

A Comparative Study of the United States Status of Forces Agreements with Korea and Japan

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Abstract

This thesis examines the argument that the Republic of Korea-United States Status of Forces Agreement (ROK-U.S. SOFA) affords greater immunities and protections to U.S. service personnel than does the Japan-U.S. SOFA. One significant source of tension for Korean-American relations over the years has been the belief of many Koreans that Japan is given greater authority to prosecute SOFA incidents because A) the Japan-U.S. SOFA is written to Japan's advantage and B) the United States unfairly favors Japan in the application of SOFA Criminal Jurisdiction. This thesis will test the accuracy of those beliefs. It will do this by first comparing the formal provisions in the SOFAs with the two countries. It will then compare their application in high-profile SOFA-related crimes and accidents over the past two decades both in South Korea and Japan to identify any possible pattern of inequity. By comparing the language of both SOFAs today with examples of how the United States has applied that language, this thesis finds that the language and application SOFA Criminal Jurisdiction provisions have changed to favor Korea today compared to Japan. This thesis also finds that the application in both countries has changed to give more deference to Host countries.

Dedication

In memory of my father,

Richard Donald Petran

September 15, 1940 – January 15, 2011

I miss you Dad.

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It is an honor to finally be able to extend my thanks and gratitude to my thesis committee. Dr. Luke and Dr. Taylor, thank you for giving me the opportunity to finish this project. Special thanks go to Dr. Milly for the countless hours she undoubtedly spent reading my endless stream of revisions. Thank you all.

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List of Abbreviations

2 ID	Second Infantry Division, United States Army
AAEFS	Army and Air Force Exchange Service
AWOL	Absence Without Official Leave
BRAC	Base Realignment and Closure
DUI	Driving Under the Influence
NATO	North Atlantic Treaty Organization
NCEC	National Campaign for Eradication of Crimes by USFK
NGO	Non-Governmental Organization
OPCON	Operational Control
ROK	Republic of Korea (South Korea)
SOFA	Status of Forces Agreement
SPARK	Solidarity for Peace and Reunification of Korea
UCMJ	Uniform Code of Military Justice
US	United States
USAF	United States Air Force
USFJ	United States Forces Japan
USFK	United States Forces Korea
USMC	United States Marine Corps
USN	United States Navy

List of Military Ranking Abbreviations

PVT	Private
PFC	Private First Class
CPL	Corporal
LCPL	Lance Corporal
SGT	Sergeant
SSGT	Staff Sergeant
CAPT	Captain
MAJ	Major

Chapter One Introduction

1.1 Introduction

The day to day business of maintaining United States forces abroad is typically governed by some type of stationing agreement with the Host nation. When a Host nation agrees to station American military forces either temporarily or permanently, it also agrees to relinquish some degree of sovereignty in exchange for the rewards of prosperity and stability. Thus, when disagreements occur between Host and Sender, they usually involve these stationing agreements. South Korea's sixty year alliance with the United States has been governed by the Republic of Korea-United States Status of Forces Agreement¹ and in that time, South Korea has experienced unheralded economic growth while at the same time maintained an uneasy truce with North Korea. This peace and prosperity Korea enjoys today, however, has come at a cost: certain limitations on Korean authorities to prosecute crimes committed by U.S. service personnel. This thesis will explore some of the problems inherent in the relationship between the two countries over the handling of SOFA crimes.

As of 2010, there were over 1,300,000 American forces stationed in approximately 150 Host nations around the world.² The presence of these servicemen and women in foreign nations is governed by stationing agreements which establish jurisdictional boundaries between Host and the U.S. Unfortunately, this jurisdictional balance is never perfect nor is it ever shared equally. The legal, cultural and historical differences that

¹ ROK-U.S. SOFA

² Defense Manpower Data Center, "Active Duty Military Personnel Strengths by Regional Area and By Country (309A)," *Department of Defense* (2010).

usually exist between the United States and its Hosts easily beget the perception that SOFA is inherently unfair by ‘favoring’ the U.S. This perception is often exacerbated when a Host nation begins to compare its SOFA to other agreements.³

Since South Korea signed its SOFA with the U.S. in 1966, a growing number of Koreans have felt their SOFA ceded greater jurisdiction to the U.S. than Japan’s SOFA. Even after two revisions to the ROK-U.S. SOFA in 1991 and again in 2001, some Koreans still see their SOFA not identical to Japan’s SOFA with the U.S.⁴ After the 2001 amendments to the ROK-U.S. SOFA, the South Korean internet portal daum.net found 22 percent of those surveyed felt that when compared to Japan and Germany's Agreement, the “Korea SOFA is revised way too far unfair.”⁵ This then begs the question: after two revisions, is the ROK-U.S. SOFA still inferior to the Japan-U.S. SOFA?

Thus, this thesis will attempt to determine the existence of any discernible disparity between the ROK-U.S. SOFA and Japan-U.S. SOFA by first comparing the language of both SOFAs followed by a comparison of how the United States has applied provisions of its SOFA in Korea and Japan to specific incidents over the last two decades. With respect to language, this thesis will demonstrate how the criminal jurisdiction provisions of the ROK-U.S. SOFA have improved since 1966. With respect to U.S. application of its SOFAs, this thesis will show patterns of change over time in both Host nations.

³ Ian Wexler, LCDR, JAGC, USN, "Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq," *Naval Law Review* 56(2008).

⁴ Egan, 2006; Cha, 2010.

⁵ Jae-gil Cho, "SOFA Revision Is Way Too Far Unfair," *Korea Economic Daily Newspaper* (2001).

1.2 *Significance*

In 1996, the U.S. State Department warned of a "growing misperception by almost every (Host) country that the SOFA in that country favors the United States, particularly vis-a-vis SOFA agreements in other countries."⁶ Since that warning in 1996, the U.S. has signed stationing agreements with almost seventy nations.⁷ Yet, in light of America's recent military expansion to far-reaching outposts around the world including former Soviet satellites, very little popular or academic attention has been given to differences in the *application* of those SOFAs. For this thesis, I use a compilation of data on high-profile incidents involving SOFA criminal jurisdiction in South Korea and Japan using publicly-available sources.⁸ These data are analyzed in conjunction with secondary sources that will provide a basis for evaluating whether the United States has applied SOFA criminal jurisdiction differently in Seoul and Tokyo.

Because international agreements like the US-ROK SOFA are based on the principal of mutual respect, an inequitable SOFA is indicative of an unbalanced relationship between the two nations. As basing relationships are usually symbolic of "a broader hierarchical relationship that exists between the sender (of troops) and host," the SOFA is "symbolic of the alliance because people tend to focus on it being unfair or showing the relationship is unbalanced."⁹

⁶ Wexler, "Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq."

⁷ See Appendix B.

⁸ Unfortunately, data used for this research come only from news media sources (See Appendix A). Any comprehensive database of SOFA crimes and convictions either does not exist or was not accessible to this author.

⁹ Robert Mounts, "How Does the Status of Forces Agreement Really Work?," *Korea Times*, May 7, 2003.

As the United States widens its global military presence, the ROK-U.S. SOFA offers an important precedent for America's future stationing needs in emerging democracies around the world.¹⁰ Like most Host nations, Korea ultimately desires some form of reciprocal SOFA arrangement with the United States that does not infringe upon its national sovereignty. Unfortunately, because cultural and legal differences probably make any bilateral equality impossible, mutual security relationships based on complete reciprocity with no resignation of Host sovereignty have so far been impossible to achieve. At the very least, Koreans compare their SOFA provisions to the Japan and North Atlantic Treaty Organization (NATO) SOFAs and insist their SOFA be at least equal to the Japan and NATO SOFAs. Jin-wung Kim explains that "when Koreans speak of wanting more respect from the United States, the nation is referring to the same respect America shows Japan, their former colonial ruler."¹¹ In light of the State Department's 1996 warning, the United States should expect similar demands for SOFA equality from other Host nations around the world.

The Korean perception that the United States may have treated their nation as a less significant partner than Japan is significant and will continue to have an impact upon America's strategic planning in Asia. Evidence of a disparity has potential long-term ramifications for both alliances as well as for future SOFA negotiations with other Host nations. Evidence of little or no disparity, however, could indicate other sources of tension

¹⁰ See Appendix B.

¹¹ Jin-wung Kim, "Ambivalent Allies: Recent South Korean Perceptions of the United States Forces Korea (USFK)," *Asian Affairs: An American Review* 30, no. 4 (2004).

may lie at the root of anti-Americanism in South Korea – such as political manipulation by forces interested in only in the eradication of America’s military presence.

This research is not intended to address the *fairness* of SOFAs themselves. Rather, the purpose is simply to ascertain if there are *differences* between SOFAs that make one SOFA less fair compared to another. Specifically, this research will investigate if there are differences in the *language* and *application* of the Criminal Jurisdiction provisions contained in both the ROK-U.S. SOFA and Japan-U.S. SOFA. This research has significance for understanding how criminal jurisdiction over deployed American troops around the world will be negotiated and applied in the future and its political ramifications.

1.3 Background

For years, many Koreans have perceived the United States as continually favoring Japan and "often assess their government's security relationship with the U.S. in comparison with the U.S. security relationship with Japan."¹² Even as recently as November, 2011 South Korea has requested the United States “positively consider” South Korean requests for custody transfer of American suspects before indictment and that consideration be equal to the consideration the U.S. extends Japan.¹³ Today, "when Koreans speak of wanting more respect from the United States, what they usually mean is that they want what Japan has."¹⁴

There are many reasons for Korea’s increasing dissatisfaction with America’s

¹² Ben Duncan, "Anti-Americanism and National Identity in South Korea" (University of Kansas, 2009).

¹³ KBS World Radio, "S.Korea, US to Discuss New Guidelines on US Military Crime," (2011).

¹⁴ Kevin Sullivan and Mary Jordan, "S. Korea Wants to Be Grown-Up Ally; Koreans Demand U.S. Respect, Just Like Japan Gets," *Washington Post* (1995).

military presence. The U.S.-ROK alliance today is beset with numerous problems that challenge the *raison d'être* of that relationship. Misunderstanding, disagreement, and anger can easily erupt because their SOFA encompasses such a wide range of legal, environmental and financial issues. Issues such as excessive military aircraft and bombing range noise, pollution and ecological damage, traffic accidents, and land reclamation all draw ire and resentment from Koreans. However, possibly none of these issues is as emotionally sensitive as the provisions specific to criminal jurisdiction. America's relationships with both Korea and Japan have been continually strained "largely due to the conduct of U.S. service members."¹⁵ Chalmers Johnson writes that the "stationing several thousand eighteen-to-twenty-four-year-old American youths in cultures... about which they are utterly ignorant is a recipe for the endless series of incidents that plague nations that have accepted bases."¹⁶ Because high profile crimes seem to generate the greatest public scrutiny of SOFAs, comparison of SOFA criminal jurisdiction is an excellent point to begin examining whether there are differences between the SOFA's with Korea and with Japan.

While many Koreans today recognize that the language of their SOFA has been revised over the years to reflect America's acknowledgement of Korea's rapid economic modernity and democratization, many also still perceive inequity to exist in *how* their SOFA is applied compared to how they perceive the U.S. applies its SOFA with Japan. Tied to this perception is the frustration that Japan, once a colonial power over Korea and a bitter enemy of the United States, may enjoy greater equity and jurisdictional power in its

¹⁵ Matthew L. Ivey, "Mediating Disputes Between United States Military Bases and Local Communities: The Japanese Case Study," *Northwestern Interdisciplinary Law Review* 2, no. 1 (2009).

¹⁶ Chalmers Johnson, *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic*, The American Empire Project (New York: Metropolitan Books, 2004).

relationship with the United States. The primary research question to be examined is whether or not there are any subtle differences between the criminal jurisdiction provisions of the ROK and Japan SOFAs. By examining how the US government has applied SOFA criminal jurisdiction, this thesis asks whether South Korean perception of inequity to Japan is indeed justified.

1.4 Contributions to the Academic Literature

This research has implications for two sets of academic literature related to the United States' military presence in countries it considers its allies. The first set of literature concerns SOFAs as binding documents. There is an extensive literature by many non-partisan legal scholars that addresses what a SOFA is and how it works, along with some of the legal, procedural, and technical problems associated with the reconciliation of disagreements.¹⁷ Some of this research focuses on the motivations and concerns by lawmakers regarding the cultural and legal differences that exist between nations and how those differences affect the SOFA negotiations.¹⁸ These issues will be addressed in more detail in Chapter Two. This thesis will contribute to a better understanding of what SOFAs are and how they are intended to be applied.

A second set of academic literature for which this research has implications involves the nature and health of the ROK-US alliance. Much of Korea's discontent in the last decade was a result of the United States failing to approach "South Korea as an ally,

¹⁷ See Cha (2010), Cooley (2005), Egan (2006), Haggard (2011), Hemmert (1999), Ivey (2009), Mason (2009), McConnel (2006), Mounts (2003) and Wexler (2008).

¹⁸ Hemmert, 1999; Ramseyer and Rasmusen, 2001; Steinberg, 2004.

equal in dignity and equal in sovereign rights, in the essential Westphalian sense.”¹⁹ This period in Korean-American relations saw some of the largest and most organized demonstrations against United States policy because Washington failed to recognize the extent to which South Korea had matured politically and economically. Failure on the part of the United States to acknowledge Korea’s maturity inevitably led to increased tensions and more demonstrations. There exists significant literature on the changing cooperation between the U.S. and Korea and how American inflexibility and insensitivity in the past has led to anti-American sentiment and pressures for change in SOFA protocols.²⁰

For Korea and Japan, tragedy and crime can easily “reinvigorate pent up resentment and anger towards the U.S. military presence” which “threaten to destabilize the long standing relationship” the U.S. has both nations.²¹ This destabilization is due in part because many Koreans see their SOFA as a “forfeiture of the sovereignty of Korea.”²² Citing the history of modern democracy in Greece, Spain and Japan, Alexandar Cooley argues the “current high level of politicization of the U.S. bases in Korea is entirely consistent with other historical cases of host countries that have undergone a democratic transition while hosting significant U.S. military facilities.”²³ Many scholars agree that Korean anti-American demonstrations “are a result of a decade of intense democratization” that has enabled “the transformation of private complaints into political interests” with local

¹⁹ Meredith Woo-Cumings, “Unilateralism and It's Discontents,” in *Korean Attitudes Toward the United States: Changing Dynamics* ed. David I. Steinberg (Armonk, New York: M.E. Sharpe, 2005).

²⁰ See Cumings (2004), Duncan (2009), Feinerman (2005), Johnson (2005), Moon (2004) and Woo-Cumings (2005).

²¹ Ian R. McConnel, “A Re-Examination of the United States-Japan Status of Forces Agreement,” *Boston College International and Comparative Law Review* 29(2006).

²² John Fletcher, “Korea: Liberation and Self-Determination,” *Crisis Watch Commentary* (2002).

²³ Alexander Cooley, “Democratization and the Contested Politics of US Military Bases in Korea: Towards a Comparative Understanding,” *IRI Review* 10, no. 2 (2005).

communities “measuring the requirements and benefits of national security and foreign policy against what they consider to be unfair costs to them.”²⁴ For those local communities positioned next door to U.S. military bases, the unfair costs are very often born from incidents, crimes, and accidents involving SOFA. This thesis will contribute to a greater awareness of the significance of SOFA crime and Host nation mobilization for the ROK-U.S. relationship.

1.5 Methodology

This analysis assesses whether there is a measurable and clearly defined level of bias in favor of Japan when compared to South Korea on the part of the United States. In this study I will first focus on the language of both SOFAs and then on the application of SOFA criminal jurisdiction by United States. Because SOFA is symbolic of the nature of an alliance between two nations, identifying possible differences in SOFA custody may offer better understanding of any inequity that may exist.

In order to determine whether the U.S. applies its SOFAs differently in Korea than in Japan, this thesis uses mixed methods, with quantitative and qualitative analysis of the treatment of American service personnel suspected of committing crimes while stationed in both Host nations. Data collected for Korea and Japan will be used to ascertain whether differences exist in the United States government’s application of SOFA provisions between each host nation. By analyzing the handling of comparable high profile incidents in Japan and South Korea, this study will help to better understand patterns of behavior of the United States Government in its relationships with Japan and South Korea and to

²⁴ Katherine Moon, "South Korea-US Relations," *Asian Perspective* 28, no. 4 (2004).

identify possible subtle differences between those relationships.

Data compiled for this study encompass approximately 45 SOFA-related incidents in Korea and Japan between 1992 and 2011. These incidents include not only tragic accidents but also violent and heinous crimes. Many of the incidents used for this research received prominent attention in the host nation media and became a cause celebre for Non-Governmental Organizations (NGO). These data will enable comparison of the number of times the U.S. government has maintained custody of American service personnel in each host nation, including instances when the United States ceded jurisdiction when it was not bound to do so by the terms of its SOFA with each host nation.

I will measure and compare characteristics of the preliminary pre-trial phases of jurisdictional custody in both countries. The period of time after an arrest and prior to trial offers an excellent opportunity for comparison as both SOFAs have established written provisions regarding the right to custody. I chose this stage for research because SOFA guidelines today are virtually identical for both Korea and Japan and thus should be handled the same. Secondly, this is a stage in which public protest and outcry have created stresses in the relationships the U.S. has with Korea and Japan. Should the U.S. have ceded jurisdiction more frequently with one host nation compared to the other, this may suggest the existence of bias. Additionally, the timing and frequency of apologies and statements of regret by the U.S. will be quantified in order to supplement the establishment of any patterns of behavior that may exist.

While this dataset is by no means complete, it does include higher-profile incidents that reflect some of the challenges the United States faces in maintaining its military

presence not only in Asia but around the globe as well.

1.6 Plan of the Thesis

This thesis proceeds as follows.

Chapter Two will offer a brief history of the SOFA and compare how the ROK-U.S. SOFA is structured relative to other similar agreements. A review of existing literature will show that while the 1966 ROK-U.S. SOFA was an unfair document when compared to the Japan-U.S. SOFA (1960) and the NATO SOFA (1949), the criminal jurisdiction provisions in today's ROK-U.S. SOFA stand virtually identical to the Japan and NATO SOFAs.

Chapter Three uses a comparative analysis of crime and accident data to analyze the application of SOFAs in both countries. These data will establish patterns of change over time in the application of the SOFAs in both Korea and Japan. It will also demonstrate that this change has been more pronounced in Korea than it has in Japan.

Chapters Four and Five examine U.S. handling of several high-profile case studies and the subsequent political and social impact upon U.S. relationships with both Host nations. These case studies will demonstrate that a greater accommodation of Korean demands by American authorities came in response to massive public protests in 2002 rather than in response to the 1991 and 2001 SOFA revisions. These case studies will complement the data presented in Chapter Three by offering a better understanding of how resentment towards the United States policy has mobilized public opinion and citizen action in the wake of terrible incidents and the impact this mobilization has had on US responses.

The conclusion, Chapter Six, will summarize the findings as well as discuss possible implications for United States foreign policy.

Chapter Two The Status of Forces Agreement

In this chapter, I will compare the formal, written language that defines custody and jurisdiction of the two SOFAs to establish if there exist any differences between the two. In order to do that, I first explain what SOFAs are, how they work and specifically examine how criminal jurisdiction provisions are written in the ROK-U.S. SOFA and Japan-U.S. SOFA. This chapter will demonstrate that while the language regarding criminal jurisdiction in both SOFAs was significantly different when first written in the 1960's with those differences favoring Japan, two subsequent revisions of the ROK-U.S. SOFA have made criminal jurisdiction provisions virtually identical today.

2.1 Status of Forces Agreements: What are They?

The purpose of any SOFA is to establish a legal framework for visiting military personnel that defines rights, responsibilities, and privileges for day-to-day operations while stationed in a Host nation. SOFAs typically include agreement on such issues as the wearing of uniforms, the application of income and sales taxes, quarantine protocol for plants and animals, duties and tariffs, use of radio frequencies and entry and exit protocol. "If U.S. military presence is the foundation of the security agreement, the Status of Forces Agreement (SOFA) is the cornerstone of that foundation."²⁵ SOFAs are also considered peacetime agreements because they do not pertain to Laws of the Sea or rules of war. As such, SOFAs become inapplicable at the onset of armed conflict.

²⁵ Timothy D. Stone, LCDR, JAGC, USN, "US-Japan SOFA: A Necessary Document Worth Preserving," *Naval Law Review* 53(2006).

SOFAs today are commonplace international agreements between a Host and Sending nation.²⁶ The United States today is signatory to “individually-tailored SOFAs²⁷ with more than 115 countries.”²⁸ Some of these SOFAs are quite extensive and have evolved over many decades to keep pace with rapidly changing geo-political landscapes. For example, the supplemental NATO agreement between Germany and the U.S., for example, is “in excess of 200 pages.”²⁹ Other SOFAs, however, are sweepingly brief. The military relationship between the U.S. and Afghanistan since 2001 has been “governed by a two page diplomatic note giving U.S. forces virtual carte blanche to conduct operations as they see fit.”³⁰

Important to this thesis is how SOFAs establish a framework for the application of Host nation laws to United States military personnel. SOFA Criminal Jurisdiction provisions are designed to safeguard certain protections for U.S. personnel facing criminal charges in foreign courts by essentially limiting a Host nation’s right to prosecute certain incidents. This trade-off between legal protections for visiting forces and Host nation sovereignty comes at a cost: the Constitutional safeguards enjoyed by all Americans are often perceived by Host nations as nothing more than unfair favorable treatment. This perception that American servicemen receive special consideration is usually a product of differing judicial systems and creates tremendous strain on America’s relationships abroad.

²⁶ A Host nation receives foreign military forces on a temporary or permanent basis. A Sending nation stations its forces on Host nation soil.

²⁷ Or similar documents known as Visiting Forces Acts

²⁸ Ji-young Cha, "Comparison and Analysis of Korea and Japan Status of Forces Agreements and their Implications for Iraq's SOFA," *Cardozo Journal of International and Comparative Law* 18(2010).

²⁹ R. Chuck Mason, "Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized ?," ed. Congressional Research Service Reports (DTIC Document, 2009).

³⁰ Karen DeYoung, "Only a Two-Page 'Note' Governs U.S. Military in Afghanistan," *Washington Post* (2008).

One important reason why most of these SOFAs the U.S. has signed are “individually tailored”³¹ is due to differences in the histories of U.S. relationships with these countries, differences between military and civilian courts, and the degrees of confidence U.S. authorities have in different Host court systems. It is because of these differences that tensions will surface. All these reasons play in to creating systems to which the U.S. is more or less inclined to turn custody over to a Host nation. For Host nations like Korea and Japan, SOFA crimes can exacerbate a sense of unfairness and a belief that the American military receives a greater level of immunity because the U.S. is often seen as an occupying force. This frustration is “one of the greatest challenges”³² to the foundations of these relationships.

2.2 Historical Background

The Status of Forces Agreement is a relatively new institution in the context of international law. Prior to formal SOFAs, visiting military forces were typically immune from Host nation prosecution for crimes committed on Host nation soil. The rationale for this ‘Law of the Flag’ doctrine was that a commanding officer was seen as being better suited to administer justice. The Law of the Flag offered sending nations *exclusive* jurisdiction over their military forces around the world and became an integral part of United States foreign policy in 1812 when the U.S. Supreme Court ruled in favor of the

³¹ Cha, "Comparison and Analysis of Korea and Japan Status of Forces Agreements and their Implications for Iraq's SOFA."

³² Stone, "US-Japan SOFA: A Necessary Document Worth Preserving."

visiting French navy in *Schooner Exchange v. McFaddon*.³³

After World War II, the United States and its European allies began to permanently station their militaries within one another's borders to strengthen their collective alliance against Communism. An agreed set of protocols soon became necessary to regulate the day to day operations for those visiting troops. The NATO SOFA was eventually signed by its twelve founding member nations in April 1949 and remains today the standard measurement for all other SOFAs.

One main feature of the NATO SOFA, which has greatly influenced other SOFAs, is assigning criminal jurisdiction over visiting soldiers stationed in Host nations. By conceding that a visiting military must be held accountable to the Host nation's system of criminal jurisdiction, the NATO SOFA in 1949 required the United States to compromise its exclusive, "Law of the Flag" jurisdiction.³⁴ For the first time, the United States permitted foreign nations to assume prosecutorial power over U.S. military forces. It is important to recognize that the NATO SOFA is a multilateral agreement negotiated collectively with protections and provisions that are shared uniformly. In contrast, the Japan and Korea SOFAs are bilateral agreements because they were created at different times and under different sets of circumstances, negotiated between only the Host³⁵ and Sending³⁶ nations. Because of this, many provisions in the ROK and Japan SOFAs lack the uniformity found in the NATO SOFA.

³³ Chief Justice John Marshall had argued in the *Schooner* case that "when a sovereign country permits a friendly foreign sovereign to enter its territory, it implicitly consents to the jurisdictional immunity of the visiting sovereign." (McConnel, 2006).

³⁴ Wexler, "Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq."

³⁵ Either the Republic of Korea or Japan.

³⁶ The United States.

By the time the Japan-U.S. SOFA³⁷ was signed in 1960,³⁸ Japan had become an important ally to the United States and a vital counter-weight to Chinese and Russian communism. Japan's strategic value to the United States enabled it to negotiate a more equitable SOFA relationship. When written, the Japan-U.S. SOFA contained "provisions on exclusive and concurrent jurisdiction, waiver, custody rights, and procedural protections that are identical to the NATO model language."³⁹

In exchange for military protection and the promise of economic rebuilding, the 1953 Mutual Defense Treaty gave American forces total criminal jurisdictional immunity from Korean domestic law. In contrast to Japan's virtual equal status to NATO-member nations, the United States maintained exclusive jurisdiction over its forces stationed in South Korea in the aftermath of Korea's civil war. With an economy and infrastructure still smoldering, South Korea lacked strategic value when it negotiated the Mutual Defense Treaty in 1953.

By 1966, however, the United States finally agreed to a more equitable bilateral SOFA⁴⁰ with Korea replacing its exclusive jurisdictional authority with a concurrent judicial framework that resembled the Japan and NATO SOFAs. Unfortunately, Korea's weak and disadvantaged negotiating position gave negotiators little choice but to accept

³⁷ Official title: "Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan."

³⁸ Unlike the ROK-U.S. SOFA which has been amended twice in 1991 and 2001, the Japan-U.S. SOFA has never been revised since its signing in 1960.

³⁹ John W. Egan, "The Future of Criminal Jurisdiction over the Deployed American Soldier: Four Major Trends in Bilateral US Status of Forces Agreements," *Emory International Law Review* 20(2006).

⁴⁰ Official title: "Agreement under Article 4 of the Mutual Defence Treaty between the Republic of Korea and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea."

terms and conditions that were not parallel with the NATO or Japan SOFAs.⁴¹ Significant differences, such as the right of United States Forces Korea (USFK) to maintain custody until a conviction,⁴² would remain in place for decades until organized protests compelled the United States to revise the ROK-U.S. SOFA in 1991 and again in 2001.

2.3 *How SOFA Criminal Jurisdiction Works*

The main purpose of SOFA criminal jurisdiction is to balance Host nation demands for custody and prosecutorial rights against the U.S. government's concern for preserving Constitutional protections and safeguards of its service members. Unfortunately, this balance is never perfect and is often seen by Host nations as unfair because criminal jurisdiction guidelines leave considerable room for discretion by U.S. authorities. Today, Korea's frustration over SOFA criminal jurisdiction is no longer directed at the specific language of the agreement but rather is rooted in the belief that their SOFA is *applied* differently compared to how it is applied in other countries – particularly in Japan. Koreans simply believe Japanese requests for pre-indictment custody receive greater *sympathy* from the U.S.

Types of Jurisdiction

Agreement over the custody and prosecution of an American soldier can be very

⁴¹ There is a general consensus among historians and scholars that a weakened Korea was unable to “fully assert its interests” during their SOFA negotiations in 1966. This argument is certainly plausible considering Korea at the time was still an impoverished, agrarian nation desperate to rebuild itself from the total devastation of civil war. Former presidential candidate Lee Hoi-chang echoed this view in 2000 saying that South Korea had “signed the current SOFA agreement when we were a poor, devastated country, but now we are richer” (Gannon, 2001) and that the ROK-U.S. SOFA “should be revised to reflect changing circumstances” (Burton, 2000).

⁴² Criminal conviction here refers to the point in the judicial process after a 'guilty' verdict has been rendered and all appeals have been exhausted.

difficult because jurisdiction depends on such factors as the type of crime committed, location of the crime scene, and whether the accused was on or off duty. The first step for any SOFA incident, however, is whether jurisdiction is *exclusive* or *concurrent*.

Exclusive Jurisdiction

Exclusive jurisdiction, in principle, applies to crimes and accidents in which one nation has complete autonomy to prosecute and administer punishment.⁴³ One such example is any law or regulation the Host or Sending nation has enacted to which there is no counterpart found in the other's legal system. Singapore, for example, prohibits the sale and possession of chewing gum and is an oft-cited example of a law with no counterpart in American jurisprudence. Other examples of exclusive jurisdiction include laws regarding what many Americans would consider to be moral issues such as adultery or pornography. A good example of a sending nation claiming exclusive jurisdiction would be when an American soldier stationed overseas leaves his post without permission. Because AWOL⁴⁴ violates the United States Uniform Code of Military Justice (UCMJ) and is not codified in Host nation criminal or civil law, U.S. authorities are permitted by SOFA to take complete jurisdiction of the accused.

Concurrent Jurisdiction

The overwhelming majority of incidents involving American forces that occur each year violate both Host and U.S. laws. Jurisdiction over crimes of murder, rape, and robbery are considered *concurrent* or *shared* because both nations have a vested interest in the

⁴³ Mason, "Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized ?."

⁴⁴ Absent Without Official Leave

custody, prosecution and punishment of the accused. Unfortunately, determining who has ‘primary’ jurisdiction is difficult and often the source of anger, disagreement, and resentment – and even anti-Americanism.

In theory, the nation with a greater interest in the prosecution of a suspected American serviceman is allowed primary jurisdiction. In many cases, both nations see it important to insist upon primary jurisdiction. Waivers of jurisdiction may be requested in situations when one nation wants the other to cede its jurisdiction. These waivers are only requests and by no means obligate a nation to automatically cede its’ jurisdiction – rather only that it offer “sympathetic consideration”⁴⁵ to the request.

Even though both Host and Sending nations have similar laws prohibiting the same offenses, there are several specific exceptions where Host nation jurisdiction is automatically waived. The language for these exceptions in the NATO and Japan-U.S. SOFAs are virtually identical.⁴⁶ These exceptions were also mirrored in the original ROK-U.S. SOFA. Today, however, Korea’s SOFA with the United States offers substantially clearer guidelines that define exceptions to primary jurisdiction. Specifically, Article 22, Paragraph 3 of the ROK-U.S. SOFA states:

In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or civilian

⁴⁵ Rjie Ernie Gao, "Between a Rock and a Hard Place: Tensions Between the US-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR," *Fordham International Law Journal* 33(2010).

⁴⁶ For complete text of these exceptions to the criminal justice provisions contained in the ROK, Japan and NATO SOFAs, please see Appendix F.

component, and their dependents, in relation to:

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or civilian component or of a dependent:

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense, the authorities of the Republic of Korea shall have the primary right to exercise jurisdiction.⁴⁷

The first exception, (a)(i), referred to as *inter se* jurisdiction, pertains to incidents involving American service personnel against other American military members on and off base. USFK for example would have primary jurisdiction over an American soldier charged with the assault of another American soldier in a Korean-owned drinking establishment off post. Incidents such as these, while common, are seldom treated as headline news and Host nation authorities typically are not interested in pursuing prosecution.

The second and more contentious of the two exceptions, (a) (ii), involves incidents that occur during performance of official duty. The NATO, Japan-U.S., and ROK-U.S. SOFAs all provide U.S. military authorities the power to assume primary jurisdiction over its military forces in the wake of offenses or accidents occurring in the performance or omission of official duty.

‘Official duty’ incidents are some of the most contentious and controversial aspects

⁴⁷ United States Forces Korea, "US-ROK Status of Forces Agreement 1966-67," Treaties and Other International Acts Series (6127) (Seoul, Korea).

of concurrent criminal jurisdiction mainly because the definition of official duty remains vague. "The United States has taken a very broad view of the term official duty and has continuously asserted since signing the NATO SOFA in 1951 that the sending state and no other party should determine whether a service member was in the performance of official duty during an alleged crime."⁴⁸ Suffice it to say that from the perspective of the Host, a vague official duty definition allows the Sending nation (the United States) tremendous latitude in claiming primary jurisdiction and this wide latitude is just one example of the problems surrounding SOFA Criminal Jurisdiction. Problems such as those related to official duty will be explained in more detail in the next section.

2.4 *Problems Related to SOFA Criminal Jurisdiction*

Limits and exceptions to primary jurisdiction that prohibit a Host nation from fully prosecuting a crime are often seen as an infringement upon its national sovereignty. Challenges to Korea's primary jurisdiction can easily offend and antagonize the Korean populace. By and large, anti-American sentiment in Korea is "issue specific"⁴⁹ – and repeated refusals to cede jurisdiction when requested easily paint the United States as a unilateralist 'bully.' According to Jimmy Koo:

The anti-American sentiment arising from the crimes perpetrated by USFK personnel against local South Koreans are mostly attributable to the implementation of the criminal jurisdiction provisions rather than the document itself. A pattern of

⁴⁸ Wexler, "Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq."

⁴⁹ Jimmy H. Koo, "The Uncomfortable SOFA: Anti-American Sentiments In South Korea and The US-South Korea Status of Forces Agreement," *National Security Law Brief* 1, no. 1 (2011).

automatic jurisdiction transfers and the lack of punishments have created a sense that USFK soldiers can “get away with murder” under the veil of the SOFA.⁵⁰

If a military alliance is based upon mutual respect, a refusal by the U.S. to cede custody is a clear demonstration of a lack of faith it has for a Host nation legal system.

The Problem of Official Duty

One of the first steps in establishing jurisdiction is to determine whether the incident took place *on-duty* or *off-duty*. For incidents and accidents occurring in the course of official duty, Host nations have little recourse.⁵¹ The 1998 gondola accident in which twenty were killed in Cavalese, Italy, is a good example of how Host nation anger can erupt over the perception of injustice.⁵² Even though the accident was ruled as an on-duty incident, Italians nevertheless believed human error and negligence were sufficient grounds to warrant primary jurisdiction. The case studies examined in Chapters Four and Five will illustrate the same inability of Host nations to pursue justice. The 1995 rape of a 12-year-old Okinawan girl and the 2002 traffic fatalities of two Korean middle school girls are landmark examples that triggered anger and a sense of helplessness over the inability to administer justice.

The NATO, Japan-U.S., and ROK-U.S. SOFAs all contain articles which address

⁵⁰ Ibid.

⁵¹ Incidents and accidents most common here involve human error or mechanical malfunction as a result of human error.

⁵² Accused of flying too low and too fast, the two United States Marine Corps pilots of the EA-6B Prowler aircraft were later acquitted of negligent homicide by the UCMJ. Both pilots claimed their altimeter had malfunctioned and tram cables were not properly indicated on NATO maps. Their subsequent court martial on charges that crucial video tape evidence had been destroyed did little to assuage Host nation anger over their helplessness to place the two American pilots on trial in Italian court.

official duty⁵³ in terms of establishing jurisdiction.

Table 1 **Definition of Offenses Related to Official Duty by SOFA**

JAPAN	“... offenses arising out of any act or omission done in the performance of official duty”
NATO	“... offenses arising out of any act or omission done in the performance of official duty”
KOREA	“... offenses arising out of any act or omission done in the performance of official duty” - additional "substantial departure" language. ¹ - specified rights to challenge USFK official duty certificates

Sources: Japan Ministry of Foreign Affairs (www.mofa.go.jp/), North Atlantic Treaty Organization, (www.nato.int/), and United States Forces Korea (www.usfk.mil/).

Notes: ¹The Agreed Minutes to Article XXII, Paragraph 3(a) defines substantial departure as "acts a person is required to perform in a particular duty will usually indicate an act outside of the person's official duty."

For both the NATO SOFA and Japan-U.S. SOFA, *official duty* is simply defined as “offenses arising out of any act or omission done in the performance of official duty.”

Today’s ROK-U.S. SOFA, however, includes additional "substantial departure"⁵⁴ language which narrows the definitions of what official duty *is* and *is not* and gives Korean authorities greater leverage to claim jurisdiction than their NATO or Japanese counterparts.

Where a member of the United States armed forces or civilian component is charged with an offense, a certificate issued by competent military authorities of the United States stating that the alleged offense, if committed by him, 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. The term "official

⁵³ See Appendix F.

⁵⁴ Gao, "Between a Rock and a Hard Place: Tensions Between the US-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR."

duty" as used in this Article and Agreed Minute is not meant to include all acts by members of the United States armed forces and the civilian component during periods when they are on duty, but is meant to apply only to acts which are required to be done as functions of those duties which the individuals are performing.⁵⁵

In addition to this more specific definition of *official duty*, the 1991 revisions also included Korea's right to challenge USFK official duty certificates.⁵⁶ Today, Korean authorities are permitted to "discuss, question, or object to any United States armed forces official duty certificate," with the U.S. agreeing to give "due consideration"⁵⁷ to these petitions.

In contrast, today's NATO and Japan SOFAs remain silent on how a Host nation may challenge official duty certificates. While critics charge that the thirty-day time limit to file a formal objection leaves any "diplomatic challenge vulnerable to political foot-dragging,"⁵⁸ the United States Embassy in Seoul claims the ROK-U.S. SOFA "gives Korean authorities greater participation in the official duty decision than any other US ally."⁵⁹ However, for all SOFAs the United States is party to, any final decision regarding *official duty* ultimately rests with U.S. military commanders.

⁵⁵ United States Forces Korea, "US-ROK Status of Forces Agreement 1966-67."

⁵⁶ Ibid.

⁵⁷ Egan, "The Future of Criminal Jurisdiction over the Deployed American Soldier: Four Major Trends in Bilateral US Status of Forces Agreements."

⁵⁸ Gao, "Between a Rock and a Hard Place: Tensions Between the US-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR."

⁵⁹ Seoul Embassy of the United States, "Political Incidents: The June 13 Accident - Q's and A's," (2002).

The Problem with Determining Primary Jurisdiction and Waivers of Jurisdiction

Determining Primary Jurisdiction

For the ROK, Japan, and NATO SOFAs, language that defines Host nation primary jurisdiction is identical:

Table 2 Definition of Primary Jurisdiction by SOFA

KOREA	“In the case of any other offense, the authorities of the Republic of Korea shall have the primary right to exercise jurisdiction.”
JAPAN	“In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.”
NATO	“In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.”

Sources: Japan Ministry of Foreign Affairs (www.mofa.go.jp/), North Atlantic Treaty Organization, (www.nato.int/), and United States Forces Korea (www.usfk.mil/).

This language means that when an accident or crime occurs off-duty, off-base, and not against another American serviceman, Host nation authorities may assume primary jurisdiction. Yet, while this language that defines jurisdiction would seem to give each Host nation considerable authority, disagreements still persist simply because the United States has long been reluctant to cede custody to any Host nation. The often significant differences between legal tradition, accepted police procedures,⁶⁰ and cultural values have compelled the United States to limit the authority of Host nations to prosecute American military service members – thereby clinging to the old Law of the Flag doctrine. “While most NATO states routinely waive primary jurisdiction in favor of the United States, the

⁶⁰ See Appendix G.

United States, in contrast, rarely waives its primary jurisdiction." ⁶¹ This is especially true in nations with differing legal systems, such as those that are based upon Confucian or Islamic law. In Japan for example, because the harmony of society outweighs the rights of the individual, police and prosecutors are given tremendous latitude in extracting confessions.

Waivers of Jurisdiction

The ROK, Japan and NATO SOFAs also contain language providing for the act of “sympathetic consideration” to be given to requests for waivers of primary jurisdiction.

Table 3 Provision of Sympathetic Consideration for Jurisdiction Waivers by SOFA

SOFA	KOREA	JAPAN	NATO
“sympathetic consideration” for requests for primary jurisdiction.	YES	YES	YES

Sources: Japan Ministry of Foreign Affairs (www.mofa.go.jp/), North Atlantic Treaty Organization, (www.nato.int/), and United States Forces Korea (www.usfk.mil/).

This language simply means that even if a nation does not have primary jurisdiction, it may request custody of the accused and this request must be given serious deliberation. For Korea, Article 22 of the ROK-U.S. SOFA states that “in cases where the right to exercise jurisdiction is concurrent, the authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular

⁶¹ Wexler, "Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq."

importance.”⁶²

Important here is that while citizens of any Host nation are likely to feel anger when the U.S. uses jurisdictional waiver protocol to assume authority over its force members accused of crimes or accidents, Koreans in particular feel special resentment when they compare the *application* of these jurisdictional waivers to similar instances in Japan.

Exercising Jurisdiction in Korea

Critics of the ROK-U.S. SOFA often point out that the very low frequency which Korean authorities have exercised their jurisdiction over the years is proof the SOFA unfairly favors the United States. If the ROK-U.S. SOFA were more equitable, this rationale contends, Korean authorities would prosecute more SOFA crimes. To the casual observer, the striking disproportion of UCMJ to ROK prosecutions in years past suggests this argument is quite plausible. In the 1990s, for example, Korea ceded its jurisdiction in 97% of all cases to the USFK.⁶³ In 2001, Korean authorities exercised jurisdiction in 7.8% of the 702 total incidents for that year.⁶⁴ Yet, according to the U.S. State Department, “82% of all crimes committed by USFK personnel in Korea were subject to Korean jurisdiction” in 2001.⁶⁵ This means that in 2001, Korean authorities chose to prosecute approximately 54 Americans while ceding primary jurisdiction to USFK in 521 other cases.

Statistically, most SOFA crimes each year involve less ‘serious’ incidents such as traffic violations, larceny, assault, and vandalism. In 2010, for example, there were 153

⁶² United States Forces Korea, "US-ROK Status of Forces Agreement 1966-67."

⁶³ Young-jin Jung and Hwang Jun-sik, "Where Does Inequality Come From ? An Analysis of the Korea-United States Status of Forces Agreement," *American University International Law Review* 18(2002).

⁶⁴ Cooley, "Democratization and the Contested Politics of US Military Bases in Korea: Towards a Comparative Understanding."

⁶⁵ Embassy of the United States, "Political Incidents: The June 13 Accident - Q's and A's."

SOFA-related incidents prosecuted either by UCMJ or Korean criminal courts – yet, as Appendix D demonstrates, out of 153 incidents for that year only one sexual assault⁶⁶ (0.65 percent) and no murders (0 percent) were reported. The fact that Korea exercises its jurisdiction so infrequently vis-a-vis such a large number of crimes each year may suggest that this issue has less to do with U.S. infringement upon Korean sovereignty and more to do with Korean authorities simply choosing to cede jurisdiction over less serious crimes.⁶⁷ Another subtle point lost in this debate is the punishment exacted by UCMJ courts-martial versus ROK criminal courts. Ordinary Host nation citizens often overlook the fact that in addition to time in prison or monetary fines, UCMJ punishments may also include a demotion in rank, forfeiture of pay and allowances, dishonorable discharge, and loss of benefits.

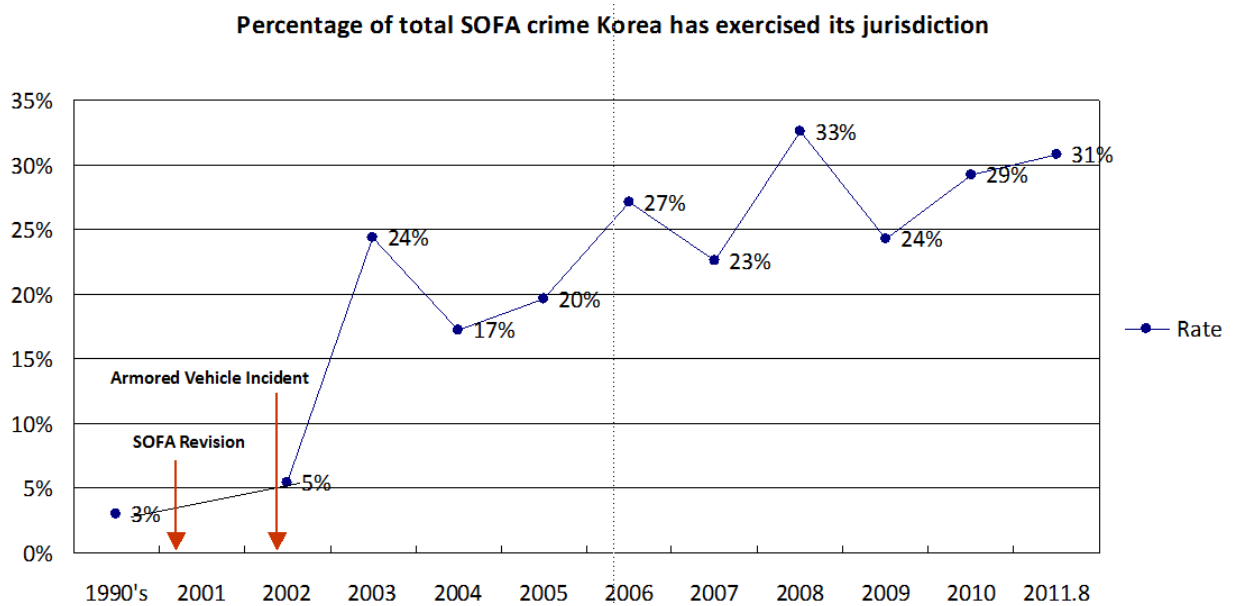
Based on data collected from five separate sources (Figure 1), it appears that Korean authorities began to increasingly exercise jurisdiction over SOFA crimes after the June 2002 Armored Vehicle Incident.⁶⁸ Prior to that time, it had been common practice for Korea to simply rubber-stamp USFK jurisdictional waiver petitions. As Figure 1 demonstrates, from the early 1990's to 2002, the percentage of SOFA crimes prosecuted by Korean criminal courts remained between three and five percent. After June 2002, this percentage rose sharply as Korea began to reassert its national sovereignty.

⁶⁶ Not rape.

⁶⁷ Basic literature distinguishes between what are considered to be 'serious' crimes from "less serious" in nature. For the ROK-U.S. SOFA, serious crimes are explicitly defined (See Appendix C) but in the Japan-U.S. SOFA, there is no specific set of criteria laid out.

⁶⁸ This SOFA-related accident will be discussed in more detail in Chapter Four.

Figure 1 Exercise of Primary Jurisdiction by Korea



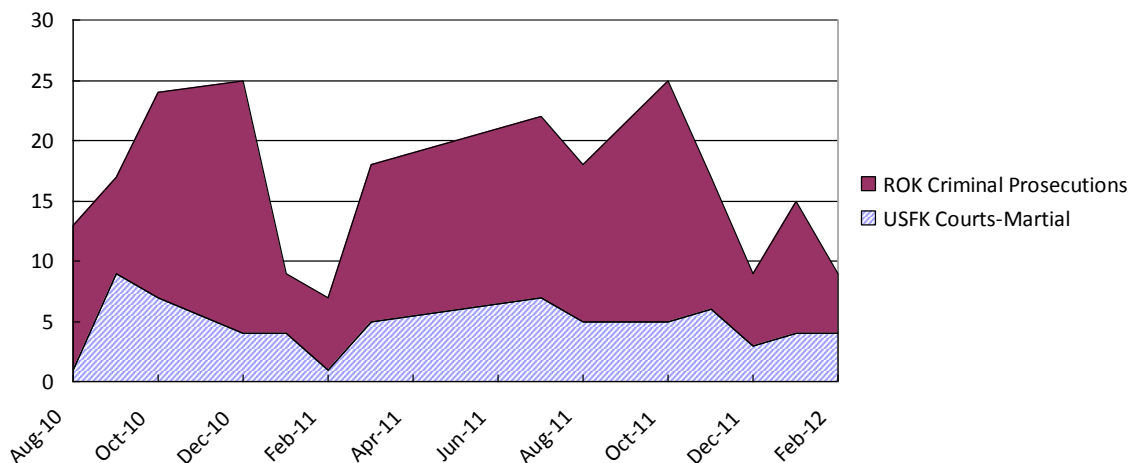
Sources: Figure created by the author using data from the following: Jung and Hwang, 2002; Cooley, 2005; Embassy of the United States Seoul, 2002; Kim S.D., 2011; Haggard and Ryu, 2011.

For more than a year after the 2001 ROK SOFA revisions, Korean authorities continued to rarely exercise jurisdiction. However, after June 2002, the percentage of cases where Korea insisted on asserting its jurisdiction increased dramatically and has continued to increase over the last decade. These data demonstrate a clear pattern of change in which Korea is exercising greater jurisdiction and this change appears to have been triggered in the wake of the 2002 traffic deaths of two Korean schoolgirls. This suggests that USFK is no longer in "the habit of filing waiver-of-jurisdiction petitions on a routine basis" nor does it seem Korean authorities are still in "the habit of granting them."⁶⁹

⁶⁹ Stephan Haggard and Jae-sung Ryu, "On SOFAs I: The Legal Issues," *The Peterson Institute for International Economics* (2011).

Today, Korean courts are routinely prosecuting a greater percentage of SOFA crimes than they ever did prior to June 2002 (See Appendix H).

Figure 2 USFK Courts-Martial versus ROK Prosecutions (08-2010 to 02-2012)



Source: United States Forces Korea (<http://www.usfk.mil/usfk/>).

Unfortunately, similar data for SOFA incidents occurring in Japan or NATO-member nations remain unavailable.⁷⁰ Without access to accurate data regarding the frequency of jurisdictional waivers, types of crimes prosecuted, conviction rates, and punishment handed down by UCMJ in Japan, this thesis is unable at this time to substantiate whether Korea exercises SOFA jurisdiction more or less often than its Japanese and NATO counterparts. Prospects for access to more complete data are not promising: in

⁷⁰ Repeated requests to the USFJ Public Affairs Office for information remain unanswered as of this writing. Speaking to the difficulties in finding any significant data regarding USFJ Courts-Martial and Japanese prosecution rates, one university librarian wrote in an email: "Given how your request has stumped my colleagues across the country... I seriously doubt that the data you want are directly accessible to any ordinary civilians. You'll have to negotiate with someone officially authorized."

a post for the Peterson Institute for International Economics, Stephan Haggard writes that "the US does not publish data on crimes committed by US military personnel that trigger the SOFA."⁷¹

The Problem of SOFA Custody versus SOFA Jurisdiction

For many SOFA crimes, *Custody* and *Jurisdiction* are not the same. *Custody* only refers to the physical imprisonment of the accused while *jurisdiction* is the authority to prosecute and punish the accused. While a Host nation may have primary jurisdiction for a crime off-base and off-duty, only under specific circumstances will the accused remain in a Host prison during the investigation.

Take for example the landmark case of three American servicemen convicted in the kidnap and rape of a 14 year-old Okinawan girl on September 4, 1995. The assault took place off-base and off-duty which gave Japanese authorities primary jurisdiction. However, several days had passed before the three suspects were identified; and by then, they had returned to their posts. When Japan notified United States Forces Japan (USFJ) of the crime, it formally requested U.S. military police to place the three men in custody. Japan had primary jurisdiction to prosecute but because the men were arrested on base, USFJ maintained custody for almost one month until Japan issued an indictment on September 29, 1995.

Unlike Japan's right to custody after indictment, Korean authorities could only take custody of an accused after a 'guilty' verdict had been reached and the appeals process had

⁷¹ Stephan Haggard and Jae-sung Ryu, "On SOFAs II: Why We Need Data," *The Peterson Institute for International Economics* (2011).

been exhausted. Like the tragic 1998 gondola accident in Italy, the 1992 murder of Yoon Geum-mi by Private Kenneth Lee Markle is a landmark example of Host nation frustration and resentment over SOFA injustice. While Markle was indicted by the Korean court one month after his arrest, he remained in USFK custody until a final appeal verdict upheld his original conviction on April 14, 1993. Had the murder taken place in Japan, Markle would have been transferred after his indictment and would have remained in Japanese custody throughout the trial. Revisions to the ROK-U.S. SOFA in 2001 gave Korea identical custody provisions to the Japan-U.S. SOFA.

Custody upon Indictment

Most scholars agree that both Korea and Japan SOFA protocols concerning custody after indictment are equal today. Japan's SOFA with the United States simply states that: "(c) The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States *until he is charged* by Japan." Revisions to the ROK-US SOFA in 2001 changed the language of *upon indictment* custody⁷² to mirror the NATO and Japan-U.S. SOFAs. Today, the United States is now obligated to transfer custody "upon indictment" to the ROK if the offense falls within one of twelve 'serious' crimes such as murder and rape (See Appendix C) making ROK-U.S. SOFA custody provisions equal to that of NATO and the Japan-U.S. SOFAs.

Although the NATO and Japan SOFA's offer only vague "until he is charged" language, today's ROK-U.S. SOFA is very clear regarding the rights of Korean police to

⁷² For 12 serious crimes, see Appendix C.

take custody *upon indictment* for any one of twelve ‘serious’ crimes (see Appendix C):

- 1 murder;
- 2 rape (including sexual intercourse with a minor under thirteen years of age);
- 3 kidnapping for ransom;
- 4 trafficking of illegal drugs;
- 5 manufacturing illegal drugs for the purpose of distribution;
- 6 arson;
- 7 robbery with a dangerous weapon;
- 8 attempt to commit the foregoing offenses;
- 9 assault resulting in death;
- 10 driving under the influence of alcohol, resulting in death;
- 11 fleeing the crime scene after committing a traffic offense resulting in death;
- 12 offenses which include one or more of the above-referenced offenses as lesser included offenses.⁷³

Comparatively, while the ROK-U.S. SOFA does limit pre-trial custody to only twelve specific crimes, some argue this agreed upon language is more favorable to Korean authorities than the ambiguity contained in the Japan-U.S. SOFA. According to Ji-young Cha, “... the custody provision of the Korea SOFA is a unique provision in favor of Korea... the Japanese custody provisions are more favorable to the United States than the modified Korean provisions.”⁷⁴

Custody Prior to Indictment

Custody prior to indictment refers to the physical detention of an American during

⁷³ United States Forces Korea Headquarters, "Criminal Jurisdiction Under Article XXII, Status of Forces Agreement: USFK Regulation 1-44 " (2010).

⁷⁴ Cha, "Comparison and Analysis of Korea and Japan Status of Forces Agreements and their Implications for Iraq's SOFA."

the investigative phases of a case prior to formal criminal charges being issued by the Host nation. Today, the custody of an American prior to formal indictment is rare but not without precedent. For the NATO, Japan-U.S. and ROK-U.S. SOFAs, pre-indictment custody today may only occur when:

1. The accused is apprehended by Host nation police at the scene of the crime or in the course of fleeing the scene and the U.S. chooses to waive custody or
2. The accused is arrested on-base for a crime committed off-base and off-duty and Host makes official request to U.S. for custody transfer.

For Host nation police, the initial hours and days after a crime are crucial to an effective criminal investigation. Failure to take immediate custody of a suspect can impede a prosecutor's chances for an indictment: evidence can be lost or destroyed, witnesses can be coerced or bribed, and the accused has more time fabricate an alibi or even flee the country.⁷⁵ For the U.S. however, significant differences in Host nation police procedures are often seen as a denial of fundamental Constitutional protections afforded to American service personnel (See Appendix G). The often stark differences in methods utilized to extract confessions by Host nation police leave U.S. authorities extremely reluctant to cede custody before a formal charge is presented.

In the mid-1990s, both Korea and Japan received promises from the United States. In 1995 and 1996, the U.S. agreed in principle with both Japan and Korea that it would "give sympathetic consideration to requests that a military suspect be handed over... prior

⁷⁵ See Christopher McCarthy, Chapter 3.

to indictment, when suspected of committing especially heinous crimes."⁷⁶ While this sympathy remains merely an oral promise for Japan, it has been included in America's written agreement with Korea. By 2001, the Agreed Minutes to the ROK-U.S. SOFA included language allowing for pre-indictment custody of American service personnel accused of committing one of twelve "serious crimes"⁷⁷ (See Appendix C).

Table 4 Custody Prior to Indictment Compared

Year	JAPAN	KOREA
1995	US exercised right to custody prior to indictment	US exercised custody prior to indictment
1996	US offers oral promise of "sympathetic consideration" to pre-indictment custody transfer requests.	US offers oral promise of "sympathetic consideration" to pre-indictment custody transfer requests.
2001 –	"sympathetic consideration" remains today only a gentleman's agreement.	ROK-U.S. SOFA now includes language allowing for pre-indictment custody of American service personnel accused of committing one of twelve "serious crimes." ¹

Notes: ¹ According to USFK Regulation 1-44: "In circumstances in which a suspect with SOFA status is arrested by ROK authorities for murder or rape, a custody request will not be presented to ROK authorities... The USFK JA will not approve a custody request if the suspect has been arrested by the ROK authorities for a heinous crime of murder or egregious rape at the scene of the crime, in immediate flight there from, or prior to the suspect's return to U.S. control..."

For decades, the US never ceded pre-indictment custody to Japan or to Korea. By 1996, however, in the wake of the rape of a 12-year-old Okinawan girl,⁷⁸ both Japan and Korea were offered the same promise of sympathy by the United States. In 2001, the

⁷⁶ Stone, "US-Japan SOFA: A Necessary Document Worth Preserving."

⁷⁷ According to USFK Regulation 1-44: "In circumstances in which a suspect with SOFA status is arrested by ROK authorities for murder or rape, a custody request will not be presented to ROK authorities... The USFK JA will not approve a custody request if the suspect has been arrested by the ROK authorities for a heinous crime of murder or egregious rape at the scene of the crime, in immediate flight there from, or prior to the suspect's return to U.S. control..."

⁷⁸ See Chapter Five, Case Study 1.

Agreed Minutes to the ROK-U.S. SOFA formally included “sympathetic consideration” for pre-indictment custody requests whereas the 1996 agreement between Japanese and American negotiators on the principle of “sympathetic consideration” remains to this day nothing more than a gentleman’s agreement. According to Ji-young Cha, sympathetic consideration “... has never been officially incorporated into the Japan SOFA and the United States appears to have no intention of doing so in the near future.”⁷⁹

The Problem with Perception

For any Host nation, pre-indictment custody is a demonstration of the mutual respect essential of a bilateral relationship. When the U.S. government refused requests by Korean authorities for the custody of Sergeants Nino and Walker in the aftermath of the 2002 Armored Vehicle Incident, Koreans protested what they perceived was America’s disregard for Korea’s judicial system.

The U.S. has historically been adamant in its refusal to hand over accused service members to any Host nation which has not fully embraced the protections and liberties found in the United States Constitution. The latitude given to Japanese police and prosecutors to extract confessions is a good example of practices to which the U.S. objects.⁸⁰ District court judges in Japan, for example, convict 99.9 percent of all defendants⁸¹ and its prison system is widely regarded as one of the most oppressive of any

⁷⁹ Cha, "Comparison and Analysis of Korea and Japan Status of Forces Agreements and their Implications for Iraq's SOFA."

⁸⁰ For more on how Korean and Japanese judicial systems differ from the United States, see Appendix G.

⁸¹ J. Mark Ramseyer and Eric B. Rasmusen, "Why Is the Japanese Conviction Rate So High," *The Journal of Legal Studies* 30, no. 1 (2001).

industrialized nation.⁸² Because these conditions are seen as counter to the rights and safeguards contained in the 5th, 6th and 14th Amendments of the United States Constitution,⁸³ U.S. officials balk at pre-indictment custody requests. (See Appendix G).

Despite the 1991 and 2001 revisions however, Korea continues to perceive an unacceptable disparity compared to Japan's SOFA. As recently as the November 2011 torture and rape of an 18 year old Korean girl by Private Kevin Lee Flippin, the local independent daily Yangju News remained critical of the existing criminal jurisdiction differences between Korea and Japan:

Unless such an unfair SOFA is revised, the reality is that there is no way to stop a suspect who can easily run away to the USA because it is difficult to obtain early evidence or to secure statements from the suspect and there is a possibility of destruction of evidence. This, compared to Japan, falls short of being fair and is too generous to American military suspects in Korea.⁸⁴

For Koreans, even after the two revisions to their SOFA, there remains a perception that the agreement is still unbalanced next to Japan's with detractors pointing to how the provisions are applied as proof of inequality. As mentioned in Chapter One, weeks after the 2001 SOFA revisions, the South Korean internet web portal daum.net questioned 4,681 respondents about how they felt about changes to the agreement. An overwhelming ninety-

⁸² According to the Human Rights Watch, "Prisoners in Japan face routine violations of human rights from the moment of arrest through the end of their prison term" (Human Rights Watch, 1995). In 1997 and 1998 Amnesty International protested Japan's mistreatment of prisoners, likening the use of leather handcuffs to "medieval instruments of torture" (Amnesty International, 2002). Speaking on the Japanese judicial system, Staff Sergeant Timothy Woodland's lawyer complained, "Here, you're guilty until proven innocent" (Cullen, 2001).

⁸³ Damien P. Horigan, "Observations on the South Korean Penal Code," *Journal of Korean Law* 3(2003).

⁸⁴ Yangju News, "일본과 같은 SOFA 수정 필요," [SOFA needs change like Japan.] (2011).

five percent of Koreans felt their SOFA remained unfair with nearly one quarter of those respondents claiming their SOFA remained less favorable than Japan's SOFA. According to one Korean report, "95% of those surveyed disagree with SOFA revisions. The survey also revealed that 65% of those respondents felt that "SOFA is unfair agreement and should be revised completely in a view of Korean sovereignty."⁸⁵

The results of this survey illustrate two serious problems for U.S. forces stationed abroad. The first and most obvious problem is the fact that neither host nation regards their SOFA with the United States as *fair*. As long as U.S. forces are perceived as being immune from Host nation laws, there is little the U.S. can do – save a more effective public relations campaign or perhaps greater transparency for UCMJ proceedings and punishment.

The second, and more diplomatically sensitive problem for U.S. forces abroad is that Host nations unfavorably compare their SOFAs to those with other countries. In 1996, the U.S. State Department warned of the "growing misperception by almost every country that the SOFA in that country favors the United States, particularly vis-à-vis SOFA agreements in other countries."⁸⁶ Here, the U.S. can learn from its long SOFA history with South Korea in order to better address future accusations of SOFA inequality from other Host nations.

Today, it is generally agreed that the language of the ROK and Japan SOFAs parallel one another – and some provisions such as environmental regulations and sympathetic consideration are written to Korea's advantage. In order to examine how and

⁸⁵ Korea Economics, "개정된 소파는 매우 불공평," (2001).

⁸⁶ Wexler, "Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq."

why many SOFA crimes can erupt into international incidents, it is important now to examine some specific problems in the application of primary jurisdiction such as the issuance of official duty certificates, jurisdictional waivers and custody of the accused before and after an indictment. Table 5 illustrates the ways in which the two SOFAs are today identical and Table 6 illustrates their differences.

Table 5 Presence or Absence of Provisions for Criminal Jurisdiction in ROK and Japan SOFAs

		KOREA	JAPAN
1	U.S. to cede custody after indictment by Host.	YES ¹	YES ²
2	Host right to retain custody after arrest.	YES ¹	YES ²
3	Reciprocal SOFA terms between Host and U.S.	NO	NO
4	Asymmetrical appeal process between Host and U.S.	YES	YES
5	U.S. retains primary jurisdiction for Inter se incidents.	YES	YES
6	U.S. retains primary jurisdiction for official duty incidents.	YES	YES
7	Official duty certificate issued by only a U.S. authority	YES	YES
8	Final decision on official duty certificates lies with U.S.	YES ³	YES
9	Rights of accused enumerated within each SOFA	Identical ⁴	

Notes: ¹ Since 2001, for one of 12 “serious” crimes (See Appendix C), ² Since 1960, ³ Since 1991, ⁴ See Appendix D.

Table 6 Differences Between ROK and Japan SOFA Criminal Jurisdiction

		KOREA	JAPAN
10	U.S. to cede custody prior to formal indictment by Host.	YES ¹	NO ²
11	SOFA protection for “other” relatives	YES	NO
12	Enhanced “substantial departure” language defining official duty	YES	NO
13	Agreed time to contest official duty certificates	30 days	10 days
14	Agreed timeframe for Host to submit request that U.S. waive its primary jurisdiction	28 days	5 days

Notes: ¹ Since 2001, for one of 12 “serious” crimes (See Appendix C), ² Remains today only a “gentleman’s agreement.”

Revisions to the ROK-U.S. SOFA have all but negated any inequity specific to criminal jurisdiction. As Table 6 illustrates, there are four points which demonstrate provisions to the agreement that are advantageous to Korea compared to Japan’s SOFA with the U.S.:

Number 10: *The U.S. will cede custody prior to formal indictment by Host.* The 1996 gentleman’s agreement to Korea that the U.S. would sympathetically consider requests for custody prior to indictment was formally ratified in 2001 – whereas “sympathetic consideration” remains today only an oral agreement between the United States and Japan.

Number 12: *Enhanced “substantial departure” language defining official duty.* The difference here is that although the ROK-U.S. SOFA has been amended to include a more specific delineation of what is and what is not “official duty,” the Japan-U.S. SOFA is silent on this. In addition, the ROK-U.S. SOFA offers more specific guidelines for Korean authorities to challenge USFK “official duty” certificates. The absence of any specific

language in the Japan-U.S. SOFA gives U.S. authorities greater Law of the Flag privileges than it has in Korea.

Number 13: *Agreed time to contest official duty certificates*

Number 14: *Agreed timeframe for Host to submit request that U.S. waive its primary jurisdiction.*

In regards to both of these points, Korean authorities have additional weeks to readdress USFK official duty determination and to process necessary paperwork than their Japanese counterparts.

2.5 *Analysis*

This chapter has examined what SOFAs are and why they exist, and it has offered the reader a brief history of the SOFA. After an analysis of SOFA criminal jurisdiction provisions and the written language assigning jurisdiction in the Korea, Japan and NATO SOFAs, this chapter found that from 1966 to 2001, the ROK-U.S. SOFA was significantly different from Japan's SOFA signed in 1960. Specifically, the absence of any post-indictment custody provision was the most obvious source of frustration for Koreans. Today however, revisions to the ROK-U.S. SOFA in 1991 and 2001 have established an agreement that is now "identical"⁸⁷ to the NATO SOFA. According to Koo, "... the argument condemning the textual unfairness of the (ROK) SOFA is unconvincing."⁸⁸

Despite this however, the *application* of primary jurisdictional power continues to

⁸⁷ Koo, "The Uncomfortable SOFA: Anti-American Sentiments In South Korea and The US-South Korea Status of Forces Agreement."

⁸⁸ Ibid.

receive critical scrutiny as many Koreans remain unconvinced equity exists between the two SOFAs exists. According to James V. Feinerman:

Historically, few cases alleging crimes committed by GIs have been decided by Korean courts. . . the criminal charges have usually been left to U.S. courts-martial. The claim of South Korean activists is that this is the result of the South Korea-U.S. SOFA being more discriminatory and unfavorable to South Korean than the similar agreements the United States has concluded with NATO nations and Japan.⁸⁹

To test the claims that Koreans have been treated unfairly compared to Japanese, the next chapter will examine whether criminal jurisdiction provisions in both SOFAs have been applied similarly over the last twenty years.

⁸⁹ James V. Feinerman, "Agreement as a Source of Continuing Korean Anti-American Attitudes," in *Korean Attitudes Toward the United States: Changing Dynamics*, ed. David I. Steinberg (Armonk, New York: M.E. Sharpe, 2005).

Chapter Three Analysis of Crime Data

3.1 Introduction

The purpose of this chapter is to compare the application of the ROK-U.S. SOFA to the Japan-U.S. SOFA over the last twenty years. In order to do this, I will analyze two sets of SOFA-related incidents occurring over the same time period. The Korea data include 26 incidents from October 1992 to September 2011. The Japan data include 22 incidents from May 1995 to June 2011. Analysis of both sets of data will focus on how the pre-trial phases of SOFA custody and jurisdiction have been applied by the United States. A comparison of these two sets of data will demonstrate significant changes in the way the U.S. has responded to criminal jurisdiction disputes in Korea and Japan over the last two decades. For Korea, this change took place in the aftermath of protests over the 2002 armored vehicle incident rather than immediately after the 2001 ROK-U.S. SOFA revisions.

The cases included in this chapter are among the few crimes and accidents that are accessible to the general public and were based on a comprehensive search of media sources. For the purposes of this thesis, these data only include incidents serious enough to warrant a request for pre-indictment custody by each Host nation. Sources used for compiling these data include Host nation, U.S. and international media outlets.⁹⁰ It should also be noted here that a comprehensive database for this research was not available to the author. Multiple requests directed to United States Forces Japan as well as the Korean and

⁹⁰ For a complete list of media sources used for this research, see Appendix A.

Japanese Foreign Ministries for more detailed information remain today unanswered.⁹¹ It should be stressed here that this dataset represents only a small percentage of the actual number of crimes committed by American service personnel each year. The overwhelming majority of yearly crime statistics involve petty robbery, parking violations and drunken brawls that go largely unnoticed by Host nation citizens.⁹²

Characteristics of the Cases

Table 7 presents crimes and accidents committed by United States Forces Korea from 1992 to 2011. Table 8 presents a similar sample set of incidents by United States Forces Japan for the same time period, thus making it possible to compare data for the two countries. For each incident, six questions were posed:

Question 1: Did the crime or accident occur while "on-duty" or "off-duty"?

This question is necessary for distinguishing between those cases for which the United States would automatically assume exclusive jurisdiction and cases for which jurisdiction was concurrent.

Question 2: Which nation made the initial arrest?

Determining which nation makes the first arrest of the suspect is important when tabulating instances of pre-indictment custody. Accepted protocol in cases where the suspect is first arrested by Host nation police is that the suspect to be immediately transferred to U.S. custody during the (pre-indictment) investigation.

For purposes here, cases in which suspects were initially apprehended by Host

⁹¹ Interestingly enough however, United States Forces Korea has been far more transparent regarding information on monthly court martials and Korean criminal court convictions.

⁹² For a more complete list of SOFA crimes for 2009 and 2010, see Appendix D.

police and remained in Host custody prior to indictment are identified as involving “pre-indictment custody.”

Question 3: When was the accused transferred to Host nation custody?

Transfer to Host nation custody could occur at any of the following points in time:

- A. Suspect remained in Host nation custody after arrest by Host nation police and no request by U.S. to return service member.
- B. Suspect transferred prior to indictment.
- C. Suspect transferred after issuance of an indictment.
- D. Suspect transferred after conviction.
- E. Suspect was never transferred to Host nation custody.
- F. Host nation arrests and immediately returned suspect to U.S. custody.

Important to this research is the frequency of A and B cases because both represent occasions when the United States gave sympathetic consideration to the Host.

Question 4: Which nation tried the suspect in court?

Cases are identified in terms of whether the individual was tried by the Host courts or the U.S. Military’s Uniform Code of Military Justice (UCMJ), or whether the charges were dropped.

Question 5: Was an apology or expression of regret offered by the US ?

Here, formal apologies to the Host and victims, acceptance of responsibility as well as formal condolences are tabulated together as “YES.” (While data for Question 5

were difficult to collect and remain incomplete, the change in the frequency of these diplomatic gestures is striking.)⁹³

Question 6: *Were public protests or / demonstrations held as a result of the United States retaining custody of the accused?*

Data here include any form of public demonstration, violent and non-violent, against criminal jurisdiction protocols. This information will be compared to instances of pre-indictment custody transfer in order to establish any significant correlation. While public demonstrations in Seoul against USFK typically include a long laundry list of grievances, most involve the SOFA. Public protest over issues not related specifically to violent crime, such as when USFK was accused in 2000 of illegally dumping untreated toxic waste into the Han River, are not included in this data set.

⁹³ "In many of these incidents, two cultural-legal Korean-American differences continue to contribute to anti-American sentiment. The first is the issue of an apology - required in Korean customary usage in a moral sense, but which, in official U.S. circles, seems to carry the stigma of guilt and responsibility, including financial liability, and is thus eschewed by lawyers. The second is that someone should be responsible for tragedies and thus take the blame, even if it is only symbolic. This is not American practice, and thus the acquittal of the acquittal of the two U.S. soldiers in 2002 was seen as unfair and inappropriate from a Korean standpoint" (Steinberg, 2005).

Table 7 United States Forces Korea SOFA Crimes (1992 to 2011)

Date	Name	Crime	1 Official Duty	2 Arresting Nation	3 Transfer Custody ¹	4 Trial Nation	5 U.S. Apology?	6 Protests ?
10.1992	PVT. Kenneth Lee Markle	Murder / Rape	NO	HOST	D	HOST	YES	YES
05.1993	CPL Roger Salroyce	Rape / Assault	NO	HOST	D	HOST		
12.1993	Richard Duff, Brian L Hem	Robbery / Assault	NO	UK ²	D	HOST		
08.1994	Larry Walton	Traffic (fatal)	YES	USFK	E	Charges Dropped		
09.1996	PVT Eric S. Munnich	Murder	NO	HOST	D	HOST	YES	YES
09.1996 ROK and U.S. agree in principle to pre-indictment transfer of custody for serious crimes (See Appendix C)								
01.1998	Timothy J Hendrix	Murder	NO	HOST	F	HOST		
12.1998	James W. Fuhrman	Murder	NO	HOST	F	UCMJ ³		
01.1998	CPL Kenneth Singlitory	Assault	NO	USFK	D	HOST		
02.2000	CPL Christopher McCarthy	Murder	NO	USFK	D	HOST		YES
01.2001 Formal revisions to the ROK-U.S. SOFA								
07.2001	SSGT. Ronnie D. Kirby	Traffic	NO	UK	D	HOST		
06.2002	SGT M.Walker, F. Nino	Traffic (fatal)	YES	USFK/ HOST	E	UCMJ	YES	YES
Fall, 2002 Nationwide protests								
09.2002	USFK soldier	Traffic (fatal)	YES	UK	E	Charges Dropped	YES	
08.2003	27 year old USFK soldier	Traffic (DUI)	NO	UK	D	HOST		
12.2003	SGT. Jerry Onken	Traffic (fatal)	NO	USFK	B	HOST	YES	
05.2004	PFC C. Humphreys	Attempted Murder	NO	HOST	B	HOST	YES	
08.2004	Maj. Richard Hart	Murder	NO	HOST	F	UCMJ		
06.2005	PFC Bryant	Traffic (fatal)	YES	USFK	E	Charges Dropped	YES ⁴	
01.2007	PFC. Ramirez	Rape	NO	HOST	A	HOST	YES	
04.2007	PFC Feldmann & SGT. Basel	Attempted Rape	NO	HOST	A	HOST		
04.2007	PFC. Martens & PFC Carpenter	Assault / Robbery	NO	HOST	A	HOST		

05.2008	Capt. C. Gray	Murder	NO	USFK	E	UCMJ		
11.2008	SSGT. V. Aruwah	Drug trafficking / Assault	NO	HOST	A	HOST		
03.2009	2ID soldier, Camp Humphrey	Assault/ Attempt Murder	NO	HOST	C	HOST	YES	
02.2011	PFC Lloyd Daniel	B&E, Assault, Attempt Rape	NO	HOST	A	HOST	YES	
09.2011	PVT Kevin Lee Flippin	Rape / Torture	NO	HOST	C	HOST	YES ⁵	YES
09.2011	PVT Kevin Robinson	Rape / Robbery	NO	USFK	B	HOST	YES	YES

Notes

¹ Incidents were coded as: A) Suspect remained in Host nation custody after arrest by Host nation police and no request by U.S. to return service member; B) Suspect transferred prior to indictment; C) Suspect transferred after issuance of an indictment; D) Suspect transferred after conviction; E) Suspect was never transferred to Host nation custody or F) Host nation arrests and immediately returned suspect to U.S. custody.

² Arresting nation unknown.

³ Fuhrman's crime was problematic: while the crime was committed in U.S. base housing, the bodies of the two victims (his 42-year old Korean-American wife and his 4 year old adopted Korean son) were transported and dumped outside the U.S. military installation.

⁴ Apology from President Bush to President Roh Moo-hyun came day of accident

⁵ Apology from US Department of State came hours after Flippin's arrest

Table 8 United States Forces Japan SOFA Crimes (1995 to 2011)

Date	Name	Crime	1 Official Duty	2 Arresting Nation	3 Transfer Custody ¹	4 Trial Nation	5 US Apology?	6. Protests
05.1995	PVT Joshua Hill	Murder	NO	UK ²	C	HOST		
09.1995	3 USFJ servicemen ³	Rape	NO	USFJ	C	HOST	YES	YES
1995 Japan and U.S. agree in principle to “sympathetic consideration” of pre-indictment transfer requests								
07.1996	Terrance Swanson	Attempt Murder / Robbery	NO	UK	B	HOST	YES	
08.1996	U.S.A.F. police officer	Rape	NO	USFJ	E	UCMJ		
09.1996	LCPL Lori Padilla	Reckless driving	NO	USFJ	C	HOST		YES
10.1998	CPL Randall Eskridge	Hit & Run, DUI	NO	USFJ	C	HOST	YES	YES
01.2000	LCPL Oswald McDonald	Attempted Rape	NO	UK	C	HOST	YES	
07.2000	LCPL Kenneth Titcomb	Molestation	NO	HOST	F	Charges Dropped	YES	
(01.2001 Formal revisions to the ROK-U.S. SOFA)								
01.2001	CPL Raven W Gogol	Molestation	NO	HOST	C	HOST		
07.2001	SSGT. Timothy Woodland	Rape	NO	UK	B	HOST	YES	YES
(Fall, 2002 Nationwide protests in Korea)								
11.2002	MAJ. Michael Brown	Assault	NO	USFJ	C	HOST		YES
05.2003	LCPL Jose Torres	Rape/ Assault	NO	USFJ	B	HOST	YES	YES
09.2005	SSGT. Armando Valdez	Molestation	NO	HOST	A	HOST		
01.2006	William Oliver Reese	Murder / Robbery	NO	USFJ	B	HOST	YES	
07.2007	19 year old Petty Officer 2 nd Class	Attempt Murder	NO	HOST	A	HOST	YES	
10.2007	4 U.S. Marines ⁴	Rape	NO	USFJ	E	UCMJ	YES	
02.2008	SSGT. Tyrone Luther Hadnott	Kidnapping/ Rape	NO	HOST	A	UCMJ	YES	YES
04.2008	Olatunbosun Ugbogu	Murder / Robbery	NO	USFJ	B	HOST	YES	YES
11.2009	SSGT. Clyde Gunn	Hit and Run (fatal)	NO	HOST	C	HOST		YES
03.2010	Petty Officer 3 rd Wendy Foster	Hit and Run	NO	USFJ	C	HOST		

08.2010	SGT. Phillip E Sawyer	Sexual Assault	NO	HOST	F			
06.2011	Rufus Ramsey	Traffic (fatal)	YES	USFJ	E	Charges Dropped		YES

Notes:

¹ Incidents were coded as: A) Suspect remained in Host nation custody after arrest by Host nation police and no request by U.S. to return service member; B) Suspect transferred prior to indictment; C) Suspect transferred after issuance of an indictment; D) Suspect transferred after conviction; E) Suspect was never transferred to Host nation custody or F) Host nation arrests and immediately returned suspect to U.S. custody.

² Arresting nation unknown.

³ PFC. Rodrico Harp, PFC. Kenneth Ledet, Seaman Marcus Gill

⁴ Gunnery SGTs. Carl Anderson, Jarvis Raynor, Lanaeus Braswell and LCPL Larry Dean

3.2 *Analysis*

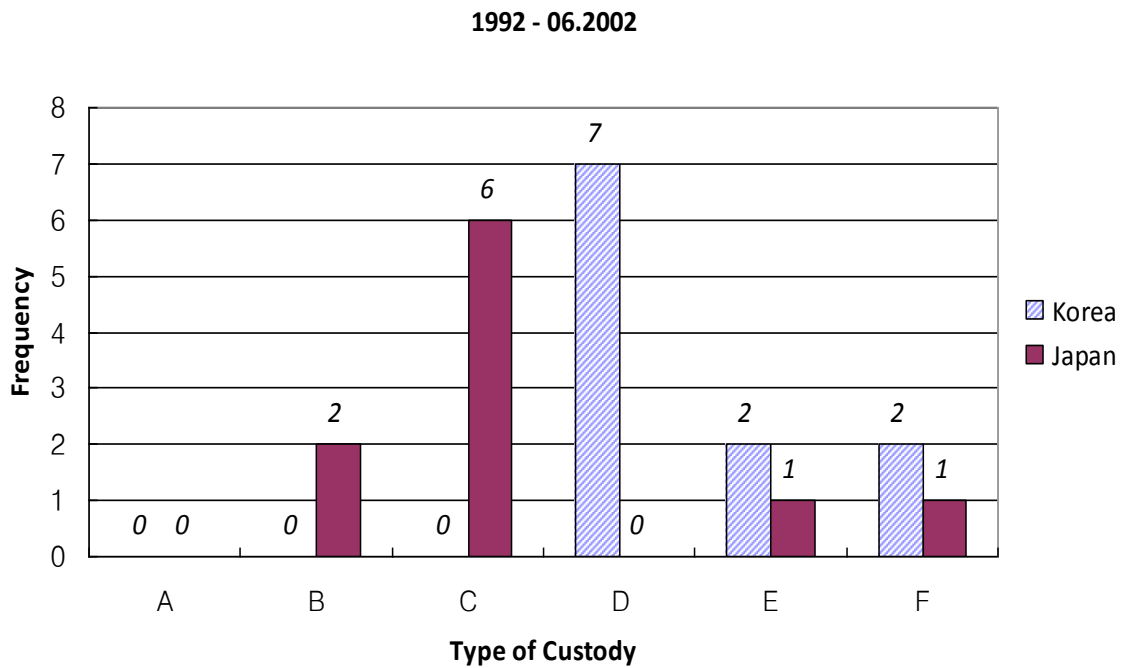
Based on available data, there have been measurable shifts in how the U.S. responds to SOFA criminal jurisdiction incidents in Korea as well as in Japan. This research demonstrates increases in the number of instances in which both Host nations assumed pre-indictment custody. Difficulty in comparing these data was due in large part to the fact that the shift towards more pre-indictment custody transfers in Korea reflected a larger change than in Japan. This is because the original Japan-U.S. SOFA included a provision permitting post-indictment custody whereas the ROK-U.S. SOFA did not contain a similar provision until 2001. It does appear that the U.S. began to increasingly cede pre-indictment custody after 2002. Additionally, data also demonstrate an observable increase in the number of official apologies issued by the U.S. to Korea compared to apologies offered to Japan. This shift, like the shift in pre-indictment custody appears to increase after 2002.

Custody

Based on data in Tables 7 and 8, changes in the way the U.S. handles the pre-trial phases of SOFA incidents occurred after June, 2002. These changes are particularly

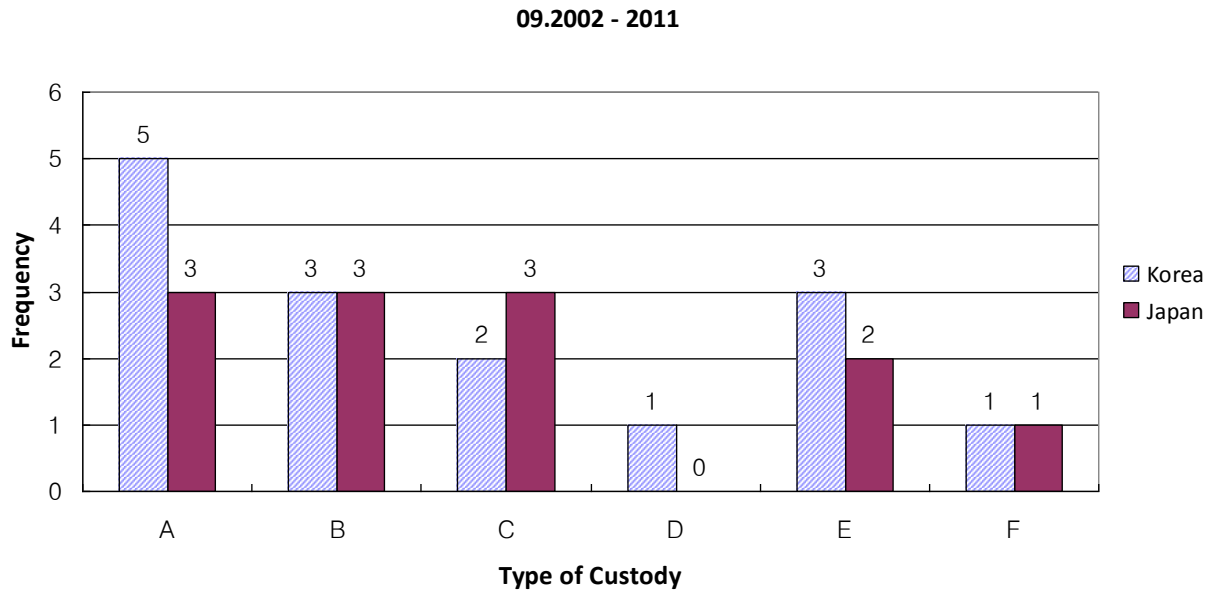
apparent for Korea. In terms of custody, the data found in Tables 7 and 8 are represented graphically in Figures 3 and 4 below.

Figure 3 Distribution of Handling Across Six Categories of Custody (1992 to 06.2002)



Notes: ¹ Incidents were coded as: A) Suspect remained in Host nation custody after arrest by Host nation police and no request by U.S. to return service member; B) Suspect transferred prior to indictment; C) Suspect transferred after issuance of an indictment; D) Suspect transferred after conviction; E) Suspect was never transferred to Host nation custody or F) Host nation arrests and immediately returned suspect to U.S. custody.

Figure 4 Distribution of Handling Across Six Categories of Custody (09.2002 to 2011)



Notes: ¹ Incidents were coded as: A) Suspect remained in Host nation custody after arrest by Host nation police and no request by U.S. to return service member; B) Suspect transferred prior to indictment; C) Suspect transferred after issuance of an indictment; D) Suspect transferred after conviction; E) Suspect was never transferred to Host nation custody or F) Host nation arrests and immediately returned suspect to U.S. custody.

The first significant shift in custody rights for Korea is demonstrated in columns C and D. This shift is a result of the 2001 revisions to the ROK-U.S. SOFA which gave Korea the right to custody after indictment rather than after conviction. Table 7 shows that (of the cases available) at no point from 1992 to June of 2002 did USFK transfer custody to Korean authorities prior to an indictment,⁹⁴ while in that same time period, USFJ transferred custody on two occasions.⁹⁵ With the exception of those two incidents, custody for all remaining cases followed agreed upon SOFA protocol. For Korea, custody

⁹⁴ See Column 3: "Transfer Custody"

⁹⁵ Swanson in 1996 and Woodland in 2001.

remained with USFK until conviction and for Japan the custody of six out of the eight cases from Table 8 remained with USFJ.

Figure 3 demonstrates that in conformance with SOFA provisions, most custody transfers in Korea came after conviction (D) while in Japan, custody was transferred after indictment (C). Figure 4 however suggests a significant shift in the years after the June, 2002, deaths of two Korean schoolgirls, reflected in an increased number of cases in which the U.S. ceded custody.

The second significant shift in custody rights is demonstrated in columns A and B. An analysis of the data for Korea indicates that at no point between 1992 and June 2002 did U.S. Forces Korea agree to pre-indictment custody (0% of 11 incidents). For roughly the same period of time however, U.S. Forces Japan transferred two servicemen⁹⁶ to Japanese custody prior to indictment (20% of 10 incidents). From 2002 to 2011, however, both USFK and USFJ ceded custody prior to indictment more often than during the previous decade. From September 2002 to 2011, USFK agreed to the pre-indictment custody of eight servicepersons (53.3 percent of 15 incidents). During the same period, USFK agreed to the pre-indictment custody of six servicepersons (50 percent of 12 incidents).

Comparing both sets of data, Korea saw a 46.6 percent increase in pre-indictment custody transfers from the incidents before 2002 to the incidents occurring after 2002 while Japan saw a 30 percent increase.

⁹⁶ Swanson in 1996 and Woodland in 2001.

Protests

This research also has highlighted the influence of protest and negative public opinion on the way the United States handles SOFA incidents. Based on the data in Tables 7 and 8, this influence would seem to be more pronounced in Korea than in Japan over the last twenty years.

Figure 5 Timeline of Protests Effecting SOFA Change in Korea

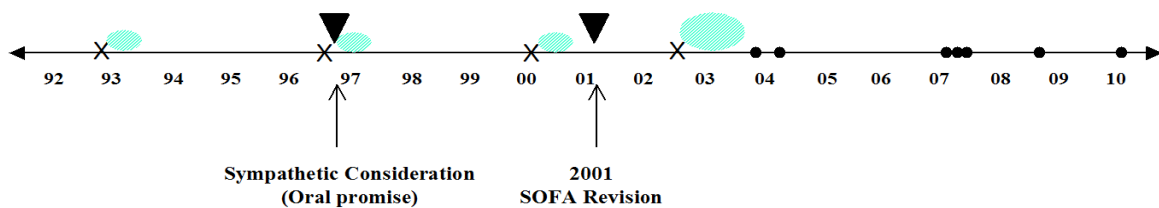
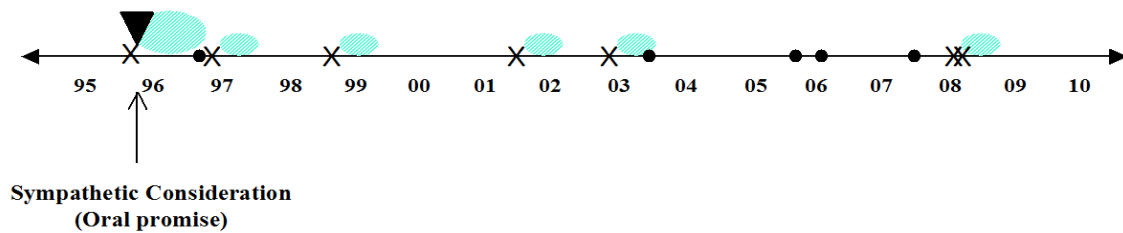




Figure 6 Timeline of Protests Effecting SOFA Change in Japan



- X Crimes eliciting Host nation protest
-  Protest
-  Changes to SOFA
- Instances of pre-indictment custody

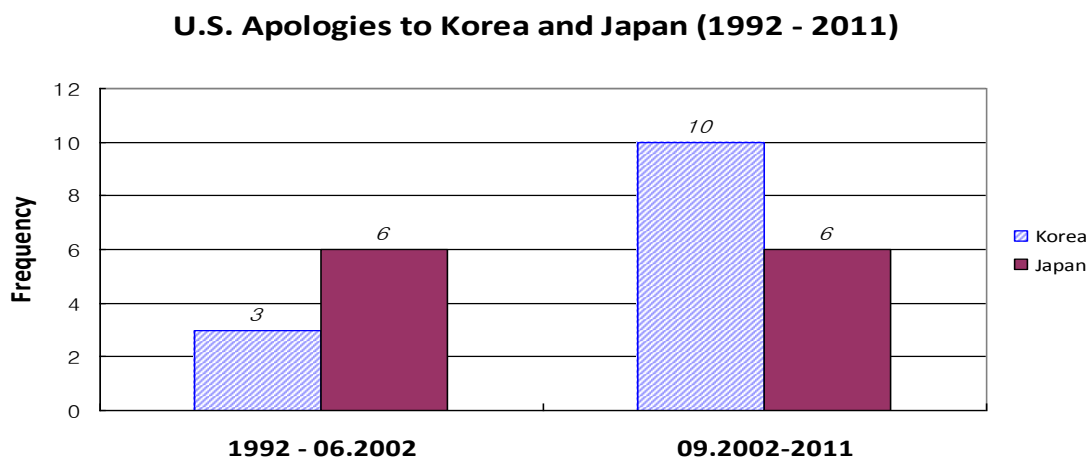
Notes: Woodland (2001), Torres (2003), Hadnott (2008), and Ugbo (2008) were all transferred prior to indictment. They are presented here as X due to fact that their pre-indictment transfer came only after Host nation protest.

Figures 5 and 6 illustrate a clear pattern that protests have had in producing change in the way the United States handles the pre-trial phases of SOFA custody. With tangible revisions to the ROK-U.S. SOFA in 2001 and the number of uncontested custody transfers after 2003, it would appear protests in Korea have been more successful than in Japan.

Apologies

A comparison of Tables 7 and 8 shows that before June 2002, the U.S. offered some form of official statement of regret, expression of condolence or apology to Korea after only three separate incidents (27.2 percent of 11 incidents) whereas Japan received six similar official statements (60 percent of 10 incidents). After 2002, however, Korea received 10 formal statements (66.6 percent of 15 incidents) while Japan received another six statements (50 percent of 12 incidents) for the same time period.

Figure 7 Frequency of Apologies by U.S. to Korea and Japan (1992-2011)



Source: Table 7 and Table 8

Note: Data includes official apologies, condolences and statements of regret by ranking American authorities.

3.3 *Conclusion*

This chapter began by comparing two SOFA crime datasets for the last two decades. This analysis quantified the pre-trial phases of custody and jurisdiction of American servicepersons accused of serious crimes or accidents. This analysis also examined the U.S. application of SOFA criminal jurisdiction over time as well as the conveyance of apologies. The data reveal significant changes in the way many serious crimes have been processed after June 2002 compared to incidents occurring before June 2002. It would appear that, in the wake of the June 2002 traffic incident in Korea, there has been a significant increase in the number of cases USFK has ceded custody prior to indictment. The increase in ceding pre-indictment custody by United States Forces Korea and the increase of apologies by U.S. officials to Korea suggest an association between the organized public demonstrations throughout the Fall of 2002 and America's willingness to accommodate Korea's demands for a more equal relationship. It also may suggest a possible shift in how the United States views Korea as an ally. While a more thorough set of data remains beyond the reach of this investigation, existing data do suggest a pattern in behavior by the United States that it has tried over the last decade to level the playing field between its relationship with Korea and its relationship with Japan.

Chapter Four South Korea

4.1 Introduction

This chapter presents two cases that illustrate how U.S. handling of SOFA incidents has changed after the accidental deaths of two Korean middle school girls in June, 2002. Where the last chapter dealt with the long term view and overall perspective of how U.S. application of SOFAs changed, this chapter uses qualitative analysis to show how the handling of pre-trial phases of SOFA criminal jurisdiction has changed. This chapter will demonstrate that even though the language specific to criminal jurisdiction was revised in 2001, U.S. application of those provisions did not begin to change until after the June 2002 traffic deaths. The social and political climate following the June 2002 traffic deaths was a major impetus for the United States to shift its custody protocol towards one of greater cooperation with Korean authorities.

After examining a case from 1992, I will discuss the transition in the treatment of sympathetic consideration that began with an oral agreement in 1996 and later formalized in 2001, and then I will present a second case that took place in 2003. The first case study in this chapter involves the 1992 murder of Yoon Geum-mi by Private Kenneth Lee Markle – four years before the United States agreed in principle to ‘sympathetically consider’ Korean requests for custody and jurisdiction. Yoon’s murder was a watershed moment in Korean-American relations and strengthened Korean sovereignty as it marks the first SOFA crime over which Koreans came together as a nation in protest of the unfairness of their SOFA. In the wake of that crime, sporadic but continuous protests by Korean NGOs and

university student groups on busy streets were successful in galvanizing a united public voice against the unfairness of their SOFA custody provisions compared to similar provisions contained in the Japan-U.S. SOFA. The second case study involves United States Air Force Sergeant Jerry Onken and his crimes of vehicular homicide, driving under the influence, and fleeing the scene in November, 2003. In contrast to Yoon's murder in 1992, the Onken case will demonstrate the beginning of a greater willingness by the United States to cede custody and jurisdiction in Korea.

4.2 *The 1992 Murder of Yoon Geum-mi*

Summary

In the late evening hours of October 27, 1992, Private Kenneth Lee Markle walked with Yoon Geum-mi to her small one-room apartment. At the time, Markle was with the Second Infantry Division stationed at Camp Humphrey and Ms. Yoon was an employee of a nearby camp town⁹⁷ 'hostess bar.'⁹⁸ After agreeing to provide sex, Yoon escorted Markle to her apartment. On the way, they crossed paths with an intoxicated Corporal Jason Lamburt⁹⁹ who began to argue with Markle before parting ways. It is unclear whether Markle was angry at the thought of Yoon sleeping with Lamburt the night before or simply that he disapproved of her sleeping other men, but nevertheless, once in her apartment, Markle began to brutally assault Yoon with a glass Coca-Cola bottle. He bludgeoned her

⁹⁷ Camp towns ("villes" as they are known by US soldiers, "kee-ji-chon" to Koreans) are small communities situated closest to U.S. military installations. Korean locales such as Dongducheon, Uijongbu and Paju have historically bore the brunt of most USFK crimes.

⁹⁸ While prostitution is illegal today in Korea, the 'world's oldest profession' still does a thriving business – from obvious 24-hour 'red-light' districts, to discreet back-alley massage parlors, hostess bars, singing rooms, coffee "delivery girls" and even barber shops.

⁹⁹ Lamburt had employed Yoon's "services" the previous evening.

repeatedly until she collapsed unconscious on the floor and died a short time later.¹⁰⁰ The next evening, Markle was recognized while walking around in the same camp town entertainment area he met Yoon. He was soon arrested by Korean police and as per standard SOFA protocol in 1992, Markle was immediately turned over to USFK custody where he would remain throughout his investigation, indictment and trial.

Two weeks after the murder, as "the situation was rapidly becoming volatile," USFK issued its regrets stating that "all members of the American community were truly sorry about her death and expressed condolences to her family, friends and the Korean community."¹⁰¹ Markle was formally indicted by Korea one month later on November 31, 1992, but remained in USFK custody inside Camp Humphreys in Pyoungtaek in accordance with SOFA protocol. Throughout this time, protests were held outside the main gate and later in front of the courthouse where his trial was held. The main point of resentment was that Markle continued to remain in USFK custody after his indictment while the SOFA Japan has with the U.S. would have obligated USFJ to hand Markle over to Japanese authorities.

On February 17, 1993, just five months after Yoon's murder, Kenneth Lee Markle became the first American soldier to be tried in a Korean criminal court.¹⁰² Prosecutors originally asked for the death penalty. They were, however, unable to disprove beyond a reasonable doubt Markle's claim that after he left Yoon's apartment the night of the murder

¹⁰⁰ Specific details of Markle's atrocities can easily be accessed from many different Internet sources and need not be repeated here. Suffice to say his crimes were repugnant and offensive enough to bring disparate civic groups together in protest.

¹⁰¹ Robert Neff, "Kenneth L. Markle: Sadistic Murderer or Scapegoat?," Koehler, Robert J., <http://www.rjkoehler.com/2010/02/24/kenneth-markle-was-he-innocent/>.

¹⁰² Ibid.

and that it was Lamburt who had returned to commit the terrible atrocities. A three-judge panel eventually sentenced Markle to life imprisonment on April 14, 1993, but an appeals court reduced the sentence to 15 years.¹⁰³ After the Korean Supreme Court upheld the 15 year sentence on April 28, 1994,¹⁰⁴ USFK finally handed him over to Korean authorities.¹⁰⁵ Markle was freed from prison on August 14, 2006 and sent back to the United States after a Korean parole board had “determined he was not likely to commit another crime.”¹⁰⁶

Analysis

The murder of Yoon Geum-mi coincided with the birth of an organized public voice in Korea. Her death in late October of 1992 came in the waning days of Roh Tae-woo’s authoritarian rule¹⁰⁷ and just weeks before Kim Young-sam would be elected in South Korea’s first democratic presidential elections. For the first time, political influence began to shift toward local, provincial governments and community groups and away from the central hierarchy in Seoul.¹⁰⁸ The demise of the National Security Law “transformed” local grievances with SOFA crimes and accidents into “political interests – and matters of local autonomy, human rights, and quality of life issues – as citizens increasingly spoke out, mobilized and pressured the central government under the flag of democracy.”¹⁰⁹

¹⁰³ "The court said it cut the sentence because Markle's family offered compensation to Yoon's family" (The Seattle Times, 1993).

¹⁰⁴ Kyung-nam Kim, Rev., "Rising U.S. Army Crimes: Korean People's Struggle to Eradicate the Crimes by U.S. Army Troops in Korea," *Asian Human Rights Commission, Human Rights Solidarity* Vol. 04(1994).

¹⁰⁵ Neff, "Kenneth L. Markle: Sadistic Murderer or Scapegoat?"

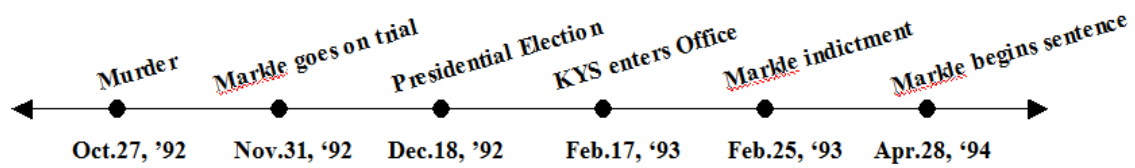
¹⁰⁶ Ibid.

¹⁰⁷ Mr. Roh was convicted in August 1996 and sentenced to 17 years for the "1979 military coup that brought Mr. Chun to power, for the violent suppression of a pro-democracy uprising in Kwangju in 1980 and for the collection of millions of dollars in bribes from businessmen." In 1997, he was pardoned by then-president Kim Dae-jung (Pollack, 1997).

¹⁰⁸ See also Cooley, 2005 and Ivey, 2009.

¹⁰⁹ Moon, "South Korea-US Relations."

Figure 8 Timeline of Handling Yoon Geum-mi's Murder



The crime itself and specific details of Yoon Geum-mi's death were important for galvanizing widely divergent groups in the unified campaign for SOFA revisions at a grassroots level. It was springtime for Korean democracy and the lame-duck Roh Administration was no longer concerned about enforcing Korea's National Security Law.¹¹⁰ Student groups, activists and NGO's were finally free to voice their dissent against the United States military presence without the fear of imprisonment. The Internet was still a few years away but civic groups were nevertheless effective in their protests. After Markle's arrest and during his trial, student and civic groups posted banners of crime scene photographs of Yoon's bloodied, naked body along the busier streets and areas popular with college students with demands for custody.

The atrocities of the crime and the inequity seen between the Korea and Japan SOFAs left many Koreans shocked and outraged as more and more university students began to demand greater Korean jurisdiction over USFK suspects. These demands included custody of the accused after indictment rather than until a courtroom conviction.

¹¹⁰ For years, Korean newspapers, student and religious organizations and leading intellectuals faced lengthy prison time or even execution for criticizing America's military presence. Written in 1948, the National Security Law prohibited among other things, membership in any organization "with aims to overthrow the government" or the creation, possession and/or distribution of "materials that promote anti-government ideas." In effect, this law effectively linked any dissent against the American military presence to support for North Korea. (Kraft, 2006).

The stark difference here between the ROK and Japan SOFAs only angered citizens further. It would take another decade of continued public pressure before the U.S. would eventually soften its resolve to never ceding jurisdiction. Explaining the tumultuous years after Yoon's murder, Bruce Cumings writes: "Koreans have been experiencing a cathartic politics in the past decade, where many suppressed and unpalatable truths have come forth with enormous political force."¹¹¹ The unspeakable truths Cumings refers to include a long list of declassified events that shed new light on America's longstanding image as 'savior' and have had a significantly negative effect upon the opinions and attitudes of younger Koreans.¹¹²

4.3 *Sympathetic Consideration*

After Yoon's death, civic groups, taxi drivers unions, teachers' unions, and student groups began to organize and speak out against SOFA crimes, and by 1996, the United States promised Korea (and Japan) to "sympathetically consider" requests for custody.¹¹³ The U.S. promise of sympathy to Korea came one year after the rape of a 12 year old schoolgirl by three U.S. servicemen in Japan.¹¹⁴ Additionally, the societal pressure that existed in Korea during this time transformed local SOFA incidents into national issues as

¹¹¹ Bruce Cumings, "The Structural Basis of Anti-Americanism in the Republic of Korea," in *Korean Attitudes Toward the United States: Changing Dynamics*, ed. David I. Steinberg (Armonk, New York: M.E. Sharpe, 2005).

¹¹² "It takes only a few days in the archives of the U.S. Military Government or the State Department to realize that the Korea critique of Americans for their country's division, the Military Government's suppression of alternative political forces, U.S. support for a succession of dictatorships, and American complicity in political massacres (Yosu in 1948, Cheju in 1948-49, the Chiri-san guerrillas, many others like Nogun-ri during the war, and Kwangju in 1980) is echoed time and time again in classified reports." (Cumings, 2005)

¹¹³ Moon, "South Korea-US Relations."

¹¹⁴ See Chapter 5.2

local authorities¹¹⁵ sought greater autonomy over crimes taking place outside the main gate on their streets and in their bars. The SOFA *incidents* taking place off-base energized social *interests* and vocal points of opposition. SOFA crimes had the effect of legitimizing non-governmental organizations as ordinary citizens developed greater confidence to speak out against government policy. This confidence put more pressure on the national government to defend Korean sovereignty. There had always been complaints against America's presence but those complaints had been historically silenced by Korea's National Security Law. In the latter part of Roh Tae-woo's administration, as enforcement of the National Security Law eased, Korean democracy and a mobilized citizenry successfully transformed local crimes into national issues as "the personal became political."¹¹⁶

Because these NGO's were so effective in demanding revisions to their SOFA, the United States eventually negotiated a gentleman's agreement with Korea on September 12, 1996 regarding pre-indictment custody for twelve serious crimes.¹¹⁷ This oral agreement mirrored a similar arrangement the U.S. made with Japan in 1995 whereby U.S. authorities would give 'sympathetic consideration' to requests for pre-indictment custody of USFJ members suspected of committing serious crimes such as murder or rape.

This promise given to Korea soon proved to be an empty gesture. By November 5, 1996 – just two months after promising sympathy – Korean authorities made a formal request for the pre-indictment custody of Private Eric Steven Munnich.¹¹⁸ Munnich had

¹¹⁵ Localities such as Dongducheon (Camp Casey), Pyeongtaek (Camp Humphreys), or Uijongbu (Camp Red Cloud).

¹¹⁶ Moon, "South Korea-US Relations."

¹¹⁷ Seoul Yonhap News Agency, "South Korean NGOs Seek Revision of Status of Forces Agreement," (2000).

¹¹⁸ Some sources spell last name "Munique"

been initially arrested by Dongducheon police for the near decapitation murder of Lee Ki-soon. Per SOFA protocol at the time, Munnich was immediately transferred to USFK custody after his initial arrest. The request for pre-indictment custody, however, was denied. USFK officials simply responded that after consideration, they were "unable to direct the transfer" but assured Koreans that Munnich was unable "to flee, destroy any evidence or commit any other offense."¹¹⁹ Given the brutality of the crime, USFK refusal to sympathetically consider a request for pre-indictment custody angered many Koreans.

Four years later, when Specialist Christopher McCarthy¹²⁰ was arrested on February 21, 2000 for the violent strangulation death of an Itaewon bar girl, USFK once again refused Korea's request for pre-indictment custody. In what would prove embarrassing for the United States, McCarthy managed to escape just hours before he was to make his first appearance in Seoul district court. He remained 'on the run' for two days before South Korean police re-captured him and turned him over once again to the US authorities, consequently reigniting the debate of the revision of the Status of Forces Agreement.¹²¹

4.4 The Accidental Traffic Deaths of June 13, 2002

Koreans continued to see the U.S. as an important ally but were less and less able to understand why their relationship unfairly accommodated Washington's interests at the expense of their own. They began to see that their SOFA had, for years, favored the United

¹¹⁹ Seoul Yonhap News Agency, "US Army Rejects Request for Transfer of US Soldier Accused of Murder," (1996).

¹²⁰ McCarthy is officially the last USFK murder of a Korean citizen to date. The only other murder to have occurred since then has been by Captain Christopher Gray in May, 2008. The crime however occurred on base and his victim was his (non-Korean) wife. The case was decided by UCMJ (See ROK Drop, 2010).

¹²¹ Seoul Yonhap News Agency, "Alleged Murder by US Soldier Prompts Status of Forces Debate," (2000).

States maintaining a strong upper hand over South Korea. By 2002, a shift in public opinion and an ever-increasing demand for a more equal relationship with the United States was driven by the rapid pace of modernity and democratization in Korea. The eventual growth and influence of internet sites such as daum.net, freechal.com, naver.com, and yahoo.co.kr allowed many NGOs and civic groups to finally organize on a national level and speak out against policy in such ways that had previously been punishable by death for decades. “A perception that the U.S. was treating the Republic of Korea as a junior partner, especially in relation to U.S. treaties with Japan and Germany, offended Korean sensibilities.”¹²² In reference to how expectations shifted partly as result of rapid economic growth, Choong-nam Kim writes:

Koreans harbor deep feelings of anger and resentment at the wrongs done to them in the past. The United States is often seen as one of the causes of this resentment. From the beginning, the management of the U.S.–ROK alliance has not been easy because the United States, a powerful and wealthy country with little interest in Korea, was seen in stark contrast to Korea, a relatively weak and poor nation in need of American assistance. In the past, Koreans accepted this unequal relationship, but those who have grown up knowing prosperity and democracy no longer tolerate such a relationship.¹²³

¹²² Center for Strategic and International Studies International Security Program, "Path to an Agreement: The U.S.-Republic of Korea Status of Forces Agreement Revision Process," in *A CSIS International Security Program Report* (Washington, D.C. : Center for Strategic and International Studies 2001).

¹²³ Kim-choong Nam, "Changing Korean Perceptions of the Post-Cold War Era and the U.S.- ROK Alliance," *East West Center: Asia Pacific Issues* Number 69(2003).

These social forces finally boiled over on June 13, 2002, when two middle school girls¹²⁴ were accidentally killed by an armored U.S. Army vehicle¹²⁵ on training maneuvers. These maneuvers were defined as being "on-duty" thus giving USFK primary jurisdiction and in the days and weeks that followed, frustration over existing SOFA provisions concerning *official duty* quickly created an international incident for the United States. Even though the incident itself would not have been covered by the 2001 revisions, these protests nonetheless had a very important effect of pushing the U.S. to change the way it handled SOFA incidents. What began as a local tragedy quickly became an indictment of the limits imposed by the United States on Korea's national sovereignty and led most Koreans to reassess the rationale of their alliance with the United States. As a result, the backlash over the 2002 armored vehicle incident saw some of the largest and the most organized protests in the history of the U.S. alliance with Korea.

Immediately after the accident, Korea requested custody of the two U.S. Army soldiers¹²⁶ who had been navigating the vehicle at the time of the accident for questioning. Based on existing literature, Korea had never before made such a request for pre-indictment custody for an on-duty accident, nor had the U.S. ever granted such a request.¹²⁷

The perceived injustice in the wake of the accident was so significant that it brought ordinary citizens from all walks of life into the streets and unified the nation with much of the blame directed at a U.S. government unprepared for the level of organization of the

¹²⁴ Shim Mi-son and Shin Hyo-sun.

¹²⁵ A 63 ton M88-A2 Recovery Vehicle.

¹²⁶ Sergeants Mark Walker, and Fernando Nino

¹²⁷ Gao, "Between a Rock and a Hard Place: Tensions Between the US-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR."

protests. Because the accident was ruled as an official duty incident, Korean authorities were not only prohibited from prosecuting the case but USFK limited local police involvement during the investigation. Had the incident occurred just a decade earlier, it is conceivable the two deaths would have remained a local issue and long forgotten today. However, given the changes produced by democratization, demands for custody led to greater organized protests nationwide. Host nation political interests began criticizing 'official duty' as a threat to national sovereignty.¹²⁸ Their argument was effective in transforming a local traffic accident into a national platform for more SOFA revisions and base relocations. At the end of the day, the significant influence of the protests and public opinion that came after June 2002 seems to have shifted U.S. priorities when dealing with SOFA-related crimes and accidents.

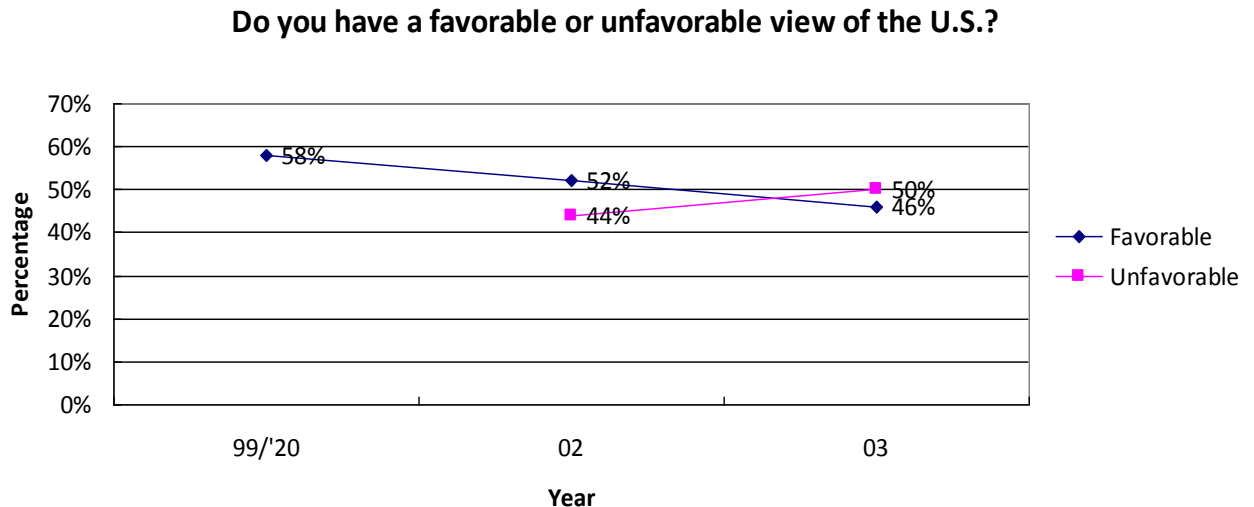
To all appearances, the U.S., using old tools in a new political context, never expected the traffic incident to explode as quickly as it did and was caught completely off guard by well-organized Korean NGOs.¹²⁹ According to Feinerman, the U.S. was "incompetent in dealing with this situation."¹³⁰ This incompetence alongside lingering anti-American sentiment over USFK refusal to cede custody of Munnich in 1996 and McCarthy in 2000 left "strategic consequences for the US government that still reverberates to this day."¹³¹ By the end of 2002, the annual Pew Global Attitudes survey¹³² suggested a decline in Korea's favorable image of the United States during this time period.

¹²⁸ See: Mason (2011), Koo (2011), and Gao (2009).

¹²⁹ For an excellent assessment of mistakes made, see "Top Five Lessons Learned from the Tragedy of 2002" <http://rokdrops.com/2008/06/17/top-five-lessons-learned-from-the-tragedy-of-2002/>

¹³⁰ Feinerman, "Agreement as a Source of Continuing Korean Anti-American Attitudes."

¹³¹ ROK Drop, "Top Five Lessons Learned from the Tragedy of 2002," (2008).

Table 9 Pew Global Attitudes Project

Sources: Figure created by the author using data from the following: Pew Research Center, December 2003. Notes: Full question wording: "Please tell me if you have a very favorable, somewhat favorable, somewhat unfavorable or very unfavorable opinion of the United States." Favorable combines "very favorable" and "somewhat favorable" responses. Unfavorable combines "very unfavorable" and "somewhat unfavorable." N = 719 (2002), 525 (2003), 718 (2007), 714 (2008), 702 (2009) 706 (2010)

"Unfavorable" data unavailable for 1999/2000

By the turn of the century, the post-Korean War generations¹³³ had "grown resentful of Washington's influence over their country" and "ashamed of Korea's military dependence" believing the United States "acts solely in its own interests when dealing with Korea."¹³⁴ According to Bruce Cumings, the number of Koreans who "disliked the United States" increased 38 percent from 1994 to 2003.¹³⁵ The higher negative attitudes shared by the younger generations of Koreans are reflected in an increased rejection of the continued

¹³² Pew Research Center, "What the World Thinks in 2002: How Global Publics View: Their Lives, Their Countries, The World, America," *Pew Global Attitudes Project* (2002).

¹³³ Approximately 80 percent of the population (Kim, 2003).

¹³⁴ Nam, "Changing Korean Perceptions of the Post-Cold War Era and the U.S.- ROK Alliance."

¹³⁵ Cumings, "The Structural Basis of Anti-Americanism in the Republic of Korea."

presence of United States Forces Korea. The younger generations of Koreans born after the war were more likely to see the United States as a barrier to peace and unification on the peninsula.

Table 10 Percentage of Negative Korean Attitudes toward the United States by Age Cohort (2002)

Percentage of South Koreans polled with negative attitudes toward the United States and toward North Korea. (N=1,054)		
Age Cohort	United States	North Korea
20s	76	32
30s	67	29
40s	53	39
50s +	26	47

Source: Gallup Korea Survey, December 2002.

For the purposes of this thesis, the latter half of 2002 and much of 2003 marks a significant turning point in how the U.S. applied the SOFA. Until this time, the United States stood adamant in its refusal to relinquish custody of its service members prior to an indictment until the public reaction to the June 2002 traffic accident pressured the United States to reassess the importance of Korea as a strategic ally. Beginning with the pre-indictment custody transfer of Sergeant Jerry Onken in 2003 (the next case study), the U.S. has since demonstrated greater willingness to accommodate Korea's expectations in order to maintain a healthy alliance.

4.5 *The 2003 Traffic Death of Ki Kyong-sun*

Summary

At 12:10 AM on November 28 2003, Sergeant Jerry Onken drove thru a stop light outside Suwon Air Base located approximately 20 miles south of Seoul. Driving thru the intersection, Onken's midsized Hyundai Sonata sedan slammed into a Visto subcompact injuring its three passengers and killing its driver, Ki Kyoung-sun. Onken and his companions fled the scene and returned to Suwon Air Base. Onken was identified hours later and apprehended by U.S. military police. Approximately five hours after his arrest, Onken's blood alcohol content (BAC) was 0.06 percent – exceeding Korea's legal limit of 0.05 percent.¹³⁶

Onken's actions that night – driving under the influence, fleeing the scene and the death of Kee Kyoung-sun – made the case “one of the 12 grave charges for which the U.S. military agreed to give up its jurisdiction in accordance with the 2001 revision of SOFA”¹³⁷ (See Appendix C). According to those revisions, the United States would be expected to give sympathetic consideration to Korea's request for custody. On December 1, with Onken still in custody on Suwon Air Base, USFK authorities informally requested Korea waive its primary jurisdiction as it assured the Korean public that Onken was “... in custody and has been charged with Article 134, leaving the scene of a vehicle accident causing fatality.”¹³⁸ Four days later, on December 5, the United States made a formal

¹³⁶ Song-won Choe and Jeremy Kirk, "Prosecutor Seeking Five-year Prison Term for Onken," *Stars and Stripes* (2004).

¹³⁷ Korea Herald, "Korea May Indict GI Under SOFA," (2003).

¹³⁸ Korea Times, "Citizens Call for Arrest of US Soldier in Hit-and-Run Incident," (2003).

request for the Korean government to “hand over its jurisdiction in the case.”¹³⁹ What was seen as an affront to Korea’s sovereignty in light of the most recent SOFA revisions and in the wake of the 2002 protests led civic groups to once again organize protests. Officials of the Solidarity for Peace and Reunification of Korea (SPARK) and National Campaign for Eradication of Crimes by USFK (NCEC) complained: “If the suspect had been a Korean, he would've been arrested a long time ago. This undermines not only the South Korean judicial branch's authority, but also the nation's sovereignty.”¹⁴⁰ SPARK and NCEC also accused USFK of not maintaining proper custody of Onken, reporting that he “was free to walk around on his military base.”¹⁴¹

On December 23, the Suwon District Court issued a warrant for Onken’s arrest – before a formal indictment was issued. The prosecutor’s office said there were “concerns that the accused may try to destroy evidence or flee again.”¹⁴² Seven days later, the United States finally agreed to Korea’s request for custody: on December 30 2003 – one month after killing Kee Kyung-sun, Sgt. Jerry Onken became the first American soldier transferred into Korean custody prior to a formal indictment. One month later, Onken was sentenced to 3 years in prison.

¹³⁹ Korea Herald, “Korea May Indict GI Under SOFA.”

¹⁴⁰ Korea Times, “Citizens Call for Arrest of US Soldier in Hit-and-Run Incident.”

¹⁴¹ Ibid.

¹⁴² British Broadcasting Corporation, “South Korean Court Issues Warrant for US Soldier's Arrest Over Car Accident,” *BBC Summary of World Broadcasts* (2003).

Analysis

Even though the *language* of the ROK-U.S. SOFA had been revised in 2001 to mirror Japan's SOFA criminal jurisdiction provisions, the Onken case in 2003 marks the real turning point for the United States' relationship with South Korea. This case represents the first real change in how the U.S. chose to *apply* SOFA protocol by finally ceding custody prior to indictment – two full years after having included the *language* of sympathetic consideration in the 2001 revisions. After witnessing more than a year of unprecedented protests, petitions, demonstrations and candlelight vigils, the U.S. was left with little recourse but to hand Onken over to Korean authorities on December 30, 2003.¹⁴³ While the Onken case marks a shift in custody protocol, the United States response was reluctant.¹⁴⁴ The first formal apology from the United States came one day after Onken was sentenced to three years imprisonment by a South Korea court on February 4, 2004 – a full nine weeks after the accident.¹⁴⁵

Just months after Onken's conviction, the United States would once again cede pre-indictment custody. Private First Class John Christopher Humphreys was arrested around 2:00 am on May 15, 2004 for the attempted murder of a taxi driver on the streets of Shincheon, a popular entertainment and nightlife district for university students. After he stabbed the driver in the neck with a 9 inch combat knife, a crowd of onlookers managed to wrestle Humphreys to the ground until Korean police arrived. Following SOFA protocol,

¹⁴³ The uncomfortable white elephant in the room for the U.S by December, 2003 had been the fact that USFJ had already established a precedent for pre-indictment custody transfers: Terrance Swanson in 1996 for the crime of attempted murder and Timothy Woodland in 2001 for rape.

¹⁴⁴ See Figure 2.5 Frequency of Apologies by U.S. to Korea and Japan (1992-2011), page 60.

¹⁴⁵ Seoul Yonhap News Agency, "U.S. Soldier Given 3 Years in Korean Prison for Hit and Run," (2004).

Humphreys was immediately turned over to USFK custody. This time however, USFK did not wait for a guilty verdict – just days after the stabbing, 8th Army officials “expressed regret for the incident” and promised “full cooperation” with the investigation.¹⁴⁶ By August 2, Humphrey became the second U.S. soldier to be held in pre-trial confinement by South Korean authorities.¹⁴⁷

4.6 *The U.S-Korea Alliance Today*

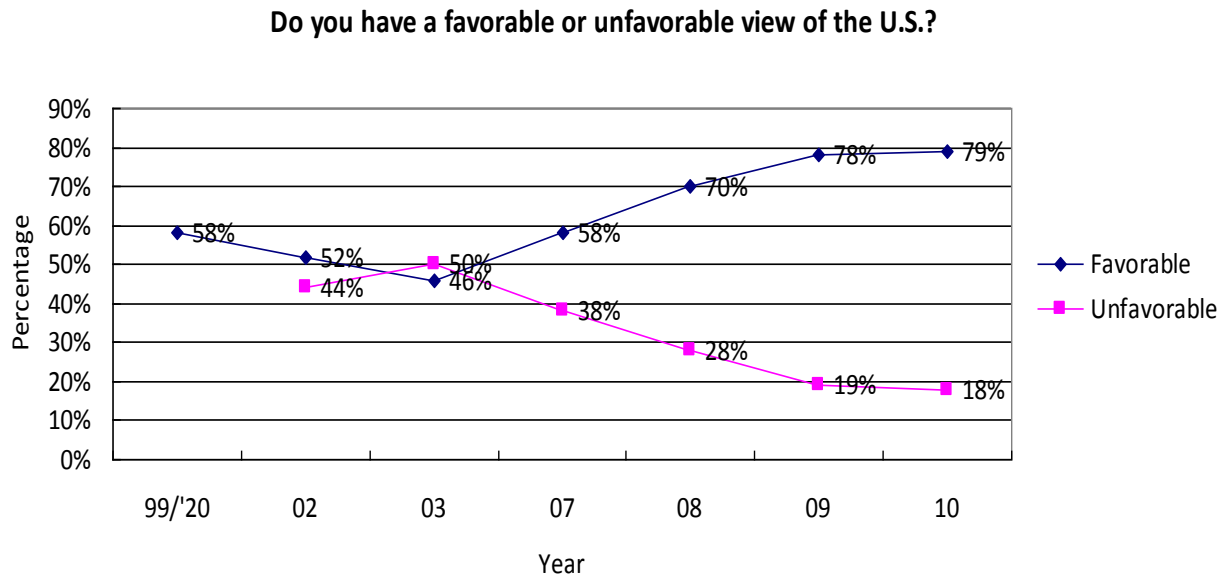
Much has changed since Kenneth Lee Markle raped and murdered Yoon Geum-mi in 1992. South Korea has transformed itself into America’s seventh largest trading partner,¹⁴⁸ and the United States has been ceding custody more frequently. Since the end of 2008, the U.S.’s relations with South Korea have been the friendliest in decades. Many in the Obama Administration consider South Korea to be America’s “closest ally in East Asia” with the president going so far as to describe the ROK-U.S. alliance as “the lynchpin” to Asia Pacific security. It is not surprising then that a 2010 Pew Global Attitudes survey demonstrated a dramatic improvement the favorable opinion of the United States among Koreans:

¹⁴⁶ Stars and Stripes, "Soldier Accused in Stabbing is Handed Over to S. Korea," (2004).

¹⁴⁷ PFC Humphreys pleaded innocent to the charge of attempted murder. He characterized the incident instead as self-defense. Nevertheless, he was found guilty by a Korean court and sentenced to 2 1/2 years incarceration.

¹⁴⁸ "U.S. Trade Balance, by Partner Country 2011," *United States International Trade Commission* (2011).

Table 11 Pew Global Attitudes Project (1999 - 2010)



Sources: Figure created by the author using data from the following: Pew Research Center, December 2003.

Notes: Full question wording: "Please tell me if you have a very favorable, somewhat favorable, somewhat unfavorable or very unfavorable opinion of the United States." Favorable combines "very favorable" and "somewhat favorable" responses. Unfavorable combines "very unfavorable" and "somewhat unfavorable." N = 719 (2002), 525 (2003), 718 (2007), 714 (2008), 702 (2009) 706 (2010)

"Unfavorable" data unavailable for 1999/2000

Today, America's response to SOFA crimes has evolved to better address the demands and grievances of a more democratically and economically mature Korea. In 2011, for example, when Private First Class Kevin Lee Flippin raped and tortured a 17-year-old Korean girl with a knife, a pair of scissors and a cigarette lighter, Assistant Secretary of State for East Asian and Pacific Affairs Kurt Campbell offered a formal U.S. apology to Korean Ambassador Han Duck-soo just hours after the crime. Additionally,

Flippin was immediately transferred to Korean custody before a formal indictment.¹⁴⁹

Washington's swift action in the hours and days after the crime is indicative of a new propensity by the U.S. "to minimize any political and diplomatic fallout."¹⁵⁰ This willingness to accommodate Korean expectations indicates that the United States has, since 2002, reassessed the strategic importance of its alliance with South Korea.

4.7 Conclusion

This chapter presented two cases which illustrated how the United States handling of SOFA incidents has changed over time by using a qualitative analysis of incidents from 1992 to 2003. These cases have shown that the change by the U.S. in its handling of SOFA criminal jurisdiction was a response to protests over the 2002 traffic accident rather than a reaction to the formal SOFA revisions of 2001. This chapter supports the findings in earlier chapters that the change demonstrated by the United States in 2003 did not totally coincide with the change in SOFA guidelines formally adopted in 2001.

In 1992, USFK chose to maintain custody of Private Markle throughout his trial. It was not until April, 1994, that Korean authorities were able to take Markle into custody. Had the murder occurred in Japan, custody transfer would have occurred immediately upon indictment - on November 31, 1992, just one month after the murder. Compounding Korean frustration was the fact that official apologies from the U.S. were not offered until after Markle's conviction - two years after the murder.

¹⁴⁹ Private Flippin was sentenced by the Uijeongbu criminal courts to 10 years in prison on November 1, 2011. According to Korea's Yonhap News Agency, "the sentence was the most severe handed down for a U.S. servicemember in South Korea in nearly 20 years."

¹⁵⁰ Korea Times, "US Regrets Soldiers Alleged Rape of Korean Woman," (2011).

By 1996, as public pressure grew over continued SOFA crimes, both Korea and Japan received similar promises from the United States that it would give sympathetic consideration to pre-indictment custody requests for serious crimes. This consideration was formally adopted into the language of the ROK-U.S. SOFA in 2001 while it remains to this day only an oral gentleman's agreement with Japan. The 2001 revisions also gave Korea the right to custody after indictment. Despite these changes, the Munnich case in 1996 and the McCarthy case in 2001 clearly demonstrate U.S. reluctance to change the way it handled pre-trial phases of custody. This reluctance to change SOFA protocol is also evident in the 2003 Onken case: while Onken was indeed the first U.S. service member to be transferred prior to indictment in Korea, official apologies for his crime were not offered until nine weeks after the accident. By comparison, apologies for the 2011 Flippin rape case came in a matter of hours.

This chapter shows that substantive change in how the U.S. handles SOFA-related crimes came only after tragedy and nationwide protest and not in response to any change in the formal language of the SOFA. Since 2003, Washington has increasingly departed from how SOFA-related crimes are handled by offering swifter apologies and demonstrating a greater willingness to not seek custody for those suspects apprehended by Korean police while fleeing the scene of the crime.

Chapter Five Japan

5.1 *Introduction*

While United States Forces Japan have changed how the pre-trial phases of SOFA incidents are handled today compared to its handling twenty years ago, this chapter will show that this change has not been as significant as the shift by United States Forces Korea. This chapter looks at several high-profile SOFA crimes that occurred in Japan between 1995 and 2011. Two case studies will enable a comparison to the case studies in Chapter Four in order to better illustrate how Korea has transformed itself from a *client state* towards equal partner status with the United States. In contrast to the significant protocol changes seen in Korea after 2003, the case studies in this chapter will highlight just how reluctant the United States has been to change protocol with Japan. The first case study involves the 1995 abduction and rape of a 12-year-old Okinawan girl by three American servicemen, which occurred during the Clinton administration. Okinawans' disgust with the crime has made this case a landmark by which all subsequent USFJ crimes have been measured. The second case study, Major Michael Brown's November 2002 crime of sexual assault occurred during the Bush administration and demonstrates the continued reluctance of the U.S. to cede jurisdiction.

Unlike the ROK, which has looked to the Japan-US SOFA as a model, Japan has never done so with the ROK-US SOFA. At no point have Japanese citizens taken to the streets demanding criminal jurisdiction provisions equal to Korea's agreement with the United States. Rather, SOFA protest in Japan over the last two decades has simply

remained focused on issues of national (and regional) sovereignty and over the rationale for a continued American presence. Another distinction has been that where public protests in Korea have nationalized the issue of SOFA crime – thus shifting the landscape of America’s relationship with Korea, SOFA crime in Japan has remained largely an Okinawan issue. Due to the fact that 74% of 35,688 U.S. combined forces stationed in Japan are situated in Okinawa,¹⁵¹ it should come as no surprise that the overwhelming majority of USFJ crimes each year occur in Okinawa.

5.2 *The 1995 Gang Rape of a 12 Year Old Okinawan Schoolgirl*

Summary

On the evening of September 4, 1995, Rodrico Harp, Kendrick Ledet, and Marcus Gill abducted a middle school girl off the street in Naha Prefecture, Okinawa. They gagged her and bound her arms and legs with duct tape, drove to a secluded location, and raped her. According to testimony, the three American servicemen had intended to employ the services of a prostitute that evening but soon realized they lacked sufficient funds for such a business transaction. Around 8:00 pm, one of the three men approached the girl and began asking for directions before the other two grabbed her from behind and forced her into the backseat of a rented Subaru.¹⁵²

¹⁵¹ Military Base Affairs Office, "U.S. Military Issues in Okinawa," *Executive Office of the Governor Department of General Affairs, Okinawa Prefectural Government* (2004).

¹⁵² Ledet and Harp told Naha District Court they were forced by the older and stronger Gill to help abduct the girl. Harp told the court he was afraid to disobey Gill. Gill, 23, has pleaded guilty to the September 4 abduction and rape of the schoolgirl. Harp, 21, and Ledet, 20, say they joined in the abduction but did not rape the girl. Gill... told the court that Harp, who first spotted the girl, and Ledet were the ones who jumped out of their rented car and grabbed her (The Herald, Glasgow, 1995).

Two days later, on September 6, all three men were arrested by U.S. military police where they would remain in USFJ custody until their formal indictment by Japanese prosecutors. As days turned into weeks and the three men remained confined to USFJ custody, Japanese outrage mounted greater pressure on Japan-U.S. relations. Aggravating Japanese anger were persistent rumors that the American suspects were free walking around on base "eating hamburgers."¹⁵³ Eventually however, Gill, Harp, and Ledet were finally indicted almost one month after their crime and per SOFA protocol, were subsequently transferred to Japanese police custody. Gill and Harp were both sentenced to seven years imprisonment while Ledet was sentenced to six and a half years.¹⁵⁴

Analysis

After the 1995 rape, the U.S. was forced to contend with some of the largest anti-American demonstrations in Okinawan history. Less than two weeks after the arrests, a number of senior American officials began issuing apologies. Secretary of State Warren Christopher, Defense Secretary William Perry, U.S. Ambassador to Japan Walter Mondale and even President Clinton all offered their apologies and regret for the incident¹⁵⁵ while USFJ officials began promising "to alleviate the size of the US footprint" in Okinawa.¹⁵⁶ Whereas the U.S. had waited 18 months to issue any formal apology to Korea for the murder of Yoon Geum-mi in 1992, USFJ apologies for the 1995 rape came within

¹⁵³ Cameron W. Barr, "U.S. Rushes to Placate Japanese, Angered by Rape in Okinawa," *The Christian Science Monitor* (1995).

¹⁵⁴ Ledet was found guilty of abetting the abduction but not participating in the rape.

¹⁵⁵ Noteworthy here is that this outpouring of apologies came less than two months before President Clinton and Japanese prime minister Tomiichi Murayama were scheduled to meet in Tokyo "to reaffirm and strengthen their security pact" (The Guardian, London, 1995).

¹⁵⁶ Kevin Sullivan and Mary Jordan, "3 Americans Guilty in Okinawan Rape; Jail Terms Imposed in Case That Sparked Debate on Troop Presence," *The Washington Post* (1996).

weeks.¹⁵⁷ Some Japanese were quite surprised¹⁵⁸ at “the speed and tone of the American response.”¹⁵⁹ Yet, as “disgusted and outraged” as Walter Mondale said the United States felt over the rape, he was quick to remind Japan that the three accused servicemen would remain in US custody “upon indictment.”¹⁶⁰

5.3 *Sympathetic Consideration*

Significant public outcry over the rape pressured the United States in 1995 to promise Japan it would sympathetically consider all future requests for pre-indictment custody.¹⁶¹ The U.S. offered the same promise to Korea a year later in 1996. Although that promise was formally amended into the ROK-U.S. SOFA in 2001, efforts by Japanese negotiators to formalize this sympathy language into a SOFA amendment have been stymied by American negotiators.¹⁶² It would seem however that “sympathetic consideration” was founded less upon legal standards and more upon arbitrary political calculations.¹⁶³ According to Ji-young Cha, the promise of sympathetic consideration “has

¹⁵⁷ USFK waited for Markle to exhaust all appeals and for his guilty verdict to be upheld before issuing any apologies.

¹⁵⁸ The secretary-general of the Okinawa Human Rights Association remarked, “I’m surprised at such a quick apology from the US government” (Barr, 1995).

¹⁵⁹ Barr, “U.S. Rushes to Placate Japanese, Angered by Rape in Okinawa.”

¹⁶⁰ Sydney Daily Telegraph and Sunday Telegraph, “Rape Row Hits US Bases,” (1995).

¹⁶¹ The U.S. agreement with Japan came October 26, 1995. A similar “sympathetic consideration” agreement with Korea came September 15, 1996.

¹⁶² U.S. negotiators have consistently demanded assurances that English-speaking lawyers as well as interpreters be present in future criminal investigations. Japan balked at the very idea of offering such rights to an accused – highlighting some of the fundamental differences between American and Japanese legal systems (See Appendix G.)

¹⁶³ Ilene R. Prusher, “Japan’s Turf, US Suspect: Resentment in Japan Continues After the US Turns Over a Sergeant Accused of Rape,” *The Christian Science Monitor* (2001).

never been officially incorporated into the Japan SOFA and the United States appears to have no intention of doing so in the near future.”¹⁶⁴

The 1995 rape case focused debate on whether the United States should pull troops out of East Asia or whether the peace and stability of Japan and East Asia was worth the costs of hosting 35,000 U.S. military personnel in Japan.¹⁶⁵ The rape also demonstrated how anger over SOFA crime can transform into demands for justifying “why, in a post-cold war world, is it necessary to keep U.S. troops on Okinawa?”¹⁶⁶ Japanese civic groups and NGOs – particularly Okinawan groups – were effective in using the 1995 rape and other SOFA crimes to protest the disproportionate presence of USFJ in Okinawa.¹⁶⁷ By the end of March, 1996, USFJ forces began limiting night jet flights, began to limit artillery practice and began reducing the amount of land utilized.¹⁶⁸ Thus, a new era of cooperation and goodwill between the United States and Japan was showcased less than a year after the Okinawa rape when Seaman 1st Class Terrance Swanson became the first American military serviceman to be handed over to any Host nation prior to indictment.¹⁶⁹ On July 16, 1996, Swanson slashed a 20-year-old Japanese woman in the throat with a knife and stole her purse containing ¥13,000.¹⁷⁰ He was arrested by U.S. military police four days

¹⁶⁴ Cha, "Comparison and Analysis of Korea and Japan Status of Forces Agreements and their Implications for Iraq's SOFA."

¹⁶⁵ Sullivan and Jordan, "3 Americans Guilty in Okinawan Rape; Jail Terms Imposed in Case That Sparked Debate on Troop Presence."

¹⁶⁶ Patrick Smith, "Can Okinawa Live Without The US," *Time Magazine* (1998).

¹⁶⁷ Okinawa represents only 0.6% of the Japanese land, yet three-quarters of the U.S. facilities in Japan are found here, covering one-fifth of the island (Smith, 1998).

¹⁶⁸ Bureau of East Asian and Pacific Affairs U.S. Department of State, "SACO Final Report," (1997).

¹⁶⁹ New York Times, "Accused U.S. Sailor Turned Over to Japanese," *The New York Times* (1996).

¹⁷⁰ Approximately \$115.00 US.

after the attack then transferred to Japanese custody in a matter of days.¹⁷¹ Swanson's transfer, according to the New York Times, opened "a new legal era for American forces in Japan."¹⁷²

This new legal era for USFJ however quickly faded. By 1998, the U.S. offered "a swift and very public apology"¹⁷³ for the fatal drunk driving death of an 18-year-old Japanese high school student involving Corporal Randall Eskridge but refused to release custody until an indictment was issued by Japanese prosecutors. Three years later, on July 2 2001, Okinawan police issued an arrest warrant for 24-year-old Air Force Staff Sergeant Timothy Woodland for the rape of a 20-year-old Okinawan female. Once again, USFJ authorities refused to hand him over prior to an indictment. Despite swift regrets from President George W. Bush, USFJ continued to refuse to hand Woodland over until Japanese authorities could assure certain rights during his interrogation process.¹⁷⁴ The Woodland case quickly transformed into a major international incident as the ensuing protests and increased pressure from Tokyo began to strain the strategic alliance between Japan and the U.S. The standoff eventually ended after the U.S. was able to receive a number of legal assurances from Japan. On July 6, 2001, after tremendous public pressure threatened Japan-U.S relations, Woodland become the second American serviceman in Japan to be transferred prior to an indictment.¹⁷⁵

¹⁷¹ Within days of the attack, the commander of US naval forces at Sasebo apologized to the Governor of Nagasaki Prefecture.

¹⁷² New York Times, "Accused U.S. Sailor Turned Over to Japanese."

¹⁷³ British Broadcasting Corporation, "Okinawa Death Strains US-Japan Relations," (1998).

¹⁷⁴ Specifically, Washington insisted Woodland receive adequate legal representation during questioning, a limit on how long he would be interrogated each day, reliable translation services, access to U.S. Embassy officials and other measures before they would agree to transfer him to Japanese custody.

¹⁷⁵ Woodland's 2001 transfer came two years before Onken's pre-indictment transfer in Korea.

In 2001, the ROK-U.S. SOFA was revised to include "sympathetic consideration." However, the gentleman's agreement the United States made with Japan in 1995 to sympathetically consider custody requests has remained to this day just a promise.¹⁷⁶ Since ratification in 1960, the Japan-U.S. SOFA has never undergone a formal revision as has the ROK-U.S. SOFA in 1991 and 2001.¹⁷⁷

5.4 *The 2003 Sexual Assault of Victoria Nakamine*

Summary

At approximately 1:30 in the morning of November 2, 2003 an intoxicated Major Michael Brown accepted a ride home from Victoria Nakamine,¹⁷⁸ an employee of the Camp Courtney officers' club. After leaving the base, Nakamine drove Brown down a deserted road to an isolated area behind the rear entrance to Camp Courtney. During initial questioning, Brown claimed that it was Nakamine who propositioned him for sex and that she became angry when he rejected her advances, while Nakamine initially asserted that it was Brown who lured her down the deserted road and attempted to rape her. Regardless, however, of the conflicting testimony that would soon complicate¹⁷⁹ the 19-month trial, Brown and Nakamine would both agree that no actual sexual intercourse took place that

¹⁷⁶ According to Woodland's lawyer, the language of sympathetic consideration was "permissive... not mandatory at all" and felt it was offered simply "to pacify the Japanese" (Prusher, 2001).

¹⁷⁷ Resistance to amending the Japan-U.S. SOFA came as Washington was adamant about creating any legal precedent for pre-indictment custody in Host nations -- particularly in those nations which offer fewer legal rights for the accused. It can be argued here the reason American negotiators have moved further in Korea to cede pre-indictment custody is due in part to changes in Korea's judicial system. One notable recent change has been the adoption of a jury system for criminal cases in 2008.

¹⁷⁸ Victoria Nakamine, a native of the Phillipines, had been living in Okinawa for 17 years and was married to a Japanese citizen.

¹⁷⁹ The case was complicated when Nakamine tried to "withdraw the charges one day after a \$13,500 check was deposited in her bank account"(Selden, Asia-Pacific Journal).

night.¹⁸⁰

One month later, on December 3, Japanese police issued an arrest warrant and requested USFJ to turn Brown over before an indictment. The very next day, on December 4, the national government in Tokyo made a formal request to Washington that Brown be handed over to Okinawa Prefecture police prior to indictment. For many Japanese, the gravity of Brown's offense certainly merited sympathetic consideration. The United States disagreed, however, insisting that "attempted" rape did not rise to the requisite level of seriousness necessary for the sympathetic consideration of pre-indictment custody requests. The response from the U.S. embassy in Japan was clear: "The government of the United States has concluded that the circumstances of this case as presented by the government of Japan do not warrant departure from the standard practice as agreed between the United States and Japan."¹⁸¹

Okinawans were outraged. They saw Tokyo dragging its feet in order to maintain its alliance with the United States. They also saw the U.S. refusal to turn Brown over as a "disregard of its sovereignty."¹⁸² By December 10, the Okinawan legislature unanimously passed a resolution condemning the U.S. refusal to hand Brown over and adopted a resolution calling on the United States to hand Brown over to the Japanese authorities. The U.S., however, continued to refuse to grant pre-indictment custody. Two weeks after his arrest, Brown was formally indicted on charges of attempted rape and destruction of private

¹⁸⁰ David Allen and Chiyomi Sumida, "Brown Convicted of Attempted Indecent Act," *Stars and Stripes* (2004).

¹⁸¹ Japan Times, "Okinawa Assembly Demands Major's Handover in Rape Case," (2002).

¹⁸² Japan Times, "Japan Won't Press for Marine Rape Suspect," (2002).

property¹⁸³ on December 19 and was transferred the next day to Japanese police custody at the Naha detention center. Following a 19-month trial, Brown was convicted on July 8, 2004 of "attempting an indecent act" and "destruction of property" but was acquitted in Okinawan court of the rape charge.

The Brown case is significant as it represents a prime example of how the United States preferred to respond to disputes over SOFA custody and jurisdiction in Japan. This is also emblematic of America's extreme reluctance to cooperate with Japan. The case received extensive attention in the Japanese media, especially in Okinawa and Washington's refusal to hand Brown over sparked calls to revise the treaty governing the conduct of U.S. troops in Japan.

5.5 Conclusion

This chapter has shown how the Criminal Jurisdiction provisions contained within the ROK-U.S. SOFA favor Korea when compared to similar provisions in the Japan-U.S. SOFA. This chapter has also shown how United States application of SOFA Criminal Jurisdiction has changed more dramatically in Korea than it did during the same time period in Japan.

The incidents in this chapter have demonstrated how the United States has repeatedly quibbled over the strict interpretation of which crimes warrant sympathetic consideration. USFJ argued in both the Woodland case in 2001 and the Brown case in 2003 that the crimes committed "did not warrant departure from the standard practice" of

¹⁸³ In the struggle that ensued during the night in question, Brown threw Nakamine's cell phone into a nearby river. She initially claimed he threw the phone when she threatened to call the police. Brown claimed he threw the phone in anger when she had taken his wallet.

transferring custody upon indictment.

Unlike the changes by USFK after 2003, the case studies in this chapter and the Japan data in Chapter Three indicate a greater unwillingness on the part of USFJ to cooperate with Japan. Today, Japan has only an oral promise from the United States to *sympathetically consider* custody requests for only “serious crimes.” In contrast, Korea’s SOFA of 2001 specifically defines twelve crimes as being serious enough in nature to justify pre-indictment custody – and one of those twelve serious crimes enumerated in the ROK-U.S. SOFA includes the crime for which Major Michael Brown was indicted in 2003: *attempted* rape.¹⁸⁴

The reluctance of the U.S. to cede custody strained an otherwise healthy alliance. For each, it took tremendous public pressure, diplomacy and condemnation by the Japanese government to convince the U.S. to respond accordingly.

¹⁸⁴ See Appendix C.

Chapter Six Conclusion

6.1 Introduction

This thesis tested the hypothesis that South Korea has ceded greater SOFA jurisdiction to the United States than Japan has. It did this first by comparing the official language of the SOFA with each country. Then, the handling of a set of SOFA-related incidents, in Korea and Japan from 1992 to present and multiple case studies for both Host nations were analyzed to establish the existence of any discrepancies between the two SOFAs. This research has shown that even though revisions in 1991 and 2001 to the Criminal Jurisdiction provisions of the ROK-U.S. SOFA have made the *language* virtually identical to that in the Japan-U.S. SOFA, it is the *application* of the ROK-U.S. SOFA that has shifted significantly towards Korea's advantage compared to Japan's.

6.2 Research

In order to evaluate whether there was any bias or favoritism by the United States towards Japan compared to South Korea, the analysis presented in Chapter Three and the case studies in Chapters Four and Five focused on the *custody* of the accused. Specifically, attention focused upon at what point accused American service members were released into Korean police custody compared to their American counterparts serving in Japan. Twenty years ago, Japan had an undeniable advantage over Korea as Japanese authorities could take custody upon indictment rather than after conviction. Revisions to the ROK-U.S. SOFA in 2001 not only eliminated this disadvantage by giving Korea the same right to custody upon indictment, but it also included the language of sympathetic consideration for

custody requests prior to indictment. Additionally, the 2001 revisions enumerated twelve specific crimes serious enough to justify pre-indictment custody. Today, these additions give Korea's SOFA a modest but clear advantage over Japan's SOFA. However, because pre-indictment custody for American service members to either Host nation is merely a suggestion rather than a requirement for the U.S., the specific act of transferring custody before indictment offers intriguing examples of American discretionary decision-making and insight into the social forces necessary to affect that decision-making process. Thus, a comparison of custody transfers *prior to* indictment in Korea and Japan offer a reliable measure of any imbalance that may exist between the relationships the U.S. maintains with both Host nations.

6.3 Findings

Several significant conclusions may be drawn from the preceding chapters. First, this research confirms that prior to revisions to the ROK-U.S. SOFA in 2001, an obvious disparity existed between Japan and Korea. The right to request custody after indictment gave Japanese authorities greater jurisdiction over U.S. forces than Korea's right to custody after a guilty verdict. This difference in the formal *language* of the SOFAs confirms the fact that the ROK-U.S. SOFA was unequal to the Japan-U.S. SOFA prior to 2001.

Second, based on the data, a strikingly disproportionate number of apologies were made by the U.S. to Japan prior to 2001 compared to the number of apologies offered Korea for the same time period. Particularly conspicuous was the habit of USFJ authorities as well as U.S. government officials to apologize to Japan for incidents within days of the

event while apologies for similar incidents in Korea were withheld until the conclusion of the trial.

Third, although apologies to Japan may have come faster and from higher levels of government, the data in Chapter Three reveal an equal reluctance by the U.S. to cede pre-indictment custody to both Korea and Japan. It should be pointed out the pre-indictment transfers in Japan of Swanson in 1996 and Woodland in 2001 came with great resistance by USFJ. Only after intense public pressure which threatened to destabilize America's alliance with Japan did the U.S. finally cede custody. It would seem this reluctance hardly qualifies as "favoring" Japan over Korea.

A fourth finding of this research is an advantage for South Korea in regards to pre-indictment custody transfers after 2002. Chapter Three suggests a turning point for United States SOFA criminal jurisdiction protocol occurred in Korea. While there have been shifts in both countries, the shift in Korea was more pronounced than in Japan. This discrepancy may suggest a change in behavior by U.S. authorities to improve relations with South Korea. At the very least, this shift may be seen as an indication that the United States today recognizes South Korea as an ally equal to that of Japan

A fifth finding is that the turning point in Korean-American relations came not after the revisions to the SOFA in 2001 but rather after the nationwide public demonstrations that erupted in response to the 2002 Armored Vehicle Incident. Despite revisions in 2001, the U.S. continued to remain adamant against transferring custody prior to indictment. Only after an unprecedented level of protest in Korea – and three pre-indictment custody transfers in Japan – did the United States begin to reluctantly soften its transfer protocol in

December, 2003. This point is corroborated by data regarding Korea's increase in its exercise of jurisdiction.¹⁸⁵ As the data suggest, Korean prosecutors began to exercise jurisdiction more often after 2003. What is clear from these data is that the United States has, since 2003, chosen to cede greater criminal jurisdiction to Korea and has thereby 'leveled the playing field' between its relationships with Korea and Japan.

Lastly, this thesis found that the role of public protest is important in effecting change. For both countries, we see how SOFA crime can quickly escalate into a much larger indictment of the role of the U.S. military in that Host nation. What begins as a local traffic accident can, virtually overnight, erupt into angry demands for the U.S. to justify its military footprint overseas. This research has also shown how the U.S. has changed the way it handles pre-trial custody phases of SOFA incidents when faced with mounting public pressure that threatens to destabilize its alliances. Rather than being a rigid set of protocols to be followed to the letter, it would seem – at least for the United States – that SOFA Criminal Jurisdiction is more a flexible tool the U.S. may use as it sees fit.

6.4 *Changes to SOFA in the Security Context*

From a broader and more contextual perspective, the shift in U.S. handling of SOFA incidents in Korea came at a time when the U.S. military was seeking more co-equal integrated cooperation with the Korean military. Tensions were high in April, 2003 when North Korean officials told the U.S. they had reactivated their nuclear weapons program and were unilaterally withdrawing from the 1994 Geneva Agreed Framework.¹⁸⁶ This

¹⁸⁵ See Figure 1: Exercise of Primary Jurisdiction by Korea

¹⁸⁶ CNN World, "Timeline: North Korea's Nuclear Weapons Development," (2003).

challenge by the North Koreans came at a time when the U.S. was seeking to consolidate its forces and rethink how it would allocate its resources to meet new global security challenges. Part of this restructuring included a U.S. force reduction in Korea. A drawdown of USFK was intended to minimize the "risk of further rifts between the ROK and the U.S." by enhancing "the role of Japan in the U.S. alliance system."¹⁸⁷

Thus, the renewed North Korean nuclear threat born in the spring of 2003 served as motivation for the United States to begin cooperating on more equal terms and demonstrate greater coordination of military strategy with South Korea. In order for the U.S. to build greater cooperation with Korea while at the same time shrinking its military footprint on the peninsula, it would first have to placate Korean demands. The 2005 Base Realignment and Closure (BRAC) commission's plan to consolidate 104 USFK installations to 48 - including closure of the controversial Yongsan Garrison in Seoul¹⁸⁸ and the 2007 transfer of Operational Control (OPCON) of Korean forces to Korea are two of the more obvious examples of U.S. willingness to cooperate with Korea.¹⁸⁹

This research has demonstrated how, beginning in 2003, the U.S. actively sought to ensure fewer problems in the handling of future SOFA crimes. It is not unreasonable then to assume that the change in custody jurisdiction identified by this research is but another

¹⁸⁷ Chang-hee Nam, "U.S.-Japan-Korea Security Cooperation in the Changing Defense Posture of the U.S. Forces in Northeast Asia," *Korea Observer (Institute of Korean Studies)* 37, no. 3 (2006).

¹⁸⁸ The existence of Yongsan Garrison has always been a sensitive issue for Korea. The 635 acres that has served as headquarters to USFK in the heart of downtown Seoul had previously housed the headquarters for the Japanese Imperial Army from 1910 to 1945. In addition, the installation is situated within an affluent and expensive area of central Seoul. As of this writing, USFK is in the process of returning Yongsan to Seoul city government and there are currently plans to turn the area into a "Central Park-like oasis" by 2017 (See Stars and Stripes: <http://www.stripes.com/news/pacific/korea/work-to-turn-s-korea-army-post-into-urban-oasis-to-begin-in-2017-1.176104>).

¹⁸⁹ Mark E. Manyin, "U.S.-South Korea Relations," *Congressional Research Service* (2010).

example of U.S. appeasement of Korean concerns in order to enhance its strategic position in Asia. The United States undoubtedly would not have transferred Sergeant Jerry Onken prior to an indictment in December, 2003 had North Korea continued to abide by the 1994 Agreed Framework.

6.5 Limitations

Comparing criminal jurisdiction provisions of the Korea and Japan SOFAs proved to be an ambitious undertaking. The sheer complexity of these bilateral agreements made any comparison difficult. From the seeming labyrinth-like maze of clauses, subparagraphs and agreed minutes to the frustrating absence of cooperation from USFJ officials, this thesis was fraught with challenges.

The limited availability of much of the data used for this study, not to mention the restricted access to any United States Forces Japan and NATO SOFA crime database made research for this thesis a very difficult. To date, three written Freedom of Information Act (FOIA) requests, four voicemail recordings, and four emails to United States Forces Japan remain unanswered.

Originally, this research was to include a comparison of solatium payments¹⁹⁰ by USFK and USFJ – how much money was paid and for what incidents. Unfortunately, data remained fleeting at best. Ideally, this research would have also included a more thorough comparison of USFK and USFJ official duty certification for any possible discrepancy.

I also wanted to include with this research a comparison of punishments meted by UCMJ in Korea and Japan. United States Forces Korea publishes monthly reports of its

¹⁹⁰ Compensation offered to alleviate the pain and suffering resulting from injury and loss.

courts martial and Korean criminal court convictions listing both the crime and the punishment – either in prison time or monetary fine. United States Forces Japan however does not publish this information nor do they maintain a database accessible to the general public.

Finally, I had hoped to include a more comprehensive data set of apologies and statements of regret by U.S. officials so that I could compare the specific timing of those condolences and from what General Schedule (GS) level those apologies came from. Again, that information remained beyond the reach of this author.

6.6 Importance

United States military basing needs today are no longer driven by the threat of Soviet Communism. The United States today requires a faster and more rapidly deployable military presence around the world. To that end, the U.S. has expanded its global footprint by signing stationing agreements with approximately 100 nations since 1991.¹⁹¹ Many of these new military alliances include former Warsaw Pact member nations and Soviet republics. This strategic military expansion around the globe, however, still demands a continued presence of U.S. forces in South Korea and Japan.¹⁹²

Yet, despite the urgent need to maintain and expand forward positions around the world, there still exists precious little in terms of scholarly research comparing the repercussions of the asymmetrical application of SOFA Criminal Jurisdiction on Host

¹⁹¹ See Appendix B.

¹⁹² According to the United States Department of Defense, America's national interests in Northeast Asia include: "honoring international commitments including security and wellbeing of allies and precluding the hostile domination of Northeast Asia... and contributing to the economic growth and productivity of the global economy, security of international lines of communication, and access to key markets" (Swope, 2004).

nation public opinion. Fortunately, South Korea and Japan offer excellent lessons of how Host nation outrage against SOFA crimes and demands for greater jurisdictional equality with other Host nations can create problems for the U.S. Over the past three decades, SOFA crimes have strained the relationships the U.S. has maintained with Japan and Korea as a number of local SOFA concerns have quickly become international incidents. Today, the "political and symbolic significance of such incidents" are far more damaging than they were in the past.¹⁹³ The effectiveness of Korean NGOs, student, and civic groups to organize against SOFA crime has evolved over the years. Before the internet, SOFA campaigns remained an issue of local politics as the national government chose not to voice protest against the U.S. Today however, SOFA crime has become a national issue as the internet and social media such as Twitter and YouTube makes any incident involving American military personnel a volatile minefield for American diplomacy and statecraft. South Korea's long struggle for a more equal Status of Forces Agreement with the United States is emblematic of the demands from any Host nation, particularly those of a maturing democracy. Just as South Korea struggled for Democracy during the 1980's, many other Host nations are only now awakening to the idea of Democracy. It would be dangerously unwise for the U.S. to ignore lessons learned in Korea and Japan considering the extraordinary number of basing agreements the U.S. has signed in the past twenty years.

This research has implications for defining the future of America's military presence

¹⁹³ Cooley, "Democratization and the Contested Politics of US Military Bases in Korea: Towards a Comparative Understanding."

abroad. In light of the recent Quran burning issue in Afghanistan,¹⁹⁴ the U.S. may at some point be forced to rethink its stationing needs around the world as more and more maturing democracies begin to demand greater SOFA equity. Negotiations with Iraq and Afghanistan probably best exemplify the most immediate SOFA issues facing the United States today. Criminal Jurisdiction provisions¹⁹⁵ under the bilateral U.S.-Iraq SOFA certainly mirror similar provisions contained in the NATO and Japan SOFAs. However, it has been the U.S. *application* of this provision that has been far from equal. According to the German media outlet Deutsche Welle: "U.S. troops accused of crimes within Iraq have been tried and punished by U.S. military courts back on home soil. No U.S. troops have been tried by the Iraqi justice system despite a number of cases allegedly falling within the definitions of the SOFA in regard to crimes punishable by Iraqi courts."¹⁹⁶ For the United States, there certainly are serious reasons why it is not ready to treat these nations as equals. Its history as an occupying force, instability of Host legal systems, and questions over whether the Host courts will work fairly and honestly are all legitimate reasons for the United States to pursue exclusive jurisdiction. But based on lessons learned in Korea, the U.S. should expect the inevitability of tension as there will be greater demands for SOFA equity and these demands are going to force the U.S. yet again to make hard choices about when it's best to cede jurisdiction versus when it should implement exclusive jurisdiction.

¹⁹⁴ On February 20, 2012, U.S. forces stationed in Afghanistan mistakenly burned copies of the Quran, the Muslim holy book, in a Bagram Air Base landfill. Such disrespect under Islamic law is forbidden and punishable by either life in prison or death.

¹⁹⁵ Iraq shall have the primary right to exercise jurisdiction" over US forces, but only in cases of "grave premeditated felonies" and only when "such crimes are committed outside agreed facilities and areas and outside duty status (Amies, 2011).

¹⁹⁶ Nick Amies, "Iraq's Move to Revoke Immunity for Troops Adds to U.S. Problems," *Deutsche Welle* (2011).

Recent incidents in Afghanistan such as the 2012 shooting massacre of Afghan civilians by an American serviceman¹⁹⁷ in Kandahar have elicited the same anger over the exercise of exclusive jurisdiction by the United States as it did fifty years ago in South Korea. Today, the U.S. SOFA with Afghanistan is “governed by a two page diplomatic note”¹⁹⁸ giving U.S. forces exclusive criminal jurisdiction. In the wake of the recent Afghan massacre, U.S. Secretary of Defense Leon Panetta said the U.S. would not change their military strategy regarding its SOFA with Afghanistan. Yet, as a longer-term, bilateral security pact¹⁹⁹ with Afghanistan is still being negotiated, any agreed upon goal of what the SOFA should accomplish has been elusive. Success will ultimately depend on to what extent U.S. negotiators are willing to cede Criminal Jurisdiction to Afghan authorities. For now, as long as the alleged 2012 Kandahar massacre shooter Robert Bales sits in a Fort Leavenworth military brig instead of a Kabul police station, it is probably a safe bet the United States is not going to completely give up on the same Law-of-the-Flag jurisdiction it demanded of Korea sixty years ago.

¹⁹⁷ Staff Sergeant Robert Bales, 1st platoon sergeant, Blackhorse Company, 2nd Battalion, 3rd Infantry Regiment, 3rd Stryker Brigade Combat Team, 2nd Infantry Division is accused of killing 16 Afghan civilians.

¹⁹⁸ DeYoung, "Only a Two-Page 'Note' Governs U.S. Military in Afghanistan."

¹⁹⁹ "The strategic partnership agreement is crucial to the U.S. exit strategy in Afghanistan... that will both map the course for U.S. forces after the majority of combat troops leave in 2014 and give the Afghan people confidence they are not about to be abandoned by their most important international ally" (Gearan and Letic, 2012).

Appendix A Sources for SOFA Crime Dataset

SOFA crime and accident data compiled for Chapter Three was originally retrieved using the Lexus-Nexus, Factiva and Google Scholar bibliographic databases and includes the following international media outlets:

Agence France Presse
Asia Times (Thailand)
CBS News
Christian Science Monitor
CNN Archives
Deutsche Presse-Agentur (Germany)
Hankook Ilbo (Korea)
Inter Press Service International Association (Italy)
Korea Economic Daily
Kiplinger Business Forecasts
Kyodo News Service (Tokyo)
Press TV (Iran)
Reuters
South China Morning Post
Stars and Stripes
Sydney Morning Herald (Australia)
The Australian
The British Broadcasting Corporation
The Courier-Mail (Australia)
The Daily Telegraph (Australia)
The Daily Telegraph Mirror (Australia)
The Daily Yomiuri (Tokyo)
The Globe and Mail (Canada)
The Guardian (London)

The Herald (Glasgow)
The Herald Sun (Australia)
The International Herald Tribune
The Irish Times
The Japan Times
The Korea Herald
The Korea Times
The National Post (Canada)
The New York Times
The Orlando Sentinel
The Seattle Times
The Sunday Herald (Scotland)
The Washington Post
The Washington Times
The Times (London)
Time Magazine
USA Today
United States Forces Korea Public Affairs Office
Yonhap News Agency (Korea)
Xinhua News Agency (China)

Appendix B United States Status of Forces Agreements by Year

KEY

- i. Signatory to the North Atlantic Treaty Organization Status of Forces Agreement
- ii. Signatory to agreements supplementing or in addition to the NATO SOFA
- iii. Signatory to bi-lateral treaty as the underlying source of authority for SOFA
- iv. Signatory to NATO Partnership for Peace Status of Forces Agreement
- v. Signatory to agreements supplementing or in addition to NATO Partnership for Peace SOFA
- vi. Leasing Agreement
- vii. Signatory to SOFA in support of a specified activity or exercise
- viii. Signatory to SOFA not in support of a specified activity or Exercise and not based on any underlying treaty or Congressional action
- X Text of applicability remains classified

<u>1941</u>	United Kingdom	- pre-NATO SOFA agreements	
	Antigua and Barbuda (U.K.)	vi	
	Bahamas (U.K.)	vi	
	Bermuda (U.K.)	vi	
<u>1949</u>	Belgium	i	
	Canada	i	
	Denmark	i	
	France	i	(1949 to 1966)
	Iceland	i	
	Italy	i	
	Luxembourg	i	
	Netherlands	i	
	Norway	i	
	Portugal	i	
	United Kingdom	i	
<u>1950</u>	Bahamas (U.K.)	vi	
	Bermuda (U.K.)	vi	
	South Korea	iii	*Taejon Treaty
<u>1951</u>	Iceland	ii	
<u>1952</u>	Greece	i	
	Turkey	i	

<u>1953</u>	Canada South Korea	ii iii	* Mutual Defense Treaty
<u>1954</u>	Netherlands Norway Turkey	ii ii ii	
<u>1955</u>	Germany , Fed Rep of	i	
<u>1956</u>	Denmark Greece Ascension Island (U.K.)	ii ii vi	
<u>1960</u>	Japan	iii	* Treaty of Mutual Cooperation and Security
<u>1963</u>	Germany, Fed Rep of Australia	ii iii	* ANZUS Pact
<u>1966</u>	Diego Garcia (U.K.) South Korea	vi iii	* 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>1971</u>	Bahrain	viii	
<u>1972</u>	Saudi Arabia	viii	
<u>1975</u>	Bahrain	viii	
<u>1977</u>	Antigua & Barbuda (U.K.) Bahrain	vi viii	
<u>1979</u>	Turks & Caicos (U.K.)	vi	
<u>1980</u>	Kenya Oman	X X	
<u>1981</u>	Egypt Sudan	viii viii	
<u>1982</u>	Honduras Spain	iii i	* Rio Treaty
<u>1983</u>	Costa Rica Philippines	viii iii	* Mutual Defense Treaty

<u>1984</u>	Grenada	viii	
<u>1987</u>	Chad	X	
	Saint Kitts and Nevis	viii	
<u>1988</u>	Dominican Republic	viii	
	Spain	ii	
<u>1989</u>	Papua New Guinea	viii	
<u>1990</u>	Malaysia	X	
	Somalia	X	
	Western Samoa	viii	
<u>1991</u>	Bahrain	viii	
	Kuwait	X	
	Solomon Islands	viii	
<u>1992</u>	Qatar	X	
	Tonga	viii	
<u>1993</u>	Grenada	viii	
<u>1994</u>	Armenia	iv	
	Azerbaijan	iv	
	Brunei	viii	
	Congo, The Dem Rep of	viii	
	Ethiopia	vii	
	Finland	vi	
	Georgia	iv	
	Israel	viii	
	Kazakhstan	iv	
	Kyrgyzstan	iv	
	Moldova	iv	
	Russian Federation	iv	
	Sweden	iv	
	Turkmenistan	iv	
	Uganda	iv	
	Ukraine	iv	
	United Arab Emirates	X	
	Uzbekistan	iv	
<u>1995</u>	Albania	v	
	Austria	iv	
	Belarus	iv	
	Haiti	iii	* Rio Treaty
	Macedonia	iv	
	Malta	iv	* 1995-1996

	Peru	vii
	Sri Lanka	viii
<u>1996</u>	Cambodia	viii
	Jordan	viii
	Switzerland	iv
<u>1997</u>	Hungary	ii
	Malawi	vii
	Mali	vii
<u>1998</u>	Bangladesh	viii
	Benin	vii
	Chad	viii
	Cote D'Ivoire	vii
	Ghana	vii
	Mongolia	viii
	Nicaragua	viii
<u>1999</u>	Czech Republic	i
	Gabon	vii
	Hungary	i
	Ireland	iv
	Poland	i
	South Africa	viii
<u>2000</u>	Ghana	vii
	Guyana	viii
	Madagascar	vii
	Mozambique	viii
	Nepal	vii
	Nigeria	vii
	Saint Lucia	viii
<u>2001</u>	Belize	viii
	Botswana	viii
	Bulgaria	ii
	Djibouti	viii
	Kyrgyz Republic	v
	Panama	viii
	Senegal	viii
	Tajikistan	v
<u>2002</u>	Afghanistan	viii
	Guinea	viii
	Romania	ii
	Tajikistan	iv
	Timor-Leste	viii

*Agreement concluded prior NATO

<u>2003</u>	Slovenia	ii	* Agreement concluded prior to NATO
<u>2004</u>	Albania	v	
	Bulgaria	i	
	Estonia	i	
	Latvia	i	
	Lithuania	i	
	Maldives	viii	
	Romania	i	
	Slovak Republic	i	
	Slovenia	i	
<u>2005</u>	Bosnia-Herzegovina	v	
	Chad	viii	
	Guatemala	iii	* Rio Treaty
	Liberia	viii	
	Paraguay	viii	
	Suriname	viii	
	Rwanda	vii	
<u>2006</u>	Bosnia-Herzegovina	iv	
	Croatia	v	
	Montenegro	iv	
	Serbia	* Agreement concluded prior to NATO PfP	
	Serbia	iv	
<u>2007</u>	El Salvador	viii	
	Montenegro	v	
<u>2008</u>	Malta	iv	
<u>2009</u>	Albania	i	
	Croatia	i	
	France	i	
	Iraq	vii	

Source: U.S. State Department (<http://www.state.gov/documents/organization/143863.pdf>).

Appendix C **Twelve 'serious' crimes the U.S. is obligated to transfer custody to the ROK at time of indictment:**

- 1 murder;
- 2 rape (including quasi-rape & sexual intercourse with a minor under thirteen years of age);
- 3 kidnapping for ransom;
- 4 trafficking of illegal drugs;
- 5 manufacturing illegal drugs for the purpose of distribution;
- 6 arson;
- 7 robbery with a dangerous weapon;
- 8 attempt to commit the foregoing offenses;
- 9 assault resulting in death;
- 10 driving under the influence of alcohol, resulting in death;
- 11 fleeing the crime scene after committing a traffic offense resulting in death;
- 12 offenses which include one or more of the above-referenced offenses as lesser included offenses.

Source: United States Forces Korea (www.usfk.mil)

Appendix D Comparison of rights and protections for accused American forces enumerated in both ROK and Japan SOFAs

JAPAN-US SOFA

Article 17.9. Whenever a member of the United States armed forces the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

- (a) to a prompt and speedy trial;
- (b) to be informed, in advance of trial, of the specific charge or charges made against him;
- (c) to be confronted with the witnesses against him;
- (d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;
- (e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;
- (f) if he considers it necessary, to have the services of a competent interpreter; and
- (g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial.

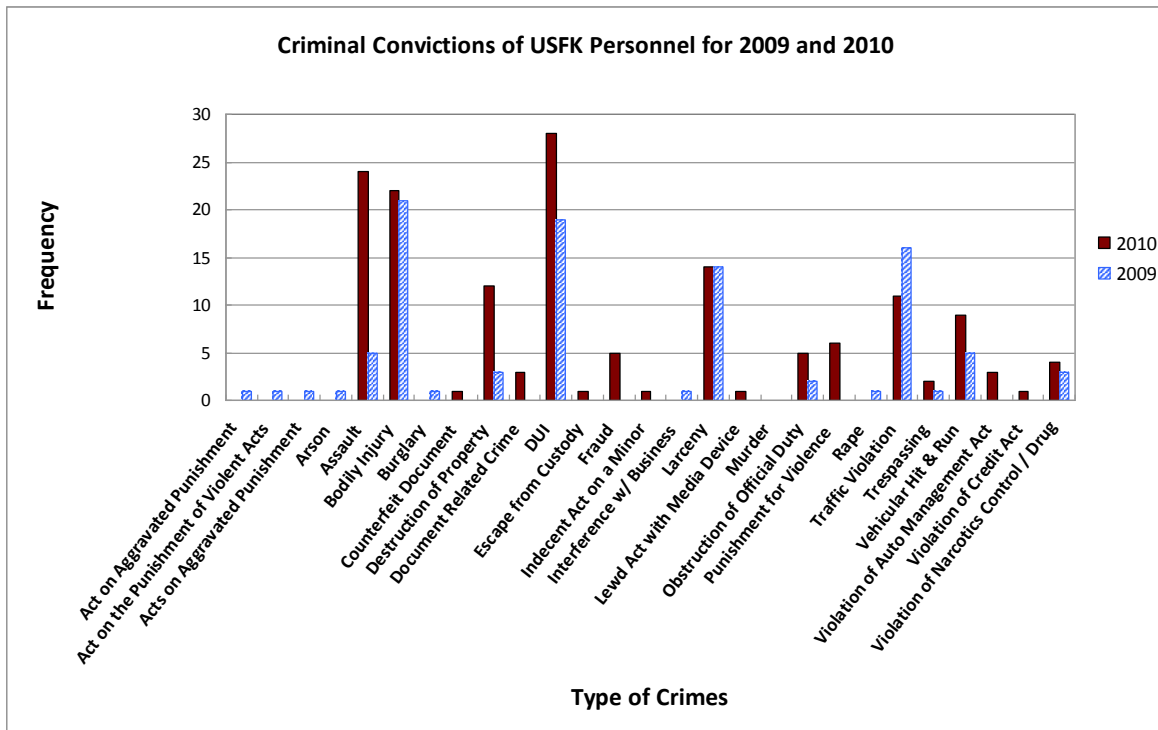
ROK-US SOFA

Article 22.9. Whenever a member of the United States armed forces or civilian component or a dependent is prosecuted under the jurisdiction of the Republic of Korea, he shall be entitled:

- (a) to a prompt and speedy trial:
- (b) to be informed, in advance of trial, of the specific charge or charges made against him:
- (c) to be confronted with the witnesses against him;
- (d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the Republic of Korea:
- (e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the Republic of Korea:
- (f) if he considers it necessary, to have the services of a competent interpreter: and
- (g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial.

Source: Ministry of Foreign Affairs of Japan (<http://www.mofa.go.jp/region/n-america/us/security/agree0009.html>), United States Forces Korea (http://www.usfk.mil/usfk/Uploads/130/US-ROKStatusofForcesAgreement_1966-67.pdf).

Appendix E Criminal Convictions of USFK Personnel for 2009 and 2010



Source: Figure created by the author using data from the following: United States Forces Korea (www.usfk.mil), ROK Drop (<http://rokdrop.com/>).

Appendix F Complete Text of the Exceptions to SOFA Primary Jurisdiction

Korea

Article 22, Paragraph 3 of the ROK-U.S. SOFA states:

In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or civilian component, and their dependents, in relation to:

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or civilian component or of a dependent:

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense, the authorities of the Republic of Korea shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall not if the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

Japan

Article 17, Paragraph 3 of the Japan-US SOFA states:

In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to:

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a

waiver of its right in cases where that other State considers such waiver to be of particular importance.

North Atlantic Treaty Organization

Article 7, Paragraph 3 of the NATO SOFA states:

In case where the right to exercise jurisdiction is concurrent the following rules shall apply:

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

Sources: United States Forces Korea (www.usfk.mil), Ministry of Foreign Affairs of Japan (<http://www.mofa.go.jp/>), North Atlantic Treaty Organization (www.nato.int/).

Appendix G Korean and Japanese Legal Systems

- ***Counsel for the accused:*** neither Korea nor Japan provide state-appointed counsel.
- ***Access to counsel:*** Korean and Japanese law does not require an attorney for the accused be present during interrogations.
- ***Detention:*** Korean police may detain suspects for 10 days before filing a formal indictment (23 days in Japan). “Throughout this time, the suspect is isolated from both family and legal counsel and subject to unrestricted police interrogation.”²⁰⁰
- ***Interrogation:*** Korean and Japanese law do not restrict time or length of interrogations.
- ***Interrogation transcripts:*** “Prosecutors are given wide legal latitude to compose (confessions) in their own words and to use them as evidence at trial, even if the confessor subsequently recants all or part of the confession. Prosecutors are not required to make verbatim records of interrogations... this means if a prosecutor adds words or omits others, the substance goes unchallenged since he will not be subjected to cross-examination.”²⁰¹
- ***Double Jeopardy:*** Korean and Japanese prosecutors are allowed to appeal not-guilty verdicts.
- ***Bail:*** rare in Korea and Japan.

Source: United States Embassy, Seoul (<http://seoul.usembassy.gov/legal.html>).

²⁰⁰ McConnel, "A Re-Examination of the United States-Japan Status of Forces Agreement."

²⁰¹ Stone, "US-Japan SOFA: A Necessary Document Worth Preserving."

Appendix H Total USFK Courts-Martial and ROK Criminal Prosecutions

	USFK Courts-Martial	ROK Criminal Prosecutions
02/2012	4	5
01/2012	4	11
12/2011	3	6
11/2011	6	11
10/2011	5	20
08/2011	5	13
07/2011	7	15
03/2011	5	13
02/2011	1	6
01/2011	4	5
12/2010	4	21
10/2010	7	17
09/2010	9	8
08/2010	1	12
	65	163

Total Convictions Between August, 2010 and February, 2012: 228

TOTAL UCMJ CONVICTIONS: 28.94 %

TOTAL ROK CONVICTIONS: 71.48 %

Percentage of total SOFA crime where Korea exercised its jurisdiction:

1990's	3 %
2001	7.8 %
2010 - 2012	22.69 %

Source: Figure created by the author using data from the following: United States Forces Korea (www.usfk.mil), ROK Drop (<http://rokdrop.com/>), Jung & Hwang, 2002; Cooley, 2005; Embassy of the United States Seoul, 2002; Kim S.D., 2011; Haggard & Ryu, 2011.

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