minutes and the Understanding to the SOFA. The former provides that the term "official duty" does not include all acts by U.S. armed forces and its civilian component during duty periods, rather it is meant to apply only to acts that are a function of an individual's duties. The latter further provides that acts that are a substantial departure from those required to perform a particular duty are usually indicative of an act outside of the person's "official duty."

In this context, one is faced with an interesting question of whether those additional provisions would place the Korea SOFA in a special position with regard to the interpretation of "official duty." Under the NATO SOFA there are no specific guidelines for the interpretation of the term and thus each country is left to rely on its

161. Id.
162. See SNEE & PYE, supra note 151, at 47-49 (stating that the U.S military authorities seemed to have applied a concept a little similar to the common-law concept of "scope of employment").
163. See OPPENHEIM'S INTERNATIONAL LAW 1167-70 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (naming example cases that reflect this old theory, such as Ministere Public v. Triandafilou).
164. See Ruppert, supra note 54, at 30 (claiming that most SOFAs do not define the term "official duty"); see also id. at 30 n.205 (noting that the Korean SOFA is an exception to the norm because it defines what constitutes an official duty).
165. See Korea SOFA, supra note 3, Agreed Minutes art. XXII, para. 3(a), Agreed Understanding art. XXII, para. 3(a) (explaining the term official duty).
166. Id. Agreed Understanding art. XXII, para. 3(a) (noting that not all actions by U.S. armed forces and its civilian component during their mission on foreign land are covered under the term "official duty").
167. Id. Agreed Understanding, art. XXII, para. 3(a) (identifying which acts fall outside official duty).
own definition, but the Korea SOFA contains more specific provisions. Therefore, it might be said that there is an agreed definition of official duty between Korea and the United States. If so, the contracting countries should determine which of the two conflicting explanations is closer to the agreed definition. The formula of "offenses arising out of any act or omission done in the performances of official duty" in the Korea SOFA can be summarized as follows:

A) official duty does not include all acts during on-duty hours;

B) official duty applies only to acts required as functions of those duties; and

C) substantial departure from the acts required in a particular duty will usually indicate "not on duty."

Provision A states that certain acts would not constitute the performance of official duty even though they are done during periods of time official acts are being done. Provisions B and C are directly related to the specific definition of the official duty concept. Provision B is to the effect that only the acts required to perform the duty fall within the category of official duty, and, therefore, it can be inferred that acts which are not required as a function of official duty would not be included in the category even if they were not private businesses. Provision C introduces the concept of "substantial departure." Acts which constitute

168. E.g. Priest-Hamilton, supra note 83, at 623-24 (noting the different definitions that the United States and Italy applied to the term "official duty").

169. See Korea SOFA, supra note 3, art. XXII, para. 3(a), Agreed Understanding art. XXII, para. 3(a) (expanding the definition of "official duty").

170. See id. (noting the definition of the term "official duty").

171. Korea SOFA, supra note 3, art. XXII, para. 3(a)(ii).

172. Id. Agreed Minutes art. XXII, para. 3(a), Agreed Understanding art. XXII, para. 3(a) (establishing the requirements for an act to constitute part of one's official duty).

173. Id. art XXII, para. 3(a)(ii).

174. See id. Agreed Minutes art. XXII, para. 3(a), Agreed Understanding art XXII, para. 3(a) (defining the extent of official duty).

175. See id. Agreed Minutes art. XXII, para. 3(a) (stating that only those acts necessary to the function of one's duty are included in the definition official duty).

176. Id. Agreed Understanding art XXII, para. 3(a)
substantial departure from a particular duty are most likely outside of the official duty.\textsuperscript{177}

The link between Provisions A and B calls for some consideration. At first glance, Provision B seems to place strict limits on the scope of official acts because the phrase “required as functions” may be interchangeable with, or at least similar to, “within the limits.”\textsuperscript{178} This may lead to the Italian interpretation, which says official acts should be within the limits of official duty.\textsuperscript{179} It is thought, however, that Provision B cannot be read with such restrictive meaning. Those who advocate the fairness of the Korea SOFA emphasize Provision A, explaining that the old theory of “duty hours” as in the Triandafilou case\textsuperscript{180} is no longer effective. This shows that the essential point of the formula is Provision A, and that Provision B is just another way of stating the same proposition.\textsuperscript{181} It may be that because Provision A is formulated in negative terminology, a positive provision such as Provision B is required to supplement it. In other words, one should read the two provisions contained in the same article\textsuperscript{182} as one integral provision, with the stress on Provision A.\textsuperscript{183} The fact that the word “limit” was avoided also supports this interpretation. Given that the determination of official duty is practically left in the hands of the U.S. military authorities, this integral provision serves as a minimum standard forbidding the U.S.

\textsuperscript{177} See \textit{id.} (noting that acts that are a substantial departure from those required to perform one's duty are outside the terms of official duty).

\textsuperscript{178} See Korea SOFA, supra note 3, Agreed Minutes art. XXII, para. 3(a) (stating that official duties are those which are required as a function of one's duty).

\textsuperscript{179} See Priest-Hamilton, supra note 83, at 623 (asserting that the Italian interpretation of official duty should include acts done in performance of official duty as well as acts done within the limits of the official duty).

\textsuperscript{180} See OPPENHEIM'S INTERNATIONAL LAW, supra note 163, at 1167-70 (noting that the official duty of crew members of warships extends to acts on shore in respect to the ship but do not apply to acts on land for pleasure or recreation).

\textsuperscript{181} See Korea SOFA, supra note 3, Agreed Minutes art. XXII, para. 3(a) (stating that not all acts committed during service in a foreign country constitute official acts).

\textsuperscript{182} Id.

\textsuperscript{183} Id.
military authorities to protect its members excessively.\textsuperscript{184} In the analysis of the Provisions A and B, it is hard to find any element that differentiates the Korea SOFA from the NATO SOFA.\textsuperscript{185} Thus the Korea SOFA is not conclusive of the controversy over the scope of official duty.\textsuperscript{186}

Secondly, the connection between Provisions B and C (or, Provisions A/B and C, because A and B are read into one statement) is also unclear. Provision B restricts the official duty to acts required in a duty,\textsuperscript{187} and Provision C states that the official duty category excludes substantial departures from acts required in a duty.\textsuperscript{188} In some respects, Provision C might be viewed as pushing the neutral Provision B closer to the American suggestion.\textsuperscript{189} Because the issue is “substantial” departure, not just simple departure, it may be possible to regard a limited, non-substantial degree of departure as falling within the official act.\textsuperscript{190}

From another point of view, however, Provision C is merely a tautological comment on Provision B. The choice of words in the provision is quite loose (“will usually indicate”), and “substantial departure” may, as a matter of course, be far from the official duty. It

\textsuperscript{184} Cf. Priest-Hamilton, \textit{supra} note 83, at 617 (noting that the drafters of the NATO SOFA anticipated that the United States would exert exclusive jurisdiction over troops stationed in foreign states).

\textsuperscript{185} Compare Korea SOFA, \textit{supra} note 3, art. XXII, para. 3(a)(ii), Agreed Minutes art. XXII, para. 3(a), Agreed Understanding art. XXII, para. 3(a) (defining the terms of official duty), with NATO SOFA, \textit{supra} note 11 (providing the definition of the official duty).

\textsuperscript{186} See Priest-Hamilton, \textit{supra} note 83, at 625 (noting the NATO SOFA does not contain a firm definition of an offense committed in the scope of official duty).

\textsuperscript{187} See Korea SOFA, \textit{supra} note 3, Agreed Minutes art. XXII, para. 3(a) (asserting that only those acts that are a necessary function of one’s duty are included in the definition of official duty).

\textsuperscript{188} See id. art. XXII, para. 3(a)(ii), Agreed Understanding art. XXII, para. 3(a) (declaring that acts which are a substantial departure from the function of one’s duty are not included in the definition of official duty).

\textsuperscript{189} See Priest-Hamilton, \textit{supra} note 83, at 624 (asserting that the U.S. interpretation of official duty includes nearly every offense committed in respect to the U.S. military’s commitments).

\textsuperscript{190} See Korea SOFA, \textit{supra} note 3, Agreed Understanding art. XXII, para. 3(a) (noting that acts that constitute a substantial departure from one’s duty do not fall under the definition of official conduct).
is not provided whether simple, non-substantial departure falls outside of the official duty. According to this interpretation, Provision C is another confirmation of Provision A/B. In this respect, the provision on “substantial departure” may be redundant. It seems that one should not read too much into the concept of substantial departure.

In conclusion, it is most probable that none of the provisions in the Korea SOFA was intended to adopt specific definitions of official duty. Korean critics say that there is no clear provision on the scope and meaning of official duty. Still, the Korea SOFA has what other SOFAs do not, and it is not without merit to assess the provisions, especially of “substantial departure,” in light of certain cases.

In Wilson v. Girard, during a rest period, the superiors of an American soldier ordered him to guard a machine gun and clothing, resulting the soldier’s killing of a Japanese woman who was gathering expended machine gun cartridges in Japan. The Japanese government claimed to have primary jurisdiction because the killing was not “duty or service required or authorized to be done by statute, regulation, the order of a superior or military usage.” The killing itself was not an official duty, but it arose out of the act of guarding the military equipment and therefore, it was understood that the primary jurisdiction remained with the United States. However, there was some testimony that the accused soldier was enticing the victim and others onto the firing range and then

191. Jae-Ho Sung, supra note 9, at 48 (arguing that the term “official duty” lacks clear definition); Jang-Hie Lee et al., supra note 9, at 108-09 (arguing that a more specific definition is needed to avoid possible disputes as to the interpretation of the Korea SOFA).

192. Compare Korea SOFA, supra note 3, art. XXII, para. 3(a)(ii), Agreed Minutes art. XXII, para. 3(a), Agreed Understanding art. XXII, para. 3(a) (providing a definition of the term “official duty”), with NATO SOFA, supra note 11 (defining “official duty”).


194. See id. at 526 (explaining that a U.S. military member killed a Japanese woman gathering spent shell casings).

195. See Snee & Pye, supra note 151, at 50 (noting that the Japanese government believed it had primary jurisdiction over the case).

196. See id. (stating that the United States, however, waived its primary jurisdiction at the request of Japan); Norman, supra note 44, at 735.
frightening them with his gun.\textsuperscript{197} If this testimony is true, the killing did not arise out of official duty, but out of his own "horseplay."\textsuperscript{198} This conclusion would be equally possible without the concept of substantial departure. Nevertheless, it might be argued that the killing resulted from the official duty of guarding the machine gun because the horseplay was incidental to the whole exercise. Such an argument could be efficiently rebutted with the help of the concept of substantial departure.\textsuperscript{199} In this context, it is possible to say that, under certain circumstances, the concept may play a useful supplementary role in facilitating the restriction of the scope of official duty.\textsuperscript{200}

On February 3, 1998, a U.S Marine aircraft EA-6B Prowler engaged in a low-level training flight in the Italian Alps severed a cable-car line at a ski resort in Cavalese, killing twenty passengers.\textsuperscript{201} An Italian public prosecutor indicted the crew and other officers of U.S Marine Corps., but the Court of Trento dismissed the case on the ground that this matter fell within the primary jurisdiction of the United States under the SOFA.\textsuperscript{202} A U.S. military court tried the pilot and acquitted him of manslaughter but found him guilty of obstruction of justice.\textsuperscript{203} His acquittal on the twenty counts of manslaughter shocked public opinion in many European states and

\textsuperscript{197} See Snee & Pye supra note 151, at 50 (claiming that there was conflicting testimony regarding the actions of the accused soldier).

\textsuperscript{198} See id. (arguing that if the death of the Japanese woman was the result of the serviceman's "horseplay," this act does not fall under the serviceman's official duty).

\textsuperscript{199} See Korea SOFA, supra note 3, Agreed Understanding art. XXII, para. 3(a) (explaining the importance of "significant departure" from official duties).

\textsuperscript{200} See id. (noting that acts that are a significant departure from official duties are not protected by the Korea SOFA).


\textsuperscript{202} See id. (noting that the United States had primary jurisdiction over the case).

particularly aroused the Italian public. In this case, if the crew-members had been obviously flying lower or faster than instructed, or if they had been flying off-course, heated debates would have arisen on the scope of official duty and the primary right to jurisdiction. Such reckless or deviant flying could not be regarded as the performance of official duty if the “within the limits of official duty” criterion were applied to the case. If the broader concept of official duty the United States favors were to prevail, the official duty provision could cover such flying, since the offense of killing twenty people was committed in the performance of the official military training, no matter how reckless the pilot was flying. In this context, the concept of substantial departure would not be of significant help. It is difficult to determine whether violations of instructions on speed, altitude, or flying course would constitute ‘substantial’ departure from the acts required in a duty.

Unlike “horseplay” that could be an issue in Wilson v. Girard, gross violations of speed or altitude limits are still closely related to the performances of official flight exercises. After all, “substantial” departure is likely to beg questions and cannot be a conclusive answer.

204. See Reisman & Sloane, supra note 201, at 508. The developments in the aftermath of the Cavalese incident were similar to the armored vehicle accident that happened in Korea in June, 2002. Both accidents took place in the performance of official duties, and the accused members of the U.S forces were all acquitted of the negligent homicide and involuntary manslaughter by the U.S court martial in both cases. Also, such acquittals enraged the public in both of the receiving countries. Id.

205. See Priest-Hamilton, supra note 83, at 606 (noting that the Italian prosecutor argued that the flight was not part of the official duty of the U.S. military because the pilot violated the mandated flight pattern).

206. See id. at 624 (arguing that reckless flying would be outside the scope of official duty).

207. Id. (stating the United States’ argument that any action undertaken in regard to its military duty falls within the scope of official duty).

208. See Korea SOFA, supra note 3, Agreed Understanding art. XXII, para. 3(a) (explaining the role of “substantial departure”).

209. See Priest-Hamilton, supra note 83, at 624 (arguing that according to the Italian interpretation of official duty, the U.S. crew-members would be acting outside of their official duty if they were flying lower or faster than instructed, or flying off course).
Certain class of acts can safely remain within the "substantial departure from the acts required to perform in a particular duty." For example, unreasonable or irregular acts in pursuit of personal pleasure (such as "horseplay") are without doubt outside of the official duty.\textsuperscript{210} Also, crimes against humanity including torture are substantial departure from any official duties.\textsuperscript{211} The decisions of the Law Lords of Britain on Pinochet, the ex-president of Chile, show that torture and other serious violations of human rights cannot constitute acts arising out of official duties.\textsuperscript{212}

Whatever the contents of the substantial departure may be, the provision is nothing but the reconfirmation of the stipulation that not all acts done during the performance of official duty are regarded as official duty.\textsuperscript{213} The Korea SOFA is not very different from the NATO SOFA in that the scope of official duty is not clearly defined.\textsuperscript{214} This leads to the question of who determines the scope of official duty.

2. Who Determines It?

At the drafting convention of the NATO SOFA, the United States argued that the authorities of the sending states were alone capable of deciding whether the members of their forces were on official duty and whether the offenses in question were committed in the

\textsuperscript{210} See SNEE & PYE, supra note 151.
\textsuperscript{211} See Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/Conf.183/9 (2002) (stating that according to the definition in the Statute of the International Criminal Court, crimes against humanity are acts committed as part of a widespread or systematic attack against any civilian populations including murder, torture and rape).
\textsuperscript{213} See Korea SOFA, supra note 3, Agreed Understanding art. XXII, para. 3(a) (noting that at a minimum "substantial departure" means that not all acts are included within the scope of official duty).
\textsuperscript{214} Compare id. art. XXII, para. 3(a)(ii), Agreed Minutes art. XXII, para. 3(a), Agreed Understanding art. XXII, para. 3(a) (defining the terms of official duty), with NATO SOFA, supra note 11 (providing the definition of the official duty).
performance of such official duties.\textsuperscript{215} The NATO SOFA is silent on this issue, and usually the sending state’s issuance of an “official duty certificate” solves the problem.\textsuperscript{216} The Korea SOFA adopts a similar approach.\textsuperscript{217} The issuance of a certificate by competent U.S. military authorities is regarded as sufficient evidence of the fact of official duty for the purpose of determining primary jurisdiction.\textsuperscript{218} In certain exceptional cases where there is proof contrary to the certificate of official duty, it is made the subject of review through discussions between Korean officials and the U.S. diplomatic mission in Korea.\textsuperscript{219} In general, Korea seems to have accepted the certificate as conclusive of the matter.\textsuperscript{220} Indeed, many receiving states accept the determination of the United States military authorities and accept an official duty certificate without question.\textsuperscript{221} It is sometimes suggested that the determination of official duty should be left in the hands of an objective third party,\textsuperscript{222} but such an arbitrational process could impede the speedy trial required in a criminal proceeding.\textsuperscript{223}

\textsuperscript{215} See Snee & Pye, supra note 151, at 51 (noting the U.S. proposal for the definition of official duty).

\textsuperscript{216} See Priest-Hamilton, supra note 83, at 625 (stating that the United States normally issues a official duty certificate to armed forces overseas and these certificates are accepted by the host country as proof of the service members’ official duty).

\textsuperscript{217} See Korea SOFA, supra note 3, Agreed Minutes art. XXII, para. 3(a) (stating that a certificate from the U.S. certifying that an action arose out of official duty will be sufficient evidence that the act was undertaken as a function of official duty).

\textsuperscript{218} See id. (noting that a certificate of official duty is sufficient for determining primary jurisdiction).

\textsuperscript{219} See Korea SOFA, supra note 3, Agreed Minutes art. XXII, para. 3(a)(2) (claiming that if the Chief Prosecutor of the Republic of Korea does not believe that the act arose out of official duty the disagreement shall be settled through discussions between the Korean government and the U.S. mission in Korea).

\textsuperscript{220} See Jae-Ho Sung, supra note 9, at 48.

\textsuperscript{221} See Priest-Hamilton, supra note 83, at 626 (noting that a large number of states unquestionably accept official duty certificates).

\textsuperscript{222} See Jae-Ho Sung, supra note 9, at 48-49; Snee & Pye, supra note 151, at 51.

\textsuperscript{223} See Snee & Pye, supra note 151, at 51 (arguing that arbitrational processes may slow down the speed of the trial); Korea SOFA, supra note 3, art. XXIII, para. 2(b), 8 (stating that in case of civil claims, however, the dispute as to whether a tortuous act or omission of a member of U.S forces was done in the performance of
If there was not a provision on the certificate in SOFAs, the receiving state’s court would determine the nature of cases concerned, and the certificate the U.S. military authorities issued would merely be a part of the whole evidence. This may support the argument that the Korea SOFA is unequal to other SOFAs, but actually Korea is not the only state who accepts the determination of the sending state’s official duty certificate. On the whole, the criteria of inequality give a mixed assessment in this respect.

The determination of official duty is not for immunity or clemency, but for establishment of proper jurisdiction. From the “losing” state’s point of view, however, the determination that the offense was committed in the course of official duty practically stands for immunity from its jurisdiction. The United States should take into consideration the sensitivity and gravity of the issue whenever it issues an official duty certificate.

CONCLUSION

The end of the Cold War in Europe has eroded public perception that the presence of foreign military forces serves national security. In the case of South Korea, where the Cold War is not completely over, however, the presence of U.S. forces is seen as essential for its official duty can be submitted to an arbitrator selected by agreement between two governments from among the nationals of Korea who hold or have held high judicial office). This arbitration process is not applied with regard to criminal cases. Id.

224. See Korea SOFA, supra note 3, Agreed Minutes art. XXII, para. 3(a) (providing that a certificate of official duty suffices for the purpose of establishing primary jurisdiction with the United States).

225. See Young-won Kim, supra note 43, at 119.

226. See Korea SOFA, supra note 3, art. XXII (explaining the terms of jurisdiction in respect to criminal acts committed by U.S. service members).

227. Cf. Reisman & Sloan, supra note 201, at 513-14 (noting the Italian dissatisfaction with the implementation of the NATO SOFA in the Cavalese case). Many Italians believe that the minimal sentence imposed on the service members indicate the United States’ unwillingness to prosecute its service members. Id.

228. See id. at 505 (noting that public perception regarding the necessity of NATO forces for national security has changed since the end of the Cold War).
security. The Korea SOFA is of great importance in maintaining such a close military alliance between the two nations. It is often criticized as an unfair or unequal agreement. Nevertheless, the foregoing analysis of various provisions on the criminal matter of the Korea SOFA and related practices reveals that it is not completely unequal or unfair in comparison with general international law and other SOFAs. After two rounds of revision, the Korea SOFA has accomplished overall similarity to the NATO SOFA and the Japan SOFA. This similarity seems to lessen the extent to which critics can argue “inequality.”

The outcome of the analysis indicates that the real problems lie in the application of the SOFA, rather than in the provisions themselves. The inequality criticism is more appropriately applied in relation to provisions such as the asymmetric appeal rights and the practice of waiver and punishment than any other issues. The asymmetry of appeal rights has not yet caused many actual problems and controversies, but the high rate of waiver of jurisdiction does present problems. Also, the wide perception that the U.S soldiers are not properly punished for their crimes provides the basis of attacks on the Korea SOFA and the military ties between the two countries. The U.S. authorities exclusive determination of the official duty could also offend sovereign sentiment of Koreans, even though such exclusivity is widely accepted in many parts of the world where the United States has stationed forces.

Such problems cannot be properly addressed by “revising the SOFA.” It should be asked if such demands for the revision of the SOFA are overly influenced by a strict legal positivism. A more realistic approach would focus on the actual application of the SOFA. For example, it is possible for South Korea to reduce the rate of waiver of its primary jurisdiction to a reasonable extent, and the


230. Compare Korea SOFA, supra note 3 (stating the terms of the Korea SOFA), with NATO SOFA, supra note 11 (describing the terms of the treaty); and Japan SOFA, supra note 11 (recounting the terms of the treaty).

231. See Kirk & Francis, supra note 9, at 256 (noting that U.S. military courts often give light sentences to U.S. service members guilty of committing crimes in foreign jurisdictions).
U.S. government could adjust the policy of requesting waiver for better relations with its allies. It is also possible to take measures to apply appropriate punishment to criminals convicted either by South Korea or by the United States. In order to improve the situations concerning the Korea SOFA, efforts should be made towards resolving such real issues.

Moreover, legal positivism may conceal important political and historical aspects of the Korea SOFA. Essentially, the SOFA exists to accord favors to the U.S. armed forces, probably in return for the obvious benefits resulting from their presence in the receiving country. In a sense, some elements of "inequality" pertain to the nature of the SOFA. Consequently, scrapping all the "unequal" statutory elements of SOFA amounts to repudiating the very existence of the SOFA. A certain degree of statutory "inequality" could well serve political needs for support from the sending country. In this respect, the balance should be struck between the very needs of the sending party and the fairer application of the SOFA.