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Between a Rock and a Hard Place: Tensions Between the U.S.-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR

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Between a Rock and a Hard Place: Tensions Between the U.S.-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR

Rijie Ernie Gao

Abstract

This Note argues that the Korea SOFA illustrates how the current approach to implementing SOFA agreements hinder state parties from complying with their legal obligations under article 2 of the ICCPR. Part I first provides an overview of the two competing bodies of international law at issue: the law governing the U.S. approach to foreign criminal jurisdiction, on the one hand, and the development of human rights law and the terms of article 2 of the ICCPR, on the other. Part II assesses the incompatibility between ICCPR and SOFA obligations from the point of view of both receiving and sending states–from the perspective of the ROK and the United States, respectively. Part III rounds out the discussion with recommendations for how both the ROK and the United States can harmonize the implementation of the Korea SOFA with their obligations under the ICCPR. Finally, this Note concludes with some general points on the importance of reconciling this conflict of obligations, and the larger implications for the viability and the legitimacy of U.S. military operations overseas.

NOTE

BETWEEN A ROCK AND A HARD PLACE: TENSIONS BETWEEN THE U.S.-ROK STATUS OF FORCES AGREEMENT AND THE DUTY TO ENSURE INDIVIDUAL RIGHTS UNDER THE ICCPR

*Rijie Ernie Gao**

"*[S]ed quis custodiet ipsos custodes?*"
—Juvenal[1]

INTRODUCTION

On November 27, 2008, a slim majority of the Iraqi Parliament ratified a Status of Forces Agreement ("SOFA") with the United States.[2] The Iraq SOFA, which authorizes the

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1. DECIMUS JUNIUS JUVENAL, SATIRES, bk. VI, ll. 347–48, *in* JUVENAL AND PERSIUS 110 (G.G. Ramsay ed. & trans., 1965). This phrase translates from the Latin: "But who will guard the guardians themselves?" *See id.* at 111; *see also* Leonid Hurwicz, But Who Will Guard the Guardians?, Nobel Prize Lecture (Dec. 8, 2007), *available at* http://nobelprize.org/nobel_prizes/economics/laureates/2007/hurwicz_lecture.pdf.

2. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter Iraq SOFA], *available at* https://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf (entered into force Jan. 1, 2009). Without the Iraq Status of Forces Agreement ("SOFA"), U.S. forces could not legally remain in Iraq after the expiration of their United Nations ("U.N.") chapter VII mandate at the end of 2008. *See* Greg Bruno, Council on Foreign Relations, *U.S. Security Agreements and Iraq* (Dec. 23, 2008), http://www.cfr.org/publication/16448 (stating that negotiations for the Iraq SOFA were initiated to replace the UN mandate); *see also* Alissa Rubin & Campbell Robertson, *Iraq Backs Deal That Sets End of U.S. Role*, N.Y. TIMES, Nov. 27, 2008, at A1 (reporting that the U.N. mandate which governs U.S. troops in Iraq expires on January 1, 2009).

continued U.S. military presence and governs the legal status of U.S. forces in Iraq, went into effect on January 1, 2009.[3] The agreement drew plenty of attention for establishing a timeline for the withdrawal of all U.S. forces from Iraq by December 31, 2011.[4]

Parliamentary ratification of the Iraq SOFA, however, was preconditioned on approval in a popular referendum.[5] Were the Iraqi people to reject the Iraq SOFA, U.S. forces would have to withdraw within a year of the referendum.[6] Although the referendum was originally scheduled for July 2009, the Iraqi government has postponed it indefinitely,[7] and the likelihood of it ever being held is uncertain.[8] Fears that the Iraqi parliamentary

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3. Iraq SOFA, *supra* note 2, art. 30.

4. *See id.* art. 24.

5. *See* Rania Abouzeid, *Iraq Approves Long-Debated US Security Pact*, TIME, Nov. 27, 2008, http://www.time.com/time/world/article/0,8599,1862660,00.html (stating that the Iraq SOFA was conditioned on the July 30, 2009, referendum); *see also Iraqi Parliament Backs US Pullout*, BBC, Nov. 27, 2008, http://news.bbc.co.uk/2/hi/middle_east/7752580.stm (reporting that the Iraq SOFA was passed on condition that a referendum is held on the pact in the middle of 2009).

6. *See* Aseel Kami & Mohammed Abbas, *Iraq Cabinet Approves Vote on U.S. Security Pact*, REUTERS, Aug. 17, 2009, http://www.reuters.com/article/idUSTRE57G2AC20090817 (reporting that all U.S. forces would have to leave Iraq within one year of the vote were the referendum to fail); Timothy Williams & Abeer Mohammed, *Explosions in Iraqi Political Office Kill At Least 5*, N.Y. TIMES, July 30, 2009, at A6 (same).

7. *See* Alissa J. Rubin, *Iraq Moves Ahead With Vote on U.S. Security Pact*, N.Y. TIMES, Jun. 9, 2009, at A13 (reporting that the Iraqi cabinet wished to delay the referendum to coincide with the January 2010 national elections, and that U.S. diplomats had been quietly lobbying for the referendum to be canceled). When July 2009 passed without a referendum, Prime Minister Maliki announced that the vote would be held in conjunction with the national elections scheduled on January 16, 2010. *See* Kami & Abbas, *supra* note 6 (stating that the referendum was supposed to be held in July 2009 but had been rescheduled to coincide with the parliamentary polls); *see also* Ernesto Londoño, *Iraq May Hold Vote on U.S. Withdrawal*, WASH. POST, Aug. 18, 2009, at A1 (noting the uncertainty as to whether Iraqi lawmakers will approve Maliki's initiative to hold the referendum).

8. *See* Gina Chon, *Iraq Vote on Pullout Put on Back Burner*, WALL ST. J., Oct. 5, 2009, at A14 (noting that Iraqi politicians seem unlikely to push through the referendum in January 2010 and that it will either be delayed again or canceled). In November 2009, the fate of the national elections scheduled for January 16, 2010 were cast into doubt, until Iraqi lawmakers managed to pass a long-delayed election law that allowed preparations for the January elections to proceed. *See* Gina Chon, *Iraq Passes Key Election Law and Prepares for January Vote*, WALL ST. J., Nov. 9, 2009, at A14 (reporting that Iraqi lawmakers said that the delays in passing the election law could push the elections back to January 23, 2010, instead of January 16, 2010). A string of bombings and political turmoil in December 2009 and January 2010 derailed preparations for the election, however, and Iraqis finally went to the polls on March 7, 2010, amid insurgent bombings

elections of March 7, 2010, would re-ignite sectarian violence prompted consideration of amending the Iraq SOFA to prolong the U.S. military presence.[9] No referendum has yet been held, and no plan exists for so doing.

Should the referendum take place, its outcome will turn on how the implementation of the Iraq SOFA and its impact on the local population. The agreement has stirred controversy over criminal jurisdiction over U.S. forces in Iraq.[10] After a September 2007 daytime shootout in Baghdad by members of the private security firm Blackwater left seventeen dead, Iraqi lawmakers were adamant during SOFA negotiations that U.S. soldiers and contractors should be answerable to Iraqi law.[11] Protracted negotiations gave Iraq primary jurisdiction over U.S. soldiers and civilians, but only for "grave premeditated felonies" committed while off-duty and outside U.S. installations.[12] The right to

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and mortar attacks. *See* Steven Lee Myers, *Iraqis Defy Blasts in Strong Turnout for Pivotal Election*, N.Y. TIMES, Mar. 8, 2010, at A1 (reporting high poll turnout for the Iraqi parliamentary elections on March 7, 2010, undeterred by concerted insurgent attacks designed to disrupt the election); Anthony Shadid & John Leland, *Baghdad Blasts Shatter Sense of Security in Capital*, N.Y. TIMES, Jan. 26, 2010, at A10 (reporting that hotels intended to house observers of the March 7, 2010, elections were the targets of fatal bombings on Jan. 25, 2010); Steven Lee Myers & Marc Santora, *Election Date Set in Iraq as Bombs Kill Scores*, N.Y. TIMES, Dec. 9, 2009, at A6 (reporting a series of car bombings that occurred as Iraqi lawmakers agreed on a March 2010 date for the national elections).

9. *See* Helene Cooper & Mark Landler, *U.S. Fears Election Strife in Iraq Could Affect Pullout*, N.Y. TIMES, Mar. 4, 2010, at A14 (reporting the concern of U.S. officials that the elections could trigger violence that would complicate the planned withdrawal, and that contingency plans have been drawn up to keep combat troops in Iraq beyond the SOFA withdrawal timeframe); Thomas E. Ricks, *Extending Our Stay In Iraq*, N.Y. TIMES, Feb. 24, 2010, at A27 (arguing that America should extend its military presence in Iraq to stabilize the country, and that the Iraqis should take the first step to re-negotiate the withdrawal plan in the Iraq SOFA).

10. *See* Thom Shanker & Steven Lee Meyers, *U.S. Makes Firmer Commitment to Pullout Date in Draft of Iraq Accord*, N.Y. TIMES, Oct. 17, 2008, at A5 (reporting that American negotiators for the Iraq SOFA bowed to Iraqi anger over civilian deaths in shootings by private security contractors); Mary Beth Sheridan & Karen DeYoung, *U.S., Iraqi Officials Question Terms of Draft Security Deal*, WASH. POST, Oct. 18, 2008, at A10 (reporting that criminal jurisdiction over troops was at issue and Iraqi politicians had strong reservations about the agreement because it did not sufficiently guarantee Iraqi sovereignty).

11. *See* Charlie Savage, *Judge Drops Charges From Blackwater Deaths In Iraq*, N.Y. TIMES, Jan. 1, 2010, at A1 (stating that the mass shooting led Iraq to insist on the elimination of immunity for American contractors in the Iraq SOFA); Mike Carter, *Iraq Killing Headed for Court*, SEATTLE TIMES, Jan. 6, 2009, at B1 (stating that the Blackwater shooting and other incidents were an issue during negotiations for the Iraq SOFA).

12. Iraq SOFA, *supra* note 2, art. 12, § 1.

determine whether the offence occurred on-duty, however, is reserved exclusively to the United States.[13]

The controversy over criminal jurisdiction in the Iraq SOFA is not new.[14] The United States is the foremost sending state in the world, and is a party to over a hundred SOFAs,[15] with receiving states such as the members of the North Atlantic Treaty Organization ("NATO"),[16] Japan,[17] and the Republic of Korea ("ROK").[18] Crimes committed by U.S. soldiers deployed overseas are a feature of the global U.S. military presence that produces resentment and ambivalence in many host communities. During negotiations for the Iraq SOFA, the Iraqi government sent teams abroad to study the long-term impact of SOFAs elsewhere, including in the ROK.[19] The ROK was an obvious choice for the Iraqis, because many of the same criminal jurisdiction issues that the Iraqis consider an affront to their sovereignty have already

13. *Id.* art. 12, § 9. The Iraqis may only request a review of such a determination at the joint ministerial level. *Id.* art. 23.

14. *See* Bruno, supra note 2 (discussing the controversy and friction caused by SOFA provisions immunizing U.S. soldiers from local prosecution in host nations such as East Timor and Japan). In 1941, the United States and the United Kingdom entered into an agreement with terms similar to current SOFAs, and since then the United States has entered into SOFAs with nations such as Afghanistan, East Timor, Germany, Japan, the Republic of Korea ("ROK"), Turkey and, most recently, Iraq. *See* R. CHUCK MASON, U.S. CONG. RESEARCH SERV., STATUS OF FORCE AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 7–17, 22, CRS No. RL34531 (Jun. 18, 2009), *available at* http://www.fas.org/sgp/crs/natsec/RL34531.pdf (tracing the historical development of SOFAs in various nations and across different periods).

15. *See id.* at 1. The exact number of SOFAs that the United States has entered is difficult to ascertain because at least ten of these agreements remain classified. *See id.* at 1 n.2.

16. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

17. Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Statue of United States Armed Forces in Japan, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652.

18. 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 Forces in the Republic of Korea, U.S.-S. Korea, July 9, 1966, 17 U.S.T. 1677 [hereinafter Korea SOFA].

19. *See* Leo Shane III, *Iraq SOFA Negotiations Loom Large*, STARS & STRIPES, June 22, 2008, http://www.stripes.com/article.asp?section=104&article=55709 (reporting that Iraqi SOFA negotiators visited Turkey, Germany, the ROK, and Japan); Adrian Croft, *Iraq Sends Teams to Study Other U.S. Military Pacts*, REUTERS, Jun. 1, 2008, http://www.reuters.com/article/idUSL0113546120080601 (same).

been encountered numerous times over the course of the more than half-century long U.S.-ROK alliance.[20]

Since its conclusion in 1966, the Korea SOFA has governed the legal status of U.S. military personnel stationed in the ROK.[21] Criminal jurisdiction over U.S. soldiers has been a source of strain for the two allies, most notably in 2002 when violent public demonstrations erupted after a U.S. military jury acquitted two U.S. soldiers, who had run over two young Korean girls while operating their armored minesweeper vehicle, of negligent homicide.[22] Incidents of misconduct where U.S. personnel receive little or no punishment fuel the charge that the Korea SOFA perpetuates a skewed allocation of criminal jurisdiction favorable to the United States, which, for the most part, immunizes U.S. forces from Korean prosecution.[23]

Agreements like the Korea SOFA are bilateral arrangements under which one state agrees to surrender some part of its sovereignty to prosecute certain categories of offenses against their domestic law, thereby immunizing the visiting troops of another state.[24] Under conventional rules of international law, a waiver of jurisdiction or a grant of immunity between sovereign nations is limited only by principles of reciprocity.[25] On the other hand, the ROK is also a party to the International Covenant on Civil and Political Rights ("ICCPR").[26] Pursuant to article 2 of the

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20. *See* Ian S. Wexler, *A Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq*, 56 NAVAL L. REV. 43, 52–53 (2008).

21. *See* Korea SOFA, *supra* note 18.

22. *See infra* notes 161–68 and accompanying text.

23. *See* Yoon-Ho Alex Lee, *Criminal Jurisdiction Under the U.S-Korea Status of Force Agreement: Problems to Proposals*, 13 FLA. ST. J. TRANSNAT'L L. & POL'Y 213, 218 (2003) (arguing that the Korea SOFA prevents the ROK from prosecuting U.S. soldiers in all but the most dire situations).

24. *See infra* notes 54–56 and accompanying text.

25. *See, e.g.*, Jerrold L. Mallory, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 169 (1986) ("[A] state's ability to grant or deny immunity is generally restrained only by considerations of reciprocity, that is, how other states will, in turn, treat its alien in their territory.").

26. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]. The ROK ratified the International Covenant on Civil and Political Rights ("ICCPR") on April 10, 1990, by accession, without any reservations, understandings, or declarations with regard to article 2. *See* U.N. Treaty Collection, Status of Treaties: Chapter IV Human Rights, 4. International Covenant on Civil and Political Rights: Declarations and Reservations, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 5, 2010).

ICCPR, state parties undertake "to respect and to ensure" the rights of individuals recognized in the ICCPR,[27] and to guarantee that those rights will receive the full protection of their domestic legal system.[28]

By surrendering jurisdiction over U.S. soldiers to the United States, the ROK relinquishes the ability to prosecute them for offenses against Korean law; as a result, individuals who are victims of such offenses no longer enjoy the full protection of the ROK's domestic legal system.[29] SOFA provisions become incompatible with the ROK's ICCPR obligations when the United States subsequently fails to take appropriate measures to investigate allegations of wrongdoing, or to bring the perpetrators to justice. It is this tension—between the legal order represented by human rights treaties, and the contractual nature of classical public international law expressed in SOFAs—that animates this Note.

As the negotiations over the Iraq SOFA demonstrate, the issue of criminal jurisdiction over U.S. soldiers overseas continues to have currency. With U.S. military operations currently ongoing in both Afghanistan and Iraq, this issue deserves scrutiny from a human rights standpoint. Using the Korea SOFA as a case study, this inquiry is motivated by one principal question: are SOFAs, which carve out the receiving state's jurisdiction to prosecute crimes committed by U.S. personnel, consistent with a receiving state's obligation under the ICCPR to guarantee an effective legal remedy for all offenses against domestic law?

This Note argues that the Korea SOFA illustrates how the current approach to implementing SOFA agreements hinder state parties from complying with their legal obligations under article 2 of the ICCPR. By revealing the tensions in the ROK's treaty obligations, the analysis also probes U.S. obligations under article 2 as they apply extraterritorially, and considers how such obligations should influence the implementation of the Korea SOFA. The potential for conflict between the Korea SOFA and the ICCPR has wider ramifications not only for the United States,

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27. ICCPR, *supra* note 26, art. 2(1).

28. *See id.* art. 2(3)(a) (establishing that state parties must provide "an *effective* remedy, notwithstanding that the violation has been committed by persons acting in an official capacity") (emphasis added).

29. *See infra* Part I.C.3.

but also for other receiving states that have ratified the ICCPR, such as Iraq.[30]

Part I first provides an overview of the two competing bodies of international law at issue: the law governing the U.S. approach to foreign criminal jurisdiction, on the one hand, and the development of human rights law and the terms of article 2 of the ICCPR, on the other. Part I then lays out the relevant criminal jurisdiction provisions of the Korea SOFA and the problems with its implementation before discussing how these problems demonstrate the incompatible obligations faced by state parties to the ICCPR as a result SOFA framework of criminal jurisdiction. Part II assesses the incompatibility between ICCPR and SOFA obligations from the point of view of both receiving and sending states—from the perspective of the ROK and the United States, respectively. It discusses various models for resolving treaty conflicts in human rights treaties from the point of view of the ROK, before turning to the issue of U.S. obligations under the ICCPR regarding the actions of its forces abroad. Part III rounds out the discussion with recommendations for how both the ROK and the United States can harmonize the implementation of the Korea SOFA with their obligations under the ICCPR. Finally, this Note concludes with some general points on the importance of reconciling this conflict of obligations, and the larger implications for the viability and the legitimacy of U.S. military operations overseas.

I. *THOSE "S" WORDS,*[31] *SOFA AND SOVEREIGNTY: COMPETING DEMANDS IN INTERNATIONAL LAW*

SOFAs and human rights law represent two distinct bodies of international law that apply to states in the international system. Both are legal regimes of relatively recent vintage, having come of age in the immediate aftermath of World War II.[32] Due

30. The United States ratified the ICCPR on June 8, 1992, but filed an understanding that the nondiscrimination guarantees of both article 2 and article 26 are subject to the standards of the U.S. Constitution. *See* U.N. Treaty Collection, *supra* note 26 (recording U.S. reservation that distinctions are permitted when "rationally related to a legitimate governmental objective"). Iraq ratified the ICCPR on January 25, 1971, without any reservations, declarations or understandings with regard to article 2. *See id.*

31. Louis Henkin, *That "S" Word: Sovereignty, And Globalization, And Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999).

32. *See infra* notes 40–43, 83–85 and accompanying text.

to the breadth and complexity of the legal issues, this discussion is not meant to be comprehensive, and only the most pertinent aspects of each body of international law are treated. Because the Korea SOFA is only one of many similar agreements that the United States has concluded with other receiving states, Part I.A provides the larger context by tracing the development of the NATO SOFA as a paradigm, and discusses the general U.S. policy of maximizing its jurisdiction over its military personnel with other receiving states. Part I.B turns to the development of an entirely different strain of international law, human rights law, and offers an overview of the key provisions of the ICCPR that are relevant to this discussion. Part I.C discusses the terms of the Korea SOFA while developing a case study of the problems and issues that have surrounded criminal jurisdiction under the Korea SOFA, with attention paid to how it conflicts with state obligations under the ICCPR.

A. *The U.S. Approach to Foreign Criminal Jurisdiction*

Since the end of the second World War, when the United States bases soldiers overseas, it will typically negotiate a SOFA with the receiving nation.[33] Of the myriad of legal issues these deployments raise, criminal jurisdiction is the most commonly addressed issue in a SOFA.[34] The paradigm for these bilateral agreements is the NATO SOFA, which allocates criminal jurisdiction between the sending and receiving states with respect to the competing claims of sovereignty between the two states.[35]

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33. *See* Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 171–72 (1994) ("The United States generally concludes SOFAs with nations in which it maintains a relatively large military presence."); Wexler, *supra* note 20, at 52–53 (stating that the United States and the host nation usually enter into a formal SOFA when U.S. troops are permanently stationed or visit regularly).

34. *See* Mason, *supra* note 14, at 3 (stating that the issue most commonly addressed in a SOFA is the protection of U.S. personnel from foreign prosecution). SOFAs follow no fixed format, but include similar terms on the pertinent issues. *Id.* (noting that a SOFA has no formal requirements and will vary in length and terms); John W. Egan, Comment, *The Future of Criminal Jurisdiction Over the Deployed American Soldier: Four Major Trends in Bilateral United States Status of Forces Agreements*, 20 EMORY INT'L L. REV 291, 293 (2006) (listing typical SOFA provisions regarding military use of land, customs and tax issues, and criminal jurisdiction).

35. *See* NATO SOFA, *supra* note 16, art. VII; *see also* Youngjin Jung & Jun-Shik Hwang, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT'L L. REV. 1103, 1116 (2003) (noting that the NATO SOFA is the global standard for other SOFAs and it serves as a criterion for the critics of

Because the NATO SOFA is currently the benchmark by which other states evaluate their SOFAs, a brief discussion of the history of foreign criminal jurisdiction and the development of the NATO SOFA's criminal jurisdiction provisions will help to situate the Korea SOFA in its greater context.

1. Development of the Current SOFA Framework: NATO SOFA as a Paradigm

SOFA provisions on criminal jurisdiction often provoke controversy because, under customary international law ("CIL"), states have exclusive jurisdiction over all crimes on their territory, whether committed by citizens or foreign nationals.[36] Nonetheless, prior to the development of SOFAs, the United States asserted, as its prerogative, full sovereign immunity over its forces overseas—a doctrine that came to be known as the law of the flag.[37] Under the law of the flag, the presumption for exercising jurisdiction was against the receiving state; absent an

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the Korea SOFA); Lepper, *supra* note 33, at 172 (stating that NATO SOFA has become "the paradigm for similar agreements" and "is still the blueprint for all other U.S. status agreements worldwide").

36. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 (1965); *see also* Lepper, *supra note* 33, at 171 (stating that without a SOFA international law recognized the receiving state's sovereign right to exercise jurisdiction over U.S. troops stationed within its borders). Historically speaking, however, where foreign troops are concerned, customary international law ("CIL") was less clear on their status. Prior to the development of SOFAs, the prevailing school of thought was that territorial jurisdiction should be substantially limited with regard to representatives of a foreign sovereign. The most famous articulation of this principle is by Chief Justice Marshall of the U.S. Supreme Court. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch.) 116, 136 (1812) ("The jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty."); *see also* Lepper, *supra* note 33, at 170 (stating that Chief Justice Marshall was one of the first commentators on foreign criminal jurisdiction over military personnel). *Schooner Exchange* concerned a vessel that the French Navy seized and pressed into service during the Napoleonic wars. *Schooner Exch.*, 11 U.S. (7 Cranch.) at 117. When the ship sailed into Philadelphia for repairs, its American owners sued to recover it. *Id.* Chief Justice Marshall dismissed the suit, reasoning that visiting military forces, as representatives of a foreign sovereign, should be immunized from territorial jurisdiction and that as a practical matter, commanders must have exclusive authority to discipline their troops. *Id.* at 139–40 ("The grant of a free passage therefore implies a waver (sic) of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.").

37. Lepper, *supra* note 33, at 171 (equating U.S. practices with regard to criminal jurisdiction overseas with the concept of the law of the flag).

agreement to the contrary, the presence of foreign troops constituted an implied waiver of jurisdiction.[38] From the nineteenth century until World War II, the United States and other nations justified the exercise of exclusive jurisdiction over their military forces overseas on the basis of the law of the flag.[39]

After World War II, the U.S. strategy of "containment" envisioned immense numbers of troops stationed as a barrier around the former Soviet Union, China, and their satellites states.[40] As the Cold War began to chill the euphoria of victory, the United States faced the prospect of maintaining standing armies in permanent bases around the world during peacetime.[41] Because of the challenges to the law of the flag posed by both the rising tides of nationalism and the increasingly complex logistics of semi-permanent bases, the SOFA was adopted to clarify and stabilize the legal status of U.S. forces abroad.[42] The importance of NATO to the success of the containment strategy, coupled with resistance from the NATO states on the law of the flag, led the United States to retreat from its insistence on exclusive jurisdiction over U.S. troops during negotiations for a SOFA.[43]

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38. *See id.* (stating that CIL had evolved to the point where mere license for foreign troops to enter was an implied waiver of territorial sovereignty).

39. *See id.* (perceiving that the law of the flag was U.S. policy for 150 years and was also embraced by other nations); Wexler, *supra* note 20, at 55 (stating that United States adhered strictly to the law of the flag during both World Wars).

40. *See* ANNI P. BAKER, AMERICAN SOLDIERS OVERSEAS: THE GLOBAL MILITARY PRESENCE 47–53 (2004) (discussing the U.S. strategy of containment after World War II).

41. *See* Wexler, *supra* note 20, at 55 (stating that large numbers of U.S. troops were permanently stationed in Europe during the Cold War out of strategic necessity); Egan, *supra* note 34, at 297 (noting that the NATO treaty envisioned a "near-permanent stationing" of troops to stem a possible Soviet invasion).

42. *See* Jung & Hwang, *supra* note 35, at 1114 (stating that the uncertainties of legal status for visiting forces in this period prompted the formal development of SOFAs); Lepper, *supra* note 33, at 171 (World War II was "high-water mark" for the law of the flag and it could not be sustained as nations became increasingly protective of their sovereignty); Egan, *supra* note 34, at 296 (noting that the growth in national sovereignty and the unique Cold War situation were both factors leading to development of shared jurisdiction in the NATO SOFA).

43. *See* Comment, *Due Process Challenge to the Korean Status Of Forces Agreement*, 57 GEO. L.J. 1097, 1097 n.5 (1968) (stating that many U.S. Senators believed that United States should have exclusive jurisdiction under international law); Lepper, *supra* note 33, at 171 (same).

With the ratification of the NATO SOFA in 1953, foreign jurisdiction over U.S. military forces became possible for the first time.[44] The NATO SOFA established a framework of exclusive and concurrent jurisdiction for determining whether the receiving state or the sending state may assert jurisdiction over the actions of U.S. soldiers.[45] When a U.S. soldier violates the law of one state, but not the other, that state will have exclusive jurisdiction to prosecute the offense.[46] When the law of both states has been violated, "a system of priorities is established,"[47] according to which the sending state will have the primary right to exercise jurisdiction over its personnel for offenses that arise out of "official duty" or that affect only its property, personnel or security.[48] For cases that are of "particular importance" to either party, a waiver of jurisdiction may be requested; the other party is not obligated to grant the request, only to pay "sympathetic consideration."[49]

The old position advocated by the United States—that states ceded their territorial sovereignty when they permitted foreign troops to visit—faded with the entry into force of the NATO SOFA.[50] Although the NATO SOFA has become a common point of reference for other states in SOFA negotiations, it remains to this day the only multilateral SOFA,[51] and is the only SOFA that is completely reciprocal on the part of the United States.[52] All other

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44. *See* NATO SOFA, *supra* note 16, art. VII (governing jurisdiction); *cf.* Lepper, *supra* note 33, at 171 (stating that with the NATO SOFA the United States "signaled the end of its insistence that its troops abroad be subject only to its criminal jurisdiction").

45. *See* NATO SOFA, supra note 16, art. VII (allocating criminal jurisdiction over visiting military personnel between the sending state and the receiving state according to the nature of the offense).

46. *See id.*, art. VII (2)(a)–(2)(b).

47. Paul J. Conderman, *Jurisdiction, in* THE HANDBOOK OF THE LAW OF VISITING FORCES 99, 103 (Dieter Fleck ed., 2001).

48. NATO SOFA, *supra* note 16, art. VII (3)(a)(ii).

49. *Id.* at art. VII (3)(c).

50. *See* Wexler, *supra* note 20, at 56 (stating that the NATO SOFA marked a "significant doctrinal shift from the 'law of the flag'" (citing Lepper, *supra* note 32 at 171)); *see also* Lepper, *supra* note 33 at 171 (commenting that the "concept of exclusive receiving state jurisdiction represented a complete reversal of traditional doctrine" and that the NATO SOFA was seen as a way to preserve some degree of sending state jurisdiction).

51. *See* Mason, *supra* note 14, at 1 (stating that SOFAs are specific to an individual country and that the multilateral NATO SOFA is the lone exception to the norm).

52. *See* Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. Rev. 137, 140 (1994) (observing that NATO SOFA is the only

SOFAs to which the United States is a party have been concluded as bilateral agreements and, for the purposes of U.S. law alone, are treated as executive agreements.[53]

It is a widely accepted principle of current CIL that absent a specific and express agreement, the doctrine of territorial sovereignty will govern.[54] By signing a SOFA, the receiving state surrenders some part of its sovereignty, because it would otherwise have exclusive jurisdiction to prosecute any crime or offense committed within its territory.[55] From a foreign relations perspective, SOFAs are a compromise between the competing concerns of the parties: the sending state's interests in maintaining command and discipline over its own troops, and the receiving state's prerogative to punish an offense against its laws.[56] As the next section demonstrates, however, SOFAs have not prevented the United States from extending the scope of immunities for its forces to the greatest possible limit.

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reciprocal SOFA); Donald A. Timm, *Visiting Forces in Korea, in* THE HANDBOOK OF THE LAW OF VISITING FORCES 443, 450 (Dieter Fleck ed., 2001) ("Like all SOFAs other than the NATO SOFA, the [Korea SOFA] is not fully reciprocal.").

53. *See* Mason, *supra* note 14, at 1 & n.4 (noting the distinction between executive agreements and treaties in U.S. law and the implications for SOFAs); *see also* Erickson, *supra* note 52, at 152 nn.45–46 (discussing factors under U.S. law determinative of whether a SOFA should be concluded as a treaty or executive agreement, including whether reciprocal obligations are required).

54. *See, e.g.*, Wilson v. Girard, 354 U.S. 524, 529 (1957) ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 461 cmt. f (1987) ("Foreign military forces present in a state's territory with the consent of that state, such as those stationed pursuant to the North Atlantic Treaty, are subject to the law of the receiving state except as otherwise agreed between the two states."). In *Wilson*, the U.S. Supreme Court upheld the constitutionality of a waiver of jurisdiction over a U.S. soldier by the United States to Japan, even though Japanese trials did not meet due process standards. 354 U.S. at 530; *see also* Munaf v. Geren, 128 S. Ct. 2207, 2227 (2008) ("Nevertheless, in light of the background principle that Japan had a sovereign interest in prosecuting crimes committed within its borders, this Court found no 'constitutional or statutory' impediment to the United States's waiver of its jurisdiction under the agreement.") (quoting *Wilson*, 354 U.S. at 530).

55. *See* Egan, *supra* note 34, at 293 (indicating that a receiving nation "voluntarily relinquish[es] a degree of their sovereign authority" by signing a SOFA).

56. *See* Egan, *supra* note 34, at 298 (remarking that the NATO SOFA reconciles territorial sovereignty with the right of the sending state to prosecute its personnel); Erickson, *supra* note 52, at 140 (stating that SOFAs are "intended to strike a balance" between the obligations and interests of both parties).

2. The Exceptions Swallow the Rule: Maximizing U.S. Jurisdiction with the Official Duty and Waiver Exceptions

The modern SOFA era is now almost sixty years old, but there are signs that the law of the flag is dead only in name, and not in fact.[57] The United States pursues an aggressive policy of maximizing its exclusive jurisdiction under the NATO SOFA and other similar agreements.[58] This policy is meant to secure the due process rights of U.S. soldiers stationed abroad,[59] but its expansive use runs the risk of infringing upon the sovereignty of the receiving state.[60] This policy is implemented through two exceptions to receiving state jurisdiction under the provisions of the SOFA: first, the "official duty" exception and, second, the waiver of jurisdiction provision, otherwise known as the waiver exception.

With regard to the first exception, the "official duty" provision has been called the "last vestige" of the law of the flag.[61] During the negotiations for the NATO SOFA, NATO

57. *See* Mark R. Ruppert, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No"*, 40 A.F. L. REV. 1, 45 (1996) (arguing that U.S. authorities have practically reverted to the law of the flag in some receiving states); *see also* infra note 61 and accompanying text (discussing how the official duty exception is a holdover from the law of the flag).

58. *See* Wexler, *supra* note 20, at 58 (discussing how the U.S. Senate drives the policy to maximize jurisdiction by taking the position that military authorities "must, to the extent practicable, exercise primary jurisdiction whenever possible"); *see also* Ruppert, *supra* note 57, at 8 (discussing Senate resolution on the NATO SOFA calling for a compulsory waiver request).

59. *See* 32 C.F.R. § 151.3 (1980) ("It is the policy of the Department of Defense to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons."); 32 C.F.R. § 151.6 (Waiver of receiving state jurisdiction must be requested where U.S. constitutional rights will not be fully protected; Department of State must take "appropriate action to safeguard rights of the accused" if waiver is not granted). The concern over a U.S. soldier's due process rights under the U.S. Constitution, while legitimate, is beyond the scope of this Note and has been examined elsewhere. *See, e.g.*, Note, *Due Process Challenge to the Korean Status of Forces Agreement*, 57 GEO. L.J. 1097, 1107 (1968) (stating that the Korea SOFA, "like all other status of forces agreements, represents a form of compromise between national interest in stationing troops abroad and the protection of individuals rights of servicemen.").

60. *See, e.g.*, Jung & Hwang, *supra* note 35, at 1115 (stating that the policy of maximizing U.S. jurisdiction increases the possibility of offending the "sovereign sentiment" of the receiving state); Wexler, *supra* note 20, at 57–58 ("[The] aggressive stance in protecting U.S. service members from foreign jurisdiction has led to a number of problems with other nations.").

61. Lepper, *supra* note 33, at 175.

member states were concerned that the exception would effectively swallow the rule.[62] They proposed a definition of "official duty" that would incorporate the agency concept of deviation: the exception would not apply when U.S. personnel acted outside the specific ambit of their duties or orders.[63] The United States refused to bind itself to a limited definition, and insisted that it had the exclusive right to determine "official duty."[64] To this day, the NATO SOFA is silent as to what constitutes official duty.[65]

U.S. policy since then has been to reserve the exclusive right to determine official duty, and to "construe it as broadly as reason and persuasion will allow."[66] For example, in the case of *Wilson v. Girard*, the United States claimed an official duty exception after U.S. Specialist William S. Girard killed a Japanese woman while on sentry duty.[67] She died after Girard hit her in the back with a spent thirty-caliber cartridge, which he had propelled from his grenade launcher by firing a blank.[68] Japan asserted jurisdiction, insisting that they had proof contrary to the official duty exception.[69] With the two sides unable to agree, the United States subsequently waived jurisdiction, thereby preserving its position that Girard's actions had been part of his official duties.[70]

Another controversial use of the official duty exception occurred in February 1998, when the United States invoked it under the NATO SOFA after a U.S. military aircraft training in the Italian Alps severed the cables of a gondola car, sending twenty people plunging to their deaths.[71] Italian authorities had

62. *See id.* at 176 (recounting that the European States considered an expansive notion of official duty a return to the law of the flag).

63. *Id.* at 175–76.

64. *See* Lepper, *supra* note 33, at *id.* at 176 (providing that consensus was not reached on either an acceptable definition of official status or who should determine it).

65. *See* NATO SOFA, *supra* note 16, art. VII.

66. Lepper, *supra* note 33, at 176.

67. 354 U.S. 524, 526, 529 (1957); *see also supra* note 54.

68. *See* 354 U.S. at 526. Specialist Girard was on guard duty at a live firing range, and the Japanese woman had entered the area during an interval, as was the local practice at the time, to collect expended brass ammunition shells. *Id.*

69. *See id.* at 529.

70. *See* SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 173 (1971).

71. *See* Matthew L. Wald, *Pilot Acquitted in Deaths of 20 on Ski Gondola*, N.Y. TIMES, Mar. 5, 1999, at A1; *see also* Adrian A. Barham, *The Establishment and Conduct of Extra-*

approved the flight plan, but it was later determined that the aircraft had been operating below the agreed 1000-foot limit and above the approved speed, and had hit the gondola cables at a height of 360 feet.[72] After the pilot was later acquitted of any wrongdoing by a jury of marine officers sitting at Camp Lejeune in North Carolina, outraged Italian authorities called for closures of U.S. bases in Italy.[73]

Apart from the official duty exception, the blanket use of the waiver exception is another problematic feature of the maximization policy. The United States always requests a waiver of jurisdiction whenever the receiving state has jurisdiction over a U.S. soldier.[74] Moreover, although facially the waiver procedure applies equally to both the sending and receiving state, receiving states routinely grant waivers, even though the United States almost never waives its primary jurisdiction.[75] This asymmetrical record is made even more troublesome by the fact that after jurisdiction is obtained, U.S. military authorities often fail to impose adequate disciplinary measures under the Uniform Code of Military Justice ("UCMJ") to deter U.S. personnel from committing crimes overseas.[76] Under the UCMJ, U.S. personnel

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territorial Military Bases in Peacetime—Some International Law Considerations, 31 BRACTON L.J. 7, 19 (1999) (discussing the gondola accident in the Italian Alps).

72. *See* Barham, *supra* note 71, at 19 (observing that the plane's flight plan was filed with and approved by the Italian authorities); Wald, *supra* note 71 (indicating that pilot was acquitted of involuntary homicide and manslaughter even though plane was flying lower and faster than permitted).

73. *See* Barham, *supra* note 71, at 20.

74. *See* Conderman, *supra* note 47, at 117 (declaring that in all cases the United States has sought to acquire or retain jurisdiction over its personnel through the waiver provisions).

75. *See Report of the Judge Advocate General of the Army*, *in* ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE § 3, at 15 (2008), *available at* http://www.armfor.uscourts.gov/annual/FY08AnnualReport.pdf (reporting that between December 1, 2005, and November 30, 2007, the United States obtained waivers of jurisdiction in 2,290 of the 2,651 cases where foreign countries had concurrent jurisdiction over U.S. military personnel—approximately eighty-six percent of all concurrent jurisdiction cases for the reporting period—and that waivers were obtained in 88.9% of all cases where foreign countries had either exclusive or concurrent jurisdiction); *see also* Lepper, *supra* note 33, at 176 (remarking that the United States "rarely" waives primary jurisdiction).

76. *See* Jaime M. Gher, *Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to be Learned from the U.S-Japan Agreement*, 37 U.S.F. L. REV. 227, 239–40 (2002) (discussing how U.S. efforts to usurp jurisdiction and inconsistent disciplinary measures compound the severity and frequency of crimes committed by U.S. soldiers in Japan). An investigative news report also revealed that many sex offenders in the U.S.

who are found guilty "generally only receive non-judicial punishments or court martials."[77] A "clear preference" of U.S. military authorities is to pursue nonjudicial remedies, which give commanding officers the discretion to impose a lesser punishment, accept an administrative discharge in lieu of a court-martial conviction, or even dismiss the charges.[78] In high-intensity deployments like Iraq, it has been reported that, compared with routine violations of military regulations, U.S. authorities are far more lenient with cases involving criminal misconduct against Iraqi civilians, and such cases are not always investigated in a thorough or timely fashion.[79]

While on their face, SOFAs represent a compromise between the receiving state's territorial sovereignty and the sending state's prerogative to discipline its own troops, the aggressive use of both the official duty and waiver exceptions has left at least one critic observing that SOFAs do not restrain the United States from "riding roughshod over the feelings of a host state."[80] From the U.S. perspective, SOFAs safeguard the basic individual rights and liberties of U.S. soldiers.[81] But prominent

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military, particularly on overseas bases like Okinawa, Japan, escape criminal prosecution or go free despite convictions. Unlike civilians, many of these service members receive no criminal record on their discharge. *See* Russell Carollo & Jeff Nesmith, *Ugly American*, DAYTON DAILY NEWS, Oct. 8, 1995, at 1A (describing cases of sex offenders in the U.S. military deployed to Japan going free or receiving lenient treatment); *see also Jane's Story*, ECONOMIST, Dec. 10, 2008, http://www.economist.com/world/asia/displaystory.cfm?story_id=12756824 (reporting that a U.S. service man was quietly discharged without punishment by the U.S. Navy after committing a violent rape in 2002 while stationed in Japan).

77. Gher, *supra* note 76, at 240.

78. *See* Wexler, *supra* note 20, at 50–51 (noting that handling cases with administrative measures "inevitably" produces lighter sanctions).

79. *See* Russell Carollo & Larry Caplow, *Justice at War: Troops Receive Light Sentences for Violent Crimes Against Iraqis*, DAYTON DAILY NEWS, Oct. 2, 2005, at A1 (describing how soldiers accused of property crimes or violations of military rules are sometimes treated more harshly than those convicted of beating, robbing, or killing Iraqis; and not all such cases are investigated). The same report also quotes Gary D. Solis, a former U.S. military judge and West Point instructor, who stated with regard to the lenient sentences, "I have an uneasy suspicion that it relates to the nationality of the victim." *Id.*

80. Barham, *supra* note 71, at 23; *see also* Ruppert, *supra* note 57, at 45 (noting that maximization policy has produced a complacent attitude in military commanders, who fail to appreciate the infringement on sovereignty that a waiver of jurisdiction request entails).

81. *See* Egan, *supra* note 34, at 306 (stating that the policy of maximizing jurisdiction derives in part from concerns that local criminal justice systems do not afford U.S. troops minimum due process).

commentators have also emphasized that SOFA provisions are meant to balance the demands of sovereignty between the sending and receiving state, and should not leave host populations without legal protection.[82]

Part I.C examines the Korea SOFA as an example of such "sovereignty-sharing agreements" to examine the issues that surround their implementation, their impact on local populations, and the legal issues that pertain. But before turning to the Korea SOFA, a discussion of the development of human rights law and of article 2 of the ICCPR will help to frame the conflict between the ICCPR and the Korea SOFA.

B. *Transforming International Law: The Development of Human Rights*

The advent of the SOFA model of criminal jurisdiction in the period immediately prior to World War II coincided with another transformation in international law.[83] That transformation, the development of human rights law, began with the creation of the United Nations ("U.N.").[84] This section briefly discusses the philosophical innovation of human rights law, before turning to an overview of article 2 of the ICCPR.

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82. *See* LAZAREFF, *supra* note 70, at 207 ("Indeed, SOFA, in many sections recognizes the overriding principle of territorial sovereignty. Therefore, is it not essential that the rights of the nationals of the Receiving State be protected?"); *see also Status of Forces Agreements and UN Mandates: What Authorities and Protections Do They Provide to U.S. Personnel?: Hearing Before the H. Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 40 (2008) (statement of Ruth Wedgwood, Professor, Johns Hopkins University) ("Recent headlines concerning events on the Japanese island of Okinawa highlight the importance of providing safeguards both to American forces stationed abroad and to the civilian populations with whom they come in contact."). Professor Ruth Wedgwood is currently a member of the Human Rights Committee ("HRC"), an independent body of experts established under the ICCPR to supervise and monitor compliance by state parties with the provisions of the Covenant. *See* Office of the U.N. High Comm'r for Human Rights, Human Rights Committee-Members, http://www2.ohchr.org/english/bodies/hrc/members.htm (last visited Apr. 7, 2010) (listing current members of the HRC). For more on the role of the HRC in the implementation of the ICCPR, see *infra* note 98.

83. *See* Henkin, *supra* note 31, at 3 ("The international human rights movement is a third transformation.").

84. *See, e.g.*, PAUL KENNEDY, THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS 178 (2006) (stating that between 1945 and 1948 the U.N. established an international human rights regime that had unprecedented legal effect).

1. Redefining Sovereignty through Human Rights Treaties

As the noted international law scholar Professor Louis Henkin put it, the years immediately following the birth of the international human rights movement out of the tumult of World War II "represented a significant erosion of state sovereignty."[85] The development of international human rights ushered in new understandings of sovereignty that have tested the classical assumptions of state sovereignty.[86] According to one scholar, evolving notions of sovereignty have shifted the discourse from a monochromatic idea of the sovereignty of nation-states, to the idea that sovereignty attaches to individual persons, based on a deepening sense of state responsibility to its citizens that is derived from the consent of the governed.[87]

The innovation of the time is aptly demonstrated by the final touches taken by the U.N. committee tasked with drafting the Universal Declaration of Human Rights ("UDHR").[88] The drafting committee adopted a change proposed by the French delegation to replace "International" with "Universal."[89] According to Johannes Morsink, the change in diction shifted the emphasis of the document away from the nation states that were its authors, and toward the intended addressees, the ordinary persons of the world.[90] In his remarks to the General Assembly on the change, the French delegate René Cassin captured the sense of the moment when he noted that "something new ha[d] entered the world."[91]

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85. Henkin, *supra* note 31, at 4.

86. *See id.* at 4–5 ("So a major rent developed in the cloak of sovereignty, due to this idea of human rights.").

87. *See* Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2050 (2003) ("Sovereignty attaches itself to the people of the state, not merely the state itself, in a multi-directional social contract.").

88. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR].

89. *See* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 33 (1999).

90. *Id.*

91. *Id.* (quoting René Cassin at a debate before the General Assembly) (alteration in original). This sense of wonder at the revolution in international law unfolding before the delegates was often echoed by Professor Cassin during the drafting process. In December 1947, during the Second Session of the Commission on Human Rights, he requested that the following comment be reported:

> In voting for the draft Declaration, the French delegation emphasized that it constitutes the first stage reached after eighteen months work. Its defects do not

This is not to say that the twenty-first century was an unqualified triumph of human rights and universal values. Classic state sovereignty retains vitality as a legal doctrine, and human rights law imposes legal obligations on states only as far as they agree to be so bound.[92] Nonetheless, in the over half a century since the UDHR, binding norms of international human rights law have emerged, and states increasingly subscribe to them. Human rights treaties and the customary law of human rights represent these fundamental obligations, and states violate these obligations when they fail to respect and ensure the rights recognized, or fail to provide remedies for rights that have been violated.[93]

Chief among these human rights treaties is the International Bill of Rights, which is comprised of the ICCPR,[94] the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),[95] and the UDHR;[96] the ICCPR and the ICESCR give legal effect to the aspirational principles articulated in the UDHR.[97] As Martin Scheinin, a past member of the Human

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detract from the fact that it contributes something new: the individual becomes a subject of international law in respect of his life and liberty; principles are affirmed, side by side with those already laid down by the majority of national laws which no national or international authority had hitherto been able to proclaim, let alone enforce.

U.N. Econ. & Soc. Council [ECOSOC], *Report of the Commission on Human Rights, 2nd Session, Geneva, Dec. 2 to Dec. 17, 1947*, Annex A, part II, ¶ 5, U.N. Doc. E/600 (Dec. 17, 1947)..

92. Henkin, *supra* note 31, at 5 ("Sovereign states accept international human rights standards . . . to the extent they wish to.").

93. LOUIS HENKIN ET AL., HUMAN RIGHTS 315 (1st ed.1999); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 207 reporter's n. 5 (1987) ("In general, a state is responsible for inaction when it fails to carry out some international obligation to act, whether an obligation assumed by international agreement (§ 321), or one imposed by customary law .... In addition to liability for failure to take appropriate steps to prevent harm to a foreign national, a state may be liable for failure to take steps to punish a violation of such rights.").

94. *See* ICCPR, *supra* note 26.

95. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

96. *See* ICCPR, *supra* note 26.

97. *See* LOUIS HENKIN, THE AGE OF RIGHTS 20 (1990) (stating that the international law of human rights is contained principally in the ICCPR and the International Covenant on Economic, Social, and Cultural Rights, both of which embody the Universal Declaration of Human Rights).

Rights Committee[98] ("HRC") argues, human rights law has acquired the character of a legal constitution, and operates as "an objective normative order *above* states."[99] This understanding articulates the position that human rights law represents a countervailing force to the contractual nature of public international law, which is constrained only by state consent and reciprocity.[100] While Martin Scheinin's opinion may be considered too expansive for classical notions of international law, it is undeniable today that the ICCPR is an international covenant with binding legal effect. The following section discusses ICCPR article 2 in detail, with attention paid to the substantive obligations undertaken by state parties.

2. Article 2 of the ICCPR

The nations around the world that consider themselves state parties to the ICCPR–such as the United States and the ROK–are

98. The Human Rights Committee ("HRC") is established by article 28 of the ICCPR: it is a body of independent experts elected by State parties that monitors implementation of the ICCPR by its State parties, has the competence to entertain both inter-state and individual complaints regarding alleged violations of the ICCPR, and, pursuant to article 40(4), issues conclusive interpretations of the provisions of the ICCPR known as General Comments. *See* Office of the U.N High Comm'r for Human Rights, Human Rights Committee: Monitoring Civil and Political Rights, http://www2.ohchr.org/english/bodies/hrc/ (last visited Mar. 5, 2010); *see also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY XXIII–IV (2005) (discussing the role of the HRC in supervising adherence to the ICCPR).

99. Martin Scheinin, *Extraterritorial Effect of the ICCPR, in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 73, 78 (Fons Coomans & Menno T. Kamminga eds., 2004) (emphasis in original).

100. *See* U.N. Human Rights Comm. [HRC], *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) [hereinafter *General Comment 24*] ("Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 cmt. f (1987) ("Ordinarily, an agreement between states is a source of law only in the sense that a private contract may be said to make law for the parties under the domestic law of contracts. Multilateral agreements open to all states, however, are increasingly used . . . to make new law, as in human rights . . . ."); *see also infra* notes 195–96 and accompanying text (discussing how human rights treaties are privileged within the hierarchy of norms in international law).

legally bound by the obligations it creates.[101] ICCPR article 2 emphasizes that *individuals* are the beneficiaries of the rights creating language in the covenant, and imposes corresponding duties on state parties to "respect and to ensure" these rights.[102] These obligations have "an accessory character;" that is, article 2 establishes no free-standing substantive rights, but imposes affirmative duties on the state parties based on substantive rights recognized in the covenant.[103] The numerous substantive rights guaranteed to all individuals under the covenant include, among others, "the inherent right to life,"[104] and the right to be free

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101. *See General Comment 24, supra* note 100, ¶ 7 ("The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."); *see also supra* note 93, and accompanying text (noting that human rights treaties represent fundamental legal obligations for states).

102. ICCPR, *supra* note 26, art. 2(1). Article 2 provides in its entirety:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
> 3. Each State Party to the present Covenant undertakes:
>
> > (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> > (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> > (c) To ensure that the competent authorities shall enforce such remedies when granted.

Id.

103. NOWAK, *supra* note 98, at 29 ("[A] violation of Art. 2 can occur only in conjunction with the concrete exercise (but not necessarily violation) of one of the substantive rights ensured by the Covenant.").

104. ICCPR, *supra* note 26, art. 6(1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

from "cruel, inhuman or degrading treatment or punishment."[105]

By imposing duties on state parties to protect Covenant rights within their domestic legal systems, article 2 expresses the principle that "the implementation of human rights under international law is primarily a domestic matter."[106] For example, article 2(1) incorporates two state obligations "to respect *and* to ensure" with a jurisdictional clause: "to all individuals within its territory and subject to its jurisdiction . . . ."[107] According to Professor Dominic McGoldrick, the concept of jurisdiction under international law "explains the orthodox situations in which states make and enforce rules of law governing individuals and other legal entities."[108] Under human rights law, the ability of a state to exercise its authority over persons and to give legal effect to individual rights is "a starting point for imposing obligations on state."[109]

Pursuant to article 2(1) of the ICCPR, each state party must adopt measures that give legal effect to the human rights recognized in the covenant for all individual persons within their territory and under their jurisdiction.[110] This entails both a negative obligation to refrain from interfering with the enumerated rights, and a positive obligation to guarantee that individuals within its jurisdiction have access to substantive and

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105. *Id.* art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.").

106. NOWAK, *supra* note 98, at 28; *see also* HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR.C.21.Rev.1/Add.13 (May 26, 2004) [hereinafter *General Comment 31*] ("The Covenant cannot be viewed as a substitute for domestic criminal or civil law.").

107. ICCPR, *supra* note 26, art. 2(1) (emphasis added).

108. Dominic McGoldrick, *Extraterritorial Application of the ICCPR*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 41, 45 (Fons Coomans & Menno T. Kamminga eds., 2004).

109. *Id.* There can be no fundamental duty or obligation pertaining to any right unless the state party has the opportunity to exercise its influence over the outcome. *See* NOWAK, *supra* note 98, at 29 (stating that privileging domestic implementation of covenant rights follows from international law principles mandating exhaustion of domestic remedies before international enforcement); McGoldrick, *supra* note 108, at 46 (arguing that covenant rights should not extend to individuals unless the state wields some degree of governmental power over them).

110. *See* ICCPR, *supra* note 26, art. 2(1); *see also* NOWAK, *supra* note 98, at XXV (discussing the state obligation under article 2 to adopt all necessary measures to give effect to covenant rights).

procedural protections.[111] Moreover, these legal protections must be applied to all individuals without discrimination of any kind.[112] The HRC has expressly stated that article 2 provides the "overarching framework" for the protection of all the substantive rights of the ICCPR, such as the right to life.[113] Accordingly, when the implementation of article 2 is stymied, the other substantive rights of the ICCPR cannot be effectively secured.[114]

Article 2(3) is crucial for defining the obligations under present scrutiny. Article 2(3)(a) mandates that any violation must have a corresponding remedy that is effective in practice.[115] To discharge the duty to provide an effective remedy, there is a clear preference for judicial remedies, and purely political or administrative remedies will not suffice.[116] Moreover, the HRC has made it clear in its jurisprudence that purely administrative or disciplinary remedies are insufficient for serious violations of human rights such as the right to life; for these violations, criminal investigations and subsequent prosecution are "necessary remedies."[117] The general obligation to investigate

111. *General Comment 31*, *supra* note 106, ¶ 6 ("The legal obligation under article 2, paragraph 1, is both negative and positive in nature. State Parties must refrain from violation of the rights recognized by the Covenant . . . ."); *see also* NOWAK, *supra* note 98, at 37–38 (distinguishing between the negative aspect of the obligation "to respect" and the positive aspect of the obligation "to ensure").

112. ICCPR, *supra* note 26, art. 2(1). The duty of nondiscrimination in article 2 is extended by article 26, which states that "all persons are equal before the law and entitled to equal protection of the law." While a treatment of article 26 is beyond the scope of this Note, its prohibition against discrimination does pose challenges to a scheme of jurisdictional waiver under which the receiving state is only entitled to request a waiver of jurisdiction for cases of "particular importance." *See infra* notes 139–42 and accompanying text.

113. *General Comment 31*, *supra* note 106, ¶ 5.

114. *See* McGoldrick, *supra* note 108, at 45 (suggesting that article 2(1) must be read into all the substantive rights of the Covenant); NOWAK, *supra* note 98, at 29 (commenting that article 2 is an "umbrella clause" for all the rights of the covenant with "an important function in [its] *systematic interpretation*" (emphasis in original)).

115. ICCPR, *supra* note 26, art. 2(3)(a) (expressly providing for "an effective remedy" for violations of the rights recognized under the covenant, irrespective of whether the perpetrator was "acting in an official capacity.").

116. NOWAK, *supra* note 98, at 64 (citing HRC commentary).

117. HRC, *Communication No. 1447/2006: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Amirov v. Russia), ¶ 11.2, U.N. Doc. CCPR/C/95/D/1447/2006 (Apr. 22, 2009); *see also* HRC, *Communication No. 612/95: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Vicente et al. v. Colombia), ¶ 8.2, U.N. Doc. CCPR/C/60/D/612/1995, (Aug. 19, 1997) (declaring that purely disciplinary and

allegations of violations must be done promptly, thoroughly, and effectively through independent and impartial bodies; a failure by a state party to investigate allegations of violations could in and of itself give rise to a separate breach of Article 2(3).[118]

Where investigations reveal violations of covenant rights, a failure to bring to justice perpetrators of such violations would also constitute a breach of the ICCPR.[119] A failure to ensure ICCPR rights could rise to the level of an affirmative violation, if the state party fails to exercise due diligence in preventing, punishing, investigating, or redressing the harm caused by the acts of private persons or entities.[120] The HRC has also emphasized that the problem of impunity may encourage the recurrence of these types of violations.[121] Indeed, no official status justifies immunizing persons accused of such violations from legal responsibility.[122]

Based on these legal facts, the policy of maximizing jurisdiction as expressed in agreements like the Korea SOFA raises certain problems with regard to state obligations under article 2 of the ICCPR. Part I.C discusses this conflict in detail through a case study of the operation of criminal jurisdiction provisions of the Korea SOFA, before turning to a discussion of how ICCPR obligations are implicated in this legal framework.

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administrative remedies are inadequate within the meaning of article 2(3) when violation of the right to life is alleged); HRC, *Communication No. 563/93: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Bautista de Arellana v. Colombia), ¶ 8.2, U.N. Doc. CCPR/C/55/D/563/1993 (Nov. 13, 1995) (determining that disciplinary sanctions and monetary reparations by themselves are insufficient remedies for violations of the right to life).

118. *General Comment 31*, *supra* note 106, ¶ 15.

119. *Id.* ¶¶ 8, 18.

120. *Id.* ¶ 8.

121. *Id.* While the HRC was concerned with impunity over systemic and egregious violations such as torture, extra-judicial killings, and enforced disappearances, the general principle against state impunity is equally applicable to the Korea SOFA context. Notably, a U.S. Army Reserve Major, commenting on the abnormally high rate of sexual assaults among U.S. servicemen based overseas, told reporters: "There is often a party atmosphere and an attitude of: 'I can act out, and I'm not going to get caught.' That's why they feel free to abuse other humans." Carollo & Nesmith, *supra* note 76.

122. ICCPR, *supra* note 26, art. 2(1); *see also General Comment 31*, *supra* note 106, ¶ 8.

C. *The Challenge of Human Rights: The Korea SOFA and Article 2 of the ICCPR*

The Korea SOFA was, from its very beginning, a creature of necessity. Not long after the Korean War ground into a stalemate and hostilities ceased between the North and the South, the United States and the ROK entered into a Mutual Defense Treaty in 1954.[123] Pursuant to article IV of the Mutual Defense Treaty, the Korea SOFA was signed in 1966 as a sole executive agreement to govern the legal status of U.S. troops in the ROK.[124] Although the NATO SOFA provided the model framework, the Korea SOFA is not reciprocal on the United States, and diverges in other key ways from the NATO SOFA.[125] No peace treaty has been signed between the North and the South, and the United States continues to maintain a military presence 28,500 strong in the Korean Peninsula.[126] Commentators have suggested that the ravages of the Korean War, coupled with the threat of imminent attack from the North, left the ROK with little choice but to accept agreements that were asymmetrical and nonreciprocal.[127]

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123. Mutual Defense Treaty Between the United States and the Republic of Korea, U.S.-S.Korea, Oct. 1, 1953, 5 U.S.T. 1677, 674 U.N.T.S. 163. Under the Mutual Defense treaty, the United States exercised exclusive jurisdiction over any offenses committed by U.S. personnel in the ROK, justifying it on the basis that the ROK had a poor record of "enforcing Western judicial rights." Egan, *supra* note 34, at 314. This arrangement proved difficult to maintain after civil unrest and political instability in the ROK was blamed on the extraterritorial status of U.S. soldiers. *See id.* (citing a 1960 coup that was attributed to the government's unwillingness or inability to punish serious crimes committed by U.S. soldiers against Koreans).

124. *See* Mutual Defense Treaty Between the United States and the Republic of Korea, *supra* note 123, art. IV. The distinction between sole executive agreements and treaties is one for U.S. constitutional law alone, and is beyond the scope of this Note. *See supra* note 53 and accompanying text.

125. *See* U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 2007, at 404 (2007), *available at* http://www.cfr.org/publication/14198/operational_law_handbook_2007.html (identifying the Korea SOFA as applying only to U.S. soldiers in the ROK; it also does not accord equal rights to Korean soldiers visiting the United States); *see also* Lee, *supra* note 23, at 229 (comparing how the Korea SOFA expressly restricts ROK jurisdiction to "distinct minority of cases" with how the NATO SOFA respects the legal regime of receiving states).

126. *See* U.S. Dep't of State, Bureau of E. Asian & Pac. Affairs, *Background Note: South Korea* (Oct. 2009), http://www.state.gov/r/pa/ei/bgn/2800.htm (stating that a 2008 agreement between the United States and the ROK capped the number of U.S. troops in the ROK at 28,500 with no plans for further reductions).

127. *See* Lee, *supra* note 23, at 221 (surmising that the ROK's dire post war situation led it to accept international agreements that fell short of prevailing norms); *see also* Gher, *supra* note 76, at 241 (reasoning that Asian countries like Japan and the ROK have

Amendments to the Korea SOFA in 1991 and 2001, however, have gone some way to address the imbalance between the parties.[128]

1. Criminal Jurisdiction Under the Korea SOFA

The Korea SOFA borrows its framework of exclusive and concurrent criminal jurisdiction from the NATO SOFA, but with some significant changes.[129] Under article XXII of the Korea SOFA, the United States has the right to exercise exclusive jurisdiction over U.S. soldiers for offenses that are "punishable by the law of the United States, but not by the law of the Republic of Korea."[130] The converse is also true for offenses that are punishable only under Korean law.[131]

The "system of priorities," as contemplated under the concurrent jurisdiction framework of the NATO SOFA, applies when an offense violates both U.S. and Korean law.[132] For example, if a U.S. soldier commits homicide in Korea, ROK authorities will have primary jurisdiction, unless the offense is solely against the property or security of the United States, only against another U.S. armed forces member, or if it arises out of any act or omission done in the performance of an official duty.[133] According to the agreed minutes to the Korea SOFA, which is incorporated to the Korea SOFA, an official duty is defined as an act "required" by military duty, and does not

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a lopsided relationship with the United States because of their economic and military dependency); Jung & Hwang, *supra* note 35, at 1115–16 (stating that the ROK is vulnerable to U.S. pressure and that international law permits states to alter equitable principles of international law by bilateral agreement to favor a state with stronger bargaining power).

128. *See* Egan, *supra* note 34, at 317–20 (discussing how the amendments have gradually expanded ROK jurisdiction); *see also* Wexler, *supra* note 20, at 63 (noting that ROK jurisdiction has grown over the years but an unequal power dynamic still remains).

129. *See* Lee, *supra* note 23, at 218 (indicating that the Korea SOFA, unlike the NATO SOFA, incorporates additional terms that limit ROK jurisdiction to a greater extent); Wexler, *supra* note 20, at 61 (noting that the NATO and Korea SOFAs appear similar but that the United States negotiated addenda that both expand and diminish U.S. jurisdiction).

130. Korea SOFA, *supra* note 18, art. XXII (2)(a).

131. *See id.*, art. XXII (2)(b).

132. *See supra* notes 47–48 and accompanying text.

133. Korea SOFA, *supra* note 18, art. XXII (3).

necessarily apply to all acts performed while on duty.[134] As elaborated by the agreed understandings to the Korea SOFA, which is also incorporated to the agreement, the conduct in question must constitute a "substantial departure" from actions required in their military duties before it will fall outside the definition of "official duty."[135]

Even without considering the empirical record of the Korea SOFA's implementation, several problems are already apparent on the face of the text. First, the agreed minutes to the Korea SOFA provides that "a certificate issued by competent military authorities of the United States stating that the alleged offense . . . arose out of an act or omission done in the performance of official duty shall be sufficient evidence of the fact for the purpose of determining primary jurisdiction."[136] In the words of

134. Agreed Minutes to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities And Areas And the Status of United States Armed Forces in the Republic of Korea, U.S.-S. Korea, art. XXII, Re paragraph 3(a), § 1, July 9, 1966, 17 U.S.T. 1768 [hereinafter Agreed Minutes to Korea SOFA].

135. Agreed Understandings 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 and Related Agreed Minutes, U.S.-S. Korea, art. XXII, Agreed Minute Re Paragraph 3(a), § 1, July 9, 1966, 17 U.S.T. 1813, [hereinafter Agreed Understandings to Korea SOFA]. The agreed understandings were terminated in 1991 pursuant to an exchange of diplomatic letters. *See* Agreement Between the United States and Korea Terminating the Agreed Understandings and Exchange of Letters of July 9, 1966 Related to the Agreement Under Article IV of the Mutual Defense Treaty Regarding Facilities and Areas and the Status of U.S. Armed Forces in Korea, U.S.-S. Korea, ¶ 1, Feb. 1, 1991, Temp. State Dep't No. 91-70, 1991 WL 494904 [hereinafter 1991 Exchange of Letters]. However, superseding understandings entered by the parties in 1991 and 2001 reasserted the "substantial departure" language. *See* Understandings 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 and Related Agreed Minutes, As Amended U.S.-S. Korea, art. XXII, Agreed Minute Re Paragraph 3(a), § 1, Jan. 18, 2001, Temp. State Dep't No. 01-57, 2001 WL 681235 [hereinafter 2001 Understandings to Korea SOFA]; Understandings on Implementation of 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 and Related Agreed Minutes, U.S.-S. Korea, art. XXII, Agreed Minute Re Paragraph 3(a), §1, Feb. 1, 1991, http://www.dprkstudies.org/documents/1966-1991-US-ROK SOFA.pdf [hereinafter 1991 Understandings to Korea SOFA]. It should be noted here that the NATO SOFA is silent on a definition of official duty. *See supra* note 65 and accompanying text.

136. Agreed Minutes to Korea SOFA, *supra* note 134, art. XXII, Re Paragraph 3(a), § 1.

one commentator, the Korea SOFA assigns the determination of the scope of official duty to the United States alone, leaving the ROK with little recourse to challenge the determination.[137] Although this resolves the silence in the NATO SOFA with regard to who determines official duty, the Korea SOFA settles the ambiguity squarely in favor of the United States. As written, this provision gives the United States the exclusive authority to fix the limits of its primary jurisdiction.[138]

Second, the agreed minutes provide that the ROK will, when U.S. military authorities so request, "waive their primary right to exercise jurisdiction . . . except when they determine that it is of particular importance that jurisdiction be exercised by the authorities of the Republic of Korea."[139] In effect, this provision establishes a general waiver in favor of the United States by creating a presumption that the ROK will always waive its jurisdiction, except in those extraordinary circumstances when a case is deemed to be of "particular importance."[140] By reversing the system of priorities established in the NATO SOFA, this modification subverts the careful balance and the intent of the compromise embodied in concurrent jurisdiction.[141] Despite the amendments to the Korea SOFA, this reversal of priorities is preserved to this day.[142]

Perhaps in recognition of these concerns, the United States and the ROK revised the ROK SOFA in 1991[143] and 2001[144] to

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137. *See* Lee, *supra* note 23, at 228 (stating that the agreed minutes unilaterally assigns determination to the United States, leaving the ROK with little means to question U.S. military authorities).

138. *See id.* ("Put simply, the United States reserves the right to delineate its primary jurisdiction as it sees fit.").

139. Agreed Minutes to Korea SOFA, *supra* note 134, art. XXII, Re Paragraph 3(b), § 1.

140. *Id.*

141. *See* Lazareff, *supra* note 70, at 195 (considering an identical provision in a 1954 bilateral agreement between the United States and the Netherlands modifying the system of priorities established in the NATO SOFA). According to Lazareff, this "regrettable practice" grants the sending state a general and primary right of jurisdiction, giving it the right to grant or refuse a waiver, and constitutes a serious violation of the principle of territorial sovereignty. *Id.* at 59.

142. *See* 1991 Exchange of Letters, *supra* note 135 (terminating the agreed understandings, but not the agreed minutes which reverses the system of priorities).

143. *See* 1991 Exchange of Letters, *supra* note 135; 1991 Understandings to Korea SOFA, *supra* note 135; Agreement Between the United States of America and the Republic of Korea Concerning Special Measures Relating to Article V of the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America

more equitably share the sovereign prerogative of criminal jurisdiction.[145] Before the 1991 amendment, the ROK's primary jurisdiction over an offense would be automatically waived unless it informed the United States within fifteen days that it wished to initiate proceedings, while the United States was not labored by a similar burden.[146] The 1991 amendments terminated this arrangement, and the United States no longer enjoys the presumption of primary jurisdiction.[147] Pursuant to these revisions, the state wishing to exercise jurisdiction over a case within the other state's primary jurisdiction is to request a waiver, to which the other side has twenty-eight days—which can be extended to forty-two days if special reasons are present—to respond.[148] Although the 1991 amendments retain the reversed system of priorities established in the agreed minutes, it still

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and the Republic of Korea Regarding Facilities and Areas and the Status of Armed Forces in the Republic of Korea, U.S.-S. Korea, Jan. 25, 1991, Temp. State Dep't No. 91-85, 1991 WL 494919.

144. *See* 2001 Understandings to Korea SOFA, *supra* note 135; Agreement Between the United States of America and the Republic of Korea Amending 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 of July 9, 1966, as Amended, U.S.-S. Korea, Jan. 18, 2001, Temp. State Dep't No. 01-56, 2001 WL 681233; 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, as Amended, U.S.-S. Korea, Jan. 18, 2001, Temp. State Dep't No. 01-55, 2001 WL 681227 [hereinafter 2001 Amendments to Korea SOFA Minutes]. These amendments are collected, along with other 2001 agreements that affect the Korea SOFA, at http://www.usfk.mil/usfk/uploads/130/us-rokstatusofforcesagreement2001amendments.pdf.

145. Egan, *supra* note 34, at 317–19 (noting that the 1991 amendment implements a more equitable arrangement and that both the 1991 and 2001 amendments favored the ROK).

146. *See* Exchange of Letters between Winthrop G. Brown, the Ambassador of the United States of America to the Republic of Korea and Tong Won Lee, Minister of Foreign Affairs of the Republic of Korea, U.S.-S. Korea, July 9, 1966, 17 U.T.S. 1830.

147. *See* 1991 Exchange of Letters, *supra* note 135, ¶ 1 (terminating the 1966 exchange of letters); Timm, *supra* note 52, at 459 (stating that the 1991 amendment requires the United States to submit an individual request for waiver in every case).

148. *See* 1991 Understandings to Korea SOFA, *supra* note 135, art. XXII, Paragraph 3(c), §4.

represents a marked improvement because it imposes the duty to request for a waiver on both parties.[149]

The 1991 amendment also permits the ROK authorities to "discuss, question, or object to any United States armed forces official duty certificate," and the United States must in turn give "due consideration" to their concerns.[150] While favorable to the ROK, this revision hardly strays from the original text of the agreed understandings.[151] The ROK continues to have no input in the determination of official duty, and the amendment vests jurisdiction with the United States if agreement cannot be reached within thirty days of the original duty certificate, leaving a diplomatic challenge vulnerable to political foot-dragging.[152]

Significantly, the 1991 amendments also terminated a list of representative cases that were meant to illustrate the criteria for a case of "particular importance."[153] One commentator noted that the deletion expanded the ROK's jurisdictional authority by giving it greater autonomy to decide whether a case was of "particular importance," but this expanded authority has yet to be realized in the implementation of the text.[154] The give-and-take evidenced in the negotiations for the 1991 amendments notwithstanding, U.S. military authorities acting in accordance with the policy of maximizing jurisdiction always request for a

149. *See id.*, art. XXII, Paragraph 3(c), § 1; Timm, *supra* note 52, at 459 n.89 (noting that the provision is symmetrical i.e. if the United States has primary jurisdiction the ROK request will be subject to the same procedures).

150. 1991 Understandings to Korea SOFA, *supra* note 135, art. XXII, Agreed Minute Re Paragraph 3(a), § 3(a).

151. *See* Agreed Understandings to Korea SOFA, *supra* note 135, Agreed Minute Re Paragraph 3(a), § 3(a) ("United States authorities shall give due consideration to any objection which may be raised by the Chief Prosecutor for the Republic of Korea.").

152. *See* 1991 Understandings to Korea SOFA, *supra* note 135, Agreed Minute Re Paragraph 3(a), § 3(b). After 1991, ROK authorities can refer duty certificate disputes to a U.S.-ROK joint committee or its criminal jurisdiction subcommittee for resolution. *Id.* The United States reserves the right to take jurisdiction after thirty days regardless of ongoing discussions, to preserve the defendant's constitutional right to a prompt and speedy trial. *Id.*

153. *See* 1991 Exchange of Letters, *supra* note 135, ¶ 1 (terminating the agreed understandings).

154. *See* Timm, *supra* note 52, at 459 n.90 (explaining that the ROK became more assertive in 1995, refusing to waive jurisdiction over "even simple assault cases and minor traffic cases," which caused the United States to convene discussions with the ROK that brought the practice to an end); *cf.* Lee, *supra* note 23, at 238 (noting that where the legal consequences of a situation turn on a matter of textual interpretation, the United States frequently takes the role of deciding and interpreting).

waiver from the ROK of its primary jurisdiction, and the ROK has almost always complied.[155]

The 2001 amendments were primarily aimed at alleviating concerns over environmental damage arising from U.S. military activities in the ROK, but it also improved the ROK's ability to obtain custody over accused U.S. soldiers. As a result, the ROK has now greater privileges to either maintain custody over the accused or to obtain an earlier transfer of custody (at the time of indictment) for certain heinous crimes.[156] This addresses local concerns that lack of access to the accused can hinder a full investigation of the allegations, thereby frustrating the administration of justice.[157]

2. Problems with Implementing the Korea SOFA

Despite the revisions over the years to the Korea SOFA that have brought it up to par with the NATO SOFA, the record of its implementation with regard to criminal jurisdiction and the interests of justice has been mixed. The popular impression among Koreans is that U.S. soldiers break the law with little to no repercussions.[158] U.S. sources tend to report off-duty offenses by

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155. *See* Jung & Hwang, *supra* note 35, at 1130 (discussing statistics that show the ROK handed over ninety-seven percent of cases where it had primary jurisdiction upon U.S. request (citing JANG-HIE LEE ET AL., A STUDY ON THE STATUS OF FORCES AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA 9 (2000))); Lee, *supra* note 23, at 229 (stating that the United States always requests waivers and the ROK is bound by the agreed minutes to hand over primary jurisdiction in nearly all instances). *But see* Wexler, *supra* note 20, at 63 (noting that there is evidence of a gradual expansion in ROK jurisdiction (citing Egan, *supra* note 33, at 319–20)).

156. *See* 2001 Amendments to Korea SOFA Minutes, *supra* note 144, art. XXII, Add a New Agreed Minute *re* Paragraph 5(c), § 3 (including in the list of heinous crimes murder, rape, kidnapping for ransoms, illegal drug trafficking, manufacturing illegal drugs for distribution, arson, robbery with a dangerous weapon, attempts to commit the foregoing offenses, assault resulting in death, driving under the influence resulting in death, fleeing the scene of a fatal traffic accident, and offences which include one or more of the aforementioned offenses as lesser included offenses).

157. *See, e.g., Commentator Deplores South Korean "Subjugation" to US Interests*, BBC Summary of World Broadcasts, Jun. 7, 2000, *available at* LexisNexis AllNews Database and on file with Author (quoting Professor Kang Chi-won that "[t]he problem, above all, is the inability of ROK authorities to interrogate US service members who are under physical detention"); *cf.* Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, 2000 ARMY LAW. 23, 27 (noting that the Japanese treated U.S. refusals to turn over rape suspects in cases where Japan had primary jurisdiction as a means to impede investigations and enable U.S. soldiers to escape justice).

158. *See, e.g.*, BAKER, *supra* note 39, at 161 (discussing Korean protests against special treatment when a Korean Court sentenced Private Kenneth Markle to fifteen

U.S. military personnel, for which the ROK authorities routinely impose fines and jail terms.[159] The reputation of impunity may be overemphasized, but the issue remains as to incidents that go unreported or for the minority of cases that fall under the Korea SOFA's official duty exception.

As discussed above, the official duty exception in the Korea SOFA permits the United States to unilaterally determine official duty status.[160] In 2002, the inherent asymmetry of this provision generated serious tension between the two allies. On June 13, 2002, two thirteen year-old girls were run over and killed by a sixty-ton U.S. armored minesweeper en route to a training exercise when walking to a birthday party in a village fifteen miles north of Seoul.[161] Although the Korea SOFA provides for full and mutual assistance from both parties in the investigation of an offense,[162] Korean authorities were not given access to the accident scene during the crucial early stages of the investigation.[163] U.S. military authorities quickly classified the accident under the official duty exception of the Korea SOFA,

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years imprisonment for a brutal rape and murder in 1992); Gwyn Kirk & Carolyn Bowen Francis, *Redefining Security: Women Challenge United States Military Policy and Practice in East Asia*, 15 BERKELEY WOMEN'S L.J. 229, 256–57 (analyzing Korean resentment toward light sentences imposed on U.S. soldiers for crimes against Koreans in relation to harsher punishments for crimes against another U.S. soldier).

159. *See, e.g.*, Franklin Fisher, *Lawyer: Americans Can Expect Fair Trial in S. Korea*, STARS & STRIPES, Apr. 15, 2007, *available at* http://www.stripes.com/article.asp?section=104&article=45096 (summarizing various cases where Korean courts imposed sentences against U.S. soldiers but also noting their general leniency); Anthony Lukas, *Seoul Convicts First U.S. Civilian Under Accord*, N.Y. TIMES, Feb. 9, 1968, at 10 (discussing four cases where Korean courts handed down verdicts for offenses against Koreans by U.S. soldiers ranging from assault, rape, and negligent homicide).

160. *See supra* notes 136–38 and accompanying text.

161. Jeremy Kirk, *Year in Review: A Look Back at the Top Pacific Stories from 2002—Turmoil in S. Korea*, STARS & STRIPES, Jan. 2, 2003, *available at* http://www.stripes.com/article.asp?section=104&article=11868&archive=true.

162. *See* Korea SOFA, *supra* note 18, art. XXII, § 6(a) ("The military authorities of the United States and the authorities of the Republic of Korea shall assist each other in the carrying out of all necessary investigation into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense.").

163. *See* Lee, *supra note* 23, at 215–16 (noting that Korean police were given limited authority to investigate despite the provisions of the Korea SOFA); *What Lies Under the SOFA?*, KOREA TIMES, May 7, 2003, *available at* LexisNexis AllNews Database and on file with Author (reporting that Korean police did not initially have access to the investigation because of the number of military vehicles at the scene).

and the family of each girl was compensated the equivalent of about US$150,000.[164]

According to the U.S. inquiry, the tragic events on that day came down to a faulty communication headset in the vehicle, but local Koreans were dubious about the official duty determination because standard operating procedures were not followed at the time of the accident.[165] After mass protests erupted in Seoul when the United States declined to prosecute the men responsible, the United States reversed its earlier position and decided to try the soldiers for negligent homicide in courts martial.[166] Despite the ROK request for waiver of jurisdiction, U.S. military authorities refused, insisting that because the case fell under the official duty exception, "there was insufficient cause for a precedent-setting transfer of jurisdiction."[167] Both soldiers were subsequently acquitted by military juries.[168]

The death of the two girls became a focal point for Korean resentment towards the U.S. military presence in the ROK, and the invocation of the Korea SOFA to defend the outcome only intensified anti-U.S. feelings among the public.[169] The wave of

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164. *South Korea Agrees Damages for Families of Victims of US Forces Accident*, BBC Worldwide Monitoring, Jul. 20, 2002, *available at* LexisNexis AllNews Database and on file with Author (stating that each family received as compensation the approximate amount of US$150,000 in Korean Won, seventy-five percent of which was paid by the United States).

165. *See* Paul Wiseman, *U.S.-South Korea Relations May Sway Election*, USA TODAY, Dec. 19, 2002, at 16A (reporting on how Koreans near the accident felt responsibility should be attributed higher in the command chain but that the U.S. inquiry attributed the accident to faulty communication equipment alone).

166. *See* Lee, *supra* note 23, at 215 (stating that the United States "reluctantly charged" the soldiers with negligent homicide after Koreans organized mass protests); Richard Halloran, Editorial, *The Rising East: Growing Anti-Americanism Festers in South Korea*, HONOLULU STAR-BULLETIN, Jul. 21, 2002, ¶ 6, *available at* http://archives.starbulletin.com/2002/07/21/editorial/halloran.html (stating that U.S. military authorities initially declined to prosecute the men involved but changed face in reaction to public pressure).

167. *U.S. Refuses Korean Justice For Soldiers*, BBC NEWS, Aug. 7, 2002, http://news.bbc.co.uk/2/low/asia-pacific/2178156.stm (quoting U.S. Force Korea Chief of Staff, Lieutenant General Daniel Zanini); *see also* Lee, *supra* note 23, at 215 (stating that the ROK request for waiver of U.S. jurisdiction in 2002 was the first in the history of the Korea SOFA).

168. *See Korean Anger as U.S. Soldiers Cleared*, BBC NEWS, Nov. 22, 2002, http://news.bbc.co.uk/2/low/asia-pacific/2497947.stm.

169. *See* BAKER, *supra* note 39, 163–64 (describing that for many Koreans the tragedy became emblematic of the unacceptable burden imposed by the U.S. military presence and the problems with the Korea SOFA).

anti-U.S. protests following the acquittals factored significantly in Roh Moo-Hyun's victory in the ROK presidential election in December 2002, who structured his campaign around greater equality in the U.S.-ROK alliance and SOFA reform.[170] The United States resisted calls to reform the Korea SOFA, but pledged to work with the ROK to improve the operation of the agreement.[171]

The aftermath of the accident typifies how the asymmetrical implementation of criminal jurisdiction under SOFAs can produce negative political ramifications between the sending and receiving states. It also highlights the limited ability of the ROK to hold the official duty process to account; the certification is essentially a *fait accompli.* The asymmetry and ambiguity of the official duty certification process, as well as the initial unwillingness to pursue charges against the men responsible, illustrates how the current implementation of criminal jurisdiction under the Korea SOFA can frustrate the administration of justice for victims of misconduct by U.S. soldiers.

These concerns are exacerbated by the ROK's longstanding deference towards the United States in the operation of the waiver exception provisions. A study from 1979 showed that the ROK waived jurisdiction in 21,195 of 23,723 cases of crimes committed by U.S. servicemen between 1967 and 1978, and chose to exercise primary jurisdiction in 177 cases, a figure that represents 0.83 percent of the total number of cases.[172] The 1991 and 2001 amendments, and also the 2002 minesweeper incident,

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170. *See* MARK E. MANYIN, U.S. CONG. RESEARCH SERV., SOUTH KOREAN POLITICS AND RISING "ANTI-AMERICANISM": IMPLICATIONS FOR U.S. POLICY TOWARD NORTH KOREA 1–2 (2003), *available at* http://fpc.state.gov/documents/organization/27530.pdf (stating that Roh's electoral campaign benefitted from massive demonstrations in late 2002 protesting the acquittals); Kirk, *supra* note 161 (reporting that Roh campaigned on platform of greater control over U.S. personnel and SOFA renegotiations).

171. *See, e.g.*, Embassy of the United States in Seoul, Korea, *The June 13 Accident- Q's and A's,* Question 10, http://seoul.usembassy.gov/june13acc.html (last visited Nov. 22, 2009) (providing that no changes to the ROK SOFA would have prevented the accident and that the United States committed a joint task force to improve operation of the agreement).

172. Soon Sung Cho, *Status of Forces Agreement Between the Republic of Korea and The United States: Problems of Due Process and Fair Trial of U.S. Military Personnel, in* U.S. STATUS OF FORCES AGREEMENTS WITH ASIAN COUNTRIES: SELECTED STUDIES 49, 55 (Charles L. Cochran & Hungdah Chiu eds., 1979) (citing a report by the Korean government on crimes committed by U.S. soldiers).

appear to have had little effect on the ROK's reluctance to prosecute offenses committed by U.S. forces. In 2003, the pacific edition of Stars and Stripes, the daily newspaper for the U.S. military, reported that the ROK "typically defers jurisdiction to [U.S. military authorities] except in high-profile cases."[173] Citing figures from U.S. military authorities, the report noted that the ROK had primary jurisdiction in over 300 crimes committed by U.S. personnel in the ROK in 2002, but elected to prosecute only twenty cases.[174]

Even when Korean authorities exercise jurisdiction over the offending U.S. soldier, the punishment imposed often amounts to no more than "a slap on the wrist."[175] Between 2004 and 2006, Korean authorities investigated 718 incidents involving U.S. servicemen, yet only six U.S. servicemen were serving sentences in Korean prisons as of April 2007.[176] One commentator complained that U.S. servicemen detained by Korean authorities are housed in prisons "especially remodeled to meet the standards of third-class American hotels."[177]

Under the waiver exception, the United States always requests that the ROK waive its primary jurisdiction, even for cases that involve off-duty offenses. The ROK almost always complies with such requests, whether out of custom or because of an asymmetrical bargaining position.[178] Commentators have rightly pointed out that a waiver of jurisdiction is meant to transfer adjudicatory jurisdiction to the requesting state to facilitate proper disposition of the offending soldier.[179] In

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173. Jeremy Kirk & Choe Song-won, *S. Korea Still Pondering Hit-and-run Case*, STARS & STRIPES, Dec. 13, 2003, *available at* http://www.stripes.com/article.asp?section=104&article=18478&archive=true.

174. *See id.*

175. Jung & Hwang, *supra* note 35, at 1131; *see also* Ernest V. Harris, *The Judicial Dilemma* O'Callahan v. Parker *Presents to SOFAs*, 3 GA. J. INT'L & COMP. L. 164, 174 (1973) (providing examples of lenient treatment of U.S. personnel by Korean courts, including an instance where a defendant was "fined only $110.00 for negligent homicide"); Fisher, *supra* note 159 ("'[U.S. servicemembers] get lenient punishment, absolutely, I can tell you that,' said Kim Jong-pyo, an attorney in Seoul.").

176. *See* Fisher, *supra* note 159.

177. Cho, *supra* note 172, at 55.

178. *See supra* notes 127, 155 and accompanying text.

179. *See* Jung & Hwang, *supra* note 35, at 1129 (explaining that waiver provisions are meant to allow the requesting state to try and punish the offenders and not to immunize them from prosecution); *see also* Lazareff, *supra* note 70, at 203 (stating a waiver of jurisdiction is meant to ensure that justice is done and the offender is tried).

practice, however, the waiver exception of the Korea SOFA appears to have achieved the opposite effect.

To their credit, in recent years U.S. military authorities have taken measures to reduce the incidence of criminal offenses by U.S. soldiers in the ROK.[180] Nonetheless, potential problems with jurisdiction linger and the policy to maximize jurisdiction remains largely unchanged.[181] The following section discusses in greater detail how this phenomenon can entail a conflict of obligations between the Korea SOFA and the ICCPR.

3. Examining the Conflicting Obligations of the Korea SOFA and the ICCPR

If victims of crimes committed on Korean territory by U.S. service members are not afforded an effective legal remedy, the ROK will fail to satisfy its obligations under article 2 of the ICCPR, regardless of the identity of the alleged perpetrator.[182] But for the Korea SOFA, the ROK would have exclusive jurisdictional authority to prosecute crimes committed by U.S. soldiers on its territory.

Two features of the Korea SOFA raise particular concerns. First, official duty determinations are solely within the province of the United States and cannot be effectively questioned by Korean authorities under the terms of the Korea SOFA.[183] This permits the United States to unilaterally delimit the extent to which Korean jurisdiction applies to the acts of its personnel. Second, the United States always requests for a waiver of

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180. *See* Ashley Rowland, *Crime Reports Up in South Korea After Curfew Eased*, STARS & STRIPES, Apr. 3, 2009, *available at* http://www.stripes.com/article.asp?section=104&article=61768 (reporting on renewed curfew hours imposed by U.S. military authorities to curb off-duty crimes by U.S. soldiers); *Crimes by Foreigners Jump 48% in 2004*, KOREA TIMES, Feb. 12, 2005 (attributing decrease in crimes by U.S. soldiers to tighter control by U.S. military authorities in response to anti-U.S. sentiment after the 2002 minesweeper accident).

181. *See* U.S. Forces Korea Reg. No. 1–44, *Criminal Jurisdiction Under Art XXII, Status of Forces Agreement*, ¶¶ 5(b), 7(f) (Mar. 1, 2010), *available at* http://8tharmy.korea.army.mil/g1_ag/programs_policy/publicationsrecords/regulations/usfk/usfk/USFK Reg 1-44 Criminal Jurisdiction Under Art XXII, SOFA.pdf (stating that current U.S. policy is to maximize jurisdiction over foreign criminal cases and that commanders are to consult with U.S. Ambassador to Korea as to whether waivers of jurisdiction should be requested).

182. *See supra* note 115.

183. *See supra* notes 160–65 and accompanying text.

jurisdiction from the ROK, and the proportion of waivers of jurisdiction granted overwhelmingly favors the United States.[184]

The United States retains jurisdiction in both situations, but the ROK receives no substantial guarantee that U.S. military authorities will investigate cases in an appropriate and impartial fashion or provide effective remedies where necessary.[185] Moreover, U.S. military personnel often receive light sanctions in relation to the severity of their crimes.[186] This undermines the effective remedy requirement contemplated under article 2(3) of the ICCPR. It is also important to note that the "effective remedy" provision is the primary means by which the rights recognized within the ICCPR are secured.[187]

Irrespective of the Korea SOFA, the ROK continues to be bound by its obligations under article 2 of the ICCPR as a state party to that agreement. Although human rights treaties re-contextualized part of the discourse—from the protection of state sovereignty to the protection of persons—the protection of individual rights is still primarily situated within a domestic legal framework.[188] Pursuant to the international law principle mandating exhaustion of domestic remedies, the ROK must be the first guarantor of covenant rights for Korean nationals when their rights are affected.[189] When the ROK waives its primary jurisdiction pursuant to the Korea SOFA, however, it no longer has jurisdiction to retain custody over the perpetrators, investigate the allegations, or provide an effective remedy to aggrieved individuals under article 2(3). If the United States subsequently neglects to pursue effective investigations, develop a judicial remedy, or otherwise see that justice is done, individuals who have suffered such violations can claim no effective remedy.

Under these circumstances, does the ROK have a duty to implement the Korea SOFA in a manner consistent with its ICCPR obligations? In light of its policy to maximize jurisdiction over its soldiers, is the United States responsible for the failure to

184. *See supra* notes 172–79 and accompanying text.

185. *See* Lazareff, *supra* note 70, at 264 (criticizing generally the operation of waiver provisions in SOFAs and stating that grant of waiver should be subject to criminal proceedings being taken by the state in whose favor the waiver is granted).

186. *See supra* notes 76–78 and accompanying text.

187. *See supra* notes 113–14.

188. *See supra* note 106 and accompanying text.

189. *See supra* notes 109–11 and accompanying text.

secure effective remedies to Korean individuals injured by the crimes of U.S. soldiers? The issues here may be restated as two questions of international law. First, if the implementation of the Korea SOFA frustrates article 2 of the ICCPR, which treaty should take precedence, and what are the ROK's obligations to improve the operation of the Korea SOFA? Second, are U.S. obligations under article 2 engaged when U.S. personnel violate the rights of individuals who are neither subject to U.S. jurisdiction nor within U.S. territory? These questions, and the means to resolve them under international law, are the subject of Part II.

II. *APPROACHES TOWARD HARMONIZING THE CONFLICT BETWEEN SOFAS AND THE ICCPR*

Complying with the Korea SOFA leaves the ROK in potential violation of its ICCPR obligations. Treating this as a breach of international law by the ROK alone, however, fails to address the reality of the situation. First, but for the Korea SOFA, the ROK would be able to prosecute U.S. soldiers for breaking Korean law, thereby vindicating any rights that have been violated. Second, aside from diplomatic channels, the ROK has no means of legal redress under the Korea SOFA if the United States fails to take adequate measures to investigate or prosecute offenses.

This Note argues that any resolution of this problem in international law must necessarily have two prongs, because both ROK and U.S. obligations under the ICCPR are engaged. Each prong implicates a different aspect of the problem and a different solution, with accordingly different implications for receiving states and sending states in general. Part II.A explores how competing treaty obligations between human rights treaties and other international agreements can be resolved, with an eye to accommodating the ROK's treaty obligations under both the Korea SOFA and the ICCPR. Part II.B analyzes the nature of the legal obligation imposed by article 2 of the ICCPR and examines how the actions of U.S. soldiers in the ROK engage U.S. obligations under the ICCPR.

A. *Addressing the Problem from the ROK's Angle: Resolving Competing Treaty Obligations*

Any consideration of the competing obligations faced by the ROK between the Korea SOFA and the ICCPR must begin with the principles of construction that control when two treaties have conflicting or incompatible provisions. This Part discusses the current state of international law on treaty conflicts. Because the European courts have developed jurisprudence on the issue of treaty obligations conflicting with human rights treaties, this Note will first consider the European perspective, and then turn to the approach adopted by the HRC.

1. Treaty Conflicts: A Theoretical Perspective

To date, experts consider efforts to codify the international law principles on inconsistent treaty obligations incomplete and unsatisfactory, particularly where multilateral treaties such as the ICCPR are concerned.[190] The Vienna Convention on the Law of Treaties ("VCLT") codifies the law of treaties.[191] Article 30 of the VCLT attempts to address conflicting treaty provisions with a last-in-time rule: as between two successive treaties with the same parties, covering the same subject matter, the earlier treaty is binding "only to the extent that its provisions are compatible with those of the later treaty."[192]

When two successive treaties do not cover the same subject, however, the VCLT is silent on a principle of construction. The VCLT addresses neither the level of generality that the phrase "same subject matter" should be understood, nor whether individual provisions that have the same subject matter should also be construed under article 30.[193] It is evident that article 30

190. *See* MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 315–16 (2005) (remarking that the current state of treaty conflict rules for multilateral treaties is widely considered unsatisfactory); *see also* John E. Parkerson, Jr. & Carolyn S. Stoehr, *The U.S. Military Death Penalty in Europe: Threats from Recent European Human Rights Developments*, 129 MIL. L. REV. 41, 71–72 (1990) (stating that courts addressing treaty conflicts "will be faced with a construction decision where there is no clear principle of international law").

191. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

192. *Id.* art. 30(3).

193. *See* Parkerson & Stoehr, *supra* note 190, at 71 ("It is not entirely clear whether 'the same subject matter' of article 30 refers only to entire treaties dealing with the same

of the VCLT is incomplete where resolving conflicts between treaty norms are concerned.[194] A simple last-in-time rule, moreover, produces particularly unsatisfactory results with human rights treaties; such treaties represent fundamental norms that privilege the rights of the individual as human beings, over and above other international obligations that states parties may have.[195] Commentators have argued that conflicts arising between human rights treaties and other types of international agreements should be addressed with something more than a *lex posterior* rule.[196]

More recently, Professor S.A. Sadat-Akhavi has provided some insight into understanding the problem of incompatible treaty obligations. Two treaties conflict when compliance with the norms of one treaty puts a state in breach of another treaty to which it is a party.[197] A conflict is partial rather than total, however, when treaty norms conflict only under certain circumstances.[198] Sadat-Akhavi distinguishes between a real and a false conflict: a conflict between treaties is false when an alternate implementation of their provisions exists whereby all their terms

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subject matter or whether it might also apply to provisions concerning the same subject matter in treaties that, as a whole, pertain to different matters."); *see also* SAYED ALI SADAT-AKHAVI, METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES 80–84 (2003) (discussing how Vienna Convention on the Law of Treaties ("VCLT") does not address how to determine what constitutes a later treaty, does not account for the position of regional treaties, or for treaties containing obligations *erga omnes*).

194. *See* FITZMAURICE & ELIAS, *supra* note 190, at 315 (commenting that article 30 of the VCLT "does not provide all the answers" for potential treaty conflicts).

195. *See* SADAT-AKHAVI, *supra* note 193, at 83 (distinguishing human rights treaties from other treaties because they emphasize "the protection of human beings" over "the mutual obligations of States"); *see also supra* note 100 and accompanying text (discussing how human rights treaties represent fundamental values).

196. Sadat-Akhavi quotes K. Zemanek, who writes:

> One may doubt that conflicts of this nature can be resolved by a, however modified, *lex posterior* rule. To put [human rights treaties] on the same footing and subject them to mechanical rules neglects their different role in [the] international system. A distinction according to their purposes and to the values embodied in them should be introduced to protect essential values which have once been agreed on against infringement.

SADAT-AKHAVI, *supra* note 193, at 83 (internal citations omitted).

197. *See id.*, at 5 (defining any given treaty as "a set of treaty norms" and conflict arises when compliance with one norm entails noncompliance with the other); *see also* Parkerson & Stoehr, *supra* note 190, at 71–72 (discussing how conflict can occur when a receiving state's compliance with a SOFA places it in breach of another treaty).

198. *See* SADAT-AKHAVI, *supra* note 193, at 11.

can be reconciled.[199] One treaty norm may prohibit one or several ways of complying with another norm, but they "remain compatible so long as one norm leaves available at least one manner in which the other norm can be respected."[200]

As the following part discusses, this theoretical foundation is consistent with the approach adopted by the European courts for reconciling conflicting treaty norms with human rights treaties.

2. Examples from European Jurisprudence

European courts have confronted the issue of conflicting obligations between the European Convention on Human Rights[201] ("ECHR") and two international agreements to which the United States is a party: the NATO SOFA and the extradition treaty between the United States and the United Kingdom.

In *Soering v. United Kingdom*,[202] the European Court of Human Rights ("ECtHR") rejected the idea that state obligations under an extradition treaty should supersede obligations created by human rights treaties.[203] The ECtHR addressed the problem of extraditing Soering, a West German national, from the United Kingdom to the United States to face capital murder charges in the state of Virginia.[204] Soering argued that compliance with the extradition treaty would subject him to cruel and inhuman treatment because of the death row phenomenon,[205] where a person could spend years awaiting execution under difficult conditions while the appeals process was exhausted.[206]

The ECtHR took notice of the death row phenomenon, and found that exposing Soering to such treatment would likely exceed the thresholds permitted by article 3 of the ECHR.[207]

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199. *See id.* at 34 (discussing how false conflicts between treaties can be reconciled when "there is at least one way of complying with all their requirements").

200. *Id.* at 41.

201. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

202. 161 Eur. Ct. H.R. (ser. A) (1989).

203. *See* HENKIN ET AL., *supra* note 93, at 914 (summarizing that in *Soering* the European Court "rejects the notion that international obligations created by extradition treaties prevail over human rights obligations.").

204. *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 2–8, ¶¶ 11–26.

205. *Id.* at 38, ¶ 76.

206. *Id.* at 41–43, ¶¶ 106–07.

207. *Id.* at 44, ¶ 111. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "No one shall be subjected to

Because the extradition treaty permitted the extraditing state to refuse transfer if the requesting party failed to give adequate assurances that the death penalty would not be carried out, the conflict between the extradition treaty and the ECHR is only partial.[208] Under the circumstances, however, the ECtHR determined that, despite the good faith efforts of the United Kingdom, article 3 was engaged, because the assurances obtained from the state of Virginia were inadequate to ensure that the death penalty would not be executed.[209] Accordingly, the ECtHR concluded that because the assurances were inadequate, there was a real risk of the death penalty being sought and extraditing Soering under such circumstances would place the United Kingdom in contravention of its obligations under the ECHR.[210]

In *Netherlands v. Short*,[211] the Dutch High Court also confronted a conflict of obligations: between Netherland's commitments under the ECHR, and its obligation to transfer jurisdiction over a U.S. soldier to the United States under the NATO SOFA.[212] Short was a U.S. serviceman who was arrested by Dutch police on suspicion of murdering his Turkish wife while he was stationed in the Netherlands.[213] The Netherlands was caught between its obligations under the sixth protocol to the ECHR[214]—which bans capital punishment—and the criminal jurisdiction provisions of the NATO SOFA. Although the NATO SOFA vested the United States with exclusive jurisdiction over

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torture or to inhuman or degrading treatment or punishment." ECHR, *supra* note 201, art 3.

208. *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 12, ¶ 36–37 (discussing how the extradition treaty permits refusal to extradite when assurances that the death penalty will not be carried out are inadequate).

209. *See id.* at 38–39, ¶¶ 97, 99.

210. *Id.* at 44, ¶ 111 (holding that extraditing Soering to the United States would "give rise to a breach of Article 3").

211. Nederlanden/Short, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 30 maart 1990, NJ 249 (ann. A.H.J. Sw) (Neth.), *translated in* 29 I.L.M. 1375 *and* 22 Neth. Y.B. Int'l L. 432 (1991).

212. *See Summary of Decision of Hoge Raad*, 29 I.L.M. 1375, at 1389, ¶ 3.2–.5; *see also Text of Opinion of Advocaat-Generaal Strikwerda*, 29 I.L.M. 1375, at 1376, ¶ 1.1–.11.

213. *See id.* at 1388, ¶ 3.1.; Keith Highet et al., *International Decisions – Short v. Kingdom of the Netherlands*, 85 AM. J. INT'L L. 698, 699–700 (1991) (recounting facts of the case).

214. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1988, Eur. T.S. No. 114 ("[The] death penalty shall be abolished. No one shall be condemned to such penalty or executed.").

Short, the Dutch refused to comply with the NATO SOFA because they believed that turning Short over to U.S. authorities could subject him to the death penalty, and put the Dutch in violation of the ECHR's prohibition against capital punishment.[215] The Dutch relinquished custody only after the United States agreed not to seek the death penalty on the basis of Short's mental incapacity.[216]

Soering and *Short* have been recognized as contributions to a limited but developing jurisprudence with ramifications for cases where a state party to a human rights treaty is faced with the removal of an individual from its jurisdiction.[217] These precedents indicate that states will be liable for any human rights violations that follow as a result of complying with another agreement, such as a SOFA, and that receiving states will be less likely to respond to U.S. demands without adequate assurances that the United States will respect their human rights undertakings.[218] These cases also demonstrate that total conflict between two treaties is rare, and where conflict is partial, the measures taken to reconcile the two competing obligations must conform to the standards of the human rights treaty.

A more recent example of this developing jurisprudence centers on the U.S. use of European military sites in the practice of extraordinary rendition. In 2006, the European Parliament established a temporary committee to examine the participation of European nations in the transportation and detention of prisoners by the United States, including states that are party to

215. *See* Highet et al., *supra* note 213, at 700 (describing the Dutch position).

216. *See* Erik Rosenfeld, *Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute*, 2 WASH. U. GLOBAL STUD. L. REV. 273, 287 (2003) (stating that Short was released after the United States informed the Dutch that the death penalty was not applicable to him); *see also* Eichelman, supra note 157, at 30–31 (noting that the distinction between the United States not seeking the death penalty due to Short's psychiatric state and waiving its right to seek the death penalty as per the Dutch request is a narrow one).

217. *See* Richard B. Lillich, Note, *The Soering Case*, 85 AM. J. INT'L L. 128, 142–43 (1991) (observing that *Soering* has far-reaching implications beyond the extradition context); *see also* Highet et al., *supra* note 213, at 702 (stating that *Short* is consistent with Lillich's view on *Soering*); Ruppert, *supra* note 57, at 46 (arguing that *Short* illustrates a relatively small sovereign's ability to disregard SOFA obligations in light of a conflicting treaty).

218. *See* Ruppert, *supra* note 57, at 46 (stating that these cases indicate "host nations are less likely to be more generous to U.S. interests than a SOFA requires when a conflict exists with another treaty obligation or a nation's sense of values.").

the NATO SOFA.[219] In its submission to the temporary committee, the International Commission of Jurists[220] pointed out:

> Where the base was subject to a SOFA, or other legal agreement, which prevented entry on, search of, or otherwise inhibited effective investigation of the allegations, the positive obligation on the State would include an obligation to seek renegotiation of the agreement, or where this was not possible, to refuse to renew the agreement on terms which failed to allow for effective investigations.[221]

This position was subsequently adopted in a formal resolution of the European Parliament.[222]

The examples from Europe indicate that the obligations of human rights treaties like the ICCPR represent fundamental transnational norms, and should be treated as imposing a minimum level of state obligations to individuals. The European approach provides an example of how human rights obligations and SOFAs can be reconciled through assertive action by the receiving state, and is instructive for the ROK's context.[223] While the HRC's jurisprudence is not as extensive in this area of

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219. *See generally* European Parliament Decision Setting Up a Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, 2006 O.J. C 287 E/159.

220. The International Commission of Jurists is a nongovernmental organization composed of a standing group of over sixty eminent jurists, and has distinguished itself with its authoritative legal positions on human rights and the promotion of rule of law. For more information on the commission's composition and activities, see Int'l Comm'n of Jurists, About Us, http://www.icj.org/rubrique.php3?id_rubrique=11&lang=en (last visited Mar. 10, 2010).

221. Int'l Comm'n of Jurists, *Submission to European Parliament Temporary Committee on Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (TDIP)* 9 (Nov. 20, 2006), *available at* http://www.icj.org/IMG/TDIPFINAL.pdf. The commission reiterated this position in a subsequent submission to the Committee Against Torture, the supervisory body for the U.N. Convention Against Torture, on the status of Poland's obligations under the NATO SOFA with regard to CIA renditions. According to the commission, Poland's human rights obligations included article 2 of the ICCPR, and when the NATO SOFA agreement impeded effective enforcement of those rights, Poland had a positive obligation to seek renegotiation or even refuse to renew the agreement if it failed to allow for effective investigations. *See* Int'l Comm'n of Jurists, *Open Letter to Committee Against Torture* 4 (May 7, 2007), *available at* http://www2.ohchr.org/english/bodies/cat/docs/ngos/icj.pdf.

222. *See* European Parliament Resolution of 14 February 2007 on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, 2007 O.J. C 287 E/309, at 325.

223. *See infra* Part III.A.

inquiry, the general articulation of fundamental, nonderogable norms accords with the European approach.

3. The Approach of the Human Rights Committee

This Part turns to the approach of the HRC regarding the fundamental, nonderogable norms codified in the ICCPR. The HRC has not specifically addressed the issue of whether the ICCPR should preempt inconsistent treaties. Within the context of extradition treaties, however, the general approach adopted by the HRC with regard to incompatible treaty obligations is consistent with that of the ECtHR.

In *Ng v. Canada*,[224] the HRC found Canada to have violated ICCPR article 7's prohibition against cruel and inhuman treatment, when it extradited Mr. Ng to California without seeking or receiving assurances from the United States that he would not be subject to execution by gas chamber.[225] The HRC recognized that state parties will often have other bilateral treaty obligations, but emphasized that such obligations must be implemented in a way that is consistent with the guarantees of the ICCPR, particularly with article 2(1).[226] The method advocated by the HRC for curing this incompatibility is consistent with the European approach: the extraditing state must obtain an undertaking from the requesting state that the individual being extradited will not be subjected to treatment that violates a substantive right under the ICCPR.[227]

The priority of the ICCPR over other international obligations can also be inferred from the principle of nondenunciation. No state party may repudiate its obligations under the ICCPR in favor of its obligations under another treaty, because the ICCPR has no provision regarding its termination, does not provide for denunciation or withdrawal, and permits no implications of a right of denunciation.[228] This follows from the

224. HRC, *Communication No. 469/1991: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Ng v. Canada), U.N. Doc. ICCPR/C/49/D/469/1991 (Jan. 7, 1994).

225. *See id.* ¶ 16.4.

226. *See id.* ¶ 14.1.

227. *See id.* ¶ 16.4.

228. HRC, *General Comment No. 26: Continuity of Obligations*, ¶¶ 3–5, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Aug. 12, 1997).

inherent nature of the ICCPR as implementing the fundamental guarantees of the UDHR:

> [T]he Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights ... [a]s such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.[229]

The HRC has stated unequivocally that article 2 represents norms so integral to the object and purpose of the ICCPR that no state party may reserve or limit their applicability.[230] Therefore, the obligations imposed on state parties by the ICCPR continue to apply regardless of other agreements that the state parties may have entered into with other parties. On this reasoning, a temporary basing agreement such as the Korea SOFA should not prevent a state party from giving effect to the rights codified in the ICCPR.[231]

B. *Engaging U.S. Obligations Under ICCPR Article 2*

The foregoing discussion of the ROK's competing treaty obligations shows that receiving states must observe the standards of the ICCPR as they implement their SOFA obligations. The question then arises as to whether a sending state's obligations under the ICCPR affect their ability to negotiate, execute, and implement SOFAs. Under the prevailing interpretation of the ICCPR, state parties are not absolved of responsibility for actions taken by their agents or representatives that happen to occur outside their sovereign territory.[232] As this Part explains, this general rule has significant implications for sending states like the United States.

1. Structural Obligations Surrounding the ICCPR

Before turning to a detailed discussion of ICCPR article 2, two structural considerations that influence the interpretation

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229. *Id.* ¶ 3.

230. *General Comment 24, supra* note 100, ¶¶ 9, 11 (noting that guarantees such as article 2(3) provide the necessary framework for the covenant and are "essential to its object and purpose").

231. *See supra* note 100, 195–196, and accompanying text.

232. *See infra* notes 246–59 and accompanying text.

and implementation of the ICCPR must be addressed. The first of these structural obligations is the VCLT, which is recognized as encapsulating well-settled principles of treaty construction.[233] The VCLT provides the substantive canons of construction for the ICCPR, as it does for all other treaties. According to the HRC:

> Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. . . . Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.[234]

Tracking the obligation of good faith performance is the general rule of interpretation that treaties be construed in good faith, taking into account "any relevant rules of international law applicable in the relations between the parties."[235] Under international law, states are obliged not to frustrate or undermine the object and purpose of a treaty when it is a signatory.[236] Therefore, both the United States and the ROK must consider their obligations under international law as state parties to the ICCPR when implementing the provisions of the Korea SOFA.

The second structural obligation is derived from the nature of the ICCPR itself. As a multi-lateral treaty, the ICCPR is a

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233. The United States has signed but not ratified the VCLT. Nonetheless, the United States accepts the VCLT as reflecting CIL on treaty application and interpretation. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §102 cmt. f (1987); *see also* U.S. Dep't of State, International Legal Authorities, http://www.state.gov/s/l/treaty/authorities/international (stating that the United States has yet to ratify the VCLT but nonetheless adheres to many VCLT rules for treaties) (last visited Nov. 10, 2009).

234. *General Comment 31*, *supra* note 106, ¶ 3. VCLT article 26 states, "'Pacta sunt servanda' Every treaty in force is binding upon the parties to it and must be performed by them in good faith." VCLT, *supra* note 191, art. 26.

235. VCLT, *supra* note 191, art. 31(3)(c). In determining the purpose and context of the treaty, suitable recourse may be had to the preamble and annexes of the treaty. *Id.* art. 31(2).

236. *See* VCLT, *supra* note 191, art. 18 ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (*a*) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (*b*) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."). *Id.* art. 18.

document that sets out to establish a transnational community of mutual interests and obligations.[237] The HRC has stated:

> While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. . . . [T]he 'rules concerning the basic rights of the human person' are erga omnes obligations . . . . Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.[238]

This language from the HRC indicates that article 2 imposes an obligation on state parties that runs to the international community as a whole. Accordingly, state parties have a duty not to interfere with another state party's performance of its obligations under the ICCPR. The U.S. policy of maximizing jurisdiction under the Korea SOFA would fail on this criterion, because the policy hinders the ROK's ability to comply with its obligations under article 2.

These background norms for the operation of the ICCPR impose an affirmative obligation on the United States to refrain from those actions that frustrate the operation of the covenant. They do not, however, address the issue of whether the U.S. obligations under article 2 are actually engaged by its actions in the ROK. For that, the discussion must turn to whether article 2 applies extraterritorially to U.S. actions in the ROK.

2. The Extraterritorial Scope of Article 2

A state party's duty to protect individual rights under article 2 of the ICCPR runs to all persons "within its territory and subject to its jurisdiction."[239] Explication of this phrase is crucial for determining the nature of the obligations undertaken by state parties, especially with regard to its applicability beyond territorial boundaries. The crux of the issue is whether the phrase "within its territory *and* subject to its jurisdiction"[240] should be construed conjunctively or disjunctively.

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237. *See* ICCPR, *supra* note 26, pmbl.
238. *General Comment 31*, *supra* note 106, ¶ 2 (italics omitted).
239. ICCPR, *supra* note 26, art. 2(1).
240. *Id.* (emphasis added).

The U.S. position has been, and continues to be, that the plain meaning of the phrase indicates that the individual must be *both* within the state's territory, and subject to its jurisdiction.[241] Leading commentators argue that a bona-fide implementation of international human rights treaties, one that is loyal to their object and purposes, will accept the extraterritorial reach of those obligations.[242] Reading article 2(1) in this way also creates problems for numerous substantive rights defined under the ICCPR, and frustrates the object and purpose of the treaty.[243] For example, article 12(4) states that "[n]o one shall be arbitrarily deprived of the right to enter his own country."[244] This right would be devoid of meaning were the conjunctive reading to control, because the only time it could be exercised is when an individual is outside of the territory of its state.[245]

Instead, the HRC endorses the disjunctive reading of "and" in article 2(1), giving the ICCPR extraterritorial scope.[246] This means that a state party must respect and ensure the rights laid down in the covenant to anyone within the power or effective control of that state party, even if not situated within the territory

241. *See* Matthew Waxman, Principal Deputy Dir. of Policy Planning, U.S. Dep't of State, Opening Statement on the Report Concerning the International Covenant on Civil and Political Rights to U.N. Human Rights Committee (July 17, 2006), *available at* http://2001-2009.state.gov/g/drl/rls/70392.htm. *But see* Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78, 79 (1994) (stating that the legislative history of article 2(1) does not support a narrow territorial construction).

242. *See, e.g.*, Meron, *supra* note 241, at 82 ("Bona fide interpretation of human rights treaties by the administration and the courts is called for, in accordance with their object and purpose of promoting human rights, even where such interpretation leads to the extraterritoriality of humanitarian obligations of the United States."); *see also* VCLT, *supra* note 192, art. 29 ("Unless a different intention *appears from the treaty or is otherwise established*, a treaty is binding upon each party in respect of its entire territory.") (emphasis added).

243. *See* Meron, *supra* note 241, at 82 ("Narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights."); *see also* McGoldrick, *supra* note 108, at 48 (stating that while the conjunctive reading is "undoubtedly the more natural one" it is nonetheless "manifestly absurd").

244. ICCPR, *supra* note 26, art. 12(4).

245. *See* McGoldrick, *supra* note 108, at 48 (stating that the disjunctive construction is more sensible in light of the goals of the ICCPR).

246. *See General Comment 31*, *supra* note 106, ¶ 10. *But see* NOWAK, *supra* note 98, at 43 n.78 (arguing for a restrained reading of the disjunctive construction because states are not responsible for all violations on their territory, e.g. those committed by insurgents or by occupation forces).

of the state party.[247] As such, the United States has a general legal obligation to guarantee the covenant rights of Koreans if they are, for example, on U.S. military bases in the ROK (such as hired workers or independent contractors).[248] A failure to ensure covenant rights can rise to a violation of those rights by the United States if it does not "take appropriate measures or [exercise] due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."[249] Any territorial focus is further eroded, moreover, because article 2 imposes on state parties a duty to assist each other in bringing to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.[250]

There is substantial support for the idea that state parties must safeguard the rights recognized in the covenant and observe their obligations while they are acting abroad.[251] The HRC has emphasized, within the context of a state party committing violations of the covenant against its overseas citizens, that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."[252] It thus follows that the state duty to take adequate measures to bring to justice private perpetrators of covenant

247. *See General Comment 31, supra* note 106, ¶ 10 (noting that state parties are required by article 2(1) to guarantee the rights of those individuals subject to the effective control of their forces acting outside their territory, regardless of how such control is obtained).

248. *Cf.* Rasul v. Bush, 542 U.S. 466, 480–81 (2004) (recognizing that the exercise of effective and exclusive control by U.S. instrumentalities over U.S. overseas bases expands U.S. jurisdiction beyond its territorial borders).

249. *General Comment 31, supra* note 106, ¶ 8; *cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 cmt. e (1987) (indicating that states are responsible under international law for failing to provide remedies to foreign individuals for injuries inflicted by either state or private individuals for instances where "a remedy would be provided by the major legal systems of the world").

250. *See General Comment 31, supra* note 106, ¶ 18.

251. *See* NOWAK, *supra* note 98, at 44 (stating that it would be contrary to the purpose of the Covenant if state parties were not responsible for actions taken on foreign territory that violate the rights of persons subject to their authority).

252. HRC, *Communication No. 52/1979: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Saldias de Lopez v. Uruguay), ¶ 12.3, U.N. Doc. CCPR/C/13/D/52/1979 (Jul. 29, 1981).

violations should apply with even greater force to offenses committed by state actors in the territory of another state.[253]

Some ambiguity remains, however, as to whether U.S. obligations under article 2 are engaged when individuals not subject to the jurisdiction of the United States suffer rights violations at the hands of U.S. soldiers. As the next Part discusses, however, HRC jurisprudence indicates that the ICCPR applies to rights violations attributed to a state party's agents acting overseas, regardless of the nationality of the individuals concerned.

3. Subsequent Practice by the Human Rights Committee

To date, the general approach adopted by the HRC is that the scope of the ICCPR applies to the actions of state parties when they act abroad. On a number of occasions, the HRC has questioned states on the application of article 2(1) with respect to situations where members of its armed forces have committed offenses against foreign nationals while deployed outside their sovereign territory.[254]

During its consideration of Belgium's third periodic report under the ICCPR in 1998, the HRC raised the applicability of the covenant with regard to Belgium's deployment of peacekeepers in Somalia.[255] Typically, the U.N. concludes a SOFA with the state

253. *See id.* ¶ 12.1; *see also* Meron, *supra* note 241, at 79 (observing that in *Saldias* the HRC stated that article 2(1) carries no implication that state parties would not be liable for violations committed by their agents on the territory of another state).

254. *See, e.g.*, HRC, *Summary Record of the 2317th meeting: Consideration of the Fifth Periodic Report of Italy*, ¶ 17, U.N. Doc. CCPR/C/SR.2317 (Oct. 26, 2005) (endorsing the Italian view that the scope of the ICCPR applied to Italian peacekeeping actions abroad); *see also* McGoldrick, *supra* note 108, at 63–65 (discussing HRC sentiment toward the applicability of Covenant obligations in the context of overseas military actions by Belgium, Israel, and Croatia).

255. *See* HRC, *Summary Record of the 1707th meeting: Consideration of Third Periodic Report of Belgium*, ¶ 3, U.N. Doc. CCPR/C/SR.1707 (Oct. 27, 1998) [hereinafter Third Periodic Report—Belgium]; *see also* HRC, *Concluding Observations of the Human Rights Committee: Belgium*, ¶ 14, U.N. Doc. CCPR/C/79/Add.99 (Nov. 19, 1998) (stating that the Belgian peacekeepers had been acting under the aegis of United Nations Operation in Somalia ("UNOSOM II")). It should be noted in this connection that the Korean War and the subsequent U.S. presence on the Korean peninsula were sanctioned by U.N. Security Council Resolution as peace enforcement actions under chapter VII of the U.N. Charter. *See, e.g.*, Timm, *supra* note 52, at 443–44 (stating that the Korean War was the first chapter VII enforcement action and discussing the various Security Council resolutions).

receiving peacekeepers based on the Model SOFA for peacekeeping operations adopted by the U.N. General Assembly.[256] Due to the collapse of governmental and administrative functions in Somalia, however, no SOFA could be negotiated or concluded.[257]

The HRC questioned the suspended sentences imposed by the Belgian military authorities for offenses committed against the local population by Belgian peacekeepers.[258] Some of these offenses were particularly egregious: "force-feeding a Muslim child with pork until it vomited, tying a Somali child to a vehicle and ordering the vehicle to drive off, procuring and offering a teenage Somali girl as a present at a birthday party, and acts of public indecency."[259] Taking notice of the fact that the stresses of overseas deployment meant that soldiers developed a different mentality from citizens, the HRC stated that the Belgian Government had the "fundamental duty" to ensure that its soldiers conformed to "responsible and humane" behavior.[260]

Addressing concerns as to how Belgium's obligations under the ICCPR were engaged when Belgium peacekeepers acted outside their sovereign territory, the HRC emphasized that "there could be no doubt that actions carried out by Belgium's agents in another country fell within the scope of the Covenant."[261] Moreover, the HRC recognized the applicability of Belgian jurisdiction to the rights violations committed by the

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256. Report of the Secretary General, *Model Status of Forces Agreement for Peacekeeping Operations*, ¶ 1, U.N. Doc. A/45/594 (Oct. 9, 1990) [hereinafter U.N. SOFA]. The U.N. SOFA is far more favorable to the sending state than the Korea SOFA or the NATO SOFA; the sending state enjoys exclusive jurisdiction over any criminal offense that may be committed by their personnel while deployed as peacekeepers. *See* Michael Bothe & Thomas Dorschel, *The UN Peacekeeping Experience, in* THE HANDBOOK OF THE LAW OF VISITING FORCES 487, 505 (Dieter Fleck ed., 2001) (stating that the U.N. SOFA gives military members of a peacekeeping operation complete immunity from the receiving state's criminal jurisdiction); Rosenfeld, *supra* note 216, at 290 (noting that the U.N. SOFA gives U.S. soldiers greater protection than other SOFAs and this arrangement is meant to encourage U.N. member states to contribute peacekeepers).

257. *See* Bothe & Dorschel, supra note 256, at 493 n.27 (citing UNOSOM II as an instance where no SOFA was concluded because no government was in place); Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 157 (1995) (noting that Somalia had no government capable of concluding a SOFA).

258. Third Periodic Report—Belgium, *supra* note 255, ¶ 3.

259. *Id.*

260. *Id.*

261. *Id.* ¶ 2.

Belgian peacekeepers against the Somalis, taking issue with the suspended sentences imposed on the Belgian peacekeepers.[262] In response, Belgium accepted the applicability of the covenant with respect to the actions of its peace-keepers in Somalia, noting that jurisdiction had been transferred from military tribunals to the regular judiciary, and that investigations into the allegations of wrongdoing were taking place.[263]

This exchange between the HRC and the Belgium delegation carries great significance, because it demonstrates that the affirmative duties to investigate and to bring to justice alleged perpetrators of covenant violations, attaches to jurisdiction over the perpetrator and not to jurisdiction over the victim. The victims were neither within Belgian territory, nor subject to Belgian jurisdiction in the conventional sense because they were Somali nationals, and the *situs* of the alleged crimes was Somalia.[264] Nonetheless, the HRC recognized that Belgium's ICCPR obligations were engaged when Belgian peacekeepers violated covenant rights in Somalia.[265]

The general rule adopted by the HRC, then, is that when a state party to the ICCPR deploys its forces overseas, it continues to have affirmative duties to provide effective remedies for any violation of covenant rights committed by its troops, regardless of whether they have jurisdiction over the aggrieved individual. As Part III.B discusses, this general rule has important ramifications for the disposition of crimes committed by U.S. forces in the ROK and elsewhere.

III. *FROM STATE CONSENT TO GLOBAL RULE OF LAW: THE UNIVERSAL DUTY "TO RESPECT AND TO ENSURE"*

Developments in human rights law are imposing greater obligations on states to respect and to ensure individual rights. State parties to the ICCPR must respect these constraints in the

262. *Id.* ¶ 3 (observing that in all cases the Belgium military courts "had imposed only suspended sentences").

263. *Id.* ¶ 22 ("Irrespective of where an act was committed, Belgian jurisdiction applied, as could be seen by the proceedings instituted in Belgium against a number of Belgian nationals in which some had been convicted and others acquitted.").

264. *See supra* note 255 and accompanying text; *see also Photos Reveal Belgian Paratroopers' Abuse in Somalia*, CNN, Apr. 17, 1997, http://edition.cnn.com/world/9704/17/belgium.somalia/.

265. *See supra* note 261 and accompanying text.

implementation of other bilateral agreements to which they are a party. Accordingly, both the ROK and the United States should consider the legitimacy of criminal jurisdiction under the SOFA framework in light of their obligations under human rights treaties. Based on the discussion in Part II, the potential incompatibility between the two treaties can be reconciled with modest effort from both parties. This Part offers recommendations for resolving the tension between the ICCPR and the Korea SOFA, first from the perspective of the ROK, and then from the perspective of the United States.

With respect to the ROK, waivers of jurisdiction should only be granted subject to a guarantee by the United States that all steps necessary will be taken to investigate the allegations, develop a judicial remedy, and ensure that justice will be done. The United States should adopt a consistent practice of making public and transparent both the investigations and the resulting judicial process following offenses by U.S. servicemen, and practice judicious use of the waiver provisions. This would effectively harmonize the Korea SOFA with the ICCPR, by implementing criminal jurisdiction under the Korea SOFA in a manner consistent with both state parties' obligations under the ICCPR.

A. *Reconciling the ROK's Obligations Under the Korea SOFA and the ICCPR*

As a state party to the ICCPR, the ROK has an affirmative obligation to ensure that individuals within its territory or subject to its jurisdiction have effective remedies for rights violations under their domestic legal system.[266] The incompatibility arises because complying with the Korea SOFA leaves the ROK both unable to provide legal protection for offenses committed by U.S. military personnel in the ROK, and without any assurance that the United States will take adequate measures to render an effective remedy.[267]

Part II.A's discussion of Professor Sadat-Akhavi's theory of treaty conflicts is particularly instructive for the conflict between

266. *See supra* notes 110–22 and accompanying text (discussing the obligation of state parties under article 2 of the ICCPR).

267. *See supra* notes 182–87 and accompanying text (identifying the conflict between article 2 of the ICCPR and criminal jurisdiction under the Korea SOFA).

the Korea SOFA and article 2 of the ICCPR. As mentioned, treaty conflicts are reconcilable when the conflict is partial, that is, when there is at least one way to comply with both sets of treaty obligations.[268] Compliance with the Korea SOFA may sometimes, but not always, put the ROK in breach of article 2.[269] Were the United States to commit itself to exercise due diligence in investigating and developing a judicial remedy, the conflict between the Korea SOFA and the ROK's obligations under article 2 evaporates. Appraising the situation from this angle reveals that article 2 of the ICCPR establishes certain baseline norms, which define and limit the implementation of the Korea SOFA. This reading captures the idea of a hierarchy of norms in the international legal system: the ICCPR establishes legal duties of such fundamental character that state parties are not permitted to limit their effectiveness through reservations or through *inter se* rules of applicability.[270]

The examples from Europe, as well as the HRC's subsequent practice, demonstrate how these otherwise incompatible treaty norms can be reconciled. Obligations under human rights treaties must be respected, and an approach similar to that adopted in cases like *Soering* and *Ng*, where state obligations under the controlling human rights treaty could be preserved by obtaining adequate guarantees from the United States, can help to address the problem.[271] Applied to this context, the ROK should obtain adequate assurances from the United States that it will take the appropriate measures to ensure an adequate and effective investigation and, if necessary, pursue judicial remedies that are responsive to the severity of the offense. Absent such assurances, the ROK should not grant any request for a waiver of jurisdiction to the United States. Such a practice, if adopted, also accords with notions of equity and reciprocity; any diminishment in U.S. sovereignty resulting from such a guarantee is matched by

268. *See supra* notes 197–200 and accompanying text (discussing possible means of understanding and reconciling treaty conflicts).

269. *See supra* Part I.C.3.

270. *See supra* notes 99–100, 228–30 and accompanying text (examining the privileged character of human rights treaties in international law and the basic values they safeguard).

271. *See supra* notes 217–18, 225–27 and accompanying text (discussing the approaches used by European Courts and the HRC in addressing potential conflicts with the human rights treaties).

the ROK's own relinquishment of sovereignty when it waives jurisdiction.[272]

Aside from obtaining guarantees, the ROK should also adopt a more assertive diplomatic position, akin to the resolution adopted by the European Parliament with regard to extraordinary rendition.[273] There, the European Parliament recognized a hierarchy of norms privileging human rights treaties, and pronounced that SOFAs would have to be renegotiated if they impinged on human rights. Similarly, in the event that the Korea SOFA prevents or inhibits effective investigations by the ROK into the allegations of misconduct by U.S. soldiers, because of either U.S. exclusive jurisdiction or U.S. custody of the alleged perpetrator, the ROK should apply more strenuous efforts to improve its implementation, and, where possible, propose renegotiations of the Korea SOFA.

The developments in human rights law have brought human rights out of the realm of legal abstraction, and they hold increasing sway over domestic politics and international relations.[274] For receiving states that are also state parties to the ICCPR, the ICCPR embodies important guarantees not only to their citizens, but to the rest of the international community. Before concluding a SOFA that diminishes the legal protections of their citizens, such receiving states should acknowledge their human rights obligations, and seek to obtain balanced provisions governing criminal jurisdiction. For the ROK, the guarantees undertaken under the ICCPR represent an important justification for seeking an equitable arrangement with the United States, and to treat U.S. soldiers who break ROK law with fairness, but not with indulgence.

B. *Harmonizing U.S. SOFA Policy and Human Rights Obligations*

From the U.S. point of view, SOFA policy is intended to protect U.S. forces abroad from facing unfair trials while

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272. *See supra* notes 54–55 and accompanying text (observing that SOFA provisions entail a loss of sovereignty for receiving states).

273. *See supra* notes 219–22 and accompanying text (examining the development and adoption of the formal resolution against extraordinary rendition by the European Parliament).

274. *See* NOWAK, *supra* note 98, at XXXIX (noting that human rights have become a significant factor in determining international relations).

stationed overseas. But this goal should not come at the cost of compromising the legal protections of the communities that come into contact with the U.S. soldier abroad. The problems with the Korea SOFA lie not with its terms per se, but rather with its implementation: the policy to maximize jurisdiction produces results that are incompatible with the object and purpose of the ICCPR.[275] Maximizing jurisdiction, however, is by no means the only way the United States can implement criminal jurisdiction under the Korea SOFA. Both normative and instrumental reasons exist for why the U.S. policy of maximizing jurisdiction should be minimized. This section will discuss them in turn.

1. Normative Justifications

The ICCPR, like other human rights treaties, embodies fundamental transnational norms that represent an evolution in international law, a development that privileges the rights of individuals over the rights of sovereigns.[276] This doctrinal shift can be described as a move away from pure state consent, to transnational norms that guarantee individual rights through the universal rule of law.[277] Therefore, the obligations imposed by article 2 under international law establish a normative baseline, one that states may not modify by bilateral agreement.[278] Agreements like the Korea SOFA undermine the obligation *erga omnes* in the covenant's preamble because it hinders the ROK's ability to ensure the rights recognized within the ICCPR.[279] It follows that the United States has an interest in the ROK's

275. *See* Jung & Hwang, *supra* note 35, at 1143 (portending that the real problems with the Korea SOFA lie with its application rather than with its provisions).

276. *See supra* notes 85–97 and accompanying text (tracing the transformation in international law ushered in by evolving philosophical notions of the relation of persons with sovereign states, and the development of a new legal regime implementing new ideas about human rights).

277. *See supra* notes 99–100 and accompanying text (discussing the momentum of human rights law and its growing viability as a check on pure state consent in the international system).

278. *See supra* notes 99–100, 195–96 and accompanying text (analyzing the legal implications of a hierarchy of norms, and contending that human rights should occupy a privileged position in international law).

279. *See supra* notes 237–38 and accompanying text (examining the transnational values enshrined within the ICCPR and its multilateral contractual aspect).

performance of its obligations under article 2, and should refrain from positions that would stymie their fulfillment.[280]

Part I.B examined how the prevailing interpretation of article 2 meant that it applied extraterritorially, and how its obligations apply to the actions of U.S. instrumentalities overseas. If the disjunctive reading imposes a legal obligation on the extraterritorial acts of the United States, then a similar obligation runs to the actions of U.S. military personnel serving in Korea.[281] In this regard, article 2 imposes a positive duty to maintain transparency and accountability in all aspects of a state party's judicial system, including the military justice system, and to develop the priority of judicial remedies over merely administrative or disciplinary sanctions, especially for serious violations such as those against the right to life.[282] To the extent that the U.S. policy of maximum jurisdiction is a valid exercise of state power, it should continue to respect these minimum requirements by providing for impartial and transparent procedures that ensures a proper and just disposition for such cases. A violation of those covenant rights under article 2 could be imputed to the United States, as a result of a failure to properly investigate, punish or provide appropriate redress for such violations.[283]

The case of the Belgian peacekeepers is also instructive for instances where the United States obtains primary jurisdiction through a waiver, or exercises exclusive jurisdiction. At the time, Somalia had no functioning government or judiciary.[284] As such, Belgium was the only state party with jurisdiction over the Belgian perpetrators and the ability to secure the covenant rights

280. Such a policy could also violate the customary international law of treaties codified in VCLT article 18. *See supra* note 236 and accompanying text.

281. *See supra* notes 242–53 and accompanying text; *see also* HENKIN ET AL., *supra* note 93, at 315 ("Where a state is obligated, by treaty or customary law, to respect the human rights of an individual, the state is responsible for acts or omissions by any of its officials or by others acting 'under color of law.'").

282. *See supra* notes 76–78, 115–22 and accompanying text (discussing how the United States regularly fails to impose adequate punishment for misconduct by U.S. soldiers serving abroad, and examining the jurisprudence of the HRC regarding the proper implementation of state obligations under article 2 of the ICCPR.

283. *See supra* notes 249–53 and accompanying text (arguing that the ICCPR imposes obligations for the U.S. failure to take adequate measures to vindicate rights violated by U.S. soldiers abroad).

284. *See supra* note 257 and accompanying text.

of Somali nationals. This de facto situation is analogous to when the ROK waives jurisdiction over crimes committed by U.S. personnel, or when the United States has exclusive jurisdiction (as in an official duty case). In both instances, the United States is the only state party capable of securing the covenant rights of ROK nationals affected by such crimes, because the ROK no longer has jurisdiction over the perpetrators.[285] Faced with this quandary, it is incumbent upon the United States to meet the standards set out in article 2(3) with regard to investigation, bringing perpetrators to justice, and respecting the priority of judicial remedies.[286]

It should be noted that the obligations imposed by the ICCPR in this context are congruent with the underlying purpose of a SOFA—to ensure that justice is done when U.S. soldiers commit offenses overseas, while also guaranteeing their constitutional rights. Serge Lazareff, in his authoritative work on SOFAs, had this to say about the framework of concurrent criminal jurisdiction:

> It certainly was not the objective of the SOFA to create a situation which would result in a denial of justice . . . . It is contrary to the spirit of SOFA, which has as its objective, as we have seen, the prompt and equitable disposition of criminal charges, and it is contrary to the general principles of justice which would require that a case be fully heard. This requirement for some sort of hearing, other than purely administrative, and, in the absence thereof, the return of jurisdiction to the State formerly having the primary right is in our opinion the most important change to be made.[287]

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285. Although article 2 is read disjunctively, state parties are not responsible for violations of the covenant by persons who are on their territory but not subject to their jurisdiction, for example, actions by international organizations against their own officials (as in the case of U.N. officials), or actions by occupation troops. *See* NOWAK, *supra* note 98, at 43. This is analogous to the de facto situation faced by the ROK under the Korea SOFA, when the ROK either waives jurisdiction, or the committed offense falls within the official duty exception—in both instances, the ROK has no jurisdiction over the U.S. soldier.

286. *See supra* notes 115–18, 249–50 and accompanying text (identifying state obligations under article 2(3) of the ICCPR and discussing the transnational reach of the obligation to bring to justice perpetrators of rights violations).

287. Lazareff, *supra* note 70, at 264–65.

While his recommendation was never implemented, Lazareff's insight remains as true today as when he was writing in 1971, whether in the ROK, Iraq, or the United States.

2. Instrumental Justifications

Aside from the breach of international law that may result from the current implementation of the Korea SOFA, there are also instrumental reasons for exercising restraint in the use of the waiver and official duty exceptions. The experience in the ROK demonstrates that an asymmetrical implementation of such SOFA provisions will inevitably inflame local sensibilities and damage political relations.[288] As the United States advances its agenda around the world, whether in the ROK or in Iraq, the perception of the U.S. soldier being above the law will only make long-term deployments more difficult to sustain.

There is evidence that the maximization policy has produced a complacent attitude in military commanders, who fail to appreciate the infringement on sovereignty that a request for a waiver of jurisdiction entails.[289] While this policy may promote consistent military discipline among U.S. forces without interference from receiving states, such a rationale is sound only when U.S. military authorities impose punishments proportional to the offenses committed. Anything less will intensify local resentment and undermine the legitimacy of the U.S. military presence, producing an environment that could fuel either street protests in the ROK,[290] or an insurgency movement in Iraq. In fact, rule of law operations and programs to discourage violence by U.S. soldiers against the local population have become an important component of the counterinsurgency strategy in Iraq.[291]

These are compelling reasons to adopt a more reasoned policy regarding foreign criminal jurisdiction, and to institute procedures that offer greater transparency and accountability in

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288. *See supra* notes 158–77 and accompanying text (tracing the impact of the criminal jurisdiction provisions of the Korea SOFA on both the local community and U.S.-ROK relations).

289. *See* Ruppert, *supra* note 57, at 45–46.

290. *See supra* notes 158, 166, 169 and accompanying text (describing the minesweeper accident of 2002 that left two girls dead in the ROK and the ensuing public protests and fallout on U.S.-ROK ties).

291. *See* Wexler, *supra* note 20, at 81–82.

proceedings adopted against U.S. soldiers who commit crimes abroad. The push to maximize jurisdiction arose from U.S. Senate concerns about the due process rights of U.S. soldiers who face prosecution abroad,[292] but numerous safeguards that track U.S. constitutional due process requirements are present in major SOFAs like the NATO SOFA and the ROK SOFA.[293] Moreover, as one U.S. Air Force lawyer argues, "a more reasoned policy avoids being asked embarrassing questions about the basis of U.S. jurisdiction and why serious cases merit only administrative sanctions."[294] A policy adopting the judicious use of the waiver request provision will convey to receiving states that the United States is sensitive to their sovereign rights, promote an image of the United States as a responsible partner, and bolster the legitimacy of U.S. forces abroad.

CONCLUSION

The problems with criminal jurisdiction under the Korea SOFA deserve scrutiny; they have important ramifications for the long term implementation of such agreements elsewhere, given the long history of the U.S. military presence in the ROK, and the continuous efforts to amend the agreement and to improve its implementation. The U.S. presence in the ROK has been compared with the current engagement in Iraq, with former U.S. President George W. Bush admitting to having considered a "Korea Model" for the ongoing campaign in Iraq.[295] Whether in the ROK, in Iraq, or elsewhere, U.S. soldiers who commit crimes against the local population are the exception rather than the norm. Nonetheless, the sheer number of U.S. soldiers deployed overseas means that even a minute fraction of "bad-hats" translates to a large number of offenses. The problem this poses

292. See *supra* notes 59, 81 and accompanying text (highlighting the original Senate justification and rationale for the policy on maximizing jurisdiction in SOFAs).

293. *See* Ruppert, *supra* note 57, at 44.

294. *Id.* at 45.

295. *See* David E. Sanger, *With Korea as Model, Bush Team Ponders Long Support Role in Iraq*, N.Y. TIMES, Jun. 3, 2007, at A1 (noting that President Bush had expressed interest in the "Korea model"); Steve Holland, *Bush Envisions United States Presence in Iraq like S.Korea*, REUTERS, May 30, 2007, http://www.reuters.com/article/idUSN3041621320070530 (citing then-White House spokesman Tony Snow that Bush would like to see a U.S. role in Iraq ultimately similar to the ROK).

for the host community warrants further study from a human rights point of view.

Overlaying the obligations of the ICCPR on the problem of criminal jurisdiction under SOFAs helps sharpen the legal duties of both receiving and sending states into focus. Article 2 of the ICCPR imposes fundamental duties that cannot be modified by bilateral agreement, and institutes a normative baseline that all state parties must respect, whether they are a receiving or a sending state. In the case of the Korea SOFA, the ROK should maintain its current efforts to improve the implementation of the agreement and exercise greater discretion in granting requests for jurisdiction waiver. Such efforts will ensure that the ROK has taken the best possible measures to bring its SOFA obligations into conformity with the fundamental norms in the ICCPR that it undertook to respect.

By the same token, the United States has important normative aspirations to achieve, and treaty obligations to fulfill. As the most influential member of the international community, the United States has a critical role in promoting the universal rule of law. U.S. policies provide examples for its allies, or fodder for its enemies. When implementing SOFA agreements around the world, the United States should refrain from any policy insinuating that the rule of law applies only when it decides to apply it. The United States should be sensitive to the infringements of sovereignty that SOFAs represent, and aim for an implementation of the criminal jurisdiction framework that preserves a receiving state's obligations under article 2 of the ICCPR. To the extent that the implementation of SOFAs impede the effectiveness of human rights treaties, the United States should pay due respect to the human rights obligations of the receiving state, as well as its own.

As the United States pursues a foreign policy aimed at fostering freedom and democracy around the world, it is imperative that the boots on the ground are not above the law. Developments in human rights and the global rule of law continue to gain momentum, and SOFA practice should change to accommodate the growing recognition of the rights of persons in international law. The United States should make all reasonable efforts to ensure that, whenever a U.S. soldier deployed overseas commits a criminal offense, the rights of

affected individuals are vindicated in every instance, and not just when they become too politically costly to ignore. Some conflicts can be resolved, but double standards simply cannot be reconciled with the promise of universal human rights.

Notes & Observations