Status of Forces Agreements and State Sovereignty

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Abstract

Status of Forces Agreements (SOFAs) have proliferated in a Post Cold War World. They are bilateral or multilateral agreements, entered into by and between various States. This study attempts to analyse some key provisions in SOFAs, specifically those relating to Criminal jurisdiction and whether such erode the Sovereignty of the host State. To that end, the writer has defined Sovereignty and examined two well-known SOFAs – the NATO SOFA and the ROK – US SOFA. The writer has endeavoured to highlight the disparities between these agreements, depending on the contracting parties and concludes with whether such agreements violate the dignity and Sovereignty of the host state.

Key Words: *NATO SOFA, ROK, US SOFA, Sovereignty*

In an increasingly contracted and interdependent world, Status of Forces Agreements (hereinafter referred to as SOFAs) have gained momentum, specifically pursuant to the end of World War II. The military presence of one State's army in another sovereign State is now considered a necessity. Whilst this topic encompasses history and international relations, for the purpose of this paper, the legalistic aspect will be examined. Namely, how do Status of Forces Agreements, with their peculiar and particular

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conditions, coincide with the Sovereignty of a State? Do such agreements necessarily violate state Sovereignty, complement it or are they indifferent to it? To this end, this paper will briefly define State Sovereignty, examine two key SOFAs that have gained global repute, with specific reference to criminal liability of the personnel in a receiving State, and finally aim to answer the hypothesis - can SOFAs and state sovereignty co-exist? Or is there a voluntary surrender of some 'part' of State sovereignty upon the ratification of a SOFA?[1] Is such partial surrender possible in terms of legal principles?

What is State Sovereignty?

To begin with, the key concept of Sovereignty must be examined. As per Hinsley's definition, Sovereignty is the '*final and absolute political authority in the political community... and no final and absolute authority exists elsewhere.*'[2] To Alan James, Sovereignty is a matter of '*constitutional independence.*'[3] To the erudite V.K Menon, it is '*the only type of organization capable of sustaining a regime of law.*'[4] For Suganami, Sovereignty has three facets: supreme political authority within a State; the quality that makes a State an international person; and

[1] See John W. Egan, Comment, 'The Future of Criminal Jurisdiction over the Deployed American Soldier: Four Major Trends in Bilateral United States Status of Forces Agreements', [2006] 20 Emory International Law Review 291, 293.

[2] Nicholas Greenwood Onuf, 'Sovereignty: Outline of a Conceptual History.' (Fall 1991) Alternatives: Global, Local, Political (Vol 16) No.4 425, 429.

[3] ibid 430.

[4] V.K.N. Menon, 'The Nature of Sovereignty' (January—March, 1940) The Indian Journal of Political Science (Vol. 1) No. 3 262.

the sum of international legal freedoms that a State enjoys at a particular moment.[5] In the case of *The Wimbledon,* the Permanent Court of International Justice thought of Sovereignty as simply the liberty of the State within the limits of international law.[6]

Sovereignty then, coexists with international law; as long as States cannot interfere with the internal affairs of other States. Territorial jurisdiction, which translates to territorial Sovereignty, is an essential component of international law.[7] The writer finds much clarity and pragmatism in the refined definition posed by Nolte, where he states,

'*In my opinion, a decisive test for any contemporary concept of sovereignty is whether it fulfils and distinguishes the following two functions:*
Sovereignty must leave enough room for the requirements of globalization
Sovereignty must, on the other hand, protect against undue interference by equals.'[8]

[5] Hidemi Suganami, 'Understanding Sovereignty through Kelsen/Schmitt' (Jul., 2007) Review of International Studies (Vol. 33) No. 3 511, 512.

[6] *SS. Wimbledon, Britain et al, v. Germany* (1923) PCIJ Series A01

[7] Lars Bangert Struwe, Mikkel Vedby Rasmussen, Kristian Knus Larsen, 'To be, or not to be: Smart Defence, Sovereignty and Danish Defence Policy,' (July 1, 2012) Centre for Military Studies https://cms.polsci.ku.dk/english/publications/To_be_or_not_to_be___Smart_Defence_Sovereignty_and_Danish_Defence_Policy.pdf accessed 1st May 2021.

[8] Georg Nolte, 'Sovereignty as Responsibility?' (2005) Proceedings of the Annual Meeting (American Society of International Law) Vol. 99 (MARCH 30-APRIL 2, 2005) 389 https://www.jstor.org/stable/25660033?read-now=1&refreqid=excelsior%3Acbf9ad17280dd4d5fa994014b08fbad8&seq=3#page_scan_tab_contents accessed 5th May 2021.

Nolte questions the integral relationship between sovereignty and globalization. In his own words, '*should growing interdependence, which goes hand in hand with a disaggregation of the state and a rise of other international actors... be reflected in the concept of sovereignty?*'[9] He then amply demonstrates his belief that Sovereignty as a concept must evolve to allow mutual interdependence. Yet, even while he so believes it, he posits the above two criteria as boundaries within which globalization must operate, so as not to violate Sovereignty.

In the context of the present article, the creation of Defence Cooperative Agreements, (SOFAs being only a component of these wider agreements), are a requirement of globalization, necessitating the expansion of Sovereignty; as per Nolte's definition then, such agreements could coexist with the concept of Sovereignty. Yet on the other hand, Sovereignty must protect the State from unwarranted intrusion by third parties. It is an acceptable principle of international law that every Sovereign State is equal to another, whatever its size, history, economic and cultural background. Therefore, in the context of a SOFA, theoretically, both parties must be on an equal footing, and treat each other as Nolte's '*equals*.' For, as he correctly observes, '*in today's interdependent world, sovereignty would seem to risk serving antisocial and antihuman purposes if it were not*

[9] ibid

tied to the responsibility to protect international law.' [10] Could this statement be interpreted as a requirement for the sending State's Sovereignty to be exercised according to the norms of international legal principles? Whereby even 'stronger' countries are obliged to recognize '*the inherent dignity and ... the equal and inalienable rights of all members of the human family*'?[11]

This article will proceed to analyse if SOFA agreements respect the Sovereignty of nations, or if some States are more equal than others, in practical reality. The premise of this paper is, however, do SOFA agreements, accord with the concepts of Sovereignty as explained above?

The commonly known salient features of SOFAs

For the students of international law, the nature of these agreements would be all too familiar. They are bilateral or multilateral, defining the legal position of military forces and related civilian personnel of one or more States or an international organization in the territory of a host State, with the consent of the latter.[12] The advent of the Cold War changed circumstances, necessitating the stationing of 'friendly' forces on foreign soil on a semi-permanent basis for the purposes of collective security

[10] ibid 391

[11] The Preamble to the Universal Declaration of Rights, 10th December 1948, which is now widely acclaimed as being a part of customary international law and being universally obligatory.

[12] Aurel Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's evolving practice' (2008) The European Journal of International Law Vol. 19 no. 1 © EJIL 67, 68

and self-defence.[13] As to being legally binding, not all SOFAs are; whilst some are concluded as treaties, others are entered into as political arrangements.[14] Resultantly, no well-established legal jurisprudence has emerged in this field, unlike the law of international treaties and conventions.[15] Sari opines that there are three reasons for this: firstly, military and civilian personnel are sent abroad for non-hostile purposes, such as technical services, advisory and peacekeeping operations. Secondly, it is noted that operational circumstances relating to the deployment of foreign personnel differ much, situationally; established legal arrangements, may not be appropriate in post conflict situations. Thirdly, stronger powers veer towards securing more favourable positions for their own forces abroad, than they are willing to accommodate to foreign forces within their territory[16]. It is submitted that points number two and three are manifestly accurate when considering intricate power

[13] Aurel Sari, 'The NATO SOFA at Sixty: Heading for Retirement or has Life Just Begun?' (April 2012) *NATO Legal Gazette* Issue 27 2–8 http://www.aurelsari.co.uk/2011/12/nato-sofa-at-sixty/ accessed 13th May 2021

[14] Dieter Fleck, 'Guidebook Drafting Status of Forces Agreements' Geneva Centre for the Democratic Control of Armed Forces (2012) 9. These can take the form of Memorandum of Understanding or Exchange of Diplomatic Notes.

[15] Auriel Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's evolving practice' (n 12) 69. Additionally, whilst treaties, customary international law and Conventions could apply to this area, it is normative rather than anything else. Concepts such as state responsibility, state immunity, human rights, international criminal law and environmental protection should ideally be uniformly protected in a positive manner, without leaving them merely in the hands of contracting parties. Else, this could result in abuse, inequality and exploitation.

[16] Auriel Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's evolving practice' (n 12) 69.

balances, (or imbalances thereof). However, the writer would like to add that if personnel are sent abroad for non-hostile purposes, it may not be very different to diplomatic postings, which requires an established code of relations and bilateral relations.[17] SOFAs exist in an environment of peace and are not wartime exigencies. This could be more of a reason to subject them to some form of uniformity.

A SOFA can be terminated if the sending and receiving State enter into a confrontation. Its repeal maybe even provided for. The aim of this paper is not to speak of the dangers of wartime or the possibility of the sending State's forces remaining on foreign soil during wartime, but a SOFAs coexistence with the host State's sovereignty during peacetime.

Types of SOFAs may vary and may generally fall into the categories of - SOFAs for peace operations, SOFAs for military cooperation and SOFAs for a Unilateral Use of Training and Exercise Facilities.[18] The United Nations has drafted Model Status of Forces Agreements in 1990 for peacekeeping forces, yet as the name denotes, it is limited to such and is not utilized for bilateral SOFAs.[19] Whilst SOFAs generally may vary according to their purpose and length of time, what is ensured is the entry and stay of military and civilian personnel in another

[17] Vienna Convention on Diplomatic Relations, 1961

[18] Dieter Fleck, 'Guidebook Drafting Status of Forces Agreements' (n 14) 9

[19] This is generally applicable when receiving States have requested the United Nations, to deploy forces in their territories for peacekeeping operations.

State. A SOFA then essentially sets out guidelines and procedures to be observed during such stay, which is mutually accepted by the sending and receiving State. Whilst on paper this would be the ideal, one is aware that in geopolitics there are always the 'weaker' states and the 'stronger' States. As to what constitutes each of these categories, is subjective, varied and no one definition would suffice. It is also due to this essential variability of nature and purpose, that a SOFA cannot be standardized. The posting of diplomats in foreign countries have established purposes, rights, obligations, duties and immunities, not so with SOFAs. The socio-political, military, and economic necessities vary such from country to country, that no uniform set of rules could be envisaged. The question emerges however, that in spite of the delicacy of the situation, should not SOFAs be somewhat standardised and regulated through international best practices? Especially in this era, which claims to be more circumspect regarding human rights and environmental awareness.

As with treaties, SOFAs are not automatically absorbed into the domestic legal system; such absorption would be dependent on legislative approval or a particular state's constitutional provisions. However, in a reciprocal environment, these agreements are normally strongly complied with.

There are two seemingly contradictory principles that a SOFA must grapple with; immunity for the sending State's personnel on one hand, and respect for the law of

the receiving State, on the other.[20]

As comforting as the latter may seem on paper, there may be no legalistic way of ensuring the execution of the host State's laws by foreign personnel, as the host State may not have effective jurisdiction. The sending State's personnel then must adhere to their own international obligations, to respect and protect the laws of another State. This too will be curtailed by the international treaties the sending State has acceded to. Ideally, ratified Conventions should include key human rights instruments, international humanitarian law and international environmental law. It is humbly submitted that if this were the case, one would envisage the sending State to be a responsible global actor who has entered into core international treaties; but what if it has not? What would one's recourse be if that State that has not ratified important international instruments?[21]

In matters of criminal law, the indictment of the personnel will usually be in a Court of the sending State. In such an event, the SOFA must provide for collaborative extradition of the alleged offender. The

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[20] Dieter Fleck, 'Guidebook Drafting Status of Forces Agreements' (n 14) 12. Military forces operating in a sending state enjoy a particular legal status. They may enjoy immunity from the proceedings of the receiving state. This particular principle is derived from customary international law. A SOFA would merely confirm such, not grant it. Whilst this would of course mean that no one is immune from criminal proceedings, the personnel in question would be subject to the jurisdiction of the sending state.

[21] For example, the United States has signed but not ratified the Convention against the Discrimination Against Women (CEDAW), and is the only UN member that is not Party to the Convention on the Rights of the Child (CRC). Neither is it a party to the Kyoto Protocol (1997) nor the Rome Statute (1998) which established the International Criminal Court.

receiving State could exercise its jurisdiction only in the event of the sending State waving its immunity.[22] As much as this would be the practice extended to diplomats and customary international law, would it not be an encroachment into State sovereignty? As per the Rome Statute of the International Criminal Court, there could be a slight compromise. Article 27 states, '*Immunities or special procedural rules which may attach to the official capacity of the person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.*'[23] This is indeed laudable, but what if the sending State is not a ratifying party to the ICC statute?[24]

Another avenue has also been suggested and practised in some circumstances. That is, for the sending and receiving States to exercise concurrent jurisdiction over the personnel. This could apply for at least criminal offences committed by foreign personnel. It then needs to be unequivocally set out in the SOFA, i.e. which areas are within the jurisdiction of the sending State, which are within that of the receiving State, and those upon which the two States will act cooperatively.[25] If the receiving State is granted jurisdiction over certain matters, the sending State has the right to set out the manner in which

[22] Dieter Fleck, 'Guidebook Drafting Status of Forces Agreements' (n 14) 16

[23] Article 27 (2), The Rome Statute of the International Criminal Court.

[24] The United States, China, India, Iraq, Libya, Yemen, Qatar and Israel are a few countries that have not acceded to the International Criminal Court (ICC) Rome Statute. The Court and its functions however, remain controversial to this day, with many countries threatening to leave it.

[25] Dieter Fleck, 'Guidebook Drafting Status of Forces Agreements' (n 14) 17 - 18. The NATO SOFA includes this provision.

its citizens ought to be treated. Whilst this may be considered diplomatic courtesy, in a strict legalistic sense, is it concomitant with State sovereignty?

Whilst the above narrative is of a generalized nature, it would be more fitting to analyse the provisions and ramifications of SOFAs which have already been signed. To this end, the writer has selected the NATO SOFA and the SOFA between the United States and Republic of Korea (ROK-US) as case studies. It is believed that analysing the practical aspects of these SOFAs will highlight their interface with State sovereignty.

The NATO status of forces agreement

Officially, this is known as the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Forces, dated 19th June 1951[26]. It is multilateral and is applicable to all countries of NATO and the United States.[27]

Prior to the adoption of the NATO SOFA, two theories of international jurisdiction were in existence, namely, the Law of the Flag and Territorial Sovereignty.[28] The Law of

[26] It is said that the coming together of these generically similar states was to counter the 'threat' of Soviet expansionism and aggression.

[27] Presently, there are 30 countries in NATO – more information can be found at https://www.nato.int/cps/en/natohq/topics_52044.htm, accessed on 25th May 2021

[28] Kimberley C. Priest – Hamilton, 'Who really should have exercised jurisdiction over the Military Pilots implicated in the 1998 Gondola Incident.' [2000] 65 J. Air L. & Com. 605, 608, https://scholar.smu.edu/jalc/vol65/iss3/9, accessed on 21st May 2021

the Flag is where the military of a sending State is only subjected to its own exclusive jurisdiction over its members. It is a representative of the home State and thus not subject to the jurisdiction of the host State.[29] Territorial Sovereignty, is the converse; under this principle, the receiving State has the general right of jurisdiction over members of the military in its territory.[30] As the name denotes, this principle bows its head to the Sovereignty of the domestic soil. This principle, it is humbly submitted, forms the very premise of the writer's hypothesis. The jurisdiction of the sending State over its forces will contradict this principle. Yet, it is interesting to note how SOFAs which were entered into at later dates, circumvented this principle of international law, which could even be recognised as a principle of customary international law. Even today, it is accepted that without the provision of a SOFA, the jurisdiction regarding a foreign force lies with the receiving State. A SOFA then, provides for exceptions to the norm? An exception the untrammelled exercise of Sovereignty?

[29] ibid, page 608. Powerful nations have generally utilized this concept for centuries, officially recognised in the US Supreme Court decision, *Schooner Exchange v. McFaddon* 11 US 116 (1812). Chief Justice Marshall stated on page 140, that, '*The grant of a free passage [through a foreign country], therefore implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments his army may require.*' Whilst Chief Justice Marshall opined of troops passing through, this general principle was extended in *Coleman v. Tennessee* 97 US 509 (1879), where the Court held that a sending state maintained exclusive jurisdiction over its force stationed in the receiving state, as well (my emphasis).

[30] Kimberley C. Priest – Hamilton, 'Who really should have exercised jurisdiction over the Military Pilots implicated in the 1998 Gondola Incident.' (n 28) 610

Article 2 of the NATO SOFA states that it is the *'duty of a force and its civilian component and the members thereof as well as their dependants to respect the law of the receiving state…'* showcasing the importance of adhering to the laws of the host country. If the receiving State requests a member of forces or civilian component to be removed from its jurisdiction, the sending State shall be responsible for receiving the person concerned in their own territory, or at least disposing of him outside of the receiving State.[31] This then places an obligation upon the sending State to take concrete action against the 'offending' (in whichever capacity it may be) party. It envisages a proactive step, which is concomitant with the sovereignty of the receiving State. Article 6 makes interesting reading. It states, *'(M)embers of a force may possess and carry arms, on condition that they are authorized to do so by their orders. The authorities of the sending State shall give sympathetic consideration to requests from the receiving State concerning this matter.'* (my emphasis). On an important and intricate matter such as the carrying of weapons, the receiving State does not seem to have a persuasive say. It is dependant upon the 'sympathetic' ear lent to its complaints by the sending State. Sympathetic consideration does not necessarily translate into mandatory or at least discretionary compliance. In the context of NATO this may not be very problematic, as most of the parties are States on an

[31] Article 5 of the NATO SOFA

'equal' footing with one other.[32] Yet, what would the plight of a 'weaker' state be?[33] Would the sending State's ear be all that sympathetic at that point? Also, how could one in legal terms, qualitatively define 'sympathetic consideration'?

Article 7 (1)(a) is also immensely interesting, as it lays down the essence of criminal jurisdiction. It is a widely debated article, commented upon vastly since its promulgation. The issue it addresses is concurrent jurisdiction in criminal law. Thus, the '*military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction, conferred on them by the law of the sending State over all persons subject to the military law of that State.*'[34] One can discern that the rights are well within that of the sending State, in the matters of exercising jurisdiction and in determining its ambit. Article 7 (1)(b) seems a concession to this; a compromise reached, with concurrent jurisdiction being the solution. It

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[32] By 'equal', the writer means in the context of economy, international status and the wielding of power, which is peculiar to Western Europe, in a neo colonial, post cold war era.

[33] By 'weaker' the writer means states which do not necessarily fall within Western Europe or if its allies around the globe. The writer (most reluctantly) uses these terms in the manner most Western nations would. It is interesting that when devastating floods affected Germany and the Netherlands in July 2021, the public who were interviewed unconsciously vented their bias through statements such as, '*You don't expect people to die in a flood in Germany. You expect it maybe in poor countries.*' & '*You can imagine this sort of thing happening in Asia, but not here.*' https://www.instagram.com/p/CRhLQiks1IB/?utm_medium=share_sheet, accessed 25th July 2021. This is as recent an example of the global north's supremacist expressions as one can obtain.

[34] NATO SOFA Article VII (1) (a)

runs, '*the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependants with respect to offences committed within the territory of the receiving State and punishable by the law of that State*'.[35] Thus, exclusive jurisdiction over criminal matters, as long as the offences are committed within its territory, is afforded to the receiving State, which is laudable. This to a great extent, is in keeping with the sovereignty of the receiving State. However, the question arises as to whether the two articles could overlap and whether there is no certainty of the boundaries between them. Priest Hamilton opines that, '*(T)his formula apportioned the right to exercise jurisdiction on a reciprocal basis depending on the paramount interests of each state.*'[36] Accordingly, the receiving State retained primary jurisdiction over offences that would be committed on its soil, offences which could also cause devastation and resentment amongst its citizens.[37] This seems a pragmatic approach and an attempt to maintain law and order domestically. Has it then sought to reconcile the opposing principles of the law of the Flag and Territorial sovereignty? One could answer, to a great extent, yes. Has it caused a NATO State to surrender its Sovereignty to another? To a great extent, no; provided that matters are solved in the spirit of

[35] NATO SOFA Article VII (1) (b)

[36] Kimberley C. Priest – Hamilton, 'Who really should have exercised jurisdiction over the Military Pilots implicated in the 1998 Gondola Incident.' (n 28) 615

[37] Offences such as murder, rape etc. have been mentioned. It has been said that US lawmakers protested strongly against this article in its draft stage, due to their traditional mistrust of certain NATO countries.

collegiality and fairness.

Paragraph 2 of the same Article gives rise to more academic debate. Two situations are envisaged. Firstly, the military authorities of the sending State have exclusive criminal jurisdiction over those subject to military laws of *that* State, which are punishable by the law of the sending State, but which would not be punishable by that of the receiving State.[38] This seems fair enough, if there are actions the sending State has legislated as being criminal, they ought to be so judged. The writer's concern is not with over criminalization, but with under criminalization, which would pose a danger to the Sovereignty of the receiving State. To that end, the Article cannot be faulted. Yet it does highlight that the legislation of the sending State takes precedence over the lack of it of the receiving State, over those in the latter's territory. Conversely, to assuage any concerns of under criminalization, one has section (b) of the article: here the authorities of the receiving State shall have jurisdiction over the members of a foreign force or accompanying civilians which is punishable by its law and not that of the sending State.[39] Again, in terms of Sovereignty, a

[38] NATO SOFA, Article VII 2 (a). Article VII 3 (c) also mentions that the State having the primary right over a matter can waive its rights in favour of the other States. Such State can also give sympathetic consideration to a request for waiver. This is done with good will and diplomacy. It is most likely not an infringement if done as an extension of courtesy and not due to coercion or duress.

[39] Both provisions, i.e. Article VII 2(a) and (b), mention jurisdiction relating to 'offences relating to the security' of each State, and clause 2(c) defines it as – '(i) treason against the state; (ii) sabotage, espionage or violation of any law relating to official secrets of that State or secrets relating to national defence of that State.'

laudable provision, as there are offences which can be tried and executed within the sovereign territory even though committed by a foreign national. Thus, they are subjected to the minimum requirements of a citizen and also upholds the supremacy of the receiving State's legislature. Needless to say, many countries were unhappy with this arrangement.

Paragraph 3 deals with concurrent jurisdiction. This is again pragmatic, because usually offences which are very serious, are likely to be criminalised in many jurisdictions – i.e. both the sending and receiving States. This begs concurrence of jurisdiction and implementing a system of priorities.[40] Thus, if the personnel of the sending State commit an offence against the property, security or person of that State, then the sending State has jurisdiction.[41] This also extends to acts or omissions done in the performance of the official duties of the sending State.[42] For offences that encompass any other area, the authorities of the receiving State shall have exclusive jurisdiction.[43] The Article also envisages cooperation between the two States in the arrest of persons and

[40] Daniel L. Pagano, Criminal Jurisdiction of United States Forces in Europe [1992] 4 Pace Y.B. Int'l L. 189, 201

[41] NATO SOFA, Article VII 3(a) (i)

[42] NATO SOFA, Article VII 3 (a) (ii). However, critics have questioned this. See the following statement, '*if the sending state determines official duty, it will make such determinations by its own criteria and in furtherance of its own policies, because each state has an interest in exercising jurisdiction to the fullest extent possible. Accordingly, sending states will define official duty in the broadest sense and receiving states will define it narrowly. Therefore, which state defines official duty is of considerable importance.*' – Daniel L. Pagano, Criminal Jurisdiction of United States Forces in Europe [1992] 4 Pace Y.B. Int'l L. 189, 202

[43] NATO SOFA, Article VII 3 (b)

handing them over to the relevant authorities; the authorities of the receiving State must promptly notify the sending State of any arrest of its members.[44] It is submitted that the article guarantees the basic rights a defendant is entitled to, to ensure the impartiality and fairness of the judicial process. This is not a curtailment of the Sovereignty of the receiving State as any norm respecting country seeking the realisation of human rights should naturally accede to them[45]. Even in tortious matters, the authorities of the sending State, (subsequent to being provided a comprehensive report on the extent of damages by the receiving State), need to decide without delay, the making of an *ex gratia* payment. If payment is not made in full, the courts of the receiving State retain full jurisdiction to entertain an action against a member of the sending State until there has been payment in full satisfaction of the claim.[46] This is respecting the sovereignty of the host State.

Sari opines that the NATO SOFA, whilst not codifying existing customary international law, nevertheless upheld the principles of '*State Sovereignty and State*

[44] NATO SOFA, Article VII (5) (a) and (b). this is further extended in subsection (6) (a) and (b) where both states must assist each other in conducting necessary investigations, collection and production of evidence and the disposition of cases where such concurrent rights exist.

[45] NATO SOFA, Article VII (9) states the basic norms that an accused should be granted even if the receiving State is prosecuting him. These include the right to a speedy trial, to be informed in advance of the charges against him, to have a compulsory process of obtaining witnesses in his favour, to have a representative of the sending State present at the time of the trial etc.

[46] NATO SOFA, Article VIII (6)

Responsibility, and continues to do so.'[47] However, it is questionable whether these very same principles have continued to be mirrored in subsequent agreements, and the writer submits this is not so. Sari makes a pivotal point, with which the writer wholeheartedly agrees, that, *'(I)f certain parts of the NATO SOFA have passed into custom, they did so only with respect to deployments comparable to those for which the NATO SOFA was designed,* ***namely the deployment of armed forces in the territory of politically equal partners*** *in the context of structured military cooperation.'*[48] (my emphasis).

The concurrent and exclusive jurisdiction bestowed upon the receiving State, especially with regard to criminal matters is not echoed in most other SOFAs.[49] Did this 'legal reciprocity' come about because of the 'equal status' of the States parties? In a strict legal sense, other States signing a SOFA could request that they be treated in the same manner the parties to the NATO SOFA were, but in the context of global inequity, it would be highly

[47] Aurel Sari, 'The NATO SOFA at Sixty: Heading for Retirement or has Life Just Begun?' (n 13) Retrieved from http://www.aurelsari.co.uk/2011/12/nato-sofa-at-sixty/, accessed on 13th May 2021.

[48] ibid

[49] For example, note Article XVII of the Agreement the US has with Japan – '(1)(b) *the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan*... (2)(b) *The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its law but not by the law of the United States.'* – Agreement regarding the Status of Unites States Armed Forces in Japan, signed on January 19th, 1960.

doubtful that they would be acceded to. It is with this particular aim in mind that the writer now seeks to analyse selected provisions of another SOFA, namely the one between the United States of America and Korea.

Status of forces agreement between the Republic of Korea & the United States of America (ROK - US SOFA).

When examining the substance of this Agreement, the history between the two signatories' merits analysis. One could argue that the Korea was considered very differently to the NATO countries.[50] The US ultimately acceded to the provisions of the NATO SOFA hereinbefore considered, as it assumed the parity of the parties. It would be interesting to evaluate if it thought the same of Korea.

The history between the US and Korea spans over 70 years, as Korea was a surrogate battlefield between the so-called communist bloc and the West. Upon the defeat of Japan in World War II, Koreans expected independence, as a major war aim of the US. However, what they received instead was military occupation and artificial division.[51] The landing of the US forces on the

[50] Not being part of Western Europe, no homogeneity with Western European culture, traditions, and considered 'underdeveloped' (by Western standards) well into the 20th century.

[51] Bruce Cummins, 'The Structural Basis of Anti-Americanism in the Republic of Korea' in David Steinberg (ed), *Korean attitudes to the United States - Changing Dynamics* (Routledge 2005).

southern peninsular of Korea occurred in 1945.[52] The Mutual Defence Treaty between the Republic of Korea and the United States of America was signed on the 1st of October 1953 (entering into force on 18th November, 1954) and is the legal basis for US presence on Korean soil. The purpose is for the common defence of the Pacific area. In a relatively short, two-page document, the two countries entwined their fates unto each other, to an ambivalent relationship spanning over 70 years.[53]

As per Article III of the Mutual Defence Treaty, each party recognizes that '*an armed attack in the Pacifica area on either of the parties now under their respective administrative control ... would be dangerous to its own peace and safety.'* The two States further declare that they would act to '*meet the common danger in accordance with its constitutional process*.'[54] Reading between the

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[52] Seung – Hwan Choi, 'Policy Proposals For The Revision of The ROK-US Status Of Forces Agreement' (Fall/Winter 2000) The Journal of East Asian Affairs Vol. 14 No. 2 241

[53] This is especially apparent when examining the layers and variations of Korean terminology to name those who have any opinion towards the United States. Bong states that, '*There exist at least eight terms in the Korean language describing images of the United States, each nuanced to suggest a distinct strand: banmi (anti-America), sungmi (worship America), hyommi (loathe America), chinm (pro-American), yonmi (associate with America), yongmi (use America), hangmi (resist America), and Pimi (resist America)*' - Yongshik Bong, Yongmi: 'Pragmatic Anti- Americanism in South Korea', (Winter / Spring 2004) *The Brown Journal of World Affairs* Vol. 10, No. 2, 153, 157. https://www.jstor.org/stable/24590528?Search=yes&resultItemClick=true&searchText=Yongshik+Bong%2C+Yongmi&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DYongshik%2BBong%252C%2BYongmi&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3Ac2a0f939739ad0f4d6bb6c5052b3c0ac&seq=1#metadata_info_tab_contents, accessed 25th May 2021. If such numerous names have evolved to describe attitudes to America, one can ascertain how complex the relationship is.

[54] The Mutual Defence Treaty between the Republic of Korea and the United States of America, Article III

lines, it seems as if the US considers itself as having a large vested interest in an area, miles away from its territory and an almost indisputable right to assert its dominance, couched behind the ubiquitous phrase of 'peace and safety.' The catch all Article IV runs thus, '*The Republic of Korea grants, and the United States of America accepts, the right to dispose United States land, air and sea forces in and about the territory of the Republic of Korea as determined by mutual agreement.*'[55] Sweeping, laden, curtailed merely by mutual agreement. Gao argues that '*... the ravages of the Korean war, coupled with the threat of imminent attack from the North, left the ROK with little choice but to accept agreements that were asymmetrical and non-reciprocal.*'[56] It is debatable whether there was much 'mutuality' between the two States, on the world stage or domestic arena, at the time the agreement was signed. Was there a parity of status, similar to the Western European States of the NATO alliance? The writer opines, not.

The Republic of Korea and the United States SOFA (hereinafter referred to as the ROK – US SOFA) was finalized on 9th July 1966 – '*regarding facilities and areas and the status of United States Armed Forces in the Republic of Korea.*'[57]

[55] ibid Article IV

[56] Rijie 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' [2009] Fordham International Law Journal 585, 609.

[57] Preamble to the Facilities and Areas and the Status of United States Armed Forces in Korea, signed on July 9th, 1966 (hereinafter referred to as the ROK – US SOFA).

It has been noted by writers that the presence of US military forces in South Korea has contributed to its security from an invasion by North Korea and to unprecedented economic development; in part because South Korea's costs for defence, was reduced. These are undoubtedly established and commendable developments. Yet, the citizens of South Korea are more than concerned over the criminal and tortious violations carried out by US Forces, which has led to the deterioration of an amicable relationship. The violations extend to human rights, property rights and the environmental rights of Korean citizens.

As per Article XXII of the 1966 Facilities and Areas and the Status of United States Armed Forces in Korea[58], the military authorities of the United States have the right to exercise all criminal and disciplinary jurisdiction conferred on them by the law of the United States over members of their forces or civilian component, within the Republic of Korea.[59] For offences committed by the US forces or their civilian component, which are punishable by Korean law, the authorities of Korea shall have jurisdiction.[60] This exclusive and concurrent jurisdiction seems a borrowing from the NATO SOFA. The US has jurisdiction over an act committed by US Personnel in pursuance of their official duty. As per the agreed

[58] Signed at Seoul on 9th July, 1966, pursuant to Article IV of the Mutual Defence Treaty Between the United States and the Republic of Korea.
[59] Ibid Article XXII (1) (a)
[60] Ibid Article XXII (1) (b)

minutes to the ROK – US SOFA, an official duty is an act 'required' by military duty, which does not necessarily apply to all acts performed whilst on duty.[61] Determining whether an act / offence departs from established procedures, and falls outside 'official duty' lies with the United States.[62] If the 'competent' military authorities of the US decide that their personnel was acting in their official capacity and certifies as such – that is the end of the matter. Korea has not much option than accept such verdict and surrender jurisdiction to the US.[63] Under such circumstances, is not the written article merely paying lip service with no realistic recourse or parity afforded to Korea? Having no real control over offences committed upon one's soil, the surrender of jurisdiction, is a violation of Korean Sovereignty.

Under the subsequent articles, exclusive jurisdiction is granted to the respective States where an act is an offence only under its own penal laws.[64] Prior to 1991, the ROK

[61] Yongshik Bong, Yongmi: 'Pragmatic Anti- Americanism in South Korea' (n 53) 610, 611.

[62] See Article XXII, section 3 '*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...*'. The 1991 amendments in the Agreed Minute show no improvement, as evident in the following section 3(a)(1), '*A substantial departure from the acts a person is required to perform in a particular duty will usually indicate an act outside of the person's 'official duty''*. One can note the width and breadth of interpretation allowed in such an instance.

[63] Rijie 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' (n 56). The writer states at page 612, '... *this... gives the United States the exclusive authority to fix the limits of its primary jurisdiction.'*

[64] Article XXII (2) (a), (b).

would waive its primary jurisdiction in favour of the US, unless it informed the US, within fifteen days of the offence that it wished to initiate proceedings. The United States was not duty bound to adhere to this protocol. The writer queries once again – where is the parity of status? The heinous crime against Yun Kumi, and the manner in which her murderer – a US solider by the name of Kenneth Markle was treated (well!), bears ample evidence to this fact.[65] It is true however, that the amendments that followed thereafter, were to address these precise inequalities; yet, is it not difficult to overcome incursions into a State's sovereignty and dignity? And have the subsequent attempts at reformation been half hearted, hesitant and sketchy, making one wonder if genuine parity of status was aimed at?

In 1991 and 2001, amendments were made to the SOFA in an attempt to be more equitable; the above arrangement of waiving one's rights unless pre-empting by 15 days, was terminated. Fortunately, the ROK was allowed to '*discuss, question or object to any United States Armed Forces Official Duty Certificate*' giving some credence to the host country and not forcing it to accept the

[65] On October 28th, 1998, the young woman Yun Kumi (who was a prostitute by profession, which should have no bearing on the unspeakable act committed against her) was found murdered. This was in a Korean town that housed a US infantry division. Her injuries were extensive and peculiar in their extremity. She was found naked, bloody, inundated with bruises and contusions, with a bottle of Coca cola inserted into her uterus and the trunk of an umbrella driven 27 cm into her rectum. – Katherine H.S. Moon – Resurrecting Prostitutes and Overturning Treaties: Gender Politics in the "Anti-American" Movement in South Korea (Feb., 2007) The Journal of Asian Studies Vol. 66 No. 1 p 129

certification of the US. This is considered an improvement on the NATO SOFA which is silent as to who determines 'official duty', yet as Gao states aptly, '*the Korea SOFA settles the ambiguity squarely in favour of the United States... this provision gives the United States the exclusive authority to fix the limits of its primary jurisdiction.*'[66]

The State requesting the waiver from the primary State must give the latter twenty-eight days, (which could be increased to forty-two days in special circumstances) to consider the surrender of primary jurisdiction.[67] This is a slight widening of the margin from the previous arrangement. Again, Gao has an interesting comment to make on the amendments '*the give and take evidenced in the negotiations for the 1991 amendments notwithstanding, US military authorities acting in accordance with the policy of maximizing jurisdiction always request for a waiver from the ROK of its primary jurisdiction, and the ROK has almost always complied.*'[68] Practice then, does not mimic what is laid down in paper? To what extent does practice then, erode the Sovereignty of Korea? Quite a bit, one may note.

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[66] Rijie 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' (n 56) 612

[67] Article XXII paragraph 3 (c) of Understandings on Implementation are recorded in the Minutes of the United States of America-Republic of Korea SOFA Joint Committee, 1st February 1991.

[68] Rijie 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' (n 56) 614, 615

Yet even by 2002, it seemed as if the patchwork was not sufficient[69]. This was verily seen by the public outcry against the Yangju Highway incident – where two teenage Korean girls were killed by a US army vehicle during a training exercise, on June 13th, 2002.[70] A US military jury acquitted the US soldiers of negligent homicide, for the manner in which the vehicle was operated. This was met with derision by Korean citizens. They felt that Korean Courts ought to have been granted jurisdiction to try the case. It is noted, that inspite of the so-called concurrent jurisdiction, Korean authorities were not granted access to the crime scene.[71] How does such conduct accord with the sovereignty of Korea when it has no unrestricted access to a crime concerning two of its juvenile citizens, on its own sovereign soil? The US authorities efficiently classified the offence as falling within the 'official duty' exception of the ROK-US SOFA, even though Korea requested a waiver of

[69] The 2001 amendments spoke of the importance of environmental protection and that the US government committed itself to implementing the agreement consistent with the protection of the natural environment and human health. It also confirmed its respect of the Republic of Korea's governmental laws, regulations and rules. (as per Article III- Amendments to the Agreed Minutes of July 9th 1966 to the Agreement under Article IV of the Mutual Defence Treaty Between the United States of America and the Republic of Korea, signed on 18th January 2001).

[70] Barbra Demick, Anti Americanism Sweeps South Korea', *Los Angeles Times*, (November 27th 2002), retrieved from https://www.latimes.com/archives/la-xpm-2002-nov-27-fg-uskorea27-story.html - accessed 30th May 2021. The deaths have been described as 'particularly gruesome' as the two girls, whilst walking down a narrow rural road to attend a friend's birthday party, were crushed to death by a 57 tonne mine clearing vehicle.

[71] Rijie 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' (n 56) 616. If access was not provided during the initial stages (crucial to an unblemished investigation) to what extent would the rights of the Korean state be protected?

jurisdiction.[72] The US was unwilling to prosecute the personnel in the first instance! It was only after repeated protests from the Korean state and its citizens through unrelenting vigils that a decision was taken to courts martial for negligent homicide. Resultantly, what used to be 'anti-baseism' in Korea evolved to Anti-Americanism.[73] Korean sentiment was further injured when the two soldiers were acquitted of all charges. They were permitted to leave Korea the day after the verdict.[74] At the very best, was this not asymmetric implementation of criminal jurisdiction as opposed to concurrent? Concurrent jurisdiction which forms the basis of the SOFA signed between the two Sovereign nations?

It is also pertinent that Korea is a signatory to the ICCPR, which mandates that states parties undertake to ensure and respect the rights of accused within their domestic

[72] Gao argues that this situation, '*highlights the limited ability of the ROK to hold the official duty process to account; the certification is essentially a fait accompli.*' –ibid 618.

[73] Richard Halloran, Editorial, The Rising East: Growing Anti-Americanism Festers in South Korea, HONOLULU STAR-BULLETIN, Jul. 21, 2002, 6, available at http://archives.starbulletin.com/2002/07/21/editorial/halloran.html/, accessed on 30th May 2021.

[74] Jiyeon Kang, Corporeal memory and the Making of a Post-Ideological Social Movement: Remembering the 2002 South Korean Candlelight Vigils (fall 2012) The Journal of Korean Studies Vol. 17 No. 2, THEMATIC ISSUE: KOREA THROUGH ETHNOGRAPHY 329, 330. They were looked after thoroughly by the US Government, inspite of Article XXII, paragraph 1(b) of Amendments to the Agreed Minutes of July 9th 1966 to the Agreement under Article IV of the Mutual Defence Treaty Between the United States of America and the Republic of Korea, signed on 18th January 2001 (n 69) which states unequivocally, '*The Civil authorities of the Republic of Korea will retain full control over the arrest, investigation and trial of a member of the United States armed forces or civilian component or dependent.*'

legal system.[75] Could not Korea then, be trusted to uphold the rights of the accused US personnel, as a valued partner to an agreement? Lee Jang Hie, a Korean law professor who led a committee to revise the SOFA stated, "*For a terrible crime like this, somebody must be held responsible. Korea has a continental legal system which is somewhat different, and the Americans should respect the spirit of our system too.*"[76] The Americans expressions of regret and sadness over the issue, were dismissed by the Koreans as insincere, irrelevant and inadequate.[77]

It has been asserted that Korea has deferred and waived its jurisdiction in numerous situations, permitting the US to exercise its own. The numbers are baffling. In the year of 2002, the same year as that of the minesweeper incident, there were 300 crimes in which Korea had

[75] International Covenant on Civil and Political Rights, 1966, Article 2.

[76] Yet inspite of all this, South Korea deployed 3,000 if its troops to Iraq, in 2003, in support of the US invasion of Iraq. This was seen by some as evidence of South Korean support of the US, notwithstanding the issues at home. It made the ROK the third largest contributor to coalition forces, after the US and UK – Balbina Hawang, South Korean Troops to Iraq: a Boost for US – ROK relations, February 13th 2004, https://www.heritage.org/asia/report/south-korean-troops-iraq-boost-us-rok-relations, - accessed on 6th June 2021

[77] James I. Matray, Irreconcilable Differences? Realism and Idealism in Cold War Korean-American Relations (2012) The Journal of American-East Asian Relations, Vol. 19 No. 1 14, 15, "*US Ambassador Thomas Howard, at a press conference, stated that President Bush had telephoned him to say that he had been "touched by this tragedy" and asked the ambassador to express his "sadness and regret" over this tragic incident... protest leaders dismissed as insufficient President Bush's expression of regret over the deaths... in a private telephone conversation... "we demand him to apologize in the capacity of the U.S. President instead of whispering personal sadness on the phone.*"'(at pages 14 and 15).

primary jurisdiction but elected to prosecute only 20![78] This is subsequent to the 2001 amendment which states, '*It is understood that the United States shall exercise utmost restraint in requesting waivers of exclusive jurisdiction.*'[79]

Matray argues that '*Anti-Americanism should never have emerged as a major force in South Korea; After all, Washington was responsible for the creation of the Republic of Korea in August 1948 and provided major support against North Korea during and after the Korean war.*'[80] It is public knowledge that approximately 33,000 American lives were sacrificed in Korea, during the Korean war, ostensibly in the defence of South Korea and thus, there is great merit to this argument[81]; yet gratitude

[78] ibid n. 56 p 619. The article also states that in the years between 2004 and 2006, the Korean state was faced with 718 incidents involving US Servicemen, but that only six of these were serving sentences in Korean prisons as of April 2007.

[79] Article XXII, Agreed Minute, Re paragraph 2 of Amendments to the Agreed Minutes of July 9th 1966 to the Agreement under Article IV of the Mutual Defence Treaty Between the United States of America and the Republic of Korea, signed on 18th January 2001 (n 69)

[80] James I. Matray, Irreconcilable Differences? Realism and Idealism in Cold War Korean-American Relations (n 77) 1. He further elaborates on the complex and ambivalent relationship the South Koreans have with the US, with these words, '*Older South Koreans remain greatly appreciative of American Soldiers for preventing a Communist Military victory and they admire and respect U.S. political, social, and economic achievements. While embracing American values and popular culture, South Koreans born after the war ended in July 1953 more often rejected U.S. policy in the Cold War because they saw it as blocking reunification of their country. Early in the twenty first century, Bush infuriated younger South Koreans when he rejected this realist approach of seeking engagement with North Korea. But older Koreans also had reasons for being disappointed with the United States because of its history if sacrificing Korea's interests to larger goals.*' (at page 3).

[81] Yongshik Bong, Yongmi: Pragmatic Anti-Americanism in South Korea (WINTER / SPRING 2004) *The Brown Journal of World Affairs* Vol. 10 No. 2 153, 154

for past assistance should not mean an erosion of present day Sovereignty. When the Korean citizens have sought parity, they have been branded as nationalists (in a derogatory sense no doubt) or ingrates. In today's context of the law of nations, one wonders whether such condescension is acceptable.

Apart from criminal jurisdiction outlined above, a pressing issue is the environmental degradation of Korean soil by stationed US Army personnel – which is well documented. Yongsan, which is a vast area of more than 300 hectares in central Seoul, has been occupied by the US since 1953. There is evidence of the camp polluting the bordering Han River with Formaldehyde and oil.[82] What was revealed as late as 2017 was that from 1990 to 2015, there had been 84 incidents of oil spillage, which were not reported to the Korean authorities. Seven of these incidents involved more than 3,780 litres, which is considered as 'worst case discharges.'[83] According to Green Korea United, a Korean NGO committed to environmentalism, the pollution of the soil, water and air (through noise) by American bases, exceeded that of legal standards set by Korea.[84] Even subsequent to the concerns

[82] Ben Jackson, US Military contaminates Central Seoul Neighbourhood, 24th June, 2017, retrieved from https://www.koreaexpose.com/usfk-yongsan-contamination-toxic-record/, accessed on 7th June 2021

[83] ibid

[84] Heejin Han, Yooil Bae, Reality Revealed: U.S. Military Bases, Environmental Impact and Civil Society in South Korea in Ed Martini (ed) *Proving Grounds* (University of Washington Press January 2015) 11. The article states that in 2000 a US mortuary officer had compelled two subordinates to pour almost 200 bottles of Formaldehyde down a drain. This eventually made its way to the river. It was also highlighted that seven oil spillages into the river took place in the base, which was not informed to the

raised by Korea and the amendments inserted to the SOFA, writers have argued that the US forces have not adhered to the new agreements.[85] This highlights that even though the SOFA was amended to address environmental degradation, the realities of the Americans polluting Korean soil has not ended even in 2015. It is accepted that these matters can be settled with clean ups and compensation (though one wonders exactly how reversible these effects are!). Yet, for the purpose of this paper, the issue is to what extent does this interfere with the Sovereign rights of the Korean nation? As per the agreement with Korea, the US is not bound to pay for or compensate for the pollution of Korean soil. The contention of the US is that Korea is gaining from US bases and installations and since the US will not request any compensation for such, clean up should be borne by the Korean side.[86] Yet, this is a stark contrast to the SOFA agreement between the US and Germany, where the strict environmental rules and Regulations of the

Korean authorities. Of the toxins found in the groundwater were, benzene, toluene, ethylbenzene and xylene. Long term exposure is considered dangerous and carcinogenic.

[85] ibid 20, the writers state that, '*This whole process of base transfer illustrates that the USFK did not faithfully comply with the newly added environmental provisions under the SOFA regime. The USFK failed to inform either the Korean Ministry of Environmental Protection or local governments of the degree of pollution and contamination caused by the USFK activities and facilities. Despite the U.S. allegation that inspections were done according to its EGS, Korean authorities or experts were not allowed to confirm their findings.[85] The USFK did not grant the media or civil society access to information regarding the investigation, either.*'
[86] ibid 24

German State apply to US forces.[87] Isn't the asymmetrical power play still at work, then? It is a moot point as to why the laws and regulations of Germany are applied consistently, but not so in Korea.
Is this an erosion of Korean Sovereignty? It could be thought thus, if one State is treated differently to another.

As recently as the 21st of May, 2021, the White House published a joint statement by the US and ROK leaders, under the new President Biden.[88] There is a promise to '*recommit*' themselves '*to an ironclad alliance*.' The statement further reads as, '*The United States and the Republic of Korea share a vision for a region governed*

[87] NATO SOFA Supplement, Agreement of 3rd August 1959 (as amended), to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (effective 29th March 1998). Article 54A (2) states, '*Without prejudice to the respect for and application of German law pursuant to the present Agreement, the authorities of a force and of a civilian component shall examine as early as possible the environmental compatibility of all projects…in this connection, the authorities of a force and of a civilian component may call upon the assistance of German Civil and Military authorities.*' See further, Article 54B, '*The authorities of a force and of a civilian component shall ensure that only fuels, lubricants and additives that are low-pollutant in accordance with German environmental regulations are used in the operation of aircraft, vessels and motor vehicles, insofar as such use is compatible with the technical requirements… the German rules and regulations for the limitation of noise and exhaust gas emissions shall be observed to the extent this is not excessively burdensome. The competent German authorities and the authorities of the force and of the civilian component shall consult and cooperate closely in the application and supervision of these provisions.*' One can see the primacy (and rightly so!) accorded to the German State, in this Agreement. This is in keeping with the Sovereignty of Germany.

[88] US ROK Leaders Joint Statement (The White House), May 21st, 2021- retrieved from: https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/21/u-s-rok-leaders-joint-statement/ accessed on 30th May 2021.

by democratic norms, human rights, and the rule of law at home and abroad.' As much as the alliance has brought to Korea, the relationship is also fraught with abuse and inequality. It then remains to be seen to what extent human rights (which extend to environmental rights of those living on Korean soil) and the rule of law (the application of law equally to all, notwithstanding their Korean or US citizenship) have been respected by this historic alliance.

Conclusion

The post-World War II context has necessitated SOFAs. They have proliferated, for reasons of global and regional security, and even perhaps, the furtherance of superpowers. Whilst the present article sought to analyse SOFA agreements, namely two of the more well-known ones, what may have been highlighted is that not all SOFA agreements are of equal application. They differ, from the time of negotiations, ratification to execution; they differ from the words written on paper, to practice. Even taking the two under consideration, namely the NATO SOFA and the ROK – US SOFA, these variations can be observed, specifically in the area of criminal jurisdiction. The reader may decide the real reasons for such variations, though some reasons have been adduced in the course of this paper. Simply put, if one State is treated differently to another State, where is the equality of all nations? The United Nations Charter reaffirms in its preamble the '*equal rights of men and women and of*

nations large and small.' If equality is not afforded to all States, is their Sovereignty respected? The disparity between the NATO SOFA and the ROK – US SOFA was observed above. The NATO SOFA seems a comfortable compromise between territorial Sovereignty and a crucial defence agreement. Military necessity does not seem to diminish Sovereignty and meticulous steps have been taken not to. Yet, is the same applicable to the ROK – US SOFA? The writer humbly submits, it is not. As noted above, even if the text of the ROK – US SOFA is seemingly fair, practice has been far from it. Some clauses have no parity with other SOFAs (mainly the NATO SOFA) and when there is parity, the treatment of a Korean 'situation' has been different.

Referring back to Nolte's definition then, where he states that Sovereignty must protect against undue interference by equals – the ROK – US SOFA simply does not seem to hold up. Statistics have shown that Korea has repeatedly surrendered its Sovereign rights – of criminal jurisdiction and environmental protection, to the 'superior' power of the United States. All of the transgressions occurred on Korean soil. In such an instance, has the Sovereignty of Korea been diminished, compromised or violated? When one examines the legal definition of Sovereignty, is it a concept that can be diluted? The writer submits that it is not; dilution precludes its very existence. For the hypothesis posed by this article, the writer can only endeavour to claim – if the equality of a nation State is valued, and a SOFA is entered into, it can be a beneficial and even necessary

exercise in international relations. '*No man is an island*', as John Donne once said – and isolation only makes one vulnerable. However, if there is no parity of status, if power politics are utilized and inequality precedes the making of a SOFA, it fails to respect the Sovereignty of the host State, from its very inception. A clear erosion of Sovereignty then. Else it would seem that first world countries are subscribing to the Orwellian quote of '*inequality is the price of civilization*' ('civilization'!)