

ADDRESSING THE STATUS OF FORCES AGREEMENT IN OKINAWA, JAPAN

by

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THESIS ABSTRACT

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The Japanese prefecture of Okinawa is a contradiction. A peaceful, idyllic tourist destination for beachgoers today, in 1945 Okinawans suffered through a four-month battle where hundreds of thousands of civilians died by American bombs, suicide, and at the hands of their Japanese soldier countrymen. For nearly thirty years afterwards, Okinawans used the U.S. dollar as citizens of an occupied territory. Today, Okinawa hosts over seventy percent of the U.S. military in Japan. Incidents in Okinawa between U.S. military personnel and accompanying civilians unsurprisingly become international incidents, testing the U.S.-Japan alliance.

This thesis details Okinawa's history, the violence perpetrated by U.S. military personnel, and the Status of Forces Agreement ("SOFA") that surrounds and governs Okinawa's "military base problem." It suggests jurisdictional reforms in criminal prosecutions and in accident investigations, concluding with proposed changes to the U.S. military criminal justice system to lead to greater accountability for servicemembers accused of sexual violence.

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CHAPTER I INTRODUCTION

In 2016, I visited Camp Kinser and Kadena Air Base, two large U.S. military installations in Okinawa, Japan. At the time, I was working at a nearby Japanese public high school as an English teacher in Ginowan, a city synonymous with Okinawa's *kichi mondai* (基地問題), or base problem. Camp Kinser was hosting an on-base festival, an annual event where the local Okinawan public can visit the installation. Typically, base access is restricted to Status of Forces Agreement ("SOFA") personnel (U.S. servicemembers, U.S. civilian contractors, and families) and locals who work on the base. Today was a day where anyone could enter, subject to a check under your vehicle for explosives and a look at your identification.

After passing through the base gate and parking, I quickly ran into two of my best students, high school juniors who were members of the advanced education track and were making strides in their English skills. These high school students were also wearing make-up, prohibited in school, making them look older than their age. Security felt strangely heavy-handed, considering the guests were families and students. Armed marines stood on the outskirts of the festivities, watching. Bradley fighting vehicles and other military armor were near the stage where performers were dancing the *eisa*, Okinawa's traditional Bon dance. It felt as if the military vehicles had been roughly pushed to the side but kept close to move back in place immediately once the performance ended.

After leaving the festival where American beer was sold alongside Japanese yakisoba, I continued to Kadena Air Base. To get there, I drove my Japanese mini car out of Camp Kinser, up Japan's Route 58, and into the massive air base not far down the

road. At this part of the island, one is never out of sight of an American base. At the gate, my license plate inscribed with Japanese a hiragana “letter” told the base guards that, while I might be American, I was not SOFA personnel and that my vehicle was not insured under the SOFA treaty’s scheme. Representative of the convoluted legal structure encapsulating these bases, technically I did not have authorization to enter Kadena, a base that famously has high levels of security and previously hosted nuclear weapons. My passenger at the time, a doctor from mainland Japan and a U.S. permanent resident, worked as a medical translator for the U.S. military and was able to get us onto the base with a pass from her co-worker. Wanting to buy some groceries from Kadena’s base exchange (or PX), we met her military doctor co-worker, who had to purchase the items for us. Both of us strangely nostalgic for average American food, we continued to Kadena’s Chili’s restaurant. Technically neither of us were allowed at the restaurant unaccompanied, but my friend’s co-worker assured us we would be fine because my Japanese friend spoke English fluently.

My experiences noted above navigating the U.S. military presence are not unusual in Okinawa, though I would argue the contradictions between civilian and militarized Okinawa truly are. Okinawa is a gorgeous place with white beaches, breathtaking blue oceans, and palm trees. There is a tradition of peace, international exchange, and commerce on the island, dating back centuries to the Ryukyu Kingdom. A popular saying in the local language translates roughly as “after we meet once, we are brothers for life.” The prefecture is now a tourist destination for international visitors from China and domestic travelers from Tokyo. The island is also heavily militarized. Air traffic control at Okinawa’s airport in Naha represents the complicated position of Okinawa in East

Asia. Located near the disputed Senkaku Islands (labeled Diaoyu in mainland China), flights of Chinese tourists are often delayed as Japanese fighter planes roar off to counter Chinese jets approaching Japanese air space. Japanese air traffic controllers at Naha's airport also work with the U.S. military, making sure that commercial flights do not stray close to U.S. bases and preventing collisions between civilian aircraft and military flights.

In this thesis, I seek to paint a holistic picture of SOFA treaties generally and how the U.S. – Japan SOFA treaty applies to Okinawa specifically. My thesis goes beyond what might be presented in the many law review articles analyzing the U.S. – Japan SOFA. In my opinion, this is necessary because understanding the U.S. – Japan SOFA's application in Okinawa cannot be accomplished in a short piece. First, I describe SOFA treaties generally, comparing some of the more than 115 such SOFAs that the U.S. has entered into with military partners throughout the world. Second, I provide a brief overview of Okinawa's history. This section is important because SOFA treaty disparities and the contentiousness of the local relationship with the U.S. military must be explained partly through historical analysis. Third, I describe the consequences the U.S. military presence has brought to Okinawa, spending a significant amount of time on military violence committed primarily against local women, incidents which have led to U.S. – Japan SOFA treaty changes over time. Finally, I conclude this project by suggesting reforms. Unlike other research, I propose simple, achievable and yes, minor, reforms to the SOFA treaty jurisdictional reforms, including criminal prosecutions and accident investigations. Unique in my analysis of the U.S. – Japan SOFA, I also include past and current proposed changes to the Uniform Code of Military Justice (“UCMJ”).

The UCMJ, and its connections to military violence in Okinawa, in my opinion, is often overlooked.

CHAPTER II: STATUS OF FORCES AGREEMENT

Status of Forces Agreements

A nation's territorial sovereignty is generally defined by a geographic limitation recognized by international law, international agreement, by a sovereign state's delimitation undisputed by other nations, or by legislation or treaties recognizing sovereignty within a fixed boundary.¹ In general, sovereignty of a nation extends to its borders unless altered by a foreign occupation or by legal agreement. Prior to 1945, the U.S. military had operated under the principle of the Law of the Flag, with complete military legal jurisdiction within its military bases.² Representative of the international community denouncing colonization and armed invasions, following World War II the Law of the Flag principle gave way to negotiated treaties defining the sovereignty of a foreign military force and the jurisdiction of the host nation.³ These treaties, today referred to as Status of Forces Agreements ("SOFA"), balance U.S. jurisdiction over nationals abroad on military missions alongside host nation sovereignty. As of 2008, the United States has enacted at least 115 SOFA treaties with other countries.⁴

The 1951 North Atlantic Treaty Organization (NATO) SOFA was established first, and its textual language, if not its practices, are often replicated in SOFA treaties between the U.S. and other partners.⁵ For example, the NATO SOFA establishes principles of shared or concurrent jurisdiction, providing host nation jurisdiction over

¹ *Island of Palmas Case*, 2 REP. INT'L ARB. AWARDS 829, 838 (1949).

² Jimmy H. Koo, *The Uncomfortable Sofa: Anti-American Sentiments in South Korea and the US-South Korea Status of Forces Agreement*, 1 NAT'L SEC. L. BRIEF 103, 106 (2010); Timothy Stone, *U.S. – Japan SOFA: A Necessary Document Worth Preserving*, 52 NAVAL L. REV. 229, 232 (2006).

³ Timothy Stone, *U.S. – Japan SOFA: A Necessary Document Worth Preserving*, 52 NAVAL L. REV. 229, 232 (2006).

⁴ Sean Foley, *The Iraq Status-of-Forces Agreement, Iran, and Guantanamo Bay*, 34 RUTGERS L. REC. 39, 41 (2009).

⁵ *Id.*

criminal offenses committed by a foreign service member in violation only of the host nation's laws, foreign government jurisdiction over offenses punishable only by foreign criminal codes, and concurrent jurisdiction over offenses punishable under both legal schemes.⁶ For offenses falling under concurrent jurisdiction, the SOFA treaty delineates mechanisms that determine which party has jurisdiction over the alleged crime. One mechanism, often criticized by host nation citizens, is sympathetic consideration, allowing one party to ask the state with primary jurisdiction to waive its right to prosecute the alleged offender. The state with jurisdiction often must give "sympathetic consideration" to this request.⁷ Another often criticized mechanism is the official duty exception, providing military jurisdiction for "offenses arising out of any act or omission in the performance of official duty."⁸ The process of determining official duty varies based on the country.

SOFAs, however, are not limited to defining criminal jurisdiction, though disputes regarding criminal jurisdiction are often the most challenging to resolve and receive the most attention. At times similarly contentious debates occur regarding SOFA environmental restoration requirements. For example, the U.S. – Japan SOFA requires the Japanese government to pay the costs to remediate environmental damage on U.S. base property returned to Japanese control and Japanese environmental laws are not mandatorily applicable on U.S. bases.⁹ German environmental laws, however, have applied to U.S. military bases since the 1993 Supplementary Agreement to the NATO

⁶ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces art. VII Sec., Jun. 19, 1951, 1-3 [hereinafter NATO SOFA]; R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED 3-4 (2012).

⁷ See NATO SOFA, at art. XXII (2)(b)(ii); see Treaty of Mutual Cooperation and Security Between the United States and Japan, art. XVII(3)(c), Jan. 19, 1960, 11 U.S.T. 1633 [hereinafter, U.S. - Japan SOFA].

⁸ See U.S. – Japan SOFA, at art. XVII 3(a)(ii).

⁹ See U.S. – Japan SOFA, at art. XVIII(1).

SOFA.¹⁰ SOFA treaties also define local authority and civilian access rights to a U.S. military base by explicitly allowing or restricting local access to U.S. military installations. For example, Italy permanently stations Italian commanders at the major NATO Aviano Air Base, and the base itself is under Italian administrative control.¹¹ These treaties also define the level of notice the U.S. military must provide local authorities regarding training exercises, and even may require host government approval or allow the local government the ability to restrict particularly noisy or inconvenient training exercises.¹² Finally, SOFA treaties often designate procedures following U.S. military accidents, providing some host countries investigative authority, while limiting that of others.¹³

Clearly SOFAs do vary, but treaties between established military partners often have similar textual language, particularly regarding criminal jurisdiction. Yet SOFAs between the U.S. and new partners, particularly global south nations, often vary from the agreements described above. As a general maxim, the length of the agreement often corresponds to the sovereignty the host nation maintains under the SOFA and is often directly related to the economic and military influence of the partner nation.¹⁴ These shorter agreements invariably provide the U.S. with more jurisdictional control over their military members stationed in country. Many of these perfunctory agreements include an

¹⁰ DIETER FLECK, *THE HANDBOOK OF THE LAW OF VISITING FORCES* 358 (2001).

¹¹ *Japan-U.S. SOFA Wildly Different from US Agreements in Germany, Italy: Okinawa Pref.*, THE MAINICHI (Apr. 22, 2018), <https://mainichi.jp/english/articles/20180422/p2a/00m/0na/005000c>.

¹² See FLECK, *supra* note 9, at 358.

¹³ See Agreed Minutes to the 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 the United States Armed Forces in Japan, art. XVII, re para. 10(a)-(b), Jan. 19, 1960, 11 UST. 1652 [hereinafter U.S. – Japan SOFA Agreed Minutes].

¹⁴ See generally R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED 3-4 (2012) (Bangladesh's 1995 agreement is one page, compared to the enacted two-hundred-page supplementary SOFA agreement with Germany).

article on criminal jurisdiction that states “U.S. personnel shall be accorded the privileges, exemptions, and immunities equivalent to those accorded to the administrative and technical staff of a diplomatic mission under the Vienna Convention on Diplomatic Relations of April 18, 1961.”¹⁵ The recently executed U.S. – Rwanda SOFA, for example, includes such language, excepting U.S. military personnel from the host country’s criminal jurisdiction, and immunizing SOFA holders from civil liability stemming from official duty acts.¹⁶ This near diplomatic immunity provided to U.S. servicemembers is particularly common in U.S. SOFAs executed with African country partners.¹⁷

Long standing SOFA treaties with partner nations possessing near economic parity to the United States have been criticized for differences that do exist compared to the NATO SOFA. Commentators looking at East Asia, for example, criticize SOFAs negotiated in the 1950s as unrepresentative of the high economic development and geopolitical influence of both South Korea and Japan today.¹⁸ These agreements are often derisively compared with the NATO SOFA treaty, an agreement argued to better protect the sovereignty of NATO countries hosting U.S. forces.¹⁹ While the shared criminal jurisdiction scheme present in the NATO treaty is also included in the South Korean and Japan SOFAs, both countries criticize some of the treaty differences alluded

¹⁵ Agreement Between the United States of America and Rwanda art. III(1) May 28, 2020 (on file with author).

¹⁶ *Id.*

¹⁷ See Yvonne S. Brakel, *Developing Better U.S. Status of Forces Protection in Africa*, 76 A.F. L. REV. 207, 230 (2016).

¹⁸ See generally Koo, *supra* note 2, at 106 (restating critics’ arguments that South Korea’s comparative level of socioeconomic development in the 1950s led to SOFA agreement unfairly favorable to the U.S.).

¹⁹ See Brandon Marc Higa, *Unpacking Okinawa's 'Suitcase Murder': Revisiting Extraterritoriality Protections for Military Contractors under the U.S.-Japan SOFA Supplementary Agreement*, 21 APLPJ 1, 34 (2019).

to above. For example, the local governments and taxpayers generally pay to restore U.S. military related environmental damage in Japan and South Korea.²⁰ In Okinawa alone, Japanese taxpayers have spent nearly one billion dollars simply to soundproof local base adjacent homes.²¹ Local government authorities in both nations are also restricted from accessing a U.S. base without U.S. military approval, a particularly important difference when considering the textually similar criminal jurisdiction schemes in both the NATO, South Korean, and Japanese SOFA treaties that often turn on which nation has initial custody of a criminal suspect. Additionally, and perhaps most visibly striking from a Japanese and South Korean perspective, are the joint patrols conducted by German and Italian police with American soldiers or by American consent on the U.S. military bases in Europe.²²

The NATO shared criminal jurisdiction scheme, present in the SOFA treaties between the United States, Korea, and Japan, also differ, though the textual scaffolding of shared jurisdiction is essentially identical. Most significantly, many European NATO partners have agreed to preemptively waive criminal jurisdiction over SOFA personnel, even including those situations where the agreement provides the host country primary jurisdiction.²³ Japan and South Korea, however, have refused similar agreements, and are

²⁰ DAVID VINE, *BASE NATION: HOW U.S. MILITARY BASES ABROAD HARM AMERICA AND THE WORLD* 271 (2015).

²¹ *Id.*

²² Elizabeth Baker, *German Civilian Police Enrich 86th SFS, RAMSTEIN AIR BASE* (Mar. 2, 2018), <https://www.rams tein.af.mil/News/Article-Display/Article/1455948/german-civilian-police-enrich-86th-sfs>; Kent Harris, *Italian Police Visit U.S. Bases to Enforce Coronavirus 'Social Distance' Rule*, *STARS AND STRIPES* (Mar. 13, 2020), <https://www.stripes.com/news/europe/italian-police-visit-us-bases-to-enforce-coronavirus-social-distance-rule-1.622279>.

²³ Jonathan T. Flynn, *No Need to Maximize: Reforming Criminal Foreign Jurisdiction Practice Under the U.S. – Japan Status of Forces Agreement*, 212 *MIL. L. REV.* 1, 16-17 (2012); See Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, art. 19, Aug. 3, 1959.

presumed to exercise primary jurisdiction over SOFA personnel where the treaty allows.²⁴ Even the mostly identical criminal jurisdiction sections of the Japan and South Korea SOFA treaties differ slightly, as the South Korea SOFA allows the suspect to remain in American custody during local criminal proceedings.²⁵ By contrast, the U.S. – Japan SOFA allows a SOFA personnel suspect to remain in Japanese custody in certain circumstances.²⁶

While most SOFA treaties with longstanding U.S. military partners include textually similar shared criminal jurisdiction schemes, differences do exist between otherwise similar treaties, as discussed above. These major and minor differences, and indeed the frequently contentious debates over SOFA revision, stem in part from the unique circumstances present in each country. Germany’s Supplementary SOFA agreement in 1963, for example, followed the permanent stationing of multinational NATO forces within German territory.²⁷ Similarly, in 1993, this Supplementary Agreement was again revised, providing more German oversight of NATO forces following the fall of the Berlin Wall in 1989 and German unification.²⁸ The U.S. – Japan SOFA treaty is similarly influenced by unique local historical conditions, particularly the de facto unitary U.S. military rule of Japan following World War II, compared to Germany’s temporary post-war multinational occupation. Further significant local considerations include the enactment of Japan’s “Peace Constitution” originally intended to completely demilitarize Japan, the sudden outbreak of war in the nearby Korean

²⁴ Jonathan T. Flynn, *No Need to Maximize: Reforming Criminal Foreign Jurisdiction Practice Under the U.S. – Japan Status of Forces Agreement*, 212 MIL. L. REV. 1, 17 (2012); *See Facilities and Areas and the Status of United States Armed Forces in Korea*, art. XXII, Feb. 9, 1967.

²⁵ Republic of Korea SOFA, at art. XXII.

²⁶ U.S. – Japan SOFA, at art. XVII(5)(c).

²⁷ *See FLECK*, *supra* note 10, at 353.

²⁸ *Id.* at 358

Peninsula in the 1950s, and the separation of Okinawa from Japan as a U.S. military territory until 1972.²⁹ Finally, SOFA treaties that cover temporary deployments of U.S. military units, like the U.S. agreement with Australia, appear particularly short and boilerplate, perhaps representative of the rotational deployment of small U.S. military detachments for seasonal training exercises.³⁰

Debates over SOFA treaties, both before an agreement is finalized and concerning later revisions, may often become a third-rail political issue for local host country leaders. For example, though the causes of the 1979 Iranian Revolution are more complicated than a debate over a SOFA treaty, scholars have suggested that the Iran – U.S. SOFA treaty criminal jurisdiction provisions helped Ayatollah Ruhollah Khomeini mobilize opponents of Shah Mohammad Pahlavi prior to 1979. Commenting on the SOFA treaty provisions that provided diplomatic immunity to U.S. servicemembers and their families, Ayatollah Khomeini stated “[t]hey have reduced the Iranian People to a level lower than that of an American dog. If someone runs over a dog belonging to an American, he will be prosecuted. Even if the Shah himself were to run over a dog belonging to an American, he would be prosecuted.”³¹ According to one scholar, Khomeini’s speech denouncing the SOFA treaty led to mass protests and in part helped set in motion the events leading to the 1979 Iranian Revolution.³²

Criticisms of SOFA treaties, and the base presence often enshrined within, have also upended the domestic politics of Japan, a traditional American ally. Prime Minister

²⁹ See *id.* at 370-72.

³⁰ See Bert Chapman, *US Marine Corps Battalion Deployment to Australia: Potential Strategic Implications*, 13 INSTITUTE FOR REGIONAL SECURITY, no. 1, 2017, at 1; see Department of Foreign Affairs and Trade, Agreement with the Government of the United States of America Concerning the Status of United States Forces in Australia, and Protocol, [1963] ATS 10.

³¹ Foley, *supra* note 4, at 39; see MASON, *supra* note 14, at 16.

³² Foley, *supra* note 4, at 40.

Yukio Hatoyama took office in 2009 as a member of the Democratic Party of Japan (DPJ) after defeating the Liberal Democratic Party (LDP), the governing party of Japan for most of the period after 1955.³³ The DPJ ran a successful campaign that called for a recalibration of East Asian politics, specifically by pursuing a warmer relationship with China alongside the reduction and relocation of U.S. military bases in Okinawa outside the prefecture and possibly Japan.³⁴ Perhaps most upsetting for conventional American and Japanese foreign policy officials:

[Hatoyama] remarked on global trends ‘away from a unipolar world led by the United States toward an era of multipolarity’ of which an East Asian community would be one sign, and defined his political philosophy as ‘*Yuai*,’ literally, ‘*Fraternité*.’ He described it as something that was ‘not tender but rather...a strong, combative concept that is a banner of ‘revolution.’³⁵

Hatoyama’s term and DPJ rule did not last long. Then President Barack Obama reacted quickly, refusing to meet with Hatoyama and deploying senior American diplomats in a coordinated pressure campaign.³⁶ When Hatoyama specifically called for the relocation of Okinawa’s Marine Corps Air Station (“MCAS”) Futenma outside of the prefecture, instead of moving it to rural Okinawa pursuant to an earlier agreement, Hatoyama was undermined by even his own government bureaucrats.³⁷ Wikileaks documents later revealed that senior officials of Hatoyama’s government encouraged the Obama administration to oppose Hatoyama by standing firm on the prior arrangement relocating Futenma within Okinawa.³⁸ Nine months after coming to power, Hatoyama

³³ GAVAN MCCORMACK & SATOKO NORIMATSU, RESISTANT ISLANDS: OKINAWA CONFRONTS JAPAN AND THE UNITED STATES 114 (2d ed. 2018).

³⁴ *See id.* at 114.

³⁵ *Id.*

³⁶ *See id.* at 115.

³⁷ *Id.* at 117.

³⁸ *Id.* at 117-18.

signed a deal reaffirming the base relocation within Okinawa, resigning a week later.³⁹

Gavan McCormack, a scholar who has described Japan as America's client-state, interpreted this episode as the U.S. silencing an inconvenient democratic movement attempting to alter a bilateral military arrangement highly beneficial to the U.S.⁴⁰

Hatoyama's resignation, his failed plans for recalibrating Japan's relationship with the United States, and the later return of the LDP can also be described as a rejection of his policies by the Japanese electorate. Regardless of the label, the fall of the DPJ and Hatoyama's resignation certainly shows the combustibility of attempted SOFA and military base arrangement reform.

SOFAs, however controversial and potentially difficult to reform, can serve important purposes for a host nation. Such significance is better understood by looking at Cuba, a nation without a U.S. SOFA agreement and where the U.S. Guantanamo Bay Naval Base is located.⁴¹ Guantanamo Bay has been a U.S. military holding, subject to U.S. "complete jurisdiction and control," since 1903.⁴² Without a SOFA treaty, U.S. government lawyers have described Guantanamo Bay as the "legal equivalent of outer space," meaning the Uniform Code of Military Justice ("UCMJ") operates without interference from Cuban judicial institutions.⁴³ With no SOFA treaty restricting U.S. actions within the base, the U.S. Justice Department selected Guantanamo Bay for detention facilities used to imprison suspected enemy combatants captured in Afghanistan following the September 11th terrorist attacks.⁴⁴ Indeed, options such as

³⁹ *Id.* at 128.

⁴⁰ *See id.* at 129.

⁴¹ Steven Press, *Sovereignty at Guantánamo: New Evidence and a Comparative Historical Interpretation*, 85 THE JOURNAL OF MODERN HISTORY, no. 3, 2013, at 593.

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *Id.*

holding the prisoners on U.S. installations in Germany were rejected because relevant treaties provided the German government influence in American treatment of foreign prisoners held on German soil.⁴⁵ The Guantanamo Bay example shows that SOFA treaties, while often criticized as overly deferential to U.S. interests, can provide critical protections for local host governments.

Before discussing Okinawa's history and its relationship to the U.S. – Japan SOFA, it is important to make clear that some attempts at SOFA reform or base elimination by host governments succeed. Any serious discussion of the U.S. – Japan SOFA treaty includes Japanese and American foreign policy concerns that a crisis in Okinawa may undermine the alliance, particularly at a time when China is seen as an increasingly threatening regional rival. Commentators on the Okinawa base problem frequently point to the 1970s reduction of U.S. bases in Spain and the 1992 eviction of American bases from the Philippines as potential outcomes if the U.S. – Japan SOFA becomes unbearable to the local electorate.⁴⁶

Both examples provide important lessons for policymakers concerned with the U.S. – Japan SOFA and Okinawa. Like Okinawa, often referred to as the “keystone of the Pacific,” Spain-based U.S. military installations were of particular geographical importance after mid-20th century base closures in Morocco prioritized a U.S. military presence in the Iberian Peninsula.⁴⁷ The Philippines, similar to Okinawa, was a U.S. military territory at World War II's close. Like Okinawa's reversion to Japan, future

⁴⁵ *Id.* at 592.

⁴⁶ Jonathan T. Flynn, *No Need to Maximize: Reforming Criminal Foreign Jurisdiction Practice Under the U.S. – Japan Status of Forces Agreement*, 212 MIL. L. REV. 1, 4 (2012).

⁴⁷ ALEXANDER COOLEY, *BASE POLITICS: DEMOCRATIC CHANGE AND THE U.S. MILITARY OVERSEAS* 58 (2008).

Philippine independence was often tied to U.S. military base considerations. Initially both agreements provided the U.S. complete criminal jurisdiction over its servicemembers, with large financial transfers used by American authorities to limit local resistance following incidents of military crime.⁴⁸ Both Okinawan and Spanish base agreements were tested by particularly egregious military accidents early on: the death of seventeen elementary school students in 1959 after a fighter jet crashed into their Okinawan elementary school and an accident involving a nuclear weapon laden B-52 bomber over Spain in 1966 that resulted in contamination and missing unexploded nuclear ordinance.⁴⁹ Finally, authorities in Okinawa, Spain, and the Philippines all attempted to limit growing domestic pressure that sought to eliminate complete U.S. criminal jurisdiction over its servicemembers, particularly following incidents of U.S. military crime.⁵⁰

In both the Philippines and Spain, frustration with U.S. military accidents and crime both led to significant reductions in American military forces based in each country and, for a time, the complete closure of all American bases in the Philippines. In Spain, the Palomares B-52 crash discussed above resulted in massive craters and contaminated debris spreading across 552 acres of a village (as well as the missing nuclear weapon jettisoned into the ocean close to shore).⁵¹ This incident led to public protest, forcing leader Francisco Franco's regime to restrict U.S. military activities in Spain, including the ban of all flights carrying nuclear weapons.⁵² Throughout the 1950s, the Philippine

⁴⁸ *Id.* at 60.

⁴⁹ MASAMICHI S. INOUE, OKINAWA AND THE U.S. MILITARY: IDENTIFY MAKING IN THE AGE OF GLOBALIZATION 110 (2017); COOLEY, *supra* note 47, at 63.

⁵⁰ See generally COOLEY, *supra* note 47, at 69-76 (discussing the contentious debate regarding concurrent jurisdiction in the Philippines and vigorous Spanish complaints about SOFA procedures in the late 1970s).

⁵¹ *Id.* at 63.

⁵² *Id.*

press published stories of U.S. base guards shooting Filipinos who had strayed onto the bases and reported abuses of Philippine base workers in Olongapo, an area where the U.S. military had exclusive jurisdiction within the town itself.⁵³

Both Spanish leader Franco and Philippine leader Fernando Marcos, likely concerned with their own political survival, negotiated concessions from the United States, including guaranteed security arrangements and monetary transfers, quieting public and political opposition.⁵⁴ Notably, the end of both regimes signaled significant reductions in the U.S. military presence in both countries. Spain's democratic transition during the 1970s and 1980s eventually resulted in a new treaty, reducing the U.S. troop presence in Spain and closing two U.S. airbases.⁵⁵ Within four years of Marcos' symbolic flight to America that took off from the tarmac of one of the bases he supported, the new Philippine government ended its agreement with the U.S., with all American military forces departing the country by 1992.⁵⁶ In 1999, U.S. forces returned to the Philippines under a new treaty and have remained on a "visiting" basis primarily located in the southern island of Mindanao assisting the Philippine government in its fight against Abu Sayyaf and other extremist groups.⁵⁷

This chapter serves an important purpose for this project, particularly by providing an overview of SOFA agreements and the international context of many of these treaties outside of Japan and East Asia, a focus of the following chapters. Though the U.S. – Japan SOFA treaty is unique, particularly because of Okinawa, the historical

⁵³ *Id.* at 68-69.

⁵⁴ *See generally id.* at 56 (discussing public opinion in both the Philippines and Spain attributing Franco and Marcos political legitimacy to the U.S. military presence).

⁵⁵ *Id.* at 78-79.

⁵⁶ *Id.* at 82.

⁵⁷ *See id.* at 87.

context included from other countries above will be a continuing theme, particularly the impact U.S. military crime has on changes to the SOFA agreement. As made clear above, SOFA agreements and the trajectories of changes and reforms often are tied to the histories of the partner countries. This next chapter will provide an outline of Okinawan history, culture, and geography, all important to understand, but often overlooked in the more narrow and technical discussions of the Okinawa base problem today.⁵⁸

⁵⁸ See generally Tyler J. Hill, *Revision of the U.S.-Japan Status of Forces Agreement (SOFA): Relinquishing U.S. Legal Authority in the Name of American Foreign Policy*, 32 UCLA PAC. BASIN L.J. 105, 120 (2014) (stating that Okinawan cultural and geographic distinctions have less relevance when analyzing the impact of the SOFA on U.S. – Japan security relations).

CHAPTER III: HISTORY OF RYUKYU AND OKINAWA

Ryukyu Kingdom to World War II

Much to the surprise of many Americans who consider themselves familiar with Okinawa through the deployment of a parent, sibling, or friend, Okinawa has not always been a prefecture of Japan. The name Okinawa itself is of recent vintage, a name placed upon the island after its formal annexation by Japan in 1872. In prehistoric times, those who inhabited Okinawa were representative of the diversity present in the prefecture today. Wanderers and settlers moved from Japan south to Okinawa, evidenced in the prefecture's historical sites containing Jomon relics, a Neolithic culture commonly associated with Japan's main island Honshu.⁵⁹ Prehistoric travelers also arrived from the tropical indies and present-day Malaysia and Korea.⁶⁰



Clockwise from top left: Gushikawa Gusuku, Nakijin Gusuku, and Nakagusuku. Nakijin Gusuku and Nakagusuku are UNESCO World Heritage Sites. Photos by author in 2016 and 2018.

⁵⁹ GEORGE KERR, *OKINAWA: THE HISTORY OF AN ISLAND PEOPLE* 21 (2000).

⁶⁰ *Id.*

By the 14th century, present day Okinawa was divided into ruling lords, each possessing hilltop fortresses, or gusukus, the remains of which populate Okinawa today, having played witness to the Battle of Okinawa and today's American military presence.⁶¹ These principalities were known as Chuzan, Hokuzan, and Nanzan, regional distinctions (middle, north, and south) still present today in Okinawa. During this period, the rulers in Okinawa entered into a tributary relationship with China, creating a competitive relationship between the different principalities as each sought Chinese recognition.⁶² Chinese cultural and economic influence increased in Okinawa, a cause of Sino-Japanese disputes later in the nineteenth century and Chinese claims to Okinawa and the Senkaku Islands in the East China Sea today.⁶³

From the 15th century on, the Ryukyu Kingdom flourished as part of an East Asia tributary trading world gravitating from China.⁶⁴ During this time, Ryukyuan cultural products, particularly good such as distinctive laquerware, dyed textiles, and pottery, were well-known throughout the region.⁶⁵ Geopolitical shifts beginning during the 16th century, including competition between China and the Shogunate in Japan, incrementally led to the end of the independent Ryukyuan Kingdom. In 1609, samurai from southern Japan invaded Okinawa, punishing the Rykyuans for not participating in Shogun Hideyoshi's recent military operations.⁶⁶ Satsuma authorities removed the last Ryukyuan king from Shuri Castle, the seat of Rykyu power, to Satsuma's capital

⁶¹ *Id.*

⁶² *Id.* at 63.

⁶³ *Id.* at 63; Justin McCurry, *China lays Claim to Okinawa as Territory Dispute with Japan Escalates*, THE GUARDIAN (May 15, 2013), <https://www.theguardian.com/world/2013/may/15/china-okinawa-dispute-japan-ryukyu>.

⁶⁴ GAVAN MCCORMACK, *supra* note 33, at 2.

⁶⁵ *Id.*

⁶⁶ *Id.* at 2-3.

Kagoshima.⁶⁷ Following this invasion, Rykyuans were caught between two powers, China and Japan, as they continued to engage in trade with China while hiding their extremely loose integration into the Edo Japanese state.⁶⁸

For a period of time into the 19th century, Ryukyu successfully balanced the pressures of both Japan and China, negotiating treaties with foreign powers seemingly as an independent nation.⁶⁹ Commodore Matthew Perry, on his journey to end Japan's isolation forcibly, visited Ryukyu in 1853, marking the first American interaction with the islands.⁷⁰ Indicative of what was to come in the U.S. – Okinawa relationship, Perry was notably brutish in his visit to the capital Shuri. The Rykyuans, cautious during Perry's visit due to the delicate balancing act at play between China and Japan, made "unmistakably clear" to the commodore that he was not welcome at Shuri Castle and that exploration of the island would not be permitted.⁷¹ Nevertheless, the expedition, determined to establish the first American base on the Ryukyuan shore, ignored their objection.⁷² Perry soon dispatched well-armed members of his expedition to survey the island at will. Indeed, in two episodes of ominous foreshadowing to the 20th century, Perry's men forcibly acquired a schoolroom for a base, and later forcefully entered Shuri Castle over the objecting Rykyuans who desperately tried to entertain the intruders elsewhere.⁷³ Forceful property expropriation in the face of American arms was not the

⁶⁷ *Id.* at 3.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ KERR, *supra* note 59, at 310.

⁷² *Id.* at 308.

⁷³ *Id.* at 311-14.

only later 20th century calamity foreshadowed by Perry's visit as one of his men broke into a private home, raped a Ryukyuan women, and died as he fled his pursuers.⁷⁴

What independence Ryukyu maintained ended with the island chain's formal annexation by Japan's Meiji government in 1879. The population, estimated to be 351,374, were now subjects of a new Japanese prefecture, Okinawa.⁷⁵ Now, instead of local rule, Okinawa was governed by administrators sent from mainland Japan. With the creation of the prefecture, the central authorities in Tokyo began economically integrating Okinawa into Japan. Economic and public health troubles persisted in the newly integrated prefecture. Representative of discriminatory economic treatment from the mainland, Okinawans were forced to pay taxes in sugar, well after in-kind tax payments had been eliminated in the mainland.⁷⁶ Contrasting with Japan's northern region of Hokkaido, an area inhabited by the Ainu ethnic minority, Okinawa did not receive capital funds and administrative talent from Tokyo, in part attributed to the lack of natural resources present in Okinawa and the more resistant Ryukyuan population.⁷⁷ While some public health advances occurred after annexation by Japan, a food shortage, cholera, and smallpox killed thousands of Okinawans in 1886.⁷⁸ Finally, in the period prior to World War II, the local Ryukyuan language and Okinawan accent were forcibly suppressed as Japan established its own education system in the island, complete with photos of the

⁷⁴ AKEMI JOHNSON, NIGHT IN THE AMERICAN VILLAGE: WOMEN IN THE SHADOW OF THE U.S. MILITARY BASES IN OKINAWA 112-13 (2019).

⁷⁵ See generally KERR, *supra* note 59, at 381-94 (discussing the symbolic elimination of the Ryukyu *han* in and the creation of Okinawa *ken*, or prefecture).

⁷⁶ *Id.* at 404.

⁷⁷ *Id.* at 402.

⁷⁸ *Id.*

emperor and empress in every school, objects considered semi-sacred by the Japanese mainland teachers.⁷⁹

World War II Okinawa

Simultaneously to Japan's cultural, political, and economic integration of Okinawa to the mainland, Japanese military garrisons began arriving in the 1870s.⁸⁰ These bases, at that time, were intended by the Japanese government to intimidate and subdue the new prefecture's population.⁸¹ These bases gradually shifted from a policing to a military function as the Sino-Japanese war in China continued throughout the 1930s and as World War II battles in the Pacific moved closer to the Japanese islands. The Japanese government conscripted Okinawans into their war machine, allowing men from the island to enlist in the imperial army and forcing local civilians to build defenses and bases to defend the island. Japanese suppression of the Okinawans' local language and culture increased alongside the militarization of the island, as school children caught speaking the Okinawan dialect were shamed and citizens were encouraged to replace distinctive Okinawan surnames with Japanese last names.⁸²

As the war moved closer, the island became even more militarized. Citizens were pressed into service and property appropriated as a tenth of the civilian population was mobilized daily to construct Japanese battle positions and soldiers took schools and residences for housing.⁸³ By 1944, Japanese troops numbered 150,000 in a prefecture of

⁷⁹ *Id.* at 413-415; see MCCORMACK, *supra* note 33, at 6.

⁸⁰ MCCORMACK, *supra* note 33, at 16.

⁸¹ *Id.*

⁸² *Id.* at 16.

⁸³ MASAHIDE OTA, *ESSAYS ON OKINAWA PROBLEMS* 30 (2000).

500,000 residents.⁸⁴ Air raids were frequent. In October of 1944, American planes bombed Naha, destroying 80% of the capital city and killing hundreds of civilians.⁸⁵ Sensing the battle to come, three months before, Japanese military officials had evacuated many women, children, and elderly from Okinawa and the surrounding islands.⁸⁶ A U.S. submarine torpedoed an evacuation ship, the *Tsushima Maru*, killing 1,418, including 775 children.⁸⁷ By the beginning of 1945, Okinawans were trapped on their islands, caught between the Japanese military and advancing American armies.

In April of 1945, the largest U.S military force in history, bigger than that of the Normandy invading force, landed in central Okinawa, having already captured the nearby Kerama islands two weeks before. The slightly populated Kerama islands, garrisoned by Japanese soldiers, foreshadowed what was to come in the main battle for Okinawa. The Japanese defenders on Tokashiki island, knowing defeat was imminent, handed out grenades to the civilians, instructed them on their use, and forced the families to commit suicide.⁸⁸ Those that survived the blasts from the few grenades provided killed their surviving family members, upon orders by the soldiers who themselves purportedly were to survive to fight on.⁸⁹ 600 civilians perished.⁹⁰ Even after these mass suicides, the survivors feared execution by surviving Japanese soldiers “spy hunting.”⁹¹ The use of the

⁸⁴ *Id.* at 31.

⁸⁵ Robert D. Eldridge, *Battle of Okinawa really began 75 Years Ago Today Escalates*, THE JAPAN TIMES (Oct. 9, 2019), <https://www.japantimes.co.jp/opinion/2019/10/09/commentary/japan-commentary/battle-okinawa-really-began-75-years-ago>; MCCORMACK, *supra* note 33, at 18.

⁸⁶ MCCORMACK, *supra* note 33, at 18

⁸⁷ *Id.*

⁸⁸ Michael Bradley, “*Banzai*” *The Compulsory Mass Suicide of Kerama Islanders in the Battle of Okinawa* 「万歳！」 沖縄戦における慶良間島民の集団自決, 11 THE ASIA-PAC. J. 22, 1-2 (2013).

⁸⁹ *See id.* (explaining the surprise of survivors to see surviving Japanese soldiers).

⁹⁰ *Id.* at 3.

⁹¹ MCCORMACK, *supra* note 33, at 25.

local Okinawan language, prohibited by military order, or simply surviving, led to the murders of at least a thousand civilians.⁹²

After landing on the main Okinawan island, U.S. forces quickly reached the top of the island. It was to the south of the island, near the location of the old Ryukyu seat of power Shuri Castle, where the fighting would become even more horrific. With the fall of the Japanese defenses at the Shuri Line imminent, General Ushijima had a choice: continue to defend the lines hastening defeat or stretch out the fighting for as long as possible by retreating further south where the civilian population was hiding. Ushijima, under orders approved by Emperor Hirohito to delay his inevitable defeat and to dissuade a mainland invasion by making the battle as costly on American forces as possible, chose the latter.⁹³ This decision had catastrophic consequences for the surviving Okinawan civilians, caught between the advancing U.S. military and defeated Japanese soldiers determined to fight to the end. This month-long period at the end of the battle is seared into the collective memory of Okinawa, a painful lesson that military presence does not equal civilian protection, and that their island and lives are disposable to protect Japan. During this period, many young conscripted female student nurses who had tended the wounded in the preceding months in hellish conditions were killed after being forced from their protective caves by Japanese soldiers, or by American grenades after their soldier protectors prevented their surrender. Their deaths today are memorialized in an Okinawan museum that protests war's civilian costs.

⁹² OTA, *supra* note 83, at 58-60.

⁹³ See generally OTA, *supra* note 83, at 46 (stating that the Battle of Okinawa was a delaying tactic to protect mainland Japan); see generally MCCORMACK, *supra* note 33, at 20 (explaining Ushijima's decision to prolong the battle as sacrificing Okinawa for the defense of the mainland); JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 54 (1999)

The Battle of Okinawa lasted from March until the suicide of Ushijima in June of 1945. At least 140,000 civilians died in the battle out of a population of 300,000 – 400,000 Okinawan civilians, more victims per capita than in the Hiroshima and Nagasaki atomic bombings combined.⁹⁴ Nearly one in three Okinawan civilians died. Others forced to service the Japanese military died at even higher rates, including student nurses, high-school aged “soldiers,” and Koreans forcibly brought to Okinawa for labor and sex work.⁹⁵ Representative of the ferocity of the battle these civilians were caught in, commanders of both armies died, including a three-star U.S. general, still today the highest-ranking U.S. servicemember killed in battle. Over 300,000 Okinawan civilians, the first and only Japanese citizens to experience a land battle in a Japanese prefecture, were placed in temporary internment camps at the end of the battle.⁹⁶ The U.S. military was in complete control over Okinawa.

American Occupation: 1945-1972

“As many G.I.s stationed in Okinawa during this time testify, no one thought there were bases on a place called ‘Okinawa;’ they thought ‘Okinawa’ itself was a military base.”⁹⁷

Annmarie M. Shimabuku

The differences between the U.S. occupations of mainland Japan and Okinawa can be understood, at least partly, simply by the end date of each. Mainland Japan’s occupation lasted from 1945-1952 and ended with the signings of the Treaty of San Francisco and the 1952 U.S. – Japan Security Treaty.⁹⁸ The reversion of Okinawa to

⁹⁴ JOHNSON, *supra* note 74, at 56.

⁹⁵ *Id.* at 87.

⁹⁶ OTA, *supra* note 83, at 200.

⁹⁷ ANNMARIE M. SHIMABUKU, ALEGAL: BIOPOLITICS AND THE UNINTELLIGIBILITY OF OKINAWAN LIFE 55 (2019).

⁹⁸ OTA, *supra* note 83, at 170; Jonathan T. Flynn, *No Need to Maximize: Reforming Criminal Foreign Jurisdiction Practice Under the U.S. – Japan Status of Forces Agreement*, 212 MIL. L. REV. 1, 9 (2012).

Japan did not happen until 1972, and, for a time, it was assumed that the U.S. military occupation of Okinawa would be permanent. After the war, General Douglas MacArthur, then military ruler of Japan as the Supreme Commander of Allied Powers (SCAP) supported an eventual end to the military occupation of the mainland in favor of a voluntary defense agreement with the Japanese government.⁹⁹ Okinawa was to be treated differently, a concession to be provided by Japan in return for the mainland occupation ending and for continued protection under the U.S. nuclear umbrella.¹⁰⁰

Okinawa was for a time assumed a permanent U.S. holding. In 1947, responding to the Japanese foreign minister's remark that the Japanese people wished to have Okinawa returned to Japan, MacArthur stated that "[t]he Ryukyus are *our* natural frontier," that the Japanese would not oppose a permanent occupation of Okinawa because "the Okinawans are not Japanese," and that bases in Okinawa are important for Japan's own security.¹⁰¹ Emperor Hirohito apparently agreed, requesting that, in light of the worsening relationship with the Soviet Union, America occupy Okinawa and other Ryukyu islands for ninety-nine years.¹⁰² Indeed, American permanent control of Okinawa was not only important for Japanese security alone as MacArthur made clear, telling reporters that the defensive line against "Asiatic aggression" was no longer the American west coast, but rather a line starting from the Philippines and continuing down to "its main bastion, Okinawa."¹⁰³

⁹⁹ WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964* 528 (1978).

¹⁰⁰ JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 552 (1999)

¹⁰¹ HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 626 (2000) (emphasis added).

¹⁰² *Id.* at 627.

¹⁰³ MANCHESTER, *supra* note 99, at 542.

The history of Okinawa's U.S. military occupation provides many examples of American suppression of local self-government as well as limited Okinawan experimentations with local rule. In 1950, the military government became the United States Civil Administration of the Ryukyu Islands ("USCAR"), an acronym synonymous with high-handed military rule lasting until Okinawa's 1972 reversion to Japan.¹⁰⁴ Regardless of USCAR's rhetoric that it was promoting democracy in Okinawa, military repression was constant, including the purge of the regional capital Naha's popularly elected anti-USCAR mayor, press censorship, unpunished servicemember violence against Okinawans, and forcible land requisition for U.S. military base construction.¹⁰⁵ Indeed, familiar to the Okinawan experience with early Japanese rule, Okinawa became a "dumping ground" for American military personnel as an end-of-the-line station in a battle scarred island less desirable than a mainland posting.¹⁰⁶

Considering this history, it is unsurprising that this almost thirty-year period of USCAR governance witnessed a decline in local support for American rule. Immediately after the end of the battle, citizens and local intellectuals viewed the U.S. military positively, particularly following their experience with the Japanese military during the war and the preparations the U.S. government made to feed the surviving civilian population.¹⁰⁷ During the 1960s, however, Okinawan support for reversion to Japan increased, particularly as democratic reforms stalled, land expropriation for U.S. military bases continued, and U.S. Air Force bombers took off from Okinawa's bases for bombing

¹⁰⁴ See INOUE, *supra* note 49, at 4.

¹⁰⁵ *Id.*

¹⁰⁶ OTA, *supra* note 83, at 205.

¹⁰⁷ *Id.* at 207-210.

runs over Vietnamese cities.¹⁰⁸ Land expropriation was particularly egregious to local citizens, as USCAR issued regulations allowed the taking of private land by “bulldozers and bayonets” if local landowners refused to sign leases.¹⁰⁹ Military crimes further infuriated the local population. In 1970, near the end of the U.S. occupation, an intoxicated U.S. soldier hit an Okinawan with his car.¹¹⁰ Following recent incidents, including a fatal car accident between an Okinawan and a military member later acquitted by a U.S. military court martial and media reports of chemical weapon stockpiles in Okinawa, the locals revolted for the first and last time, turning over and burning U.S. military vehicles in what was to be known as the Koza Riot.¹¹¹

Okinawa’s reversion to Japan formally occurred on May 15, 1972. While celebrated by many Japanese and Okinawans, substantial misgivings remained in the returned prefecture. First, Okinawa’s involvement in the increasingly unpopular U.S. war in Vietnam would continue.¹¹² The initial organizing force behind the reversion movement was local opposition to the use of Okinawa’s American air bases for bombing sorties over North Vietnam and a desire to join Japan’s largely demilitarized state.¹¹³ Prior to reversion, however, the Nixon administration came to an agreement with Japan’s prime minister, declaring that the United States would retain military facilities in Okinawa required for the mutual security of Japan and the United States.¹¹⁴ Further, kept secret at the time and only revealed recently through the declassification of U.S. records, the two parties also entered into a secret agreement, with Japan paying the United States

¹⁰⁸ *Id.* at 211; see MCCORMACK, *supra* note 33, at 84.

¹⁰⁹ SHIMABUKU, *supra* note 97, at 68.

¹¹⁰ *Id.* at 120.

¹¹¹ *Id.*; MCCORMACK, *supra* note 33, at 83.

¹¹² See MCCORMACK, *supra* note 33 at 84.

¹¹³ *Id.*

¹¹⁴ *Id.*

to keep its forces in Okinawa as a deterrent and providing permission for the U.S. military to reintroduce nuclear weapons in Okinawa during a time of emergency.¹¹⁵ Second, the U.S. military footprint would not be reduced and, in-fact, would increase with base relocations from mainland Japan.

After the 1950s, no new U.S. military bases have been built in mainland Japan.¹¹⁶ In 1982, ten years after the reversion, 53% of Japan's U.S. military bases were in Okinawa.¹¹⁷ By 1996, it rose to 75%, near today's figure.¹¹⁸ Today, Okinawa, making up 0.6% of Japan's territory, now hosts over 70% of the country's U.S. military presence. With a large military presence in Okinawa, international attention often follows military related crime and accidents in the prefecture. These crimes and accidents, alongside ongoing base expansion efforts, also create ongoing controversies related to the U.S. – Japan SOFA to which we now turn.

¹¹⁵ *Id.* at 59; Eric Johnston, *Old Deals Sowed Seeds of Unresolved Problems*, THE JAPAN TIMES (May 17, 2012), <https://www.japantimes.co.jp/news/2012/05/17/national/old-deals-sowed-seeds-of-unresolved-problems/>.

¹¹⁶ MCCORMACK, *supra* note 33, at 86.

¹¹⁷ OTA, *supra* note 83, at 171-72.

¹¹⁸ *Id.*

CHAPTER IV: CONSEQUENCES OF THE U.S. MILITARY PRESENCE IN OKINAWA

Violence Against Women

“When demanding the withdrawal of the U.S. military, when asking for the revision of the SOFA, when protesting against the U.S. – Japan Security Treaty, do we all remember that violence against women and girls has [happened] and continues to happen today...

Why is this threat not listed—alongside helicopter crashes, airplane engine noise, and bullets accidentally whizzing over fences—as damages to Okinawans’ lives?”¹¹⁹

Suzuyo Takazato, *Okinawa Women Act Against Military Violence*

“In times of war, the military takes people’s lives. In times of peace, the military takes the dignity – and often the lives – of women. In Japan, where ordinary citizens are rarely exposed to these facts about the military, Okinawa is an exception.”¹²⁰

Yumiko Mikanagi, *International Christian University Japan*

Scholars analyzing violence related to U.S. military bases often focus primarily on the victimization of local civilian women by U.S. servicemembers, accompanying dependents, and contractors. Like pollution, this violence can be categorized as a spillover effect from within the bases impacting those living beyond the fences. An analysis of such violence, however, should start with the prevalence of sexual violence within the military ranks itself. In 2019, the U.S. Department of Defense received 7,825 reports of sexual assault of which U.S. military servicemembers made 6,236 of these reports.¹²¹ 922 other reports came from U.S. civilians and foreign nationals.¹²² Domestic violence rates within the U.S. military are additionally estimated to be five times civilian

¹¹⁹ JOHNSON, *supra* note 74, at 128.

¹²⁰ Yumiko Mikanagi, *Okinawa: Women, Bases and U.S. – Japan Relations*, 4 INT’L REL. OF THE ASIA-PAC., no. 1, 2004, at 97.

¹²¹ 2019-2020 U.S. Dep. of Defense Sexual Prevention and Response, app. B, <https://www.sapr.mil/reports>; Jennifer Steinhauer, *After Failures to Curb Sexual Assault, a Move Toward a Major Shift in Military Law*, N.Y. TIMES, Apr. 28, 2021, at A1.

¹²² *Id.*

rates, which I will attempt to explain below.¹²³ Before moving to an overview of specific incidents of gender-based sexual violence related to U.S. military bases in Okinawa, crimes that changed the text and understandings of the U.S. – Japan SOFA treaty itself, we must first discuss the military’s gender hierarchy, militarism, and ties of both to violence.

Political scientist Cynthia Enloe writes that “relations between governments depend not only on capital and weaponry but also on the control of women as symbols, consumers, workers, and emotional comforters.”¹²⁴ Analyzing the structure of the armed forces broadly, she writes: “[e]very militarized ritual, rule, and arrangement has at its primary goal the effective operation of the country’s military, including the smooth operation of the facility on which its soldiers...are based.”¹²⁵ Scholars have relatedly described militaries as “total institutions,” meaning, like a boarding school or a prison, they have complete control over the entirety of a person’s life.¹²⁶ The gender-hierarchy existing within the military and its effects on servicemembers’ relationships with local nationals is important to understand. Looking at accompanying families, the militarization of marriage, and the “camptowns” near these bases will help illuminate this gendered hierarchy.

A permanent global network of U.S. bases and an all-volunteer military force requires stationing abroad spouses (mostly women) and children alongside servicemembers.¹²⁷ As of 2015, 233,000 dependents, including spouses, children, and

¹²³ VINE, *supra* note 20, at 190.

¹²⁴ CYNTHIA ENLOE, BANANAS, BEACHES AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS 22 (2014).

¹²⁵ *Id.* at 137.

¹²⁶ VINE, *supra* note 20, at 158.

¹²⁷ *See id.* at 153.

family members, accompany U.S. servicemembers abroad, outnumbering the overseas soldiers themselves by more than 55,000.¹²⁸ Before looking at how this reality relates to the military's gender hierarchy, and indeed how this hierarchy has evolved in recent decades, it is worth noting that there are some practical benefits from the "total institution" of a military base. For example, bases are by nature orderly and generally safe for families, provide decent schools with small class sizes, and promote a sense of comradery between on-base families and the greater military community.¹²⁹ The military, while possessing purposely visible and concealed hierarchies of rank and gender respectively, also has generally low levels of economic inequality: the highest-ranking general typically makes only ten times that of a private, a stark difference from general American wage disparities.¹³⁰ The military, even in extremely dense areas like Okinawa where many locals live in apartment blocks, also provides extremely generous living allowances for those servicemembers allowed to live off-base in suburbia-like homes, complete with a well-manicured yard and barbeque. With these benefits, and alongside the general socially conservative atmosphere of the military, it is likely unsurprising that servicemembers marry at an earlier age than their civilian counterparts.¹³¹ What may be less obvious, however, is the benefit the spouse provides to the military.

Enloe notes that feminist Betty Friedan's "devastating critique of American white suburban woman's entrapment" is readily visible in the military's "gendered community

¹²⁸ *Id.*

¹²⁹ *Id.* at 151.

¹³⁰ *Id.* at 152.

¹³¹ See generally Jennifer Lundquist & Zhun Xu, *Life Course Policy and Marriage in the Military*, 76 J. OF MARRIAGE AND FAMILY no. 5, 2014, at 1069 (notes that the average military age for her study is 22); see generally Levi Leidy, *Why Do People in the Military Get Married So Young*, OUR MILITARY, <https://www.ourmilitary.com/young-marriage-in-military> (last visited May 3, 2021) (notes the average civilian age at marriage is 27.4 years and 29.5 years for women and men respectively).

model.”¹³² In some ways, the gendered structure of a military base is more consistent with entrapment than a traditional American suburb and not simply because of the base perimeter fences. Frequent moves disrupt the accompanying spouse’s economic potential represented by active duty spouse unemployment rates measured at twenty-five percent.¹³³ Those spouses who are employed largely in base-function supporting positions must also be prepared to take on the entirety of the childrearing and housekeeping responsibilities if the active duty soldier is deployed.¹³⁴ Spouses are also often responsible for supporting the military community within the base, and in-turn their spouse’s careers, through their unpaid labor with clubs or Family Readiness Groups, often hierarchically organized by their partner’s rank.¹³⁵

Military efficiency may also be supported by the institution of marriage itself. For example, military policymakers believe re-enlistment rates increase alongside a servicemember’s morale.¹³⁶ Soldier morale in turn is assumed to be positively related to the happiness the accompanying spouse has with military life.¹³⁷ The marriage, then, may be considered a tool of militarism, described by feminist scholar Catherine Lutz as “the contradictory and tense social process in which civil society organizes itself for the production of violence.”¹³⁸ Certainly, some military strategists view marriage as a tool to promote orderliness within the ranks, deploying the stereotype that marriage may raise the “moral tenor” of the troops by cutting down on drunkenness, licentiousness, venereal

¹³² ENLOE, *supra* note 124, at 149.

¹³³ See VINE, *supra* note 20, at 156.

¹³⁴ *Id.*

¹³⁵ *Id.* at 157.

¹³⁶ ENLOE, *supra* note 124, at 149.

¹³⁷ *Id.*

¹³⁸ Catherine Lutz, *Making War at Home in the United States: Militarization and the Current Crisis*, 104 AMERICAN ANTHROPOLOGIST, no. 3, 2002, at 723.

disease, indebtedness and unsanctioned violence not in support of the military's mission.¹³⁹ Strategists also may assume that having a spouse and child deploy alongside the servicemember, say to Korea or Japan, may increase the servicemember's incentive to defend the host nation if attacked.¹⁴⁰

Aside from the benefits a militarized marriage is assumed to have for the military itself, policymakers have also recognized downsides in using marriage to further military objectives. For example, a married soldier may be more resistant to a dangerous deployment and loyalties may be divided between family and the government.¹⁴¹ The monetary benefits discussed above, including better housing allowances, health care, and public school services, increase military costs on budget items not directly related, and opposite in character, to the lethal act of making war and defense.¹⁴² Whatever the costs, the statistics demonstrate that the military has determined that marriage benefits its mission: by the turn of the twenty-first century, the U.S. military's active duty marriage rate of 58.7 percent is the highest in its history.¹⁴³

The military further demonstrates an intention to militarize marriage through the control placed on soldiers' sexuality and sex lives. As a "total institution," the military once required its soldiers to ask permission to marry.¹⁴⁴ Until 2011, the military prohibited same-sex relationships and permitted soldiers to identify only as heterosexual.¹⁴⁵ Similar control exists today, though simply more in the form of

¹³⁹ See generally ENLOE, *supra* note 119, at 149 (discussing military strategists' debates over whether accompanying spouses assist or detract from military efficiencies).

¹⁴⁰ JOHNSON, *supra* note 74, at 69.

¹⁴¹ ENLOE, *supra* note 124, at 149.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ VINE, *supra* note 20, at 158.

¹⁴⁵ *Id.*

persuasive authority and less a legal restriction, over interracial marriages between servicemembers and the local population. The history of international marriages between Okinawan women and U.S. servicemembers represents this control.

Immediately after the Japanese surrender in 1945, the U.S. military formally restricted American servicemembers from marrying Japanese women through anti-fraternization regulations.¹⁴⁶ By 1946, U.S. servicemembers were able to marry local women, although the marriage was formalized only under Japanese law.¹⁴⁷ U.S. immigration laws then prohibited Japanese immigration to the United States, even in a legal marriage between a Japanese national and a servicemember.¹⁴⁸ Japanese spouses were not able to immigrate to the United States until legislative changes passed in 1952.¹⁴⁹ Even with equal status before the law, in the following decades marriages between Okinawan women and U.S. servicemembers were strongly discouraged by both military commanders and the local Okinawan community.¹⁵⁰ The sexualized nature of the U.S. occupation of Okinawa in these first decades, influenced by the “camptown” areas surrounding military installations and the prevalent sex trade industry, created a social context where these international marriages were frequently assumed by local Okinawans and other U.S. servicemembers to be tied to the sex trade.¹⁵¹

This early history informs the bureaucratic processes surrounding international military marriages today. This bureaucracy is often identified by scholars as an example of the military controlling personal aspects of its servicemembers’ lives to ensure soldiers

¹⁴⁶ Rebecca Forgash, *Negotiating Marriage: Cultural Citizenship and the Reproduction of American Empire in Okinawa*, 48 *ETHNOLOGY*, no. 3, 2009, at 220.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 221.

remain committed to the military's war making and defense functions, and to prevent an international marriage from undermining that mission.¹⁵² The military contends that this marriage bureaucracy equips servicemembers and their partners with skills necessary for navigating a military marriage.¹⁵³ The military-run pre-marital seminar, a two-day affair for servicemembers and their prospective spouses, American and Okinawan, is a rite of passage for all active duty military marriages in Okinawa.¹⁵⁴

The premarital seminar, part of the "marriage package," resonates with Catherine Lutz's description of militarism, and is an example of marriage as a tool for militarism, particularly as the seminar attempts to mold the engaged couple into a family unit supportive of the military mission. Assumptions regarding gender and cultural differences are noted to be a common theme in the seminar. For example, journalist Akemi Johnson recounts a military chaplain's comments made in 2009 during the military's program for engaged couples, the Prevention and Relationship Enhancement Program (PREP):

'[g]uys and girls are wired differently...[t]hey just work differently.' He showed a PowerPoint slide about it. Men were 'Mr. Fix-Its,' wanting to fix everything without asking for help, programmed like that since childhood. Women were 'pursuers,' wanting to make a connection with their partners 'at all costs.' His message was that men and women were biologically different, leading to inevitable inequalities and conflict.¹⁵⁵

¹⁵² See generally *id.* at 229 (stating that the imagery of an ideal military family is constantly circulated throughout pre-marriage seminars); see JOHNSON, *supra* note 68, at 66.

¹⁵³ JOHNSON, *supra* note 74, at 66.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 68.

Assumptions regarding masculinity and femininity do not escape discussion by military chaplains, particularly the stereotype that men are necessarily more sexual.¹⁵⁶ Likely assumed to be a comical depiction of the differences between a military man and a civilian woman, Johnson describes a PREP PowerPoint slide where a woman, asking for a hairdryer from her soldier husband, is handed a handgun.¹⁵⁷

Cultural and linguistic differences are simplified and made a focus of the seminar. Anthropologist Rebecca Forgash notes that these lectures often stereotype and polarize Okinawan and American cultural values as distinctive and immutable characteristics, much the way PREP simplifies male and female traits:

[i]f you analyze some of your experiences in Okinawan culture, saving face and being polite is absolutely integral to their belief system...[i]f you as an American, with your let-me-wear-it-on-my-face-attitude, go and get all over your wife...and you may be wrong, and she may know that you're wrong, but her belief system will filter that through, and you'll get a silent polite response.¹⁵⁸

Proper communication skills are highlighted throughout these seminars, particularly the need for the Japanese or Okinawan woman to learn English, while the servicemember learning any Japanese is jokingly dismissed.¹⁵⁹ Indeed, the Okinawan wife's failure to learn English or adapt to American culture is tied to a higher likelihood of failure for the marriage, particularly once the servicemember is transferred back to the United States.¹⁶⁰

Not only are assumptions of gender and cultural differences common throughout these seminars, military lawyers and U.S. consular officials encourage the prospective

¹⁵⁶ *See id.* at 72.

¹⁵⁷ *Id.* at 69.

¹⁵⁸ Forgash, *supra* note 146, at 228.

¹⁵⁹ *Id.*; JOHNSON, *supra* note 74, at 72.

¹⁶⁰ JOHNSON, *supra* note 74, at 71-72.

couples to be realistic about their marriage, noting that most end in divorce. Present here is the assumption that local women are often trying to take advantage of young American servicemembers they met at a club, girls' bar, or massage parlor.¹⁶¹ Many of the servicemembers in Okinawa, particularly members of the Marine Corps, are young and unmarried. The military incentivizes marriage because single, lower-ranked enlisted soldiers are able to acquire a car, leave the barracks, and move to a house off-base, often only after marrying.¹⁶² Indeed, the housing allowances provided following marriage often essentially result in a salary raise.¹⁶³ Local women interested exclusively in military men and their benefits, including access to on-base supermarkets and amenities subsidized by the U.S. government, are pejoratively referred to as "tag chasers," a term with other derivations often heard in Okinawa.¹⁶⁴ Government and military representatives at the pre-marital seminar support this paradigm, particularly by recounting incidents where an Okinawan wife suddenly returns to Japan from the U.S. with the couple's child, does not return to the U.S., and does not allow contact with the father.¹⁶⁵ Even though Japan signed the Hague Abduction Convention in 2014, legally requiring Japanese officials to enforce international custody orders, such examples are still used to problematize marriages between servicemembers and local women.¹⁶⁶

The military not only utilizes the relationship of marriage to further its mission, but also supports a prolific sex trade commonly found in the camptowns immediately outside the base fences and within the base perimeter itself. Base architecture expert

¹⁶¹ See ENLOE, *supra* note 124, at 148.

¹⁶² *Id.* at 70.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 71.

¹⁶⁵ *Id.* at 67.

¹⁶⁶ JOHNSON, *supra* note 74, at 67.

Mark Gillem argues that the importance of the sex trade to the military base has informed sociospatial planning policies of military outposts dating back centuries.¹⁶⁷ Specifically, Gillem concludes that male armies located abroad “well outside the moralizing influence of their homeland” have led military planners to purposely integrate the sex trade into base planning.¹⁶⁸ For example, the British Parliament and the colonial authorities in India implemented the 1864 Cantonment Acts, bringing local women into British bases to work as prostitutes, requiring regular medical examinations to prevent the spread of sexually transmitted infections, and providing public housing and licensing.¹⁶⁹ The Cantonment Acts’ effects, particularly the compulsory gynecological examinations of local women conducted by colonial officials, created political resistance by British women’s groups leading to its repeal in 1895, though such practices informally continued.¹⁷⁰

Parallel policies were implemented immediately at the beginning of the U.S. occupation of Japan. The surrendering Japanese government, aware of the sexual violence their military had perpetrated in Asia, assumed similar consequences awaited women in their cities following the arrival of thousands of allied soldiers.¹⁷¹ In August 1945, Japanese officials promptly organized and funded special “comfort facilities” and, using nationalist slogans and fervor, enlisted Japanese women into the Recreation and Amusement Association (R.A.A.).¹⁷² These R.A.A. facilities, like the public housing provided to sex workers in colonial India, were located in geographically limited areas

¹⁶⁷ MARK GILLEM, *AMERICA TOWN: BUILDING THE OUTPOSTS OF EMPIRE* 9 (2007).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 9-10.

¹⁷⁰ ENLOE, *supra* note 124, at 163-64; GILLEM, *supra* note 167, at 10.

¹⁷¹ JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 124 (1999)

¹⁷² *See id.* at 125-27.

and regulated by the government, with different facilities reserved by rank and for white and black soldiers.¹⁷³ These facilities spread quickly to twenty other cities, with as many as thirty-three locations in Tokyo.¹⁷⁴ Even with the popularity of the R.A.A., and the success the Japanese government believed it had achieved in reducing sexual assaults committed by occupation forces, by January 1946 allied occupation authorities ended the program.¹⁷⁵ The U.S. military publicly labeled the R.A.A. as “undemocratic and in violation of women’s human rights.”¹⁷⁶ Their major motivation in closing the “comfort facilities,” however, is likely attributable to the soaring rates of sexually transmitted infections within the American ranks.¹⁷⁷

The nineteenth century British Cantonment Acts and the R.A.A. in 1945 Japan were formal attempts to regulate and ensure the sexual availability of local women for foreign soldiers away from their home countries. That both Britain and the U.S. supported such policies nearly a century apart supports Cynthia Enloe’s argument that military leaders have made brothels as important to their bases as their dry docks.¹⁷⁸ Feminist scholar Gwyn Kirk similarly analogizes, stating while “[b]ases are refueling and repair depots for warships and planes; military personnel are also ‘refueled’ by local women and girls.”¹⁷⁹ Today, the sociospatial planning policies noted by Gillem support a

¹⁷³ See *id.* at 130.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See Cynthia Enloe, *Banana, Bases, and Patriarchy*, 19 *RADICAL AMERICA*, no. 4, 1985, at 19; see generally GILLEM, *supra* note 160, at 10 (linking nineteenth-century British regulations in India to those of the twentieth-century “American Empire”).

¹⁷⁹ Gwyn Kirk & Carolyn Bowen Francis, *Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia*, 15 *BERKELEY WOMEN’S L.J.* 229, 241 (2000).

more informal, if not less prevalent, sex trade than the policies of the last two centuries, specifically in the camptowns surrounding U.S. military bases abroad.

Camptowns, also referred to as basetowns, serve the purposes of a “dry dock” or a place to be “refueled.” These areas, present near and adjacent to U.S. bases located domestically and abroad, are often made up of massage parlors, night clubs, strip clubs, and self-advertised girls’ bars. Less related to sexual services, but often still present, are tattoo parlors, used car lots, and even antique shops. Often not mentioned by scholars, these sites today also serve as entertainment areas for locals, tourists, and accompanying families. For example, market areas near the military bases in central Okinawa include antique shops bartering in classic Americana wares popular with mainland Japanese tourists. Okinawa’s American Village shopping and tourism district is similarly located near areas appropriately described as camptowns, an image recreated in its higher-end shops selling replica military gear.

Understandably, however, camptowns are most often discussed as markets for nightclubs, sex work, paid female companionship, illicit drugs, and crime. Their beginnings are similar to that of the formal legalized sex industry described above, particularly in the use and regulation of local female bodies to further military efficiencies. Base expert David Vine explains that South Korean camptowns in Seoul, created by Korean officials as “special districts,” were designed as a buffer meant to keep rapacious American soldiers from civilian local women, at least those who did not “choose” to work in the brothels, nightclubs, or bars.¹⁸⁰ In the early decades following

¹⁸⁰ VINE, *supra* note 20, at 165.

the Korean War, these areas in South Korean cities were made off-limits to Koreans who did not work in the districts.¹⁸¹

South Korean camptown researcher Katharine Moon further documents how the local government and the U.S. military collaborated in licensing sex workers and the facilities that employ them, subjecting the women working in these facilities to gynecological exams in order to track a potential “source” of sexually transmitted infections in American soldiers, similar to the repealed nineteenth century British Cantonment Acts in India discussed above.¹⁸² Okinawan literature and postcolonial studies scholar Annmaria Shimabuku similarly describes a 1950s “special drinking district” established in Yaejima, Okinawa, meant “to contain sexual relations with the G.I.s” in a remote area of a village.¹⁸³ From the perspective of the military and local officials, containing these areas was not a question of moral propriety, but one of military effectiveness and public health in limiting the spread of infectious disease and violent crime.¹⁸⁴

Beyond serving military efficiencies and public health in the eyes of U.S. military commanders, these basetowns also drove economic reform in war devastated Okinawa and South Korea. Immediately after the end of World War II in Okinawa and the end of the Korean War in South Korea, these areas were profitable for certain local landowners and entrepreneurs; however, the creation of these camptowns was not simply a result of the free market driving local businesses into industries supporting the U.S. military. As

¹⁸¹ *Id.* at 165.

¹⁸² Katharine H.S. Moon, *South Korean Movements Against Militarized Sexual Labor*, 39 *ASIAN SURV.*, no 2, 1999, at 316.

¹⁸³ SHIMABUKU, *supra* note 97, at 58.

¹⁸⁴ *See id.*

Shimabuko recounts, the dense number of brothels and nightclubs in parts of Okinawa City, areas that can be described as camptowns today, resulted from official U.S. military policy. In 1949, U.S. officials, concerned with rising rates of sexually transmitted infections, instituted a one-mile-limit policy, prohibiting local businesses and farmers from operating near most military garrisons.¹⁸⁵ This policy threatened local farmers and small business livelihoods because Goyeku Village (today Okinawa City) was located almost entirely within this one mile limit.¹⁸⁶ Locals responded to this policy, creating business centers of international exchange; these areas eventually became informal “comfort stations,” entertainment districts, and today’s camptowns.¹⁸⁷

Local women working in Okinawan camptowns were also commoditized into political weapons by USCAR in economic battles between the U.S. military, Okinawan landowners, and movements for democracy and unionization. In the early 1950s, left-leaning Okinawan political parties attempted to organize local military base workers, arranged protests, and successfully pressured the Ryukyuan legislature to pass a resolution supporting unionization.¹⁸⁸ Simultaneously, USCAR demanded new twenty-year contracts with local landowners for land confiscated during the war, agreements resisted by Okinawans.¹⁸⁹ Timed to coincide with a local election, Shimabuko explains how USCAR issued off-limit orders for camptown establishments frequented by U.S. servicemembers.¹⁹⁰ Unlike before where such restrictions were attributed to rising sexually transmitted infection rates, now USCAR leadership hinted that the orders were

¹⁸⁵ *Id.* at 55.

¹⁸⁶ *Id.*

¹⁸⁷ *See id.* at 57.

¹⁸⁸ *Id.* 67-68.

¹⁸⁹ *Id.* at 68.

¹⁹⁰ *Id.* at 69.

tied to “anti-American thought.”¹⁹¹ Shortly afterwards, an editorial appeared in local Okinawan papers written by a resident dependent on the base economy, criticizing the “anti-Americanists” for sacrificing their economic livelihoods in a political battle with the U.S. military government, demonstrating the U.S. military’s ability to divide the local electorate between individuals reliant on the camptown economy and democracy activists.¹⁹²

Cynthia Enloe has argued that camptown sex trades support a “militarized masculinity,” allowing soldiers to easily commit acts of violence on individuals and groups perceived to be inferior.¹⁹³ More broadly, she has labeled this militarization as essential to our current global order, stating that no institution including “multilateral alliances, bilateral alliances, [and] foreign military assistance programmes can achieve their militarizing objectives without controlling women for the sake of militarizing men.”¹⁹⁴ The institutionalized sex trades present in camptowns sanctioned by policymakers are a specific instance where soldiers are allowed – even encouraged – to feel power, superiority, and control over local women.¹⁹⁵ Researchers have identified that a major challenge in military training is to nurture a recruit’s willingness to kill another human being when ordered.¹⁹⁶ The dehumanization required to achieve this aim is then supported by a military culture that has often labeled women, particularly local women, as inferior or material items. As the camptowns discussed above exist alongside U.S. military bases abroad, this militarized masculinity can nurture beliefs about racial,

¹⁹¹ *Id.*

¹⁹² *See id.* at 69-70.

¹⁹³ *See* ENLOE, *supra* note 124, at 155; VINE, *supra* note 18, at 182.

¹⁹⁴ KATHARINE H.S. MOON, SEX AMONG ALLIES: MILITARY PROSTITUTION IN U.S. – KOREA RELATIONS 11 (1997).

¹⁹⁵ VINE, *supra* note 20, at 182.

¹⁹⁶ *Id.* at 182

ethnic, and cultural superiority alongside a willingness to commit violence.¹⁹⁷ In Okinawa, violence by U.S. military servicemembers has frequently occurred against local young girls and women, both on and off-base, leading to changes in the SOFA treaty and in the U.S. – Japan relationship.

The early years of the American occupation of Okinawa was a time of widespread sexual assault committed by U.S. servicemembers against local women. The numbers themselves remain largely unknown with most cases unreported or ignored by local and military authorities.¹⁹⁸ Estimates range from ten-thousand sexual assaults committed by U.S. military personnel in Okinawa following the war, to the military's implausible number of zero.¹⁹⁹ It is unsurprising that such data is limited as both the Okinawan and Japanese press were censored during their respective occupations. Many Okinawan women were also kept in refugee camps for a period after the Battle of Okinawa ended, likely further making reporting difficult. Comparisons with data from mainland Japan, however, indicates just how prevalent such assaults were. Historian John Dower, citing Japanese author Yoshimi Kaneko, notes that an average of forty sexual assaults committed by U.S. soldiers occurred daily in mainland Japan early in the occupation.²⁰⁰ The number reportedly rose to 330 a day following the closure of the R.A.A. “comfort stations” discussed above.²⁰¹

The U.S. military was clearly concerned by the number of assaults at the earliest periods in the occupation. During the Battle of Okinawa itself, in May 1945, the U.S.

¹⁹⁷ *Id.* at 182-83.

¹⁹⁸ See Calvin Sims, *3 Dead Marines and a Secret of Wartime Okinawa*, N.Y. TIMES, Jun. 1, 2000, at A12.

¹⁹⁹ *Id.*

²⁰⁰ DOWER, *supra* note 100, at 579 n.16 (1999); Terese Svoboda, *U.S. Courts-Martial in Occupation Japan: Rape, Race, and Censorship*, 7 THE ASIA-PAC. J.: JAPAN FOCUS, no. 21, 2009, at 1-3.

²⁰¹ JOHNSON, *supra* note 74, at 118.

Command instituted capital punishment as a potential sentence for soldiers convicted of rape; however, this change appeared to be ineffective as civilians recounted systematic sexual assaults committed by American soldiers in the refugee camps following the battle.²⁰² While certainly not the first victim of a U.S. military sexual assault, the 1955 rape and murder of six-year-old Yumiko by a U.S. servicemember is the earliest case that caused substantial local resistance to the U.S. military presence in Okinawa.²⁰³ What is known about this case comes largely from the defendant's appeals following his conviction and death sentence before a U.S. military court martial sitting in Okinawa.²⁰⁴ The crime was atrocious: the defendant was convicted of kidnapping Yumiko, raping and murdering her, and leaving her body near the beach.²⁰⁵ The defendant's death sentence, though upheld by both the intermediate and highest U.S. military appellate courts, was never imposed.²⁰⁶

This case, though the most infamous of the occupation period, was unfortunately but one of the many others that have remained largely anonymous. What is significant about this tragedy is the anti-base reaction that followed, and the military's growing fear that servicemember sexual violence could lead to eventual U.S. base reduction or withdrawal:

Because of the public outrage that followed the discovery of Yumiko's body, and because of three other rape cases involving Okinawan child victims and American servicemen, General Moore...called a meeting of the hastily formed "Ryukyuan-American Community Relations Advisory Council." Among the Okinawans present were the

²⁰² *See id.*

²⁰³ *Id.* at 117-18.

²⁰⁴ *See* United States v. Hurt, 22 C.M.R. 630 (1956).

²⁰⁵ *Id.* at 632.

²⁰⁶ *See* Richard A. Serrano, *Pvt. John Bennett is the Only U.S. Soldier Executed for Rape in Peacetime*, LOS ANGELES TIMES (Sept. 10, 2000), <https://www.latimes.com/archives/la-xpm-2000-sep-10-tm-18406-story.html>.

Chief Executive of the Islands, the President of the Ryukyuan University, the Speaker of the Ryukyuan Legislature, the Chief Justice of the Ryukyuan Islands, and the editors of several newspapers located on Okinawa. General Moore, of course, was the principal speaker at the meeting. He advised the Okinawans that [the then-accused] was going to be tried by the Americans, and that he would be given a fair and impartial trial.²⁰⁷

The military officials went to great lengths to explain military justice procedures to local leaders and media, assuming that the recent offenses against locals “will be whipped up out of all proportion.”²⁰⁸ The military leadership’s concerns were, plainly put, that “the righteous indignation of the Okinawans had carried them away to the extent of mixing up the rape cases with such subjects as ‘civil rights,’ ‘human liberties,’ and ‘reversion to Japan.’”²⁰⁹

Indeed, Yumiko’s murder and other crimes perpetrated against local women early in the occupation led to local acts of retribution and sanctioned resistance. Worth dispensing with here are the oft-spoken platitudes by military officials that an Okinawan is a “docile, rustic citizen who passively accept the changes that have come to his way of life since [the] American occupation” or simply willing to “pick up a good deal of money and have a reasonably happy existence from an American base development” as both early U.S. military pamphlets and General Douglas MacArthur stated.²¹⁰ Annmaria Shimabuko recounts the role Okinawan women played in the local unofficial resistance, using information gained from soldier boyfriends to protect communist political activists

²⁰⁷ Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 UCLA L. REV. 1, 111 (1970).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 112.

²¹⁰ JOHNSON, *supra* note 74, at 113.

hiding from military agents in Okinawan villages.²¹¹ A more well-known incident spanning nearly the entire U.S. – Okinawa relationship occurred in Katsuyama, a northern area of Okinawa. During the immediate beginning of the U.S. occupation in 1945, three U.S. marines terrorized this mountain village, returning every Saturday often unarmed to abduct and assault local women.²¹² Eventually, the villagers found Japanese soldiers hiding in the forest and sprung an ambush, killing the soldiers and dumping their bodies into a deep cave.²¹³ In 1998, investigators, following a tip and the local lore, discovered the cave and the remains of the three nineteen-year-old marines.²¹⁴

Official local resistance to the U.S. military presence and U.S. military rule increased during the 1950s alongside military sexual violence, culminating in the first anti-base movement, the All-Island Struggle. By the 1950s, mainland Japanese movements had successfully applied pressure on the U.S. military, prompting military officials to begin relocating military bases from Japan to Okinawa.²¹⁵ Japan had regained its sovereignty in 1952, making Okinawa, still under U.S. military rule, a viable location for more U.S. bases. During the early periods of the 1950s, the U.S. military again displaced Okinawans from their lands, seizing land by force and restricting resistance by enacting anti-protest ordinances.²¹⁶ By 1955, the year of Yumiko’s murder and the beginning of the All-Island Struggle, a quarter-million Okinawans remained displaced.²¹⁷

Yumiko’s abduction, rape, and murder, alongside three other sexual assaults in 1955, certainly inflamed the All-Island Struggle protests; however, in the end, the

²¹¹ SHIMABUKU, *supra* note 97, at 77.

²¹² JOHNSON, *supra* note 74, at 121.

²¹³ *Id.*

²¹⁴ *Id.* at 121-22; Sims, *supra* note 198.

²¹⁵ JOHNSON, *supra* note 74, at 116.

²¹⁶ *Id.* at 116-17.

²¹⁷ *Id.* at 117.

movement remained largely focused on land. The protesters' main issue remained rent payment amounts provided the displaced owners of the forcibly expropriated land. The U.S. government wanted to pay the Okinawans rent in a lump-sum while the local landowners demanded annual payments calculated according to the market.²¹⁸ As tensions originating in land and money grew alongside incidents of sexual violence, the military relented, agreeing to increase landowner payments and allow local labor collective bargaining rights.²¹⁹ For now, the anti-base movement quieted, though remained present in Okinawan politics after the 1972 reversion to Japan.

Forty years later in early September 1995, the Fourth U.N. World Conference on Women in Beijing had recently concluded when three U.S. servicemembers in Okinawa attacked a young girl, threatening the U.S. – Japan relationship and causing an international outcry. The pre-meditated abduction and rape of an Okinawan junior high school student came to have international implications. In September, the story first appeared in the middle section of the New York Times international edition later in the month.²²⁰ In the United States, the issue later made the front page nearly two months later after the top U.S. commander in the Pacific commented to the media following the soldiers' guilty pleas: "I think that it was absolutely stupid. I have said several times: for the price they paid to rent the car [used in the crime] they could have had a girl."²²¹ He was forced to resign immediately after his comments.²²² The brutal crime itself naturally infuriated Okinawan civilians and leaders but, unlike the 1955 murder, Okinawa was now

²¹⁸ *Id.*

²¹⁹ *Id.* at 122.

²²⁰ Andrew Pollack, *Rape Case in Japan Turns Harsh Light on U.S. Military*, N.Y. TIMES, Sept. 20, 1995, at A3.

²²¹ VINE, *supra* note 20, at 184.

²²² Irvin Molotsky, *Admiral Has to Quit Over His Comments on Okinawa Rape*, N.Y. TIMES, Nov. 18, 1995, at A1.

part of Japan, and questions immediately arose regarding the SOFA treaty, custody, and prosecution of the involved Americans.

The 1995 rape galvanized the prefecture's anti-base movement, particularly as it followed the fiftieth anniversary of the Battle of Okinawa's end and the beginning of American occupation. A month later, 85,000 people gathered in Ginowan's Seaside Park, the city hosting Futenma Air Station, demanding a reduction of the U.S. military base presence in Okinawa and a revision of the U.S. – Japan SOFA, particularly because the treaty allowed the three suspects to remain in American military custody until indicted by Japanese prosecutors.²²³ Indeed, U.S. and Japanese officials began an examination of the SOFA treaty the next day.²²⁴ At issue was one sentence in Article XVII of the U.S. SOFA treaty: “[t]he 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.”²²⁵ The following sentence adds that the Japanese and U.S. authorities will assist each other in the investigation of any offenses.²²⁶ Practically this means that the suspected servicemember, if on base, will not be turned over to Japanese law enforcement before an indictment; however, U.S. authorities may transport the suspect to Japanese investigators for an interrogation.

The three suspected servicemembers returned to base after committing the crime and were detained by U.S. military officials.²²⁷ Japanese officials immediately demanded

²²³ Mikanagi, *supra* note 120, at 99.

²²⁴ *Id.*

²²⁵ U.S. – Japan SOFA, at art. XVII(5)(c).

²²⁶ *Id.* at 6(a).

²²⁷ Higa, *supra* note 19, at 5.

that the three suspects be turned over to Japanese custody; however, U.S. officials publicly resisted, stating that the soldiers would remain in U.S. custody until a Japanese indictment pursuant to the SOFA treaty.²²⁸ During this period, American authorities turned the three suspects over to Japanese officials for interrogations lasting up to nine hours a day.²²⁹ Nevertheless, the Okinawan populace demanded that the servicemembers be turned over and that the SOFA be reformed, concerned that servicemembers accused of heinous crimes can avoid Japanese custody by simply returning to base. Many in Okinawa were also concerned that the suspects may escape Japanese prosecution by fleeing Okinawa. Indeed, less than two years prior, a U.S. soldier accused of raping a Japanese woman fled Okinawa while under orders not to leave the base, likely by forging a SOFA document allowing him to fly commercially back to the U.S.²³⁰ This followed a 1992 incident when two sailors accused of armed robbery similarly fled.²³¹ Perhaps due to the notoriety of the 1995 crime, and the embarrassing previous escapes, the U.S. military promptly detained the three accused servicemembers in a base brig.²³²

Eventually the three servicemembers were indicted, turned over to Japanese authorities pursuant to the SOFA treaty, and convicted in an Okinawan court. Two of them received eight-year sentences in a Japanese prison, with the third sentenced to seven

²²⁸ Hilary E. MacGregor, *Rape Case Furor Provokes Legal Review by U.S., Japan: Diplomacy: Tokyo Wants Custody of Three GIs Accused of Assaulting a Japanese Girl, 12*, LOS ANGELES TIMES (Sept. 22, 1995), <https://www.latimes.com/archives/la-xpm-1995-09-22-mn-48701-story.html>; Richard A. Serrano, *Pvt. John Bennett is the Only U.S. Soldier Executed for Rape in Peacetime*, LOS ANGELES TIMES (Sept. 10, 2000), <https://www.latimes.com/archives/la-xpm-2000-sep-10-tm-18406-story.html>.

²²⁹ *Id.*

²³⁰ *Okinawa Demands Return of U.S. Soldier in Rape Case*, UNITED PRESS INT'L (Aug. 16, 1993), <https://www.upi.com/Archives/1993/08/16/Okinawa-demands-return-of-US-soldier-in-rape-case/2798745473600/>.

²³¹ *Id.*

²³² Robert D. Eldridge, *The 1995 Okinawa Rape that Shook U.S.-Japan Ties*, THE JAPAN TIMES (Sept. 3, 2020), <https://www.japantimes.co.jp/opinion/2020/09/03/commentary/japan-commentary/okinawa-rape-incident-us-japan-relations/>.

and a half years.²³³ Regardless of the individual sentences, the 1995 case marked a change in the U.S.-Japan alliance based in Okinawa and set off a new anti-base movement.

The anti-base protests in 1995-1996, for the first time, were partly successful. First, following bilateral talks titled the “Special Action Committee on Okinawa” (“SACO”), the U.S. and Japanese governments agreed to close MCAS Futenma and return the land it occupied to the prefecture.²³⁴ Initially understood by protestors and the local government as reducing the base burden in Okinawa, this pledge was later limited by the Japanese government’s decision, under U.S. pressure, to build a replacement base in northern Okinawa, a consequence discussed below.²³⁵ Second, the United States and Japan agreed to revise the SOFA treaty, following a meeting between President Clinton and Prime Minister Hashimoto.²³⁶ Specifically, the United States agreed to give “sympathetic consideration” to Japanese requests for pre-indictment custody of SOFA personnel suspected of “especially heinous crimes.”²³⁷ This change brought the U.S. – Japan SOFA into line with the NATO SOFA, allowing the local government to request custody in certain cases.²³⁸ “Especially heinous crimes” has never been defined; however, it is generally understood to include suspected sexual assaults and homicide, and was expanded in 2004 to include attempted murder and arson.²³⁹ Statistics on such

²³³ JOHNSON, *supra* note 74, at 136.

²³⁴ MCCORMACK, *supra* note 33, at 91.

²³⁵ *See id.* at 91-92.

²³⁶ Chalmers Johnson, *Three Rapes: The Status of Forces Agreement and Okinawa*, JAPAN POLICY RESEARCH INSTITUTE (Jan. 2004, <http://www.jpri.org/publications/workingpapers/wp97.html>).

²³⁷ *Id.*

²³⁸ Kirk & Francis, *supra* note 179, at 255.

²³⁹ Johnson, *supra* note 236; Flynn, *supra* note 23, at 37.

turnovers are difficult to find albeit it is clear that they are rare. When pre-indictment handovers do occur, they are controversial.

The tension over allowing Japanese officials to take custody of a military suspect in an alleged heinous crime prior to indictment is documented by political scientist Chalmers Johnson in two incidents following the 1995 SOFA modification.²⁴⁰ In July 2001, an Okinawan woman reported to Japanese officials that she had been sexually assaulted by a U.S. servicemember in the parking lot of American Village, a shopping and tourist area immediately adjacent to nearby U.S. bases.²⁴¹ A warrant was issued for the servicemember's arrest.²⁴² Under the new post-1995 SOFA procedures, U.S. authorities would give sympathetic consideration to a Japanese request for pre-indictment custody of a suspect in a heinous crime. After four days, the American authorities turned the suspect over to the Japanese police.²⁴³ This incident, however, inflamed tensions surrounding the SOFA treaty.²⁴⁴ Japanese officials and civilians were upset that the U.S. authorities waited four days while Japanese legislators voted unanimously in support of further SOFA reform.²⁴⁵ On the American side, U.S. officials were concerned that turning the suspect over to Japanese authorities violated his rights, particularly concerns over the presence of legal representation and an interpreter during his interrogation.²⁴⁶ Though the suspect here was eventually convicted in a Japanese court and sentenced to

²⁴⁰ See Johnson, *supra* note 236.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

almost three years in a Japanese prison, the first incident of U.S. officials turning over a servicemember pre-indictment influenced future custody determinations soon to come.²⁴⁷

Less than eight months later, Michael Brown, a Marine Corps officer, was accused of the off-base attempted rape and assault of a bartender working at the base officers' club.²⁴⁸ Notably, this was the first time in recent memory that an officer had been in trouble with the local Okinawan police.²⁴⁹ The Japanese courts soon issued a warrant for Brown's arrest, but this time U.S. officials refused to turn Brown over pre-indictment.²⁵⁰ This U.S. Embassy response led to Japanese and Okinawan speculation that an attempted rape was not viewed as a "heinous crime" by American policy makers.²⁵¹ Though Brown was eventually indicted and turned over to Japanese authorities pursuant to the SOFA treaty, the initial refusal of U.S. authorities to relinquish custody not more than a decade after the 1995 revisions made clear that the more flexible SOFA arrangement still provided all discretion to U.S. authorities.²⁵² Indeed, put simply, even after the SOFA revisions in 1995 created a mechanism where Japanese authorities can request custody of an American military suspect pre-indictment, the arrangement today is still perceived by Japanese critics as lenient towards American perpetrators:

Japanese authorities investigating a crime committed in their country cannot have exclusive access to a suspect held by the U.S. military until Japanese prosecutors have actually indicted him in court. It also means that the Japanese police are hobbled in carrying out an investigation and that prosecutors may thus be reluctant to indict an American serviceman because of insufficient evidence...[a]ll servicemen in Okinawa know that if after committing a rape,

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

a robbery, or an assault, they can make it back to the base before the police catch them, they will be free until indicted even though there is a Japanese arrest warrant out for their capture.²⁵³

U.S. policy on pre-indictment transfers to Japanese custody was again modified in 2004 with the U.S. military agreeing to expand pre-indictment waivers to the alleged crimes of attempted murder and arson in return for Japan allowing a representative to be present for any interrogation of the suspect.²⁵⁴

Major Brown's case ended with his conviction in a Japanese district court in Okinawa and a suspended prison sentence.²⁵⁵ His case, however, likely hardened U.S. policymakers' positions against any further SOFA modifications regarding criminal jurisdiction. Brown, while his trial was pending and he was held in Japanese custody, applied pressure on U.S. officials in hopes that his trial would be removed from Japanese courts. First, he applied political pressure, using his military status in an appeal to his Congressional representatives who in turn informed the U.S. Secretary of Defense of their concerns that the officer was being treated unfairly.²⁵⁶ Second, after the victim rescinded her complaint, Japanese prosecutors refused to drop the case, further leading the officer to claim unfair treatment.²⁵⁷ Finally, in a complaint common still today, Brown accused Japanese prosecutors and judges of bias and collusion against charged U.S. servicemembers, in part frustrated with an element of Japanese law giving more weight to a sex crime victim's testimony than that of the accused.²⁵⁸

²⁵³ *Id.*

²⁵⁴ Flynn, *supra* note 23, at 37.

²⁵⁵ *Marine Convicted, Accuser or No*, THE JAPAN TIMES (Jul. 9, 2004), <https://www.japantimes.co.jp/news/2004/07/09/national/marine-convicted-accuser-or-no/>.

²⁵⁶ Johnson, *supra* note 236.

²⁵⁷ *Id.*

²⁵⁸ David Allen, *Brown Asks Embassy to Intervene in Trial*, STARS AND STRIPES (Oct. 18, 2003), <https://www.stripes.com/news/brown-asks-embassy-to-intervene-in-trial-1.12717>; Johnson, *supra* note 145.

While Brown did not end up serving any additional time in confinement following his conviction, his critiques of the Japanese criminal justice system were echoed by U.S. government officials, including the following in Japan's Asahi Shimbun newspaper: "American soldiers are in Okinawa to defend Japan. They are even prepared to die if necessary. And yet, when something happens, they [the Okinawans] will treat U.S. military personnel as criminals right away."²⁵⁹ This attitude persists today, and indeed unchanged from cases pre-1995 revision, as the U.S. military attempts to maximize their jurisdiction by reaching a SOFA suspect before the Japanese police. Author Akemi Johnson writes of the following exchange with an Okinawa-based Air Force military police officer:

Part of his job was responding to off-base crimes involving Americans. For a SOFA-status person, the U.S. military "protects you to a certain degree," he explained. "But if the Japanese already have you in their custody, we can't do nothing about it." Therefore, the goal...was to get to the perpetrator before the Japanese police did. "If we arrive at the same time as the Japanese, we have to make sure to get them quickly before the Japanese do...[w]e have to say, 'No he's our people.'²⁶⁰

Clearly, the 1995 SOFA revision allowing the Japanese to request custody in incidents of heinous crimes provides some guidance when the crime is, by political or media attention standards, heinous. Where the crimes are not as well-known, or serious but not considered heinous, the SOFA treaty's criminal jurisdiction provisions may still enable extraterritorial protection for those servicemembers who make it back to base.

The next major test of the U.S. – Japan SOFA treaty criminal jurisdiction scheme occurred in 2016, with the murder of Rina Shimabukuro by a former U.S. servicemember

²⁵⁹ Johnson, *supra* note 236.

²⁶⁰ JOHNSON, *supra* note 74, at 63.

turned military contractor. The crime in this case was again atrocious. Kenneth Franklin Gadson, a former marine stationed in Okinawa who was working as a civilian IT contractor on Kadena Air Base, later said he had been searching for a woman to attack for hours when he crossed paths with the twenty-year-old Shimabukuro.²⁶¹ She had been on an evening walk when Gadson abducted her and murdered her.²⁶² After he murdered her, Gadson forced her body into a suitcase and left her in a wooded area near Onna Village, a city near the military bases, but not frequently impacted by U.S. military



Protesters in Okinawa holding signs stating “our anger has surpassed its limit” at a rally following Gadson’s arrest in 2016. Credit Reuters.

crime.²⁶³ Shimabukuro was not found until May 19th, nearly a month after her murder and after Gadson led local police to her body.²⁶⁴ I lived and worked at a Japanese public school near where Shimabukuro was last seen, and during this month-long period, many

around me questioned if the U.S. military was connected to her disappearance. My students asked me why American soldiers kill civilians, a difficult question to answer, and in part motivating this project. Gadson was arrested by Japanese police the day her body was discovered and confessed his involvement shortly thereafter.²⁶⁵ Following his arrest, large protests were scheduled in Okinawa, leading to a rare U.S. State Department warning encouraging American residents to avoid areas of the capital city.

²⁶¹ Higa, *supra* note 19, at 9-10.

²⁶² *Id.*

²⁶³ *Id.* at 11; JOHNSON, *supra* note 74, at 10.

²⁶⁴ Higa, *supra* note 19, at 11.

²⁶⁵ *Id.* at 13.

This 2016 case was in some ways less complicated to resolve under SOFA criminal jurisdiction provisions. The allegations that the suspect had kidnapped, sexually assaulted, murdered, and concealed Shimabukuro's body in a suitcase clearly fit the parameters of a "heinous crime," avoiding the still-lingering 2002 dispute over the



A poster on an electric pole taken in central Okinawa, near the locations where Yumiko's body was found in 1955 and Shimabukuro's in 2016. Photo by author in 2018.

definition. Gadson in this case had also been arrested by Japanese police, making the macabre distinction of a heinous crime irrelevant as he was never in U.S. military custody. Not only was he arrested by local police, but the suspect was also married to a local Okinawan woman with whom he shared a child and had retired from the military, lowering the U.S. military's interest in resisting Japanese custody.²⁶⁶ Yet, while Gadson was arrested

by the Japanese police for an undoubtedly "heinous crime," his contactor status at the time provided him with SOFA protection legally equivalent to that of active duty servicemembers and their dependents.²⁶⁷

Following Gadson's arrest and confession, local activists in Okinawa assailed the involvement of the U.S. military in yet another brutal crime. Such criticisms continued even after Gadson was convicted at trial and sentenced to life in prison by an Okinawa-based Japanese district court. While many activists called for the reduction or complete removal of the U.S. military from Okinawa in order to protect locals from violent crime, U.S. and Japanese policymakers targeted narrow SOFA reforms, including limiting

²⁶⁶ See JOHNSON, *supra* note 74, at 10.

²⁶⁷ See U.S. - Japan SOFA, at art. XVII(2)(1).

SOFA protections of U.S. military contractors from Japanese criminal prosecution and custody and a U.S. agreement to provide more transparency regarding the number of SOFA status civilian contractors present in Japan.²⁶⁸ Specifically, in a 2017 supplemental agreement to the U.S. – Japan SOFA, SOFA protections for civilian contractors were limited to those who meet at least one of a list of qualifications, including those with higher skills or knowledge attained via higher education, those with U.S. government security clearances, and those temporarily dispatched to Japan for an emergency.²⁶⁹ The 2017 supplemental agreement also imposed new data gathering responsibilities on the U.S. government which agreed to track crimes committed by civilian SOFA personnel and annual notification requirements to Tokyo regarding the number of civilian SOFA personnel in Japan, as well as the name and qualifications of military contractors.²⁷⁰ These changes would not have removed Gadson’s SOFA protections (as he likely had a security clearance) and did not placate local activists, politicians, and Okinawan groups demanding the reduction or complete removal of U.S. forces from Okinawa.²⁷¹ Regardless of these small changes, the 2017 supplemental SOFA agreement, like similar changes following the 1995 rape incident, is considered an example where U.S. military violence committed against Okinawan women led to small SOFA reforms.

²⁶⁸ See Higa, *supra* note 19, at 42-46.

²⁶⁹ *Id.* at 44; U.S. Department of Defense Office of the Under Secretary of Defense, DARS 2018-00019, Class Deviation - Contractor Personnel Performing in Japan (Aug. 30, 2018), <https://www.acq.osd.mil/dpap/policy/policyvault/USA002186-18-DPC.pdf>.

²⁷⁰ Higa, *supra* note 19, at 45.

²⁷¹ See *id.* at 44.

Accidents

After the Battle of Okinawa ended in June of 1945, the U.S. military took over Japanese-built bases throughout the prefecture. Even while the battle raged in the island itself, U.S. military construction workers began to expand these bases, many of which were located in the Chubu region of central Okinawa.²⁷² Many of these bases, like Kadena Air Base and MCAS Futenma, today are entirely surrounded by sizable cities and large local civilian populations. Looking at Okinawa's population growth demonstrates just how geographically intertwined these bases have become with Okinawan cities. At the time of the Battle of Okinawa in 1945, the population of Okinawa was roughly 450,000 people.²⁷³ Today the population of the prefecture is around 1.5 million residents and it remains the only prefecture in Japan that has a naturally growing population.²⁷⁴ Alongside the population growth, the number of houses, schools, and businesses next to and surrounding the military bases increased. This is unsurprising for two reasons: the bases were the economic center for Okinawa during much of the post-World War II period and Okinawan population centers are already extremely dense due to the lack of available land in the small island prefecture.

Considering the land surrounding the U.S. military bases in Okinawa is not owned by the U.S. government, as is the land surrounding domestic U.S. bases, the bases in Okinawa today are closer to civilian populations than would be allowed in the United

²⁷² See MCCORMACK, *supra* note 33, at 200.

²⁷³ Jon Mitchell, *The Battle of Okinawa: America's Good War Gone Bad*, THE JAPAN TIMES (Mar. 30, 2015), <https://www.japantimes.co.jp/community/2015/03/30/issues/battle-okinawa-americas-good-war-gone-bad/>.

²⁷⁴ *Overview of Okinawa*, OKINAWA CONVENTION & VISITORS BUREAU, <https://www.visitokinawa.jp/about-okinawa/overview-of-okinawa> (last visited May 3, 2021); *Japan's Population Continues to Slide Even as Foreign Resident Numbers Increase*, THE JAPAN TIMES (Jul. 10, 2019), <https://www.japantimes.co.jp/news/2019/07/10/national/japanese-population-falls-10th-straight-year/>.

States.²⁷⁵ Commentators often note that while civilian population sizes often grow in base cities located domestically in the United States, government ownership of land in the base flight paths prevents developments from encroaching unsafely on the base itself.²⁷⁶ The U.S. Marine air base at Futenma, in the city where I lived and worked, was once described by then-Secretary of Defense Donald Rumsfeld as “the world’s most dangerous base” and has been analogized to “carved runways into...downtown Baltimore.”²⁷⁷ Near Futenma Air Station, 90% of the Okinawan town of Kadena is Kadena Air Base, one of the largest U.S. military bases in the world. Military accidents related to the bases, then, are unsurprising.



MCAS Futenma in Ginowan, Okinawa. Credit Associated Press.



Kadena Air Base in Kadena, Okinawa. Credit Stars and Stripes.

Cataloging the list of military accidents tied to U.S. military bases in Okinawa is challenging, likely in part due to the decades of U.S. military governance of Okinawa. The records that are available are telling. For example, a dated list of accidents in Okinawa that is not all-inclusive, and limited only to those involving aircraft, records at

²⁷⁵ GILLEM, *supra* note 167, at 257.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 256; VINE, *supra* note 20, at 264.

least ten accidents between 1959 and 2004, including the deaths of 40 civilians and injuries to many more.²⁷⁸ Of course, the list above is concerned with the accidents that actually resulted in significant consequences to life and property immediately felt outside of the base itself. From Okinawa's reversion in 1972 until 2010, 1,545 military accidents were recorded.²⁷⁹ In 2009 alone, 59 base-related accidents occurred, any of which could have had tragic consequences.²⁸⁰ Around the two periods where I lived in Okinawa and Japan (29 months between 2015-2018), more accidents occurred, including a Futenma-based Marine helicopter accidentally dropping a large window on an elementary school injuring one child and a Futenma MV-22 Osprey crash landing into the sea near Okinawa.²⁸¹ Accidents including the MV-22 Osprey are particularly contentious in Okinawa as these tiltrotor vertical takeoff and landing aircraft are viewed as particularly accident-prone.²⁸² Indeed, the deployment of the Osprey to Okinawa itself posed a threat to the SOFA treaty and continued base arrangement in Okinawa because it was so controversial.²⁸³

Two U.S. military accidents are particularly noteworthy in Okinawa's post-war history and have influenced local opposition to the base presence and SOFA treaty. In 1959, an American fighter jet based at Kadena crashed into Miyamori elementary school in central Okinawa, killing eleven primary school students, six residents, and injuring

²⁷⁸ See VINE, *supra* note 20, at 44-45.

²⁷⁹ MCCORMACK, *supra* note 33, at 173.

²⁸⁰ See *id.* at 172.

²⁸¹ Scott Neuman, *U.S. Marine Helicopter in Okinawa Loses Window over School*, NPR (Dec. 13, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/13/570395912/u-s-marine-helicopter-in-okinawa-loses-windshield-over-school>; Matthew M. Burke & Aya Ichihashi, *Okinawa Prosecutors Decline to Charge Marine Pilot at Fault in 2016 Osprey Crash*, STARS AND STRIPES (Dec. 12, 2019), <https://www.stripes.com/news/pacific/okinawa-prosecutors-decline-to-charge-marine-pilot-at-fault-in-2016-osprey-crash-1.610935>.

²⁸² MCCORMACK, *supra* note 33, at 168.

²⁸³ See *id.* at 172.

over two hundred students and civilians.²⁸⁴ Twenty-seven homes and a community center were also destroyed and survivors and family members of the deceased received \$2,525 out of the requested \$19,906.²⁸⁵ The crash, eventually ascribed to human error in faulty maintenance, occurred while the plane was likely carrying four bombs.²⁸⁶ The pilot ejected.²⁸⁷ Today, much of the resistance to the U.S. base presence in central Okinawa is tied to the permanent deployment of Ospreys to Futenma Air Station. The Miyamori deaths are utilized by many as a potential symbol of the cost.²⁸⁸ The 2017 incident of a U.S. helicopter window falling onto an elementary school playground injuring a child demonstrates to Okinawans that the risk of another Miyamori tragedy remains.

Not far from the since rebuilt Miyamori elementary school, in 2004, a Futenma based helicopter crashed into Okinawa International University. Important to the debate



Photo of the 2004 U.S. military helicopter crash at Okinawa International University in Ginowan. U.S. Marines blocked access to local media and investigators. Credit Stand with Okinawa/Ryukyū Shimpo.

over relocating Futenma Air Station, and its label as the world's most dangerous base, this crash occurred only a few hundred meters away from the base's fence.²⁸⁹ Indeed, American officials were likely perceived as particularly dismissive of Okinawan safety concerns, considering

²⁸⁴ *Id.*

²⁸⁵ Glenn D. Hook, *The American Eagle in Okinawa: The Politics of Contested Memory and the Unfinished War*, 27 JAPAN FORUM, no. 3, 2015, at 311; INOUE, *supra* note 44, at 47.

²⁸⁶ Glenn D. Hook, *The American Eagle in Okinawa: The Politics of Contested Memory and the Unfinished War*, 27 JAPAN FORUM, no. 3, 2015, at 310-11.

²⁸⁷ *Id.* at 310.

²⁸⁸ *See id.* at 311.

²⁸⁹ *Id.* at 313.

then Secretary of Defense Rumsfeld labeled Futenma “world’s most dangerous base” on a visit to Okinawa only a year previously.²⁹⁰ Fortunately, this crash occurred during the university’s summer vacation; however, the several hundred students and staff still present on campus narrowly avoided injury as chunks of concrete were blasted as far away as a quarter of a mile.²⁹¹

While the 2004 university crash did not result in the tragedy of Miyamori elementary school, the incident had particular implications for the SOFA treaty. In 1959, when the Miyamori elementary accident occurred, Okinawa was still governed by the U.S. military with limited, if any, local control over the crash site and investigation. By 2004, the long-standing SOFA treaty was assumed by the Okinawan public to protect local sovereignty in the investigation, or minimally the physical site itself, considering the helicopter crashed in an incredibly dense civilian area outside, if still near, the base fences and the perceived limit of American control. This was not the case. The Agreed Minutes to the SOFA treaty, annotated understandings to the actual text of the SOFA treaty itself, specifies:

“Japanese authorities will normally not exercise the right of search, seizure, or inspection with respect to any persons or property within facilities and areas in use by and guarded under the authority of the United States Armed forces or with respect to property of the United States armed forces *wherever situated*, except in case where the competent authorities of the United States armed forces consent to such search, seizure, or inspection by the Japanese authorities of such persons or property.”²⁹²

²⁹⁰ *Id.* at 314.

²⁹¹ *Id.* at 313.

²⁹² U.S. – Japan SOFA Agreed Minutes, re para. 10(a)-(b).

In practicality, this little known or understood provision in the Agreed Minutes to the actual SOFA treaty itself meant that, following an American helicopter crash into an off-base Okinawan university, U.S. marines barricaded the university for four days, not allowing local police, officials, staff, or students into the campus located centrally in an Okinawan town.²⁹³ This differs from British, Italian, and German officials who are allowed to independently investigate U.S. military accidents.²⁹⁴ A similar process played out again in a 2016 Futenma based Osprey crash into the sea off the coast of Okinawa, notably near the construction site for an extremely controversial new U.S. base.²⁹⁵ This reality means that Okinawan investigators (and media) have no access to the crash site or ability to analyze the records of the U.S. military investigation.²⁹⁶ In the 2016 example, local officials were not provided even the name of the American pilot involved.²⁹⁷

Continued Base Construction at Henoko

Mentioned in nearly everything written about the U.S. – Japan military partnership is the fact that 75 percent of Japan’s U.S. military bases are located in Okinawa, Japan’s smallest prefecture making up 0.6% of the country’s total area.²⁹⁸ The U.S. military alone controls a fifth of Okinawa.²⁹⁹ Recently, certainly in part to alleviate the burdensome image of this statistic, the U.S. government returned 10,000 acres of land

²⁹³ Hook, *supra* note 286, at 314.

²⁹⁴ See *Stifled Probes of U.S. Forces Aircraft Crashes in Okinawa Expose one-sided Japan Pacts*, THE MAINICHI (Jun. 7, 2020), <https://mainichi.jp/english/articles/20200605/p2a/00m/0na/031000c>.

²⁹⁵ *Id.*

²⁹⁶ *See id.*

²⁹⁷ *Id.*

²⁹⁸ MCCORMACK, *supra* note 33, at 8.

²⁹⁹ Motoko Rich, *U.S. Returns Some Okinawan Land to Japan, but Unease Endures*, N.Y. TIMES, Dec. 23, 2016, at A4.

previously used for jungle warfare training, the largest ever return of Okinawan land.³⁰⁰ This land transfer, however, is not all that it seems as the returned area is almost entirely a dense jungle and is located in the least populated area of the island. Most strikingly, the land was returned in exchange for new helipads, constructed and paid for by the Japanese government, in the parts of the jungle the U.S. military will continue to control.³⁰¹ The construction of these helipads is controversial particularly because the U.S. is still building new military facilities in Okinawa nearly fifty years after reversion, including the most problematic new base at nearby Henoko in Oura Bay.

Henoko is a rural coastal district of Nago, Okinawa's largest northern city. One can quickly understand the different base burdens placed upon Okinawan communities by traveling north along Okinawa's main artery highway. In the southern capital, Naha, no U.S. military bases are present and U.S. military traffic is rare to non-existent. Within a twenty-minute drive, however, one reaches the large bases spanning crowded central Okinawa, with the base perimeter fencing abutting the civilian highway for many miles. Farther north on this highway, after passing numerous major bases including gigantic Kadena Air Base, Okinawa becomes more rural and the coast fills with resorts popular with tourists. For a little while, with the exception of a military-only beach resort, it is possible to forget the military bases exist. Once one arrives in Nago, however, a smaller military presence is visible, though still small compared to central Okinawa. It is here where the U.S. government is building a new base, an intended replacement for the dangerous Marine Corps Air Station Futenma in Ginowan.

³⁰⁰ *Id.*

³⁰¹ *Id.*

The Futenma replacement plan at Henoko in many ways is a microcosm of the larger U.S. military base conflict in Okinawa and with debates over SOFA reform. From the perspective of the U.S. military and Japanese government in Tokyo, the 1995 kidnapping and sexual assault of a twelve-year old middle school student by three U.S. servicemembers in central Okinawa discussed above presented the gravest threat to the alliance and continued military presence in Okinawa. In a calculated fashion, the two partners quickly created a formula that would protect the continued base presence in Okinawa while placating the enormous 1995 protest movement. The tragedy presented an opportunity to solve two problems at once: relocate the dangerous Futenma military base and reduce the U.S. military presence in Okinawa. Reducing Okinawa's military burden, however, quickly turned into a plan to build a modern base with a runway constructed out into the sea and scaffolded upon a coral reef in rural Henoko's Oura Bay.

Well before 1995, U.S. military officials had viewed sparsely populated Henoko as a logical location to move some base operations from heavily populated central and southern Okinawa, particularly as anti-base and Japanese reversion activism increased during the 1960s.³⁰² Henoko and Oura Bay, though ecologically pristine compared to the well-used ports and coastal areas in central and southern Okinawa, provided deep water, capable of hosting a U.S. aircraft carrier.³⁰³ These early plans included a major military port with a large pier and, notably, an "all-weather, jet-capable" runway built upon the coral reef.³⁰⁴ During this period, however, American budget constraints due to the increasingly costly Vietnam War limited these plans.³⁰⁵ Perhaps most significantly to

³⁰² MCCORMACK, *supra* note 33, at 92-93.

³⁰³ *Id.* at 93.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

today's situation, during the 1960s, Okinawa was still under U.S. military rule, meaning any large-scale base facility constructed at Henoko was to be paid for by U.S. taxpayers.



Clockwise from top left: base fencing near construction site, police removing protestors preventing construction vehicles from entering the construction site, and an individual protestor near Henoko. Photos by author in 2015 and 2018.

By the mid-1990s, the calculus had obviously changed: central Okinawa had become even more congested with a dangerous U.S. military base nestled in the middle, anti-base activism following the 1995 sexual assault, was at an all-time high, and Japan was willing to fund a replacement facility, in part due to Tokyo's attempts to alleviate pressure from the base burdened Okinawan electorate. In April of 2004, preliminary construction on the planned Futenma replacement base at Henoko began.³⁰⁶ Quickly, local resistance toughened. Protestors first blocked access to the new base site,

³⁰⁶ *Id.* at 98.

preventing construction vehicles from entering.³⁰⁷ After construction workers took to the bay itself, accessing the site from an existing U.S. military base, protestors took to kayak, obstructing the construction of the sea-based runway.³⁰⁸ Today, protestors continue to challenge the continuing construction daily, as they have for well over a decade. The protesters continued activity, the election of an anti-base Okinawan governor in 2018, and recently discovered architectural challenges in building the new base have caused cost overruns of three times the original estimate of one billion dollars and landed environmental litigation in the U.S. federal courts.³⁰⁹ The new base, originally intended to be completed in the early 2000s, is now estimated to be operational in the 2030s, meaning the dangerous Futenma Air Station will continue to operate for decades after the 1996 agreement called for its closure.³¹⁰

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ See Phillip Brasor & Masako Tsubuku, *Japanese Government Keeps Plugging Away at Henoko Base Construction Despite Clear Structural Obstacles*, 18 THE ASIA-PAC. J: JAPAN FOCUS no. 6, 2020, at 1-3; see *Ctr. For Biological Diversity v. Esper*, 938 F.3d 895 (9th Cir. 2020).

³¹⁰ See Phillip Brasor & Masako Tsubuku, *Japanese Government Keeps Plugging Away at Henoko Base Construction Despite Clear Structural Obstacles*, 18 THE ASIA-PAC. J: JAPAN FOCUS no. 6, 2020, at 1-3.

CHAPTER V: SOFA REFORMS AND THE UNIFORM CODE OF MILITARY JUSTICE

Reforming the U.S. – Japan SOFA treaty is a topic frequently in the news, particularly following incidents of major crimes committed by U.S. servicemembers or other SOFA personnel. The discussions naturally most often center on reforming the foreign criminal jurisdiction scheme discussed above; however, as will be discussed below, opportunities for other reforms should also be considered. Strikingly, considering the active anti-base movements in Okinawa and South Korea, SOFA treaty criticisms are common, yet prescriptions for specific reforms are few. One reason for the lack of concrete proposals is simple: rising tensions in East Asia between China and U.S. allies, including Japan, South Korea, and Taiwan, have made proactive SOFA reform unlikely. Thus, most scholarly research focuses on anthropological, sociological, and environmental elements of America’s relationship with Japan and South Korea, particularly analyses of base-related violence, an American empire, and pollution. Nevertheless, I intend to investigate areas for reform in this chapter.

I first examine the approaches of two military law scholars who have contrasting views on U.S. – Japan SOFA foreign criminal jurisdiction (“FCJ”) reform. Their approaches require a brief dive into the Japanese criminal justice system, its procedures, and comparisons with the American civilian criminal justice system. Immediately following the discussion of reforming the FCJ, I will discuss other areas of possible SOFA reform, particularly providing access rights for Japanese officials to enter U.S. bases without permission and accident investigation authority for Japanese officials to investigate U.S. military accidents. I also briefly include a suggested collaborative

process that could further local understandings of the SOFA treaty. Finally, I consider reforms to U.S. military criminal procedure, including current proposed reforms to the UCMJ.

U.S. – Japan Foreign Criminal Jurisdiction Reform

The U.S. government’s policy to maximize its jurisdiction over SOFA personnel, even when Japan has the primary right to jurisdiction under the FCJ scheme, is controversial. Military law scholar Jonathan Flynn argues that these maximization policies should be eliminated because they increase local aggravation towards the U.S. military bases in Japan, domestic pressures he views similarly to those that led to the reduction of the U.S. military presence in Spain and the Philippines.³¹¹ Jurisdiction maximization results from a decades-old U.S. Department of Defense policy, summarized relatively succinctly in U.S. service branch regulations:

Constant efforts will be made to establish relationships and methods of operations with host country authorities that will *maximize U.S. jurisdiction* to the extent permitted by applicable agreements. In particular, the [commander officer’s] representative should maintain direct liaison with the judicial authorities who have cognizance over cases involving U.S. forces in the host country. Also, *efforts will be made in all cases, unless the circumstances of a case dictate otherwise, to secure the release of an accused to the custody of U.S. authorities* pending completion of all foreign judicial proceedings.³¹²

These policies provide military commanders a set of instructions to follow when a servicemember or other SOFA status individual is arrested. First, more informally,

³¹¹ Flynn, *supra* note 23, at 4-6.

³¹² U.S. DEP’T OF ARMY, REG. 27-50; SEC’Y OF NAVY, INSTR. 5820.4G; U.S. DEP’T OF AIR FORCE, REG. 110-12, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION para. 1-7 (14 Jan. 1990).

American commanders are encouraged to “establish relationships and methods of operation with host country authorities that will maximize U.S. jurisdiction to the extent permitted by applicable agreements.”³¹³ Second, beyond simply seeking jurisdiction and custody of an accused servicemember, the commanding officer also must determine whether the host country’s legal procedures ensure a fair trial, giving “[d]ue regard” to certain U.S. trial rights, including confrontation rights, burden of proof allocation, search and seizure protections, and something akin to double jeopardy protections, described as a prohibition of “consecutive trials for the same offense...so vexatious as to indicate fundamental unfairness.”³¹⁴ A commander cannot decide to waive U.S. jurisdiction in favor of a Japan without the approval of the accused service member’s Judge Advocate General (JAG), the highest military lawyer in his or her service branch.³¹⁵ Finally, these regulations establish a graduating level of American response if the local government refuses to surrender jurisdiction and U.S. officials deem the host country’s criminal processes as inimical to U.S. trial protections. In this situation, the final step is to consult U.S. consular officials, who will seek U.S. jurisdiction through diplomatic processes.³¹⁶

This policy of maximization is contentious with local populations, particularly in Okinawa, and has been at the center of multiple controversies involving U.S. SOFA personnel suspected of criminal offenses. Most notably, this policy was central to the diplomatic crisis following the 1995 sexual assault of an Okinawan teenager by three servicemembers. As recounted the above chapter, following the early September 1995 assault, U.S. military officials refused to turn the three suspects over to Japanese custody,

³¹³ *Id.* at 1-7(a).

³¹⁴ *Id.* at Appendix D.

³¹⁵ *Id.* at 1-7(c).

³¹⁶ *Id.* at 1-7(2).

instead detaining them on-base while making them available for interviews with the Japanese authorities. Pursuant to this maximization policy and the SOFA treaty itself, the suspects were not turned over to Japanese custody until after they were indicted in a local district court weeks later. Following this incident, the SOFA treaty was reformed, requiring the U.S. military provide sympathetic consideration for a pre-indictment custody request made by the Japanese government in situations of heinous crime. Nevertheless, the policy of maximization still prevents Japanese custody of SOFA personnel suspected in serious crimes, evidenced by the U.S. military's 2002 refusal to turn over sexual assault suspect Major Michael Brown prior to an indictment in Japanese courts.

The military's policy of maximization extends beyond simply refusing to turn over a servicemember to Japanese custody pre-indictment. Indeed, military police are instructed to physically gain custody of servicemembers who are detained by Japanese police outside the confines of the military base, even in instances where Japanese primary jurisdiction is clear. Often more controversial, however, is the official duty exception, a legal instrument written into the SOFA treaty immunizing SOFA personnel after the fact from Japanese prosecution for conduct committed pursuant to official duty. The official duty exception is a major jurisdiction maximizing tool, described as the law of the flag's "last vestige" as it allows the U.S. to seize jurisdiction even when the victim is Japanese, the conduct committed outside base fences, and Japan would otherwise have primary jurisdiction under the FCJ scheme.³¹⁷

³¹⁷ See Stone, *supra* note 3, at 247.

Textually, Article XVII of the SOFA treaty states that “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 offences arising out of any act or omission done in the performance of official duty.”³¹⁸ Procedurally, the Agreed Minutes to the U.S. Japan SOFA establishes how an official duty “certificate” works, essentially removing primary jurisdiction from the Japanese legal system in favor of the United States:

[w]here a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of an official duty, shall, in *any judicial proceedings*, be sufficient evidence of the fact unless the contrary is proved.³¹⁹

The determination by a commanding officer that a SOFA status holder acted pursuant to official duty can be challenged by Japanese authorities to the Joint Committee, a regularly meeting group of Japanese and American officials that oversee matters of mutual concern under the U.S. – Japan SOFA.³²⁰ In reality, however, Japanese prosecutors are incentivized not to indict a servicemember if it is assumed the defense of official duty will eventually be raised.³²¹

Importantly, the U.S. military has limited the use of official duty certificates to servicemembers and, in theory, has agreed not to maximize jurisdiction over civilian dependent or employee SOFA personnel. This decision resulted from U.S. Supreme

³¹⁸ U.S. – Japan SOFA, at Art. XVII para. 2

³¹⁹ US – Japan SOFA Agreed Minutes, at art. XVII, re para. 3(a)(ii).

³²⁰ *Id.*; Administrative Agreement under Article III of the Security Treaty Between the United States of America and Japan, Art. XXVI, Feb. 28, 1952, 3 U.S.T. 3341, T.I.A.S. 2492.

³²¹ HIROSHI FUKURAI, *THE JAPANESE LEGAL SYSTEM: AN ERA OF TRANSITION* 132 (Tom Ginsburg & Harry Scheiber eds., 2012).

Court rulings in the 1950s and 1960s that removed court-martial jurisdiction over civilians in favor of traditional Article III U.S. federal district courts.³²² Nevertheless, because the U.S. military still holds non-judicial disciplinary jurisdiction outside of the U.C.M.J. over civilian SOFA personnel, the Japanese government allows U.S. jurisdiction in alleged SOFA civilian offenses committed pursuant to official duty.

Assumedly, crimes of personal violence or increased culpability, like driving under the influence, would never be in-line with official duty; however, this provision has insulated SOFA personnel from Japanese criminal prosecutions following deadly vehicle accidents resulting from negligence. In general, SOFA personnel are acting pursuant to official duty when they commute to and from work, without detour, on Japanese roads.³²³ Two particular examples involving American civilian employees bring into focus the contentiousness of U.S. commanders' official status determinations. In 2009, a civilian employee of a military base in mainland Japan killed an elderly Japanese man, himself involved in an anti-base local organization, off-base in a vehicle accident.³²⁴ Stating that the accident took place when the civilian was on-duty, the Japanese Prosecutorial Review Commission declined to criminally charge her, while she received a four-month license suspension by U.S. authorities as a disciplinary sanction.³²⁵ In January of 2011, a nineteen-year-old Okinawan died in a vehicle accident again with a U.S. military civilian

³²² COOLEY, *supra* note 47, at 402; *Reid v. Covert*, 354 U.S. 1, 42 (1957); *Kinsella v. United States*, 361 U.S. 234, 240-49 (1960); See Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs Under Secretaries of Defense Commanders of the Combatant Commands (Mar. 10, 2008) (on file with author); The Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 (2021).

³²³ Chiyomi Sumida, *Okinawans Protest U.S. – Japan Status of Forces Agreement*, STARS AND STRIPES (June. 29, 2011), <https://www.stripes.com/news/pacific/okinawa/okinawans-protest-u-s-japan-status-of-forces-agreement-1.147755>.

³²⁴ FUKURAI, *supra* note 321, at 153-54.

³²⁵ *Id.* at 154-55.

employee.³²⁶ The worker was initially not charged under Japanese law, with Japanese prosecutors concluding that the civilian acted pursuant to his official duty when driving off-base.³²⁷ The civilian's driving privileges in Japan were suspended for five years by the U.S. military, but no criminal charges were filed.³²⁸ Public criticism of this decision in Okinawa led to SOFA treaty modifications, with the U.S. government agreeing to give sympathetic consideration for Japanese jurisdiction in official duty cases where the U.S. government chooses not to prosecute.³²⁹ Following these changes, the civilian was indicted in Japanese district court, convicted of vehicular manslaughter, and sentenced to eighteen months in a Japanese prison.³³⁰

Another more informal maximization policy pursued by U.S. military officials is the use of apology.³³¹ Commentators describe Japan's criminal justice system as one focused on reintegrating the offender back into society through tailoring specific, and at times lenient, sentences and sanctions.³³² To generalize, apology is understood to help restore societal harmony.³³³ A determining factor in a Japanese prosecution in a particular case often is the willingness of the offender to apologize, and the apology itself

³²⁶ *Id.* at 131.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 134; Memorandum for the Joint Comm. Criminal Jurisdiction Subcommittee (Nov. 23, 2011) (on file with the author).

³³⁰ Travis Tritten & Chiyomi Sumida, *American on Okinawa gets 18 Months in Prison for Vehicular Manslaughter*, STARS AND STRIPES (Feb. 22, 2012), <https://www.stripes.com/news/pacific/okinawa/american-on-okinawa-gets-18-months-in-prison-for-vehicular-manslaughter-1.169343>.

³³¹ Flynn, *supra* note 23, at 19-20.

³³² David T. Johnson, *Japan's Prosecution System*, 41 CRIME AND JUST., PROSECUTORS AND POLITICS: A COMP. PERSPECTIVE, no. 1, 2012, at 45.

³³³ See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 477 (1986).

may obviate a harsher sentence.³³⁴ A suspect apologizing may also result in the police not referring the case to the local prosecutor’s office at all.³³⁵

At the level of policymaking and diplomacy, U.S. military and government officials understand the importance of apology in Japanese society and in the Japanese criminal justice system. Simply searching “U.S. military” and “formal apology” in a search engine will result in a number of newspaper articles from recent decades highlighting military commanders and other U.S. officials apologizing, sometimes face-to-face to Japanese politicians, for servicemember or other official misconduct.³³⁶ In fact, often following major incidents in Okinawa, local newspapers will typically feature front page images of U.S. military generals, bowing in apology to Okinawa’s governors.



The top U.S. military commander in Okinawa apologizes to Governor Takeshi Onaga in two separate visits following the arrests of servicemembers for serious crimes in 2016 and 2017. Credit Ryukyu Shimpo and Stripes newspapers.

³³⁴ *Id.* at 482-83.

³³⁵ *Id.* at 482.

³³⁶ See Nicholas D. Kristoff, *U.S. Apologizes to Japan for Rape of 12-Year-Old in Okinawa*, N.Y. TIMES, Nov. 2, 1995, at A7; Calvin Sims, *Marines Apologize to Okinawa Over Sex Case*, N.Y. TIMES, Jul. 7, 2000, at A8; Yuka Hayashi, *U.S. Replaces Diplomat, Apologizes over Alleged Remarks on Okinawa*, WALL STREET J., Mar. 10, 2011, at A8; see Ayako Mie, *Obama Visit Highlighted Differences in Japan and U.S. over ‘an Apology’*, THE JAPAN TIMES (May. 31, 2016), <https://www.japantimes.co.jp/news/2016/05/30/national/politics-diplomacy/obama-visit-highlighted-differences-japan-u-s-apology/>; Matthew Burke & Hana Kusumoto, *Mattis Apologizes to Japan over String of Aircraft Mishaps on Okinawa*, STARS AND STRIPES (Jan. 10, 2018), <https://www.stripes.com/news/mattis-apologizes-to-japan-over-string-of-aircraft-mishaps-on-okinawa-1.505967>.

Military law scholar Timothy Stone disagrees with Flynn’s conclusion that the maximization policies delineated above should be eliminated, and in fact argues that further Japanese concessions are needed in order to protect U.S. servicemembers subject to Japanese criminal jurisdiction.³³⁷ In his analysis, every article of the SOFA treaty pertaining to FCJ is worth maintaining because the Japanese criminal justice system is “structurally deficient and incompatible with the American idea of due process and an individual’s right to defend themselves.”³³⁸ He identifies the “institutionalization of near absolute prosecutorial power” as the source of the Japanese criminal justice system’s incompatibility with American due process.³³⁹ Specifically, he assails the use of confessions, long investigatory detention periods, the lack of an adversarial system, and the ability of prosecutors to appeal an acquittal, as specific elements of the Japanese criminal justice system necessitating policies insulating SOFA personnel from the local prosecutions.³⁴⁰ Due to these deficiencies, he argues that current SOFA protections are insufficient and that suspect SOFA personnel should be mandatorily provided with Japanese defense counsel pre-indictment.³⁴¹ Currently, U.S. military commanders have the discretion to provide SOFA personnel suspects private counsel pre-indictment.³⁴²

His primary critique of the Japanese criminal justice system is the practice of *daiyou kangoku*, or the pre-indictment substitute detention system.³⁴³ From the perspective of the American criminal justice system, the substitute detention system does infringe on U.S. constitutional protections, particularly government restrictions on search

³³⁷ Stone, *supra* note 3, at 231-32.

³³⁸ *Id.* at 238.

³³⁹ *Id.* at 238-239.

³⁴⁰ *Id.* at 238-45.

³⁴¹ *Id.* at 257.

³⁴² *Id.* at 256.

³⁴³ *Id.* at 241-43.

and seizure.³⁴⁴ For example, before turning a case over to prosecutors, the Japanese police can arrest and hold a suspect for forty-eight hours.³⁴⁵ If further custodial interrogation is wanted, within twenty-four hours of receiving the case, Japanese prosecutors can ask for up to twenty days of additional detention through two separate ten-day extensions that judges rarely deny.³⁴⁶ In total, this period of substitute detention can last up to twenty-three days and, importantly, is pre-indictment where the suspect has no ability to seek bail.³⁴⁷ From the American perspective, prosecutors must have a suspect's detention approved by a judge through a probable cause hearing within forty-eight hours of arrest.³⁴⁸ Initial court appearances for suspects in-custody often occur the weekday following arrest, at which time bail is frequently set. U.S. federal prosecutors must also seek a grand jury indictment either before or immediately after a suspect's arrest for a felony offense.³⁴⁹

Stone argues that the Japanese criminal justice system is inherently non-adversarial, and that the judicial process serves simply to rubberstamp the work of prosecutors and police officers.³⁵⁰ Subjecting U.S. SOFA personnel to Japanese investigations and prosecutions is problematic, under his analysis, primarily due to the police and prosecutor dominated "inquisitorial investigative stages" detailed immediately above.³⁵¹ First, prosecutors can begin investigations through charging decisions made on their own initiative, as there are no grand juries or preliminary hearings screening

³⁴⁴ See U.S. Const. amend. IV.

³⁴⁵ Johnson, *supra* note 325, at 42.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 43.

³⁴⁸ See *County of Riverside v. McLaughlin*, 500 U.S. 44, 58-59 (1991).

³⁴⁹ See U.S. Const. amend. V.

³⁵⁰ Stone, *supra* note 3, at 239.

³⁵¹ *Id.*

charging documents in the Japanese system.³⁵² Second, suspects are pressured heavily to cooperate, both due to Japan’s rehabilitative focused criminal justice model and because confessions are viewed as “practically required” for convictions by Japanese judges.³⁵³ Stone points to the long periods of pre-indictment substitute detention with heavy police and prosecutor pressure as the likely explanation behind Japan’s ninety-three percent suspect confession rate.³⁵⁴ Prosecutors do act with “benevolence,” Stone recognizes, choosing not to indict thirty-one percent of suspects and seeking alternatives to incarceration for the majority of defendants actually convicted.³⁵⁵ Though Stone recognizes that the Japanese criminal justice system can be lenient, he states that there is “substantial debate whether this benevolence is equally applied to foreigners prosecuted in Japan.”³⁵⁶

Beyond the institutional power of Japanese prosecutors, long periods of custodial interrogation, and high confession rates Stone argues violate American constitutional expectations, he also cites the fundamentally different treatment of driving offenses under both criminal systems.³⁵⁷ Alongside crimes of violence committed by U.S. SOFA personnel, vehicle accidents often increase local resistance to the U.S. military presence, as discussed above.³⁵⁸ For driving offenses, Japan’s criminal justice system assigns

³⁵² Johnson, *supra* note 326, at 43.

³⁵³ Stone, *supra* note 3, at 239.

³⁵⁴ *Id.* at 242.

³⁵⁵ *Id.* at 240.

³⁵⁶ *Id.* at 241.

³⁵⁷ *See id.* at 248.

³⁵⁸ *See Okinawa Car Crash Sparks U.S. Troops Alcohol Ban in Japan*, BBC (Nov. 20, 2017), <https://www.bbc.com/news/world-asia-42048473>; *see Car Driven by Marine Kills 3 on Okinawa*, N.Y. TIMES, Jan. 8, 1996, at A6; *see Naha District Court Sentences U.S. Marine to Four Years for Fatal Drunken Driving Crash in Okinawa*, THE JAPAN TIMES (Apr. 21, 2018), <https://www.japantimes.co.jp/news/2018/04/11/national/naha-district-court-sentences-u-s-marine-four-years-fatal-drunken-driving-crash-okinawa/>; *see Kevin Sullivan, U.S. Marine is Held in Hit-and-Run Accident on Okinawa*, THE WASHINGTON POST (Oct. 8, 1998), <https://www.washingtonpost.com/archive/politics/1998/10/08/us-marine-is-held-in-hit-and-run-accident-on-okinawa/97fc73c1-9729-4a5a-bcb7-55a6067109df/>.

criminal penalties on a negligence standard, different from U.S. criminal codes that typically require a higher culpable mental state like a wanton and reckless standard.³⁵⁹ Drivers causing serious vehicle accidents in Japan are subject to more severe criminal penalties because operating a motor vehicle is treated as a professional or occupational skill in the Japanese criminal code.³⁶⁰ While intoxicated drivers convicted of causing fatal accidents are typically punished severely in Japan as in the U.S., sober negligent drivers in Japan are also at risk of comparable jail sentences.³⁶¹ In 2004, a U.S. navy sailor was sentenced to three years in a Japanese prison after he failed to slow down for a yellow light, passed through a red light going slightly over the speed limit, and killed an older Japanese man.³⁶² Representing the severity with which negligent driving may be punished alongside more egregious offenses, another U.S. navy sailor was sentenced to less than three years for a fatal vehicle accident where he was believed to be intoxicated.³⁶³

Stone's listed differences between the Japanese and American criminal justice system largely focus on areas that by the statute's text appear more incompatible than they are practically. He first critiques Japanese prosecutors' institutional power; however, similar processes exist in the American criminal justice system. For example,

³⁵⁹ Compare Stone, *supra* note 3, at 248 (describing Japanese law as criminally punishing negligent action) with ORS § 163.145 and *State v. Corpuz*, 621 P.2d 604, 607 (Or. Ct. App. 1980) (differentiating recklessness and felony criminally negligent homicide) and ORS 811.140 and *State v. Griffin*, 640 P.2d 629, 630 (defining recklessness as a person disregarding a known and substantial risk constituting a gross deviation from a standard of care).

³⁶⁰ Stone, *supra* note 3, at 248.

³⁶¹ See Chelsea Deffenbacher, *Man Sentenced for Fatal Crash*, THE REGISTER GUARD, Oct. 25, 2019, at B1.

³⁶² Nancy Montgomery, *Kitty Hawk Sailor Faces 3 1/2 Years in Prison*, STARS AND STRIPES (Mar. 27, 2004), <https://www.stripes.com/news/kitty-hawk-sailor-faces-3-years-in-prison-1.18076>.

³⁶³ *Id.*; Greg Tyler & Hana Kusumoto, *Woman Killed, Daughter Injured in Crash near Sasebo*, STARS AND STRIPES (Apr. 16, 2003), <https://www.stripes.com/news/woman-killed-daughter-injured-in-crash-near-sasebo-1.4444/comments-7.5684>.

while the substitute detention system on paper can land an unindicted criminal suspect in detention for up to twenty-three days without bail, state prosecutors in the U.S. often use the cash-bail system to similar effect.³⁶⁴ While the opportunity to seek release exists soon after a suspect is arrested in the U.S., cash bail amounts are routinely set that make the chance of release impossible for most defendants.³⁶⁵ Notably both systems also require a judge to find probable cause indicating the suspect committed the crime before they are subjected to periods of detainment.³⁶⁶ Finally, Stone's criticism that Japanese prosecutors can often arrest and convict a defendant with limited outside review of their charging decisions is not entirely without a comparable practice in the U.S. criminal justice system. Criminal defendants in the federal system often choose to waive formal indictment, typically pleading guilty to the conduct alleged on the prosecutor's information.³⁶⁷ While Japan's high confession rate on paper receives attention, the vast majority of U.S. criminal cases end with a conviction following a guilty plea. Like Japanese prosecutors mitigating punishment for cooperative defendants, criminal defendants in the U.S. federal system often choose to forego grand jury scrutiny of their charges as part of an arranged plea deal to receive a reduced sentence.³⁶⁸

Perhaps a more important difference is the ability of Japanese law enforcement to subject a suspect to pre-indictment custodial interrogation during a twenty-three-day

³⁶⁴ See generally Kaylee Raymer, *Bailing on a Broken Cash Bail System: A Comparative Analysis of Cash Bail Reform in North Carolina, Kentucky, and California*, 58 U. LOUISVILLE L. REV. 515, 516 (2020) (noting that in 2014, half of the local jail population in the United States consisted of pretrial detainees).

³⁶⁵ See generally Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 237 (2018) (discussing the connection between high bail amounts and higher numbers of cases ended due to plea bargain).

³⁶⁶ *County of Riverside v. McLaughlin*, 500 U.S. 44, 58-59 (1991); Flynn, *supra* note 21, at 49.

³⁶⁷ See *Former Weyerhaeuser Employee Sentenced to Federal Prison for Multi-Million Dollar Fraud Scheme*, THE U.S. ATTORNEY'S OFF. DIST. OF OR., <https://www.justice.gov/usao-or> (last visited Apr. 23, 2021).

³⁶⁸ FED. R. CRIM. P. 8(b).

substitute detention period. During this period, suspects have the right to counsel and the right against self-incrimination; however, unlike the American criminal justice system, a suspect's invocation of those rights does not terminate questioning.³⁶⁹ Worth noting here, however, are the unique protections already provided SOFA personnel subjected to custodial interrogation by Japanese law enforcement pre-indictment. Japanese police must notify U.S. military officials immediately following the arrest of SOFA personnel and provide an interpreter, triggering two actions.³⁷⁰ First, SOFA personnel are provided the following information, similar to *Miranda* warnings in the United States:

You have the absolute right under Article 38 of the Constitution of Japan to remain silent. This is similar to rights guaranteed under Article 31, Uniform Code of Military Justice and the Fifth Amendment, U.S. Constitution; however, there are some differences that you should discuss with the installation legal office or other representative designated by your installation commander. You and you alone must decide whether you will answer all, some, or no questions. While Japanese authorities are usually favorably influenced by a cooperative attitude, anything you say may be used either for or against you.³⁷¹

Second, U.S. representatives immediately visit the suspect, informing him or her about condolence procedures in Japan.³⁷² U.S. representatives can continue to visit the detained suspect at any time, however, generally representatives are not allowed to be present during interrogations themselves and police control the timing of such visits.³⁷³ This would appear to be a major difference from the American system where the right to an attorney necessarily extends to periods of interrogation; however, the difference may not

³⁶⁹ Flynn, *supra* note 23, at 55; *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

³⁷⁰ U.S. – Japan SOFA, art. XVII(5)(b).

³⁷¹ Compare Stone, *supra* note 3, at 256-57 with *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

³⁷² Flynn, *supra* note 23, at 55.

³⁷³ US – Japan SOFA Agreed Minutes, art. XVII, re para. 9.

be as stark as it seems.³⁷⁴ During SOFA reform discussion in 2003, Japanese officials agreed to allow a U.S. representative to be present during interrogations of military suspects in situations of suspected “heinous crimes,” a major departure from Japan’s system of uncounseled interrogation.³⁷⁵

Stone views the Japanese criminal justice system as one fundamentally at odds with the rights provided under the U.S. Constitution. He considers the current maximization policies under the SOFA treaty’s FCJ scheme as necessary to protect the legal expectation of SOFA personnel, and advocates for more SOFA personnel protections, specifically U.S. military officials providing local defense counsel in all cases at the earliest point possible.³⁷⁶ He believes that maintaining the SOFA as written is necessary in order to protect “fair treatment” by SOFA personnel suspected of crimes in Japan.³⁷⁷ As discussed above, however, many of the elements of the Japanese criminal justice system he criticizes are present in the American system.

The current FCJ scheme, even with multiple maximization policies, still results in many prosecutions of U.S. SOFA personnel in Japanese courts. Stone’s critique that the Japanese criminal justice system is fundamentally unfair when applied to SOFA personnel does not appreciate the frequency of these prosecutions. For example, in 2009 the Japanese courts conducted 451 trials of SOFA personnel.³⁷⁸ Virtually all of the most heinous alleged crimes already end up prosecuted in the Japanese system. Even conduct that would likely not lead to felony criminal charges in an American court, such as

³⁷⁴ See *Miranda*, 384 U.S. at 469.

³⁷⁵ Johnson, *supra* note 236, at 9.

³⁷⁶ Stone, *supra* note 3, at 257.

³⁷⁷ *Id.* at 231-32.

³⁷⁸ Flynn, *supra* note 23, at 64.

negligent driving, are prosecuted in Japanese courts and punishable by multiyear prison sentences.

The reality that Japan's criminal justice system already has jurisdiction over SOFA personnel suspects in off-base criminal conduct calls into question whether U.S. officials are truly concerned about the fundamental fairness of Japanese courts. More convincing, however, is Flynn's assertion that the Japanese public's perception of maximization policies may lead to a politically charged atmosphere for SOFA personnel actually criminally charged in Japan's courts.³⁷⁹ Certainly, maximization policies, and U.S. officials past reluctance to turn over SOFA personnel, have created an atmosphere where the Japanese public believe that American servicemembers and military employees charged with serious crimes are insulated from Japanese prosecutions, even if that is not the case.³⁸⁰ Serious offenses are already prosecuted in the Japanese system, as detailed above.³⁸¹ After the Japanese public's outcry following the U.S. government's decision not to turn over the 1995 rape suspects pre-indictment, U.S. officials today are likely more sensitive to Japanese requests for pre-indictment custody of SOFA personnel in suspected cases of heinous crime.³⁸² Recognizing this reality, then, makes Flynn's argument in support of ending maximization policies convincing. In recent decades, the most serious criminal offenses committed by SOFA personnel against Japanese citizens have been prosecuted in Japan's courts.³⁸³ Maximization policies, then, are irrelevant in

³⁷⁹ *Id.*

³⁸⁰ *See Higa, supra* note 19, at 47.

³⁸¹ *Id.* at 64.

³⁸² *Id.*

³⁸³ *See generally* Flynn, *supra* note 23, at 64 (noting that maximization policies have "little effect" in "politically sensitive cases").

instances of serious crime, and their existence simply invites controversy that threatens the relationship between Japan and the United States.

Suggested SOFA Reforms Beyond FCJ

While literature on U.S. – Japan SOFA reform focuses most often on changes to the criminal jurisdiction scheme, other potential areas of reform remain significant.³⁸⁴ These changes would eliminate some of the disparities between the U.S. – Japan SOFA and the NATO SOFA, differences often noted by the Okinawan media, particularly following U.S. military related crimes or accidents.³⁸⁵ Additionally, beyond the text of the SOFA treaty itself, U.S. and Japanese officials should undergo efforts to make the SOFA treaty better understood by locals through a permanent working group in Okinawa. This will help alleviate local misunderstandings regarding the SOFA treaty.

One simple SOFA reform would be for the U.S. to provide Japanese authorities consistent access to U.S. military installations. As discussed above, the U.S. – Japan SOFA text does not allow Japanese access to U.S. military bases without U.S. government permission.³⁸⁶ This differs drastically from the realities on U.S. bases located in European countries. In Italy, the large NATO air base at Aviano is under Italian administrative control, has an Italian commander, and stations Italian forces on the installation.³⁸⁷ In Germany, German police conduct patrols on and off-base with

³⁸⁴ See Hill, *supra* note 58, at 109 (arguing that the official duty exception should be eliminated to provide greater Japanese criminal jurisdiction over SOFA personnel); see Flynn, *supra* note 21, at 6 (supporting the elimination of maximization policies); see Stone, *supra* note 3, at 231-32 (concluding that the criminal jurisdiction scheme should remain unchanged); see Higa, *supra* note 16, at 50 (arguing that the 2017 expansion of Japanese criminal jurisdiction over civilian contractors benefits the U.S. – Japan alliance).

³⁸⁵ See *supra* note 292.

³⁸⁶ See US-Japan SOFA Agreed Minutes, art. XVII, re para. 10(a)-(b).

³⁸⁷ *Supra* note 11.

American military police.³⁸⁸ In Japan, while base perimeter and gate security is provided by Japanese security guards and U.S. military police cooperate with Japanese police in certain circumstances off-base, essentially no Japanese authority exists inside the base perimeter fences without the consent of the U.S. military.³⁸⁹

An additional beneficial reform to the SOFA text would allow Japanese investigators greater access to U.S. military crash sites off base and allow them to partner with U.S. officials in accident investigations. Okinawan media coverage makes clear that the lack of investigative authority local investigators have in crash sites occurring in local communities is a driving source of controversy, particularly due to the risk such accidents pose to local civilians.³⁹⁰ The 2004 U.S. helicopter crash at Okinawa International University provides a telling example. Following the crash, which occurred off the MCAS Futenma base in a dense area of Ginowan, U.S. Marines quickly barred access to the local university for four days, prohibiting local police and investigators from entering a substantial section of a sizable Okinawan city.³⁹¹ In 2016, a MV-22 Osprey aircraft crashed off the coast of Okinawa, near the construction site of the controversial new base at Henoko. As discussed above, the Osprey is a highly controversial military aircraft in Okinawa over mass perceptions of its poor safety record.³⁹² This crash occurred immediately off Okinawa's shore and, in fact, Japanese coast guard rescuers were

³⁸⁸ Baker, *supra* note 22.

³⁸⁹ See generally FLECK, *supra* note 10, at 398 (noting that the U.S. military can arm Japanese base security guards); U.S. – Japan SOFA, art. XVII(5)(a); see US-Japan SOFA Agreed Minutes, ngart. XVII, re para. 10(a)-(b).

³⁹⁰ See Tomohiro Osaki, *Okinawa Virus Outbreaks Ignite Scrutiny of U.S. SOFA Privileges*, THE JAPAN TIMES (Aug. 3, 2020), <https://www.japantimes.co.jp/news/2020/08/03/national/okinawa-coronavirus-us-military-sofa/>.

³⁹¹ Hook, *supra* note 286, at 314

³⁹² Julian Ryall, *US Defies Japan's Okinawa in Osprey Aircraft Row*, DEUTSCHE WELLE (Aug. 8, 2017), <https://www.dw.com/en/us-defies-japans-okinawa-in-osprey-aircraft-row/a-40011081>.

involved in initial rescue efforts.³⁹³ Nevertheless, following this crash, local investigators were provided no information regarding the pilot's identity.³⁹⁴

The Okinawan public, particularly following the 2004 Okinawa International University accident, was surprised and angered that local officials were restricted from investigating the crash, and that the U.S. military restricted civilian movement within an Okinawan city. This is particularly problematic in Okinawa due to its long history of American occupation and the large number of fatal accidents that have occurred in the prefecture. Post-reversion to Japan in 1972, many Okinawan civilians likely assumed that the U.S. military no longer had the ability to restrict civilian movement outside of the base fences, nor unilaterally control investigations into accidents impacting the local community. This realization was particularly sour considering NATO SOFA treaties with European nations, on the other hand, allow local investigator access to accidents occurring off base and even those that occur on U.S. military installations.³⁹⁵ For example, in 1998, a U.S. military jet collided with a ski lift wire, killing twenty skiers after the lift fell to the ground.³⁹⁶ Following that disaster, the U.S. military “went to great lengths to include the Italians” in the investigation and placed an Italian military officer on the investigation team.³⁹⁷

³⁹³ Hope Hodge Seck, *Shallow-Water Osprey Crash Caused by Pilot Error, Marine Corps Finds*, MILITARY.COM (Sep. 11, 2017), <https://www.military.com/daily-news/2017/09/11/shallow-water-osprey-crash-caused-pilot-error-marine-corps-finds.html>.

³⁹⁴ See Matthew M. Burke & Aya Ichihashi, *Okinawa Prosecutors Decline to Charge Marine Pilot at Fault in 2016 Osprey Crash*, STARS AND STRIPES (Dec. 12, 2019).

³⁹⁵ *Supra* note 11.

³⁹⁶ John Tagliabue & Matthew L. Wald, *How Wayward U.S. Pilot Killed 20 on Ski Lift*, N.Y. TIMES, Feb. 18, 1998, at A1.

³⁹⁷ Steven Lee Myers, *Pentagon Blames Jet's Crew for Ski-Life Disaster in Italy*, N.Y. TIMES, Mar. 12, 1998, at A1.

Reforming the SOFA treaty to allow local involvement in crash investigations occurring off-base would benefit the U.S. – Japan relationship, particularly in Okinawa. Assumedly, U.S. military and government officials support the current SOFA treaty provisions due to the politicization and base opposition that inevitably follows any accident that occurs in Okinawa. By controlling investigation access, the U.S. military likely believes it can control the narrative in the press following an accident. Clearly, however, the 2004 Okinawa International University accident and the more recent MV-22 Osprey crash off the Okinawan coast resulted in popular outrage only magnified by the U.S. military restricting any local oversight or investigative involvement. U.S. servicemembers blocking access to areas of the city off base, particularly in Okinawa with its decades longer history of American military occupation than mainland Japan, makes locals feel like Okinawa is still under a U.S. military occupation.³⁹⁸ Updating the U.S. – Japan SOFA using provisions similar to the NATO SOFA and allowing local involvement in accident investigations would be an equitable reform, and would promote better relationships between the local Okinawan government and the U.S. military when the inevitable next accident occurs.

Finally, while not directly dealing with the SOFA text itself, U.S. and Japanese officials should construct a permanent working group discussing SOFA related issues and involving local civilians, particularly in Okinawa where the military base problem has indefinitely remained the primary political issue. A recent study conducted in Okinawa interviewing younger citizens of the prefecture (primarily millennials classified as twenty to forty-five-year old individuals) noted some interesting conclusions. While the

³⁹⁸ Hook, *supra* note 286, at 314.

qualitative survey-based research only minimally references the SOFA treaty, its conclusions are applicable to the purpose of this chapter. First, the respondents generally stated that they desired more interactions with the local servicemembers and the base installations.³⁹⁹ Second, the researchers discovered that the text and procedures of the SOFA treaty in Okinawa are not well understood.⁴⁰⁰ For example, many respondents believed inaccurately that the treaty allows SOFA personnel to commit crimes against the local population while avoiding local prosecution.⁴⁰¹

Considering this study demonstrates that many younger Okinawans desire more contact with SOFA personnel, including more opportunities for joint community service projects and events on base, the U.S. military has an opportunity to further local understandings of the SOFA treaty. The local population's misunderstanding regarding the SOFA treaties is problematic and many Okinawans expressed concerns that the negotiations completed between the U.S. – Japan regarding the bases in Okinawa do not include Okinawan voices. A working group including citizens of Okinawa, rank-and-file SOFA personnel, local U.S. consulate officials, and U.S. military officials may help increase communication between the U.S. military and the Okinawan population. Most importantly for this project, such a group may help facilitate greater knowledge of the SOFA treaty in Okinawa, which in turn may help the local population advocate for beneficial SOFA changes as outlined above.⁴⁰²

³⁹⁹ Charles E. Morrison & Daniel Chinen, *Millennial+ Voices in Okinawa: An Inquiry into the Attitudes of Young Okinawan Adults toward the Presence of U.S. Bases*, EAST-WEST CENTER, Apr. 18, 2019, <https://www.eastwestcenter.org/system/tdf/private/okinawamillennial.pdf?file=1&type=node&id=37074>.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *See id.*

U.S. Military Criminal Justice System Reforms

Violence committed by SOFA personnel against host nation citizens is a spillover effect from the base itself, as described above. Okinawan officials in particular have long argued that the violence experienced by their communities at the hands of U.S. military personnel is a tragic consequence of serious criminal activity occurring unchecked by authorities inside the U.S. military bases, between Americans, and often invisible to outsiders. In 2017 reporting that thirty-six Okinawa-based U.S. servicemembers had been arrested by Naval Criminal Investigative Services in “child sex stings,” Manabu Sato, a professor of political science at Okinawa International and a commentator on the U.S. military presence in Okinawa, stated:

[t]his high number of cases suggests there is a real problem with sex offenses in the U.S. military on Okinawa...[w]henver there is an incident off-base involving a service member, the military likes to claim it is a one-off but these cases show such behavior is not an exception. If the military cannot even protect people within its bases then how can they claim to be able to prevent crimes from occurring off-base in Okinawan communities?⁴⁰³

More recently, the attention of the U.S. public and many policymakers has focused on the high rates of sexual violence perpetuated by servicemembers against their military colleagues, arguing that the UCMJ should be reformed and criminal activity within the military more seriously addressed.⁴⁰⁴ While the attention of Congress and bipartisan statements supporting military justice reform are primarily about protecting

⁴⁰³ Jon Mitchell, *Pedophile Sting Ops Roil U.S. Forces on Okinawa*, THE JAPAN TIMES (Feb. 22, 2017), <https://www.japantimes.co.jp/community/2017/02/22/issues/pedophile-sting-ops-roil-u-s-forces-okinawa/>.

⁴⁰⁴ Donna Cassata, *Outraged Lawmakers Look to Change Military Justice*, ASSOCIATED PRESS (Apr. 30, 2013), <https://apnews.com/article/af9cbd6786e24deb8d2a5264c07e6404>; see generally Sarah Mervosh & John Ismay, *14 Officials Disciplined After Army Investigates Fort Hood Conditions*, N.Y. TIMES, Dec. 9, 2020, at A23 (discussing how serious crimes on and off Fort Hood were not addressed prior to Vanessa Guillen’s murder).

servicemembers from sexual violence, reforms to the UCMJ and the military criminal justice system could help limit the violence that spreads beyond the base fences into host areas like Okinawa.⁴⁰⁵

Before moving to recent legislation reforming the UCMJ, including current proposals, first it is necessary to discuss the opaque nature of military law enforcement records to outside agencies and policymakers. Beginning in 1995, the *Dayton Daily News* completed a series of articles detailing the shortcomings of the military justice system, particularly the processes through which military servicemembers accused or charged with sex crimes frequently evade justice.⁴⁰⁶ The series noted how military law enforcement failed to turn over important documents, including arrest and conviction records, to local law enforcement.⁴⁰⁷ These records, particularly in instances of sexual misconduct and violence, are important for civilian law enforcement agencies investigating future crimes.⁴⁰⁸ The series further concluded that military officials often diverted servicemembers accused of serious sex offenses away from criminal courts into administrative proceedings, processes that allow a suspect to resign from the military in lieu of a prosecution and a potential jail sentence, and eventually return to civilian life potentially without a reportable criminal record.⁴⁰⁹

This reporting next turned to U.S. military installations in Japan, determining that between 1989-1994, more navy sailors and marines were prosecuted for sexual

⁴⁰⁵ See generally Jennifer Steinhauer, *After Failures to Curb Sexual Assault, a Move Toward a Major Shift in Military Law*, N.Y. TIMES, Apr. 28, 2021, at A1 (discussing Republican Joni Ernst announcing her support of Democrat Kirsten Gillibrand's military justice reform proposals).

⁴⁰⁶ Russell Carollo, Jeff Nesmith & Carol Hernandez, *Military Secrets – A 5-Part Series*, DAYTON DAILY NEWS, Oct. 1, 1995, at 1A.

⁴⁰⁷ Russell Carollo & Jeff Nesmith, *Secret Files – Military Fails to Report Many*, DAYTON DAILY NEWS, Oct. 2, 1995, at 1A.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

misconduct, including rape and child molestation, in Japan than any other partner nation.⁴¹⁰ This is particularly striking, considering the U.S. Navy's court systems in Japan cover fewer marines and sailors than many other areas of the world.⁴¹¹ After successfully suing the Army for access to its database, the paper found that between 1990 and 1997, of 1,392 soldiers prosecuted for felony-level sex offenses, 163 were referred to the military equivalent of misdemeanor court, 870 were convicted with 135 serving less than 90 days in jail, and 93 individuals received no jail time at all.⁴¹² Many soldiers accused of sexual assaults were not referred to criminal court and instead were diverted to the above-described non-public nonjudicial administrative hearings, where a criminal conviction or incarceration are not possibilities.⁴¹³

Today it remains an open question whether the military has fixed the opacity problems identified by the *Dayton Daily News* over twenty-years-ago, albeit some progress has been made. For example, Department of Defense regulations implemented in 2017 require military law enforcement officials collect DNA samples from service members investigated for a qualifying offense.⁴¹⁴ Qualifying offenses include crimes of personal violence like murder, sexual assault, and stalking and more minor offenses like theft.⁴¹⁵ If investigators, together with a military attorney, determine probable cause

⁴¹⁰ Russell Carollo & Jeff Nesmith, *Ugly American – Japan Bases Have High Rate of Sex Cases*, DAYTON DAILY NEWS, Oct. 8, 1995, at 1A.

⁴¹¹ Russell Carollo & Jeff Nesmith, *Navy Has Sex Problem in Japan, Navy Sex Abuse Worst in Japan*, DAYTON DAILY NEWS, Nov. 26, 1996, at 1A.

⁴¹² Russell Carollo, Jeff Nesmith & Elliot Jaspin, *Army Treated Rape as Lesser Crime – Sexual Offenses Were Routinely Lightly Punished*, DAYTON DAILY NEWS, Jan. 12, 1997, at 1A.

⁴¹³ *Id.*

⁴¹⁴ INSPECTOR GENERAL, U.S. DEPARTMENT OF DEFENSE, DODIG-2020-064, EVALUATION OF DoD LAW ENFORCEMENT ORGANIZATION SUBMISSIONS OF CRIMINAL HISTORY INFORMATION TO THE FEDERAL BUREAU OF INVESTIGATION (2020).

⁴¹⁵ U.S. DEPARTMENT OF DEFENSE, 5505.14, DEOXYRIBONUCLEIC ACID (DNA) COLLECTION REQUIREMENTS FOR CRIMINAL INVESTIGATIONS, LAW ENFORCEMENT, CORRECTIONS, AND COMMANDERS (2015).

exists indicating the servicemember committed the crime, the samples are turned over to the FBI to be included in the FBI Combined DNA Index System, CODIS.⁴¹⁶ This is generous to military investigators, considering DNA samples taken by civilian law enforcement cannot be “processed or placed in a database” before a *judge* finds probable cause supporting the charges at arraignment.⁴¹⁷ If the suspect is acquitted or the charges are dismissed, the servicemember can petition to have his or her DNA sample expunged from CODIS.⁴¹⁸ For all of these changes, however, the system remains far from perfect, as a 2020 Department of Defense Inspector General review demonstrates.⁴¹⁹ Following Devin Patrick Kelley’s court martial conviction and year jail sentence, the Air Force failed to submit convictions for felony-level assault and domestic violence as required to civil authorities.⁴²⁰ Kelley was then able to pass a background check to purchase firearms, eventually killing more than twenty-six people in a 2017 church shooting in Texas motivated by “domestic rage” and targeting his mother-in-law.⁴²¹

Over the last decade, U.S. political leaders have pressured military officials to better combat sexual assaults occurring within the military ranks, both through better reporting requirements and UCMJ reforms enabling the punishment of attackers.⁴²² 2011 legislation updated reporting requirements, mandating annual reports that include the number of military member sexual assaults reported the previous year.⁴²³ Congress also

⁴¹⁶ *Id.*; INSPECTOR GENERAL, *supra* note 391.

⁴¹⁷ *Maryland v. King*, 569 U.S. 435, 443 (2013).

⁴¹⁸ U.S. DEPARTMENT OF DEFENSE, *supra* note 391.

⁴¹⁹ *See* INSPECTOR GENERAL, *supra* note 391.

⁴²⁰ *Id.*; David Montgomery, Richard A. Oppel Jr. & Jose A. Del Real, *Air Force Error Allowed Texas Attacker to Purchase Guns*, N.Y. TIMES, Nov. 7, 2017, at A1.

⁴²¹ David Montgomery, Richard A. Oppel Jr. & Jose A. Del Real, *Air Force Error Allowed Texas Attacker to Purchase Guns*, N.Y. TIMES, Nov. 7, 2017, at A1.

⁴²² Robert Draper, *In the Company of Men*, N.Y. TIMES MAG., Nov. 30, 2014, at 27.

⁴²³ Pub. L. No. 111-383, sec 1631.

reformed the UCMJ through the Military Justice Act of 2016, eliminating commanders' discretionary authority to overturn felony equivalent court martial convictions and allowing "special victim counsels" to support victims, frequently civilian accusers, during military court proceedings.⁴²⁴

Legislation reforming the military justice system is often reactive to a recent event. For example, the 2016 reforms followed a widely publicized case where a U.S. commander overturned a high-ranking officer's conviction and sentence for sexually assaulting a female civilian military employee.⁴²⁵ The commander, who is not legally trained, explained why he overturned the jury's verdict in a letter that could be described as somewhat petulant, considering he reiterates that an explanation is not required and is only necessary due to what he observed in the "court of public opinion."⁴²⁶ Among other reasons, he did not believe, contrary to the jury, that the defendant, a "doting father and husband" could have committed the "egregious crime of sexually assaulting a sleeping woman." He cites perceived inconsistencies in the victim's testimony, including "her description of the state of her clothing during and immediately after the assault." He also cited evidence, excluded from the trial under an evidentiary ruling, indicating to him the victim's unreliability. In short, he questioned the victim's veracity, credited a possible motivation to lie the trial court excluded, and found the defendant more credible, as the jury did not. Months later, a fulfilled public records request disclosed an email the commander sent immediately following the conviction inquiring whether the officer

⁴²⁴JENNIFER K. ELSEA AND JONATHAN M. GAFFNEY, CONG. RESEARCH SERV., RL46503, MILITARY COURTS-MARTIAL UNDER THE MILITARY JUSTICE ACT OF 2016 26 (2020); Robert Draper, *In the Company of Men*, N.Y. TIMES MAG., Nov. 30, 2014, at 27.

⁴²⁵ See *id.*

⁴²⁶ Letter from Lt. Gen. Craig Franklin Explaining Why He Overturned the Decision in Rape Case, THE WASHINGTON POST, <https://apps.washingtonpost.com/g/documents/national/letter-from-lt-gen-craig-franklin-explaining-why-he-overturned-the-decision-in-rape-case/401/> (last visited May 31, 2021).

would lose his pension.⁴²⁷ The commander was then told that the defendant’s pension would be forfeited without his intervention.⁴²⁸ Notable to today’s reform efforts, he also cited his regret, post-conviction, that he allowed the officer to be initially charged.⁴²⁹

Senator Kirsten Gillibrand has for years unsuccessfully advocated to eliminate command control over charging decisions in cases of sexual misconduct. Currently under the U.C.M.J., a commander must refer charges to initiate a criminal prosecution.⁴³⁰ The commander can importantly also choose to take no action, take administrative action that will not lead to a criminal sanction, impose a non-judicial punishment, or refer an enlisted servicemember to a summary courts-martial where criminal conviction and military discharge are not available sanctions.⁴³¹ Following the murder of Army Specialist Vanessa Guillen by a male servicemember colleague, Senator Gillibrand’s frequently reintroduced bill, now uniquely bipartisan, is viewed by commentators as likely to pass the current legislative session.⁴³² The bill’s proposed changes, similar to the “I am Vanessa Guillen Act” introduced in the House of Representatives, will remove charging decisions from military commanders in cases of sexual assault in favor of a civilian-led office where specially trained military lawyers would make prosecutorial decisions.⁴³³

⁴²⁷ Sarah Childress, *Emails Shed New Light on Military Sexual Assault Case*, PBS, <https://www.pbs.org/wgbh/frontline/article/emails-shed-new-light-on-military-sexual-assault-case/> (last visited Apr. 23, 2021).

⁴²⁸ *Id.*

⁴²⁹ *Supra* note 426.

⁴³⁰ Elsea & Gaffney, *supra* note 424.

⁴³¹ *Id.*

⁴³² *See generally* Steinhauer, *supra* note 405 (describing the reform efforts as “posed to make major changes in military laws”).

⁴³³ Steinhauer, *supra* note 405.

The civilian military leadership, particularly the Secretary of Defense and retired general Lloyd J. Austin III, support changes to the military's treatment of sexual assault, improvements long overdue.⁴³⁴ In 2019, military authorities reported that 20,500 servicemembers were sexually assaulted, including 13,000 women.⁴³⁵ A similar study commissioned by the Department of Veterans Affairs concluded that military sexual assaults of female servicemembers occur at twice the rate of civilian sexual assault.⁴³⁶ Beyond reported numbers, command control over charging decisions has also made victims resistant to report misconduct over reasonable fears that it will jeopardize their careers. Base scholar David Vine illustrates the costs of a military culture where victims are not encouraged to report their attackers:

At Camp Victory – the base where the two Dallas Cowboys cheerleaders performed with Al Franken – several women died of dehydration in their barracks during the first years of the occupation of Iraq. They died because, despite 120-degree heat, they stopped drinking water every afternoon. They stopped drinking water because they feared being raped by other GIs while using the unlit latrines at night. [Others] call it a “war on two fronts,” in which women in Afghanistan and Iraq have had to fight “a second, more damaging war – a private, preemptive one in the barracks.”⁴³⁷

The late Senator John McCain, a powerful retired military figure, recognized the dangers military service poses women, not from combat, but from their fellow soldiers, stating in

⁴³⁴ See generally Steinbauer, *supra* note 405 (describing Secretary Austin as open to the proposed changes, particularly after a panel he appointed came to similar conclusions).

⁴³⁵ Bill Chappell, *Military Panel Urges Taking Sexual Assault Cases out of Commanders' Control*, NPR (Apr. 23, 2011, <https://www.npr.org/2011/04/23/990174459/military-panel-urges-taking-sexual-assault-cases-out-of-commanders-control>).

⁴³⁶ H. Patricia Hynes, *Reforming a Recalcitrant Military*, TRUTHOUT, <https://truthout.org/articles/reforming-a-recalcitrant-military/> (last visited Apr. 29, 2021).

⁴³⁷ VINE, *supra* note 20, at 186.

2013 that he could not give his “unqualified support” for women joining the military until the sexual assault crisis is eliminated.⁴³⁸

While the attention is rightfully focused on the mistreatment of women who choose to serve in the military, often overlooked is the connection between military sexual violence and assaults committed on civilians. As mentioned above, most victims of military sexual violence are civilians and when the crimes occur between Americans or inside military bases, these cases are typically dealt with through the military justice system. Even more troubling is the fact that men who have spent time in the military are more likely to be imprisoned for sexual offenses than are civilian men, significant considering men with military experience are *less* likely to be imprisoned for other crimes like theft, robbery, or drug possession.⁴³⁹ Domestic violence rates in the military are also estimated to be five times the civilian rate, a concerning statistic considering the difficulties the military has had in reporting domestic violence convictions as required to federal authorities.⁴⁴⁰ Following the Sutherland mass shooting in 2017 discussed above, the U.S. Department of Defense stated that it had only reported one domestic violence case to the federal database used for gun background checks as required.

The connection between failures in the military criminal justice system to effectively prosecute violence against women and U.S. base-related crimes against women abroad is often also not discussed, though I argue obvious. The aftermath of the 1995 sexual assault of a teenage Okinawan middle school student demonstrates, in one

⁴³⁸ *McCain Cannot give 'Unqualified Support' for Women Joining the Military Until Crisis Resolved*, N.B.C. NEWS, <https://www.nbcnews.com/news/us-news/mccain-cannot-give-unqualified-support-women-joining-military-until-crisis-flna6c10197034> (last visited Apr. 29, 2021).

⁴³⁹ VINE, *supra* note 20, at 190.

⁴⁴⁰ *Id.*; Montgomery, Oppel Jr. & Del Real, *supra* note 421.

example, the costs to civilian women abroad and domestically. Following Kenneth Ledet's conviction in Okinawa's district court and serving over six years in a Japanese prison, Ledet sexually assaulted and murdered a college student in Georgia before committing suicide.⁴⁴¹ Following the murder of Specialist Vanessa Guillen, the U.S. Army commissioned a report investigating Fort Hood. The report determined that "serious crime issues on and *off* Fort Hood were neither identified nor addressed" by military law enforcement.⁴⁴² As the 1995 incident in Okinawa shows and the report itself states, violence committed by military servicemembers spreads outside of the bases into local communities. When these bases are located abroad, this violence spreads into other country's communities, harming local civilians, and threatening relationships between the United States and partner nations.

⁴⁴¹ Kate Brumback, *Ex-Marine Convicted of Raping Schoolgirl Kills Student, Self*, MT. AIRY NEWS, Aug. 29, 2006, at 7.

⁴⁴² *Report of the Fort Hood Independent Review Committee*, U.S. ARMY, Nov. 6, 2020, https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_redacted.pdf.

CHAPTER VI CONCLUSION

This project consisted of an interdisciplinary look at SOFA treaties at a general level and at the military base problem in Okinawa. Future changes, as always, are inevitable. Will the new U.S. base at Henoko, much despised by Okinawans, ever be complete? Once completed, will protests against it remain or will they fade away? Like multiple incidents discussed above, will a random act of U.S. military crime, or an accident, lead to new SOFA reforms, or perhaps undermine the U.S. – Japan relationship altogether? The reforms suggested immediately above build off earlier chapters in my paper and include a reasonable assumption that Okinawa will remain bound by its geography, caught between the U.S., Japan, and China. Though admittedly less ambitious than other writings that sought a complete rewrite of the U.S. – Japan SOFA, I believe my suggestions are pragmatic, achievable, and importantly, proactive.

Recognizing the reality that the U.S. military will continue to influence Okinawa for decades to come only makes these reforms more critical.

Living in Okinawa, I was fortunate enough to befriend a soon-to- retire English teacher who was perhaps one of the most famous anti-base advocates in the prefecture. She complained to me that young Okinawans, who did not grow up with a parent or grandparent who survived the Battle of Okinawa, have accepted the base presence, and do not desire the political discord accompanying the debates over base reduction and SOFA reform. My friend viewed this as a loss, believing that the U.S. military and Japanese government finally outlasted the base opposition that followed for decades after World War II. Sadly, she is likely correct. I'm hopeful, however, that a new focus on U.S. military violence domestically may spur conversations about the behavior of servicemembers abroad. As Okinawa continues to develop as one of Asia's top tourist destinations, perhaps economic pressures on the U.S. military will force conversations about some of the above proposed reforms in Okinawa. Finally, as the U.S. military presence in Okinawa will almost certainly remain, I hope future proactive SOFA treaty lead the U.S. military in Okinawa to eliminate their artificial and fragile connections with local communities, demonstrated in the 2016 festival I opened with.

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