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NO NEED TO MAXIMIZE: REFORMING FOREIGN CRIMINAL JURISDICTION PRACTICE UNDER THE U.S.-JAPAN STATUS OF FORCES AGREEMENT

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"[T]he Status of Forces Agreement is humiliating . . . . We want to end the suffering and the burden . . . ."[1]

I. The Foreign Criminal Jurisdiction Dilemma

A. Background

In September of 1995, a U.S. sailor and two Marines brutally kidnapped, beat, and raped a 12-year-old Okinawa girl in the backseat of

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[1] Kyoko Hasegawa, *Japan Minister: U.S. Troop Agreement 'Humiliating,'* DEF. NEWS, Oct. 15, 2009, *available at* http://www.defensenews.com/story.php?i=4325916 (quoting Japanese Minister of Defense Toshimi Kitazawa).

a car.[2] "Massive protests" erupted as Okinawans unleashed "pent-up emotions about the U.S. military," anger boiling after decades of hosting 70% of the U.S. forces in Japan.[3] The United States refused to remit custody of the suspects to Japanese police until formal indictment, citing servicemember protections afforded under the U.S.-Japan Status of Forces Agreement (SOFA).[4] The result was momentous controversy[5] and popular cries for SOFA reform.[6] In the following months and years, Japan would call for the total removal of U.S. bases from Okinawa.[7]

Fast forward to 2009. The Democratic Party of Japan (DPJ), seeking control of Japanese parliament, needed to wrest votes from the relatively pro-U.S. military Liberal Democratic Party (LDP).[8] With LDP rule virtually uninterrupted since 1955, this was no easy task. [9] As part of their platform, the DPJ vowed a "greater 'equality' in Japanese relations with the United States,"[10] including "radical" revision of the U.S.-Japan SOFA and a pledge to reduce the U.S. military presence in Okinawa.[11] In 2009, the DPJ won a "landslide victory" in parliamentary elections,

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[2] Andrew Pollack, *One Pleads Guilty to Okinawa Rape; 2 Others Admit Role*, N.Y. TIMES, Nov. 8, 1995, *available at* http://www.nytimes.com/1995/11/08/world/one-pleads-guilty-to-okinawa-rape-2-others-admit-role.html.

[3] William L. Brooks, *The Politics of the Futenma Base Issue in Okinawa*, ASIA-PAC. POL'Y PAPER SERIES, No. 9, at 4 (2010), *available at* http://www.sais-jhu.edu/centers/reischauer/publications.html.

[4] *See* 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, L.A. TIMES, Sep. 22, 1995, *available at* http://articles.latimes.com/1995-09-22/news/mn-48701_1_japanese-police; *see generally* Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, T.I.A.S. 4510, 11 U.S.T. 1652, 373 U.N.T.S. 186 [hereinafter U.S.-Japan SOFA].

[5] *See* Teresa Watanabe, *Japanese Take Custody of 3 Soldiers Accused of Rape*, L.A. TIMES, Sep. 30, 1995, *available at* http://articles.latimes.com/1995-09-30/news/mn-51615_1_japanese-media.

[6] Richard Lloyd Parry, *U.S. Asked to Cut Bases in Rape Row*, THE INDEPENDENT, Oct. 4, 1995, http://www.independent.co.uk/news/world/us-asked-to-cut-bases-in-okinawa-rape-row-1575892.html.

[7] Brooks, *supra* note 3, at 4.

[8] *See* EMMA CHANLETT-AVERY ET AL., CONG. RESEARCH SERV., RL 33436, JAPAN-U.S. RELATIONS: ISSUES FOR CONGRESS 1 (2009), http://assets.opencrs.com/rpts/RL33436_20091125.pdf.

[9] *See id.*

[10] *Id.*

[11] Wendell Minnick, *In Japan, Fiery Rhetoric Subsides After DPJ Landslide*, DEF. NEWS, Sept. 7, 2009, at 4.

marking the end of an era.[12] New Japanese Prime Minister Yukio Hatoyama publicly vowed to change the Japan-U.S. military relationship.[13]

Thus, fourteen years after the Okinawa rape, Japan had elected a ruling party that embraced the ideals of 1995 Okinawa protestors. In the interim, U.S. military-related crimes, accidents, and other basing issues received extensive Japanese media attention and popular opposition.[14] In response to these issues and the 1995 rape, the United States acquiesced to some of the demands for change. In 2006, a U.S.-Japan agreement reduced Okinawan troop-levels by 8,000.[15] Also, the United States agreed to "informal" SOFA revisions in 1995[16] and 2004,[17] giving Japanese law enforcement greater custodial rights over servicemember criminal suspects. Nevertheless, the reforms failed to stop the once perceived "leftist ideal" of SOFA revision from moving to the mainstream of Japanese politics.[18]

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[12] *See* CHANLETT-AVERY ET AL., *supra* note 8, at 1.

[13] *Former Opposition Leader Yukio Hatoyama Elected Japan's Prime Minister*, DAILY NEWS, Sep. 16, 2009, *available at* http://www.nydailynews.com/news/world/2009/09/16/2009-09-16_former_opposition_leader_yukio_hatoyama_elected_japans_prime_minister.html.

[14] *See* Noriko Namiki, *Japanese Arrest U.S. Sailor on Murder Charge*, ABC NEWS, Apr. 3, 2008, http://abcnews.go.com/International/story?id=4581947&page=1 (discussing a recent murder involving a U.S. sailor and how "crimes committed by U.S. military personnel are nothing new to Japan").

[15] Yoshio Shimoji, *The Futenma Base and the U.S.-Japan Controversy: an Okinawan Perspective*, ASIA-PAC. J.: JAPAN FOCUS, May 3, 2010, *available at* http://japanfocus.org/-Yoshio-SHIMOJI/3354.

[16] Press Release, U.S. Embassy in Japan, Joint Committee Agreement on Criminal Jurisdiction Procedures (October 25, 1995) (on file with author). The United States agreed to "give sympathetic consideration to any request for the transfer of custody prior to indictment of the accused which may be made by Japan in specific cases of heinous crimes of murder and rape." *Id.*

[17] Lieutenant Commander Timothy Stone, *U.S.-Japan SOFA: A Necessary Document Worth Preserving*, 53 NAVAL L. REV. 229, 254-55 (2006). In 2004, U.S. policy was further amended to include attempted murder and arson, with Japan agreeing to "allow a representative to be present during all stages of interrogation of a pre-indictment transferee." *Id.*

[18] *See* Hisahiko Okazaki, *The DPJ's Sense of Duty*, THE JAPAN TIMES ONLINE, Sep. 4, 2009, http://search.japantimes.co.jp/cgi-bin/eo20090904ho.html.

With ominous Chinese and North Korean threats looming over the East Asian region and other parts of the world,[19] the military presence in Japan[20] is a key United States and Japanese strategic asset.[21] In protecting this asset, the United States has firmly rejected Japanese propositions to further reduce its military footprint in the area.[22] Moreover, out of concerns with the fairness of the Japanese criminal system, it has shown reluctance to grant the Japanese greater control over servicemember criminal suspects.[23]

However, it would be strategic folly for the United States to underestimate Japan's building domestic pressures against its Japan-based military assets. Maintaining a peacetime military presence abroad requires consent from the host nation,[24] and domestic pressures have caused the United States to lose such consent in the past. It experienced a total loss of its French bases in the 1960s,[25] partial loss of its Spanish bases in the 1970s,[26] and total loss of its Philippine bases in the 1990s.[27]

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[19] *See* Admiral Timothy Keating, Commander, U.S. Pacific Command, Briefing to Japan Society of New York, May 7, 2008, http://www.pacom.mil/web/pacom_resources/pdf/20080507-Japan_Society.pdf.

[20] Japan hosts approximately 47,000 U.S. active duty troops and nearly 50,000 U.S. civilians and dependents. *About U.S. Forces Japan*, OFFICIAL MILITARY WEBSITE, U.S. FORCES JAPAN, http://www.usfj.mil/Welcome.html (last visited Nov. 29, 2010). Excluding Iraq and Afghanistan, this is second only to Germany in total overseas U.S. numbers, and just ahead of active duty force-levels in South Korea. *See also* DEP'T OF DEFENSE, BASE STRUCTURE REPORT: FISCAL YEAR 2009 BASELINE 78-95, *available at* http://www.defense.gov/pubs/pdfs/2009baseline.pdf.

[21] *See* Viola Gienger, *Gates Says US Troop Presence in Japan Necessary for Regional Stability*, BLOOMBERG, Jan. 14, 2011, http://www.bloomberg.com/news/2011-01-13/gates-says-u-s-troop-presence-in-japan-necessary-for-regional-stability.html.

[22] Eric Talmadge, *Futenma Dispute Stains Ties with Japan*, NAVY TIMES, Dec. 29, 2009, *available at* http://www.navytimes.com/news/2009/12/ap_japan_futenma_122909/.

[23] Chalmers Johnson, *Three Rapes: The Status of Forces Agreement and Okinawa* (Japan Policy Research Institute, Working Paper No. 97 2004, http://www.jpri.org/publications/workingpapers/wp97.html (asserting the United States "clings desperately to [the SOFA's] every stipulation" regarding foreign criminal jurisdiction).

[24] Major Mark D. Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics*, 122 MIL. L. REV. 77, 87–88 (Fall 1988).

[25] *See id.* In the mid-1960s, France withdrew from NATO and told the United States to leave. *Id.* French President Charles de Gaulle and the French government exhibited an idealistic perspective on military bases, feeling the presence of foreign troops in France was a grave infringement on French sovereignty. *Id.* at 89. In 1967, 30,000 U.S. troops, civilians, and dependents departed the country. Jerry McAuliffe, *The USAF in France 1950-1967*, http://edmerck.tripod.com/history/francebases.html (last visited Jan. 29, 2011).

[26] ALEXANDER COOLEY, BASE POLITICS 76 (2008). In the late 1970s, local Spanish politicians and their constituents vigorously complained to the Spanish central

The United States has recognized the precedent and taken preventative measures in an attempt to avoid a similar fate in Japan. These include temporary curfews and restrictions of servicemembers to base, bans on alcohol consumption, and increased educational efforts in the areas of violence prevention and sexual assault.[28] In addition, military officials routinely make public apologies for crimes and provide symbolic monetary payments to victims.[29] Finally, Japanese victims of crime often receive additional compensation in the form of damages, either from the alleged perpetrators themselves[30] or through the SOFA-directed claims process.[31]

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government "about their inability to collect road taxes from the bases, SOFA procedures, and lack of compensation" from the central government. *Id*. In addition, due to deeply rooted domestic and political beliefs in a security stance of "neutrality," anti-base sentiments grew when revealed the United States had used Spanish-based assets to conduct Libyan air strikes; *See id*. at 78; SPAIN: A COUNTRY STUDY: STUDY ch. 5 (Eric Solsten & Sandra W. Meditz, eds., 2d, 1988). Ultimately, the Spanish government demanded drastic changes to U.S. military presence, resulting in the closing of two major U.S. airbases and a 40% reduction in troop presence. *Id.* ch 5.

[27] COOLEY, *supra* note 26, at 80–82. In 1991, political turmoil pervaded the Philippine government. *Id*. Also, the government disagreed with the United States over the length of a new basing agreement, including an inability for the two countries to resolve "perennially tricky criminal jurisdiction provisions" and U.S. financial compensation to the Philippine government. *Id.* Despite the United States offering $200 million per year, the Philippine Senate formally disapproved of continued U.S. presence. *Id.* In November 1992, U.S. forces departed, ending their nearly century-long presence in the country. *Id*. The United States would reenter the Philippines in 2000 and establish a much smaller presence over the following years. *Id*. at 85–89. Disputes regarding foreign criminal jurisdiction continue to the present. *See id*. (describing the United States recent demand of custody of a Marine after the Marine's conviction of rape of a local national).

[28] *See* David Allen, *Curfew, Alcohol Restrictions Imposed on Okinawa Airmen*, STARS & STRIPES, Sep. 27, 2010, *available at* http://www.stripes.com/news/pacific/okinawa/curfew-alcohol-restrictions-imposed-on-okinawa-airmen-1.119821; *U.S. Navy to Conduct Background Check Among All Members*, BREITBART NEWS, April 30, 2008, http://www.reitbart.com/article.php?id=D90BLDE00&show_article=1; Gidget Fuentes, *Navy Lifts Drinking Ban for Yokosuka*, NAVY TIMES, April 7, 2008, *available at* http://www/navytimes.com/news/2008/04/navy_alcohol_040708w/; Yoko Kubota, *Japan Arrests U.S. Sailor for Murder*, REUTERS, Apr. 3, 2008, http://www.reuters.com/article/id/UST8360820080403?sp=true; *Curfew on All Personnel in Okinawa*, MARINE TIMES, Feb. 16, 2008, *available at* http://www.marinecorpstimes.com/news/2008/02/ap_okinawa_curfew_080219/.

[29] *See* U.S. FORCES JAPAN, INSTR. 36-2612, CONDOLENCE PROCEDURES (Nov. 15, 2002) (discussing standard procedures for solatia payments and public apologies).

[30] *See, e.g.*, Charlie Reed & Hana Kusumoto, *U.S. Teen Gets Suspended Prison Sentence in Yokota Rope Stringing Case*, STARS & STRIPES, Nov. 12, 2010, *available at* http://www.stripes.com/news/u-s-teen-gets-suspended-prison-sentence-in-yokota-rope-stringing-case-1.125284 (citing $17,000 paid by a suspect's parent to victim of assault-type offense); Erik Slavin, *Robbery Charges Not Filed, but Three Dependents Sent Back to the*

These measures, while helpful, do not address the root of the problem. Despite the 1995 and 2004 reforms to the U.S.-Japan SOFA relationship, the United States continues to adhere to a nearly 60-year-old Department of Defense (DoD) policy of maximizing jurisdiction and custody in situations of servicemember crimes.[32] To illustrate, when a soldier physically assaults a Japanese national, the U.S. military must maintain physical custody of the soldier as long as possible and attempt all reasonable methods to obtain a waiver of foreign criminal jurisdiction (FCJ) from the host nation.[33] It is this "maximization policy" that fueled domestic unrest in the 1995 Okinawa rape and many criminal cases that followed, resulting in a dangerous Japanese domestic perception of a lack of independence and sovereign rights. In order to maintain the quantity and quality of its desired military presence in Okinawa, Yokosuka, and beyond, the United States should eliminate its application of the maximization policy to Japan. Such reform will return a wide degree of sovereignty to the Japanese people, enhance political relations, and create a more effective U.S.-Japanese alliance.

B. Roadmap

In Part II, the U.S.-Japan SOFA construct is explained and compared to the North Atlantic Treaty Organization (NATO) SOFA.[34] The two SOFAs exhibit striking similarities, but the NATO SOFA has not generated the same level of domestic angst. The distinguishing factor

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United States, STARS & STRIPES, Aug. 23, 2009, *available at* http://www.stripes.com/news/robbery-charges-not-filed-but-three-dependents-sent-back-to-states-1.94067 (citing "restitution" paid by suspects' parents to the Japanese victim of a theft).

[31] *See, e.g.*, Erik Slavin, *U.S. Sailor Ordered to Pay Japanese Murder Victim's Family $593,000*, STARS & STRIPES, Sep. 24, 2010, *available at* http://www.stripes.com/news/u-s-sailor-ordered-to-pay-japanese-murder-victim-s-family-593-000-1.119389 (noting that under the SOFA, if a servicemember is unable to pay a civil award, the United States and Japan share the burden in paying damages to the victim). For a general discussion of SOFA claims, see generally DIETER FLECK ET AL., THE HANDBOOK OF THE LAW OF VISITING FORCES 159–86 (2001). *See also* Mizushima Tomonori, *Yamaguchi v. United States*, 97 A.J.I.L. 406 (David D. Caron ed., Apr. 2003) (discussing SOFA claims in Japan).

[32] 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) [hereinafter TRI-SERVICE REG.].

[33] *See id.*

[34] *See generally* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, Jun. 19, 1951, T.I.A.S. 2846, 4 U.S.T. 1792 [hereinafter NATO SOFA].

between them is not the facial scheme, but the unique method of application in Japan of an essentially domestic U.S. maximization policy. Ironically, the more favorable procedures, those in Japan, generate more controversy.

The subsequent parts of the article analyze the costs and benefits of this maximization policy in the context of "two-level game theory" concepts. Under two-level game theory, basing stability is a contest "in which key decision-makers must interact at dual levels in order to achieve a single interdependent outcome."[35] Base politics are an international issue between the host nation, sending state, and international community at large.[36] Equally important, however, is domestic politics, the "matter of domestic coordination—among foreign and defense ministries, local landlords, and protest groups, for example."[37]

As in any country, results on military basing issues in Japan depend on both—Japan needs U.S. military bases to further their foreign policy objectives and national security, but, if popular sentiment is strongly against U.S. bases, Japanese leaders may have no choice but to acquiesce to the desires of it populace. Of course, the United States has foreign and domestic concerns of its own—promoting security in East Asia while ensuring that its servicemember's are treated fairly. The two-level game is a method of analyzing these international and domestic concerns, aiding in determining the outcome of U.S.-Japanese interaction regarding military basing in Japan, and helping to determine whether more effective and efficient systems are desirable.

Within this contextual framework, Part III examines the international security considerations of the U.S.-Japanese alliance, and Part IV discusses the domestic impact of U.S. maximization policies on Japan. Part V turns to U.S. reasons for the maximization policy, including the primary U.S. concern: Japan's allegedly unfair system of criminal justice. In Part VI, the international and domestic interests of the United States and Japan are brought to the hypothetical U.S. military basing negotiating table, finding that the United States should make changes to its maximization policy. This in turn leads to Part VII's proposals for reform: (1) revise the Secretary-level SOFA instruction to allow

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[35] KENT E. CALDER, EMBATTLED GARRISONS 83 (2007).
[36] *Id.*
[37] *Id.*

Designated Commanding Officers (DCO) discretion to formulate region-specific "maximization" policies; (2) in cases of Japanese primary jurisdiction, eliminate the policy of automatic waiver requests; and (3) in cases of Japanese primary jurisdiction, immediately relinquish custody of U.S. Forces personnel to Japanese authorities upon request. In Part VIII, the Article concludes that such reforms will best serve both Japanese and U.S. interests—Japan's domestic interest in administering justice over military servicemembers will be strengthened, or at least perceived to be strengthened, while both Japanese and U.S. leaders will be better positioned to win Japanese domestic support for U.S. military bases in Japan. Meanwhile, it will cost the United States relatively little in regards to ensuring the protection of the rights of U.S. servicemembers.

II. The U.S.-Japanese FCJ Framework

A. Overview of the SOFA

Specifically defined, "A SOFA is an agreement that establishes the framework under which armed forces operate within a foreign country," providing for the "rights and privileges of covered individuals while in a foreign jurisdiction . . . ."[38] "Covered individuals," or "SOFA personnel," typically include U.S. active duty servicemembers, civilians, and dependents of these persons.[39] The United States currently has a SOFA or SOFA-like agreement with more than 100 countries,[40] all of which are bilateral in nature with the exception of the multilateral NATO SOFA.[41] Status of Forces Agreements often address matters such as "the wearing of uniforms, taxes and fees, carrying of weapons, use of radio frequencies, licenses, and customs regulations,"[42] as well as monetary claims procedures amongst signatories.[43] However, the most commonly

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[38] R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT AND HOW HAS IT BEEN UTILIZED? 1 (2011), http://www.fas.org/sgp/crs/natsec/RL34531.pdf.

[39] *See* JOHN WOODLIFFE, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW 173–74 (1992).

[40] MASON, *supra* note 38, at 1.

[41] *Id*. Of these countries, twenty-six are parties to the NATO SOFA and another twenty-four are "subject to the NATO SOFA through their participation in the NATO Partnership for Peace (PfP) program." *See id*. at 2. In contrast, a "bilateral" treaty or agreement is one made between only two nations. *See id*.

[42] *Id*. at 3.

[43] *See* FLECK ET AL., *supra* note 31, 159–86 (giving a general overview of SOFA claims).

addressed provision in a SOFA is the application of FCJ to SOFA personnel.[44]

B. Foreign Criminal Jurisdiction Development after World War II

Following World War II, the United States concluded peace and security treaties with its fallen enemies, including the European 1949 North Atlantic Treaty[45] and the 1951 U.S.-Japan Security Treaty.[46] These treaties were general in nature, memorializing the requirement of peace and cooperation between nations. However, with United States' and other nations' militaries to be stationed in these areas for the indeterminate future, countries recognized that detailed rules were needed to govern foreign military forces.[47]

Prior to the War, two competing doctrines governed the status of U.S. forces abroad: the "Law of the Flag" versus the territorial sovereignty of states.[48] The United States subscribed to the former, deeming its military forces "immune from the jurisdiction of a foreign receiving state."[49] The United States judicially validated the "Law of the Flag" principle in an 1812 U.S. Supreme Court case.[50] The Court, while acknowledging the general rule of the territorial sovereignty of foreign nations, stated that military personnel passing through a foreign state at its invitation were representatives of the sovereign and entitled to sovereign immunity.[51]

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[44] MASON, *supra* note 38, at 1.
[45] North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.
[46] Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Jan. 19, 1960, 11 U.S.T. 1632, T.I.A.S. No. 4509, 373 U.N.T.S. 186.
[47] *See* FLECK ET AL., *supra* note 31, at 19–20.
[48] *See* Captain Benjamin P. Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Trial Standards*, 106 MIL. L. REV. 219, 220 (1984).
[49] *Id*.
[50] *See id.*
[51] The Schooner Exchange v. McFaddon & Others, 11 U.S. 116 (1812). In *Coleman v. Tennessee*, the Court furthered the logic of *Schooner*, stating that foreign troops permanently stationed abroad with consent of the host nation were immune from the host nation's criminal jurisdiction. 97 U.S. 509, 515 (1878). In the modern day, it is accepted as customary international law that absent an international agreement, a host nation has "exclusive jurisdiction to punish offenses against its laws committed within its borders." Wilson et. al. v. Girard, 354 U.S. 524 (1957). *See also* WOODLIFFE, *supra* note 39, at 170–71. However, the U.S. Supreme Court has consistently held that "where a state of war exists between two nations, jurisdiction may not be exercised by the courts of one nation over the members of the armed forces of another." Donald T. Kramer, *Criminal Jurisdiction of Courts of Foreign Nations over American Armed Forces Stationed*

Generally, European countries involved in post-World War II SOFA negotiations heavily resisted this idea.[52] Thus, in the NATO SOFA, the United States and other European nations agreed to cede some criminal jurisdiction over their foreign-based forces to the host nation.[53]

Under the 1951 U.S.-Japan Security Treaty, Japan did not receive this jurisdictional benefit, with the United States maintaining the extraterritorial jurisdiction it had given up under the NATO SOFA.[54] However, Japan "would insistently request treatment similar to that the United States provided to its NATO allies."[55] In 1953, the parties modified the agreement to follow the NATO SOFA.[56]

C. Foreign Criminal Jurisdiction Scheme of the NATO and U.S.-Japan SOFAs

Under the NATO and U.S.-Japan SOFAs, jurisdiction over SOFA personnel[57] is either exclusive or concurrent. [58] The sending and

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Abroad, 17 A.L.R. FED. § 4, at 725, 737 (1978). In FCJ context, a "state of war" applies to military occupations. *Id*. Moreover, the doctrine of sovereign immunity is valid in other, non-installation contexts, such as misconduct committed aboard a naval vessel and diplomatic immunity. *See id*. § 5, at 743; RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 (1987); *id.* § 502.

[52] Kramer, *supra* note 51, § 2(a), at 731; Major Mark R. Ruppert, *Criminal Jurisdiction over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No,"* 40 A.F. L. REV. 1, 5–6 (1996).

[53] *See* NATO SOFA, *supra* note 34, art. 7. In 1957, the U.S. Supreme Court recognized that the United States may constitutionally bargain away "Law of the Flag" immunity. *See Girard*, 354 U.S. 524 (1957). In some of its modern-day bilateral SOFAs (typically with less-developed countries), the United States has maintained a Law of the Flag-type criminal jurisdiction arrangement. Examples include Mongolia and Afghanistan. *See* MASON, *supra* note 38, at 4–8. *See also* Commander Trevor Rush, *Don't Call It a SOFA: An Overview of the U.S.-Iraq Security Agreement*, ARMY LAW., May 2009, at 34, 48–60 (laying out the parameters of criminal jurisdiction provisions entered into between Iraq and the United States, including the narrow Iraqi right of primary jurisdiction in "grave premeditated felonies" and expansive Iraqi jurisdictional rights over U.S. contractors).

[54] *See* FLECK ET AL., *supra* note 31, at 384; Administrative Agreement under Article III of the Security Treaty Between the United States of America and Japan, art. 17, Feb. 28, 1952, 3 U.S.T. 3341, T.I.A.S. 2492. The United States maintained "the right to exercise within Japan exclusive jurisdiction over all offenses which may be committed in Japan by members of the United States armed forces, civilian component, and their dependents . . . ." *Id.*

[55] FLECK ET AL., *supra* note 31, at 384.

[56] *Id*. at 387.

[57] Overseas U.S. jurisdiction over civilians and dependents is limited by: (1) the first clause of each of the SOFAs; and (2) a line of Supreme Court cases eliminating the

receiving states have the exclusive right of jurisdiction over legal violations that are unique to their respective criminal codes.[59] For example, where a U.S. soldier stationed abroad is "absent without leave," a crime under the Uniform Code of Military Justice (UCMJ), the United States alone has exclusive criminal jurisdiction.[60] Meanwhile, a host nation may criminalize acts that the United States does not, such as treason, sabotage, or espionage against the host nation.[61]

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peacetime court-martial jurisdiction of the United States. *See* NATO SOFA, *supra* note 34, art. 7, para. 1; U.S.-Japan SOFA, *supra* note 4, art. 17, para. 1 (both explaining that military authorities may exercise jurisdiction only over "persons subject to the military law of the United States."); DIETER ET AL., *supra* note 31, at 109–11 (noting the series of cases, beginning with *Reid v. Covert*, 354 U.S. 1 (1957), that eliminated "military jurisdiction of the United States over American dependents and civilians in peacetime"). For a general discussion of the challenges associated with exercising jurisdiction over civilians in the overseas environment, see Captain Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, ARMY LAW., Aug. 200, at 23, 24–26. However, on the practicing levels, arguments can and are made that civilians fall under the "disciplinary jurisdiction" of the United States, administrative sanctions are sufficient, or an extraterritorial federal statute applies. *See* THE JUDGE ADVOCATE GENERAL'S SCHOOL, AIR FORCE OPERATIONS & THE LAW 56–57 (2d 2009) [hereinafter AIR FORCE OPERATIONS & THE LAW].

[58] *See generally* NATO SOFA, *supra* note 34, art. 7; U.S.-Japan SOFA, *supra* note 4, art. 17.

[59] NATO SOFA, *supra* note 34, art. 7, para. 2; U.S.-Japan SOFA, *supra* note 4, art. 17, para. 2.

[60] WOODLIFFE, *supra* note 39, at 176–77; UCMJ art. 86 (2012).

[61] *See* NATO SOFA, *supra* note 34, art. 7, para. 2(c); U.S.-Japan SOFA, *supra* note 4, art. 7, para. 2(c). Given the unique aspects of foreign country law, some may assume host nation exclusive jurisdiction is somewhat broad. For example, in Japan it is an offense to drive with a blood alcohol content of 0.03 or greater. Captain Gerardo Gonzales, *Japan Toughens Traffic, DUI Laws*, PAC. AIR FORCES, Sep. 7, 2007, http://www.pacaf.af.mil/news/story.asp?id=123066866. Moreover, it is an offense to possess certain types of knives with a blade longer than 2.1 inches. Master Sergeant Allison Day, *Revised Japanese Law Cuts Down on Knives*, MISAWA AIR BASE, Jan. 22, 2009, http://www.misawa.af.mil/news/story.asp?id=123132231. The United States is able to extend secondary criminal jurisdiction over such off-base offenses through two methods. First, for servicemembers, the UCMJ may punish such activity as "prejudicial to good order and discipline" pursuant to Article 134. *See* UCMJ art. 134. Second, Designated Commanding Officers and service regulations may impose disciplinary and administrative penalties for violating host nation law. *See, e.g.*, U.S. FORCES JAPAN, INSTR. 31-205, MOTOR VEHICLE OPERATIONS AND TRAFFIC SUPERVISION para. 4.6.3.2 (5 Apr. 2004) (allowing for adverse disciplinary/administrative action in violation of Japanese drinking and driving laws); Colonel Patrick T. Stackpole, U.S. Forces Japan Instruction 31-207 Addendum to Policy (Mar. 2, 2009) (on file with author) (unpublished memorandum prohibiting and restricting the possession of knives off-base pursuant to Japanese law).

However, most offenses involve concurrent jurisdiction,[62] where both states criminalize a suspected offense. In this situation, the host nation generally has "primary jurisdiction," with the initial right to decide whether to take prosecutorial action.[63] Should it decline, the sending state exercises its secondary right if it wishes.[64] There are two exceptions that give the sending state the primary right of jurisdiction: (1) "offenses solely against the property or security of [the sending state], or offenses solely against the person or property of another member of the force or civilian component of that [sending state] or of a dependent;" and (2) "offenses arising out of any act or omission done in the performance of official duty."[65]

An example of the first exception is soldier-on-soldier mutual assault at an off-base drinking establishment. Common examples of the second exception, "official duty," include U.S. military air, sea, and security operations resulting in off-base accidents that harm the property or persons of the host nation.[66] Also included is the travel of SOFA personnel directly to and from their place of duty.[67] Although the term has not been precisely defined in any SOFA,[68] the sending state initially

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[62] *See* Dean, *supra* note 48, at 220–21.

[63] NATO SOFA, *supra* note 34, art. 7, para. 3; U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3.

[64] *See* NATO SOFA, *supra* note 34, art. 7, para. 3(c); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3(c).

[65] NATO SOFA, *supra* note 34, art. 7, para. 3(a)(ii); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3(a)(ii). Thus, under both the NATO and U.S.-Japan SOFAs, jurisdiction provisions are dependent on the persons and/or property involved, not the place of the crime. *See* MASON, *supra* note 38, at 4.

[66] For example, in 1957, a U.S. soldier guarding a firing range shot at and killed a Japanese female collecting expended cartridges in the area. Wilson et al. v. Girard, 354 U.S. 524, 525–26 (1957). The soldier's command initially asserted that the soldier was acting in the scope of official duty in protecting the area. *Id*. Ultimately, the United States reversed the command's initial official duty determination. *Id*.

[67] U.S. ARMY IN EUROPE, REG. 550-50; U.S. NAVAL FORCES EUROPE-UNITED STATES SIXTH FLEET, INSTR.5820.K; U.S. AIR FORCES IN EUROPE, INSTR. 51-706, EXERCISE OF FOREIGN CRIMINAL JURISDICTION OVER UNITED STATES FORCES PERSONNEL 58 (Nov. 26, 2007) [hereinafter TRI-SERVICE EUROPEAN FCJ INSTR.]; *Drinking at Work Part of '56 SOFA*, JAPAN TIMES ONLINE, Jun. 17, 2008, http://search.japantimes.co.jp/cgi-bin/nn20080617a7.html (describing a 1950s U.S.-Japan agreement that extended the definition of official duties to drinking at official parties followed by driving).

[68] Implementing military directives in Europe define "official duty" as an act "done pursuant to or in accordance with competent authority or directive, whether express or implied, and is reasonably related to the performance (by the individual concerned) of required or permissive official functions in his or her capacity as a member of the U.S. Forces. TRI-SERVICE EUROPEAN FCJ INSTR., *supra* note 67, at 58. "Competent authority

determines official duty status,[69] and the United States defines official duty expansively.[70]

Aside from a lack of specificity, the facial jurisdictional schemes of the NATO and U.S.-Japan SOFAs generally have not been a source of great international controversy.[71] A goal of the NATO SOFA drafting team was "to strike a balance as far as possible between the *legitimate* interests of the sending and receiving states."[72] When a crime involves only U.S. personnel or property, the United States will have a great interest in prosecution, the host nation will have little, and the United States will have the primary right of jurisdiction. Likewise, when a host national is victimized, the host nation will generally have a greater interest in prosecution. If one state is not satisfied with a jurisdictional result, the state may request a waiver of jurisdiction from the other.[73] The recipient must then give the request "sympathetic consideration."[74]

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or directive" includes but is not limited to statute, regulation, the order of superior, or military use commensurate with the specific factual situation and the circumstances involved." *Id*. In Japan, the term is defined in a supplemental agreement as "any duty or service required or authorized to be done by statute, regulation, the order of a superior, or military usage." *See* U.S. FORCES JAPAN, PAM. 125-1, CRIMINAL JURISDICTION IN JAPAN 22 (1 Jan. 1976). "The term 'official duty' is not intended to include all acts by USFJ personnel during periods while on duty, but rather is limited to those acts or omissions which are related to the performance of official duty." U.S. FORCES JAPAN, INSTR. 51-1, CRIMINAL AND DISCIPLINARY JURISDICTION UNDER THE STATUS OF FORCES AGREEMENT WITH JAPAN para. 4.4.2.2 (3 Oct. 1997). Some legal scholars have defined "official duty" as actions having a "nexus" with military or employment duty. *See* Lieutenant Colonel Chris Jenks, *A Sense of Duty: The Illusory Criminal Jurisdiction of the U.S./Iraq Status of Forces Agreement*, 11 SAN DIEGO INT'L L.J. 411, 421–23 (Spring 2010).

[69] Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, art. 18, Aug. 3, 1959 [hereinafter German Supplementary Agreement]; Agreed Minutes to the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Force in Japan, art. 17, para. 2(c), Jan. 19, 1960, T.I.A.S. 4510, 11 U.S.T. 1749 [hereinafter Agreed Minutes]; FLECK ET AL., *supra* note 31, at 402 (explaining that if Japanese government objects to a United States official duty determination, the U.S.-Japan Joint Committee will decide the issue).

[70] SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 172 (1971).

[71] *See* WOODLIFFE, *supra* note 39, at 133 (finding that only "extreme nationalists" criticized Article 7 of the NATO SOFA). A possible exception to this lack of criticism is the U.S. definition of official duty. *See* Part IV.C, *supra*.

[72] LAZAREFF, *supra* note 70, at 131 (emphasis added).

[73] NATO SOFA, *supra* note 34, art. 7, para. 3(c) ("The authorities of the State having the primary right shall give sympathetic consideration to a request from authorities of the

D. The U.S. Senate/Department of Defense Mandate to Maximize

Perhaps the most strenuous objector to the facial FCJ scheme has been the United States.[75] In 1953, when the NATO SOFA was presented to the U.S. Senate for its advice and consent, the Senate ratified but expressed what were termed "reservations."[76] First, "where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state . . . the Commanding Officer . . . in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States."[77] If, in the opinion of the commanding officer, "there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request authorities of the receiving state waive jurisdiction" in accordance with Article VII of the NATO SOFA.[78] If the receiving state then refuses to waive jurisdiction, "the commanding

other State for a waiver of its right in cases where that other state considers such waiver to be of particular importance."); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3(c).

[74] NATO SOFA, *supra* note 34, art. 7, para. 3(c); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 3(c).

[75] *See* WOODLIFFE, *supra* note 39, at 179–80. The debate surrounding the NATO SOFA was an emotional one. Various military commanders, the Under Secretary of State, and President Eisenhower himself claimed that the FCJ provisions of the NATO SOFA were fair and adequate. *See* LAZAREFF, *supra* note 70, at 130. Nevertheless, many in the Senate and Congress were appalled at the prospect of foreign courts trying American troops. *See id*. Critics saw it as ironic that servicemembers would be subject to criminal systems that denied the constitutional rights the members undertook to defend. *See id*. at 130. Emotions boiled to the point where, "several times during the course of the congressional hearings on SOFA it was stated that in France and Italy most judges were communists, and therefore hostile . . . toward American troops." *Id*. at 128.

[76] 32 C.F.R. § 151.6 (1953). These Senate "reservations" did not actually alter the treaty as ratified by the President. *See Subjection of American Military Personnel to Foreign Criminal Jurisdiction: The Territorial Imperative*, 58 IOWA L. REV. 532, 539 n.33 (1972–1973) [hereinafter *Subjection of American Military Personnel to Foreign Criminal Jurisdiction: The Territorial Imperative*] (arguing the Senate Resolution was "merely precatory," not internationally or domestically binding in nature); Edmund Schwenk, *Jurisdiction of the Receiving State over Forces of the Sending State under the NATO Status of Forces Agreement*, 6 INT'L L. 525, 530–31 (1972) (explaining the Senate "reservations" did not change the provisions of the NATO SOFA, and "are purely municipal in nature. . . ."); Captain Jack H. Williams, *An American's Trial in Foreign Court: The Role of the Military Trial Observer*, 34 MIL. L. REV. 1, 8 n.27 (1966).

[77] 32 C.F.R. § 151.6.

[78] *Id*.

officer shall request the Department of State to press such request through diplomatic channels . . . ."[79]

Some legal scholars have argued the Senate Resolution did not require the United States to use persuasive or coercive methods to wrest primary jurisdiction from the host nation.[80] That is, it merely required a request for waiver where U.S. constitutional protections lacked, and, failing that, host nation law might not afford a fair trial. A waiver request is required in only those cases where "there is a danger of concrete prejudice to the accused."[81]

The current version of a DoD Directive on SOFA policies generally supports this argument. It applies the Senate Resolution to all "overseas areas where U.S. Forces are regularly stationed."[82] If it appears "probable that a release of jurisdiction will not be obtained," it is the duty of the DCO, who is Commander, United States Forces Japan (USFJ), to determine whether there is a danger an accused will not receive a fair trial, "in light of legal procedures in effect in that country."[83] The directive explicitly states foreign trials need not mirror U.S. trial procedure to meet the standard of "fairness."[84] However, "due regard" is to be given to a list of seventeen "fair trial guarantees," guarantees "considered . . . applicable to U.S. state court criminal proceedings, by virtue of the 14th Amendment as interpreted by the [U.S. Supreme Court]."[85] If the DCO finds a risk of unfair trial, the DCO may "press a

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[79] *Id*. The reservations also called for a U.S. military representative to attend the trial of anyone subject to military jurisdiction and stated that Article VII of the NATO SOFA did not constitute precedence for future agreements. *Id*.

[80] *See* Ruppert, *supra* note 52, at 8 (arguing the Senate Resolution "did not expressly require the U.S. to obtain jurisdiction in all cases . . . ."); *Subjection of American Military Personnel to Foreign Criminal Jurisdiction: The Territorial Imperative*, *supra* note 76, at 570 (explaining that regardless of the constitutional protections of a foreign court, the waiver provisions of the Senate Resolution apply only when a deprivation of rights is in fact "harmful to the accused").

[81] *See* Williams, *supra* note 76, at 9 n.22 (quoting JOSEPH M. SNEE & KENNETH A. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 119 (1967)).

[82] U.S. DEP'T OF DEF., DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION (7 Aug. 1979) [hereinafter DoDD 5525.1].

[83] *Id*. para. 4.5.1.

[84] *Id*. para. 4.5.2.

[85] *Id*. encl. (2).

request for waiver of jurisdiction through diplomatic channels."[86] The directive does not directly discuss maximization of waiver or custody.[87]

Nevertheless, from the 1953 Senate Resolution "grew our policy to secure jurisdiction whenever possible in cases where the receiving State had the primary right of jurisdiction."[88] A "Tri-Service" Secretary-level regulation adds to the language of the DoD Directive (DoDD) 5525.1, explicitly directing the U.S. military to liaison with host nation authorities and maximize of jurisdiction.[89] Consistent with this goal, "efforts will be made in all cases . . . to secure the release of an accused to the custody of U.S. authorities pending completion of all foreign judicial proceedings."[90] Finally, "military authorities will not grant a waiver of U.S. jurisdiction without prior approval of [the Judge Advocate General] of the accused's service."[91] In short, the Tri-Service regulation significantly restricted any existing DCO discretion afforded under DoDD 5525.1.

E. Operation of the Maximization Policy in Europe versus Japan

Unlike their nearly identical facial FCJ schemes, the operation of U.S. maximization policy in the NATO context differs from its application in Japan. In Europe, a number of host nations have formally agreed with the

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[86] *Id*. para. 4.5.3.

[87] *See generally* DODD 5525.1, *supra* note 82. *See also* Press Release, Backgrounder: Status of Forces Agreements, A Summary of U.S. Foreign Policy Issues (Apr. 12, 1996) (on file with author).

> U.S. military commanders . . . are directed by DoD not to consider a trial by the host country unfair merely because it is not identical with trial held in the United States. Nonetheless, if the U.S. commanding officer believes an American under his authority is not being protected under the host country's legal system because of the absence or denial of Constitutional rights the accused would enjoy in the United States, he will request that the host country waive its SOFA rights.

This guidance does not contemplate the maximization of waivers or custody. *See id*.

[88] Ruppert, *supra* note 52, at 8.

[89] TRI-SERVICE REG., *supra* note 32, para. 1-7 ("Constant efforts will be made to establish relationships and methods of operation with host country authorities that will maximize U.S. jurisdiction to the extent permitted by applicable agreements.").

[90] *Id*.

[91] *Id*. para. 1-7(c).

United States to presumptively waive all cases over which they have primary jurisdiction.[92] For example, if Germany wishes to exercise its right of primary jurisdiction over a case, they must notify the sending state within a set time limit.[93] Otherwise, they are presumed to waive.[94] Japan refused this arrangement in 1953, has not agreed to it since, and is thus presumed to exercise their primary right until they notify the United States of their intentions otherwise.[95]

The second difference lies in the practice of criminal custody. Both SOFAs facially state that where the sending state has custody of the suspect, the sending state will retain control "until he is charged by the receiving state."[96] Regardless of who has the primary right of jurisdiction, if the United States takes a SOFA person into custody before the host nation can arrest them, the United States maintains control until indictment. States such as Germany and Spain took this a step further, agreeing to relinquish pre-trial custody upon U.S. request.[97] Although the United States has reached similar agreements with non-NATO nations,[98] it has not done so with Japan.[99]

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[92] *See* FLECK ET AL., *supra* note 31, at 112–14; German Supplementary Agreement, *supra* note 69, art. 19.
[93] FLECK ET AL., *supra* note 31, at 112–14.
[94] *Id*.
[95] *Id*. at 387. An exception to this practice, albeit minor, is that the United States need not bother to inform Japanese authorities of incidents

> involving minor traffic offenses or other minor offenses, which in the opinion of the appropriate SJA/legal officer, based upon discussions with local prosecutors and police authorities and past experience, the local Japanese authorities have clearly indicated that in such cases Japanese prosecution is not contemplated and official written notices of such alleged offenses are not desired.

U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68, para. 4.4.1.2.4.
[96] NATO SOFA, *supra* note 34, art. 7, para. 5(c); U.S.-Japan SOFA, *supra* note 4, art. 17, para. 5(c).
[97] FLECK ET AL., *supra* note 31, at 118; German Supplementary Agreement, *supra* note 69, art. 22.
[98] FLECK ET AL., *supra* note 31, at 118. Based on 2001 SOFA reforms, South Korea now only immediately turns over the custody of civilians and dependents, not active duty servicemembers. *Id*.
[99] Under the U.S.-Japan SOFA Agreed Minutes, Japanese authorities agreed to relinquish such custody to the United States "unless they deem there is adequate cause and necessity to retain such offender." Agreed Minutes, *supra* note 69, art. 17, para. 5. In practice, Japanese authorities often have strong incentive to retain the offender. *See* Stone, *supra* note 17, at 255. In Germany, "where the arrest has been made by German authorities, the arrested person *shall* be handed over to the authorities of the sending State concerned if

F. Foreign Criminal Jurisdiction Practice in Japan

The Commander of U.S. Forces Japan, "establish(es) policies that maximize U.S. jurisdiction and custody."[100] Likewise, installation commanders throughout Japan are tasked with implementing "policies to maximize U.S. jurisdiction and custody of USFJ personnel."[101] Furthermore, at "all levels of command," the military will effectively liaison with "Japanese police, investigative agencies, and judicial, Ministry of Justice, and prosecutorial officials . . . in order that a maximum number of waivers of jurisdiction and releases from Japanese custody will be granted."[102] As one commentator has noted:

> Maximization of U.S. jurisdiction . . . involves a much more proactive posture than waiting until a SOFA person is facing actual charges and then requesting that the charges be waived or dropped. Procedures used within Japan to maximize U.S. jurisdiction include a variety of methods which attempt to obtain release of cases to the U.S. through a combination of non-indictments, U.S. investigation of crimes involving alleged U.S. perpetrators, lapse of time to provide a notice of intent to indict, and if necessary, waivers of cases already under indictment.[103]

Pursuant to the goal of maximizing custody,

> when both United States Armed Forces and Japanese law enforcement personnel are present on the scene where any violation of law has occurred, the arrest of [SOFA personnel] should be made by United States law enforcement personnel.[104]

Moreover, "unless the Japanese police have officially arrested the SOFA person prior to the arrival of U.S. law enforcement personnel, it is

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such authorities so request." German Supplementary Agreement, *supra* note 69, art. 22, para. 2(a) (emphasis added).

[100] U.S. FORCES JAPAN, INSTR. 31-203, LAW ENFORCEMENT PROCEDURES IN JAPAN para. 4.1.2 (24 June 2004).

[101] *Id*. para. 4.3.2.

[102] U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68, para. 3.

[103] FLECK ET AL., *supra* note 31, at 388.

[104] U.S. FORCES JAPAN, INSTR. 31-203, *supra* note 100, para. 7.2.

immaterial who arrived on the scene first."[105] Under such circumstances, U.S. law enforcement should "ensure they obtain and retain custody of personnel."[106] If Japanese police detain a SOFA person, "responding law enforcement personnel are to make a written request for custody of such members."[107] If U.S. authorities initially obtain custody, generally they must maintain it until Japanese authorities decide whether to formally indict.[108]

In addition to aggressive law enforcement approaches, SOFA procedural tactics, and creating effective liaisons with the host nation, another crucial method of maximizing jurisdiction is apology, or what implementing instructions term "condolence procedures."[109] In Japan, a harmonious community relationship is imperative,[110] placed above "abstract notions of 'just deserts' or 'debts to society' that require a particular penalty."[111] As one commentator explains, "Apology works. Confession of wrongdoing and acceptance of responsibility toward those harmed begins the process of correction," while creating a critical positive relationship with the victim.[112] Through such expressions of remorse and acceptance of accountability through compensation of the victim, the police, prosecution, and/or judge will be encouraged to "divert an offender out of the formal system and back into his or her community."[113] Furthermore, while sincere apologies for serious felony-level crimes will not keep a defendant out of prison,[114] they will often mitigate punitive impact.[115]

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[105] *Id*. para. 7.2.1.
[106] *Id.*
[107] *Id*. para. 9.2.4.1.1. The same request shall be made for members of the civilian component and dependents "unless the parent command directs otherwise." *Id*. para 9.2.4.1.2.
[108] U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68, para. 4.5.1.2.
[109] *See* U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29; COMMANDER NAVAL FORCES JAPAN, INSTR. 5820.16E, COMNAVFORJAPAN JAPANESE JURISDICTION MANUAL sec. 10 (1 Aug. 2006).
[110] JACK OWEN HALEY, THE SPIRIT OF JAPANESE LAW 85 (1998).
[111] *Id*. at 79.
[112] *Id*. at 85.
[113] *Id*. at 76. Haley asserts that a very small percentage of prosecutable cases are actually prosecuted at the criminal trial level, and that the low rate is in large part due to the "apology" dynamic. *See id*. at 79.
[114] *Id*. at 74. As would be expected, serious crimes such as homicide, drug offenses, rape, and robbery are fully prosecuted at the criminal trial level most of the time, regardless of apology. *Id*.
[115] *Id*. at 79.

United States military authorities generally embrace this concept, and not only for individual personnel. In cases of death or serious injury, senior commanders and non-commissioned officers often make official apologies, sometimes offering solatium payments with the use of command funds.[116] Such actions not only help maintain the military's relationship with the community, but may also help further U.S. jurisdictional concerns in a particular case.[117]

G. Japan's Frustration with the Maximization Policy

If favorability of an FCJ agreement is judged in terms of jurisdictional control, Japan seems to have it. With no presumption of waiver and the ability to hold the military offenders they catch, Japan has benefits that NATO SOFA signatories lack. Also, while the United States uses various methods to obtain jurisdiction, one of those methods, condolences, is harmonious with the Japanese criminal system and not a source of controversy.[118]

However, U.S. maximization policies in NATO countries tend to be non-controversial,[119] while in Japan they are perceived as "failing to deter the abhorrent behavior of American servicemen and women,"[120] and "impeding investigation and favoring the accused United States citizen."[121] Unsurprisingly, Japan exercises its primary right of

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[116] U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29, paras. 2, 3.5; COMMANDER, NAVAL FORCES JAPAN, INSTR. 5820.16E, *supra* note 109, secs. 1001–1005.

[117] *See* U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29, para. 2.

[118] *See* HALEY, *supra* note 110, at 76–77. United States and Japanese authorities have publicly promoted the relative international Japanese advantage in their criminal jurisdiction arrangements. *See, e.g.*, *Cases Highlight Custody Issues*, JAPAN TIMES ONLINE, January 18, 2006 [hereinafter *Cases Highlight Custody Issues*], http://search.japantimes.co.jp/cgi-bin/ed20060118a1.html.

[119] *See* COOLEY, *supra* note 26, at 21 n.52; Major Wes Erickson, *Highlights of Amendments to the Supplementary Agreement*, ARMY LAW., Dec. 1993, at 15. In the late 1980s Germany sought changes to NATO SOFA-based provisions that "were no longer consistent with the Federal Republic's status as an equal partner in NATO." *Id*. In 1993, negotiating parties agreed to a number of significant revisions, including the controversial issue of the U.S. military's ability to execute the death penalty inside Germany. *See id*. at 19–25. However, there was no serious push for FCJ revisions during the process of negotiation. *See id*.

[120] Jaime M. Gher, *Status of Forces Agreements: Tools to Further Effective Policy and Lessons to be Learned from the United States-Japan Agreement*, 37 U.S.F. L. REV. 227, 229 (Fall 2002).

[121] *Id*.

jurisdiction at a higher rate than NATO countries.[122] As for the U.S.-Japan custody arrangement, a scholar characterizes the Japanese perception of it as follows:

> [T]he 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 . . . . All servicemen in Okinawa know that if after committing a rape, 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.[123]

Thus, although relatively more advantageous, U.S.-Japan's FCJ applicative structure has engendered more conflict than the FCJ structure in many NATO countries. Over years of practice, the NATO's automatic jurisdiction and custody provisions seem to have become institutionalized and given predictability to criminal jurisdiction actions. Such stability is lacking in Japan. Custody often hinges on which country arrests first, engendering international tension. In addition, condolences may fail to satisfy the victim, or, due to seriousness of the crime, waiver of jurisdiction may be impossible. In such situations, the military authorities will need to use persuasion with Japanese authorities, either polite or confrontational, to obtain the jurisdiction and custody it is required to seek in every case.

The following sections analyze the unique international and domestic influences that shape Japan's approach to FCJ issues. Attempts to improve the U.S.-Japan FCJ relationship should not be based on international uniformity, but should focus on addressing Japan's unique views and their interplay with Japan's unique FCJ construct.

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[122] In a study of 1988 FCJ numbers, one legal scholar found that NATO countries waived their primary right of jurisdiction over sending state criminal suspects in 12,269 of 12,674 cases, or 96.8%. WOODLIFFE, *supra* note 39, at 184–85. Germany waived at a rate of 99.9%. *Id*. *See also* Dean, *supra* note 48, at 33 (explaining that German waiver rates increased dramatically since 1978, with rates above 99% in 1984–1985). In the same year, Japan waived their primary right at a rate of 78.5%. WOODLIFFE, *supra* note 39, at 194 n.102. Estimated Japanese waiver rates in recent years are just above 70%. E-mail from Ms. Hiromi Takahasi, Foreign Criminal Jurisdiction Liaison, Region Legal Serv. Office Japan (Mar. 2, 2011, 01:54:00 EST) (on file with author).

[123] Johnson, *supra* note 23.

III. International Considerations in U.S.-Japan Military Basing

A. Two-Level Military Basing Games

Overseas bases have been a staple of U.S. defense policy for decades, and will continue to be important "as U.S. planners reconfigure the force structure and basing posture to cope with more regionally based threats."[124] Such bases allow the United States to "flexibly and rapidly concentrate resources from diverse locations for national advantage on land, at sea, and, ultimately, in the air."[125] They are a projection of American ideals abroad, "embodiments of U.S. power, identity, and diplomacy."[126] In the modern day, U.S. military bases stabilize regions with their mere presence.[127]

However, the United States has experienced changes to overseas basing terms, changes it did not necessarily want.[128] Military basing-related agreements, including SOFAs, typically take the form of "incomplete contracts," where "many clauses . . . remain initially unspecified or . . . deferred for future negotiation."[129] Even where an agreement is clear, "states cannot take for granted that other international actors will honor agreements."[130]

Two-level game theory is a useful construct in explaining the interaction of FCJ issues with the stability of the U.S. military presence in Japan. Any two-level game includes both international and domestic players, with somewhat unique interests for each. Thus, "the political complexities for the players in [a] two-level game are staggering."[131]

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[124] COOLEY, *supra* note 26, at 4.
[125] CALDER, *supra* note 35, at 8.
[126] COOLEY, *supra* note 26, at 7.
[127] *See* CALDER, *supra* note 35, at 9.
[128] *See* Part I.A; CALDER, *supra* note 35, at 255–56 (listing the host nation ejections of military bases belonging to the United States, Russian, British, and French military bases). Since 1990, South Korea and Germany have made extensive revisions to their SOFAs. *See* Amendments to the Agreed Minutes of July 9, 1966, to the Agreement under Article IV of the Mutual Defense Treaty Between the United States and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, as Amended, July 18, 2001, U.S.-S. Korea, Jan. 18, 2001, *available at* http://www.usfk.mil/usfk/sofa; Erickson, *supra* note 119, at 15.
[129] ALEXANDER COOLEY, CONTRACTING STATES 5 (2009).
[130] *Id.*
[131] Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORGANIZATIONS 427, 434 (Summer 1988).

Depending on the issue, one player may significantly affect the negotiation process.[132] Moreover, chief negotiators may be heavily influenced by domestic opinion, as their political careers may be at risk.[133] The purpose of the game is to engage in "international cooperation . . . where it allows for a superior aggregate outcome," considering both international and domestic interests.[134] The best outcome may include both the personal utilitarian interests of the players and more altruistic notions of public welfare.[135]

A crucial part of the game of base politics is the "catalyst," the action that results in the scrutinizing of military basing and may ultimately result in changes to the host-sending state relationship.[136] The political and military actions of China and North Korea have been catalysts in shaping the current U.S.-Japan basing structure.

B. Common Threats: China and North Korea

Over the last decade, China has undergone significant military modernization, with "deployment of fourth-generation jet fighters, aerial refueling capabilities, an impressive submarine fleet, new destroyers, and . . . plans for an Airborne Warning and Control System (AWACS) and aircraft carrier," and a "strengthening of virtually all the key elements that we traditionally associate with comprehensive national power . . . ."[137] They have continued to increase military expenditures, with a "whopping increase of 18%" in their 2008 defense budget.[138] In the most recent data available from the Central Intelligence Agency's (CIA) World Factbook, covering the years of 2005 to 2006, China's military expenditures accounted for 4.3% of gross domestic product (GDP),

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[132] *Id.*
[133] *See id.* at 457–59.
[134] Joel P. Tractman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127, 154 (Summer 2010). Tractman builds on the work of international relations theorists such as Putnam and creates a new game theory model focused on predicting a state's compliance with international law. *Id.*
[135] *See id.* at 140–47. In determining compliance with a particular international rule, "the government official's objective includes both the private interest in re-election and aggregate social welfare based on altruism." *Id.* at 140.
[136] *See* CALDER, *supra* note 35, at 86.
[137] RICHARD J. SAMUELS, SECURING JAPAN 140 (2007).
[138] DAVID M. SMICK, THE WORLD IS CURVED 116 (2009).

compared to the United States' 4.06%.[139] However, the United States suspects that China's official numbers are significantly underestimated.[140]

China has put their military prowess to use. In 2005, it "adopted an anti-secession law that legalized the use of force to block Taiwan independence." [141] Japanese intelligence indicates China is anticipatorily targeting U.S. forward-deployed assets in Japan, "installing seabed sensors on likely U.S. warship-routes in the event of their deployment to Taiwan," and, despite Japanese Coast Guard resistance, conducts surveys for submarine navigation.[142]

In addition, China asserts sovereignty over the Senkaku Islands in the East China Sea.[143] These islands were administered as part of Okinawa after WWII and were undisputed until 1968, when oil deposits were discovered nearby.[144] In 1992, lacking oil resources within its territory, China claimed the islands as their own, a claim that Japan summarily rejected.[145] Moreover, China asserts that its Exclusive Economic Zone (EEZ) extends all the way to the continental shelf of Okinawa.[146] Both China and Japan have attempted exploration of Senkaku energy resources, with diplomatic disputes and minor armed fighting resulting.[147]

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[139] *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world- factbook/rankorder/2034rank.html?2034rank.html?countryName=United States&countryCode=us&regionCode=na&rank=24#us (last visited Jan. 29, 2011).

[140] *See* YUTAKA KAWASHIMA, JAPANESE FOREIGN POLICY AT A CROSSROADS 107 (2003); U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 43 (2010) [hereinafter U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA, http://www.defense.gob/pubs/pdfs/2010_CMPR_Final.pdf.

[141] SAMUELS, *supra* note 137, at 140.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 142.

[145] *Id.*

[146] *See* KENT E. CALDER, PACIFIC ALLIANCE 143 (2009); Mark J. Valencia, *The East China Sea Dispute*, 31 ASIAN PERSPECTIVE, 127, 147–49 (2007).

[147] CALDER, *supra* note 146, at 143–44.

The United States and Japan recognize these threats and have publicly reaffirmed their alliance because of them.[148] While sometimes publicly promoting a positive relationship with China,[149] the United States recognizes the Chinese are rapidly building military capabilities in order to increase "options for using military force to gain diplomatic advantage or resolve disputes in its favor."[150] The United States has declared it will continue to utilize its Navy, Air Force, and other military assets to secure its Taiwanese interests.[151] The Japanese government, at least officially, generally agrees with these assessments.[152]

North Korea is also a major international security concern. For approximately two decades, North Korea has devoted a large amount of its national resources to military advancement.[153] It possesses weapons of mass destruction and is suspected of developing nuclear weapons.[154] In resistance to "nuclear diplomacy" efforts, North Korea has, on multiple occasions, conducted ballistic missile and anti-ship missile tests in the Sea of Japan.[155] They continually test the boundaries of South Korea with military operations and have harassed U.S. reconnaissance aircraft.[156] In

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[148] *Id*. at 145; Kate Anderson Brower, *Obama Calls Alliance with Japan a Cornerstone of Security in Kan Meeting*, BLOOMBERG NEWS, Sep. 23, 2010, http://www.bloomberg.com/news/2010-09-23/obama-calls-alliance-with-japan-a-cornerstone-of-security-in-kan-meeting.html (reporting President Obama's comment that the U.S.-Japan alliance is "one of the 'cornerstones' for global security." *Id.* Foreign policy analysts have recognized the U.S. military presence there as offering "breathing room for the rest of Asia" in terms of regional stability. ZBIGNIEW BRZEZINSKI, AMERICA AND THE WORLD: CONVERSATIONS ON THE FUTURE OF AMERICAN FOREIGN POLICY 132 (2008).

[149] John D. Banusiewicz, *Gates Urges Positive U.S.-China Military Relations*, U.S. DEP'T OF DEF., June 5, 2010, www.defense.gov/news/newsarticle.aspx?id=59504.

[150] U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 140, at 1.

[151] *Id*. at 25.

[152] *See generally* KAWASHIMA, *supra* note 140, at 96–109. In addition, Kawashima discusses two fears of China: (1) its economic success dangerously enables its military capability to the detriment of the world, or (2) the Chinese economic system, and its societal order along with it, crumbles. *Id*. at 101. If either projection comes true, it will be an unprecedented international security dilemma due to its massive population of 1.3 billion, who could either serve as a strong-armed force or create an epic humanitarian disaster. *Id*.

[153] SAMUELS, *supra* note 137, at 149. Exact numbers are not available, although one estimate puts North Korea expenditures at 25% of GDP. *See Military*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/ world/dprk/budget.htm.

[154] CALDER, *supra* note 146, at 144–45.

[155] SAMUELS, *supra* note 137, at 149.

[156] *Id*.

2001, "the Japanese Coast Guard sank a North Korean spy ship, in the first incident of Japanese hostile fire since World War II."[157]

If the North Korean threat was not deemed credible in the past, the recent events have crystallized the danger. On November 23, 2010, North Korea launched artillery strikes against South Korea.[158] With this attack occurring in the wake of a March 2010 North Korean sinking of a South Korean Navy ship, the United States called North Korea's actions "the latest sign . . . of continued belligerence" and deemed the attack as dangerous and destabilizing for the region.[159] In a country where every North Korean move dominates the Japanese news,[160] Japan's Prime Minister said the country would work with South Korea and the United States to address "North Korea's reckless and dangerous acts."[161] China, who supplies North Korea with the bulk of its energy resources, effectively blocked a UN Security Council Resolution that would have condemned the North Korean attacks and its continuing uranium enrichment program.[162]

C. Differences in Foreign Policy Outlook

Although the United States and Japan have similar security concerns, one foreign policy scholar has observed that "shared interests do not translate directly into shared policy."[163]

Perhaps the most pronounced divide between U.S. and Japanese perceptions of security threats is "immediacy." With their military capabilities, North Korea and China pose a physical danger to Japanese territory and its citizens. China lacks the weaponry and force capacity to attack mainland America, and it will likely be years before they have

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[157] *Id*. at 148.
[158] Jim Garamone, Mullen: *North Korea's Unpredictability Endangers Region*, U.S. DEP'T OF DEF., Nov. 28, 2010, www.defense.gov/news/article.aspx?id=61859.
[159] *Id*.
[160] Justin McCurry, *Japan's Response to North Korea Takes on a Sharper Edge*, CHRISTIAN SCI. MONITOR, Nov. 30, 2010, www.csmonitor.com/layout/set/print/content/view/print/346190.
[161] *Id*. (quoting Japanese Prime Minister Naoto Kan).
[162] Louis Charbonneau, *U.N. Push for North Korea Condemnation Falters*, REUTERS, Nov. 30, 2010, http://www.reuters.com/article/idUSTRE6B00A520101201.
[163] SAMUELS, *supra* note 137, at 142.

such ability.[164] However, Japan is well within reach of Chinese armaments.[165] Likewise, a number of North Korean weapons are "demonstrably capable of striking Japan."[166]

Moreover, a significant contingent of Japanese politicians and bureaucrats question the practical ability of U.S. military bases to defend against such threats, as well as the U.S. willingness to do so. For example, in early 2010 when "North Korea was threatening to go ahead with a series of missile launches," reporters asked "why Defense Secretary Robert Gates openly refused to defend Japan. . . ."[167] In 2011, former Prime Minister Hatoyama publicly stated that the presence of U.S. Marine Corps bases in Okinawa were not an effective deterrent to Chinese threats.[168] In the past, other prominent officials have openly raised similar concerns.[169]

Moreover, political and cultural history influence Japan's outlook. There is a winding trail of recurrent conflict between Japan and its neighbors, and with it a permeating animosity amongst Japan, China, and North Korea.[170] Over the last two centuries, Japan and China have engaged in armed conflict on multiple occasions, including the still-controversial Sino-Japanese War of 1937–1945.[171] Although Japan has repeated overtures of remorse for this event,[172] Chinese anger

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[164] U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 140, at 29–32.
[165] *Id*. at 32.
[166] CALDER, *supra* note 35, at 144.
[167] *See* Sheila A. Smith, *More Mature Basing Policy Needed in Japan*, ASAHI SHIMBUN, Jun. 5, 2010, *available at* http://www.asahi.com/english/TKY201006040369.html.
[168] *Hatoyama was Irresponsible to Use Presence of U.S. Marines in Okinawa as a Political Maneuver*, MAINICHI DAILY NEWS, Feb. 16, 2011, *available at* http://mdn.mainichi.jp/perspectives/editorial/archive/-news/2011/02/20110216p2a00m0na001000c.html?inb=rs&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+mdn%2Fall+%28Mainichi+Daily+News+-+All+Stories%29.
[169] *See* Morihiro Hosokawa, *Are U.S. Troops in Japan Needed? Reforming the Alliance*, COUNCIL ON FOREIGN RELATIONS, FOREIGN AFF. 2 (July/August 1998); *A Dialogue with Shunji Taoka*, (Japan Policy Research Institute, Working Paper No. 31 1997), http://www.jpri.org/publications/workingpapers/wp31.html.
[170] *See* SAMUELS, *supra* note 137, at 135–56.
[171] JAPAN: A COUNTRY STUDY ch. 8 (Ronald E. Dolan & Robert L. Worden eds., 1994). This war included the brutal "Rape of Nanjing," wherein some 100,000 Chinese civilians were killed. *Id*.
[172] Shiela K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PAC. L. & POL'Y J. 23, 43–44 (2002) (describing the apology attempts made by Japanese officials and arguing their inadequacy).

continues.[173] The Japan-North Korea relationship faces similar adversity. In 2002, North Korea admitted to kidnapping at least thirteen Japanese civilians in the 1970s and 80s.[174] These kidnappings have been a prominent subject of Japanese politics.[175] In 2008, the issue created friction between Japan and the United States, when, in an attempt to improve North Korean relations, the United States removed its designation of North Korea as a sponsor of terrorism without consulting Japan.[176] Japanese leaders were infuriated.[177]

Another policy divergence stems from Japan's dependence on Middle Eastern oil.[178] In 2001, seeking to ease the burden, Japanese corporations sought and won the rights to support exploitation of a massive Iranian oil field. Japan's Prime Minister provided official assistance to the project, even after Iran was found to have a secret nuclear enrichment program.[179] Despite the U.S. Secretary of State publicly and privately admonishing the business deal and pushing Japan to cease all Iranian contacts, Japan moved forward on it "as a matter of national interest."[180] It was not until late 2006, after the UN Security Council formally demanded that Iran cease uranium-enrichment, that Japan cut most of its ties to the Iranian

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[173] SAMUELS, *supra* note 137, at 138. Samuels states that "[i]n the Chinese media, there is no mention of Japanese development assistance or investment, no recognition of sixty years of Japanese pacifism, and little acknowledgment of formal Japanese apologies for wartime aggression." Moreover, Japanese citizens tend to believe the Chinese teach only a "one-sided, patriotic version of history." *Id*.

[174] Norimitsui Onishi, *Japan Rightists Fan Fury over North Korea Abductions*, N.Y. TIMES, Dec. 17, 2006. Since the admission, more abductees have been identified and many have not been returned. *Id*.

[175] *Id*. The issue was a critical factor in Shinzo Abe's victorious Prime Ministerial 2006 campaign. *Id*.

[176] Glenn Kessler, *U.S. Drops North Korea from Terrorism List*, WASH. POST, Oct. 12, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/10/11/AR2008101100261.html. For the current list of U.S. list of "State Sponsors of Terrorism," see U.S. DEP'T OF STATE: COUNTRY REPORTS ON TERRORISM 2009, ch. 3 (2009), http://www.state.gov/s/ct/rls/crt/2009/index.htm (last visited Aug. 15, 2010).

[177] Kessler, *supra* note 176. *See also See* EMMA CHANLETT-AVERY & WESTON S. KONISHI, CONG. RESEARCH, RL 33740, THE CHANGING U.S.-JAPAN ALLIANCE: IMPLICATIONS FOR U.S. INTERESTS 21 (2009), http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA504451 ("Political turmoil in Tokyo and shifting policy approaches toward North Korea challenge the robustness of the alliance. In the short to medium-term, some predict a downturn for U.S.-Japan relations.").

[178] SAMUELS, *supra* note 137, at 153. In 2005, the Middle East supplied 90.2% of Japan's oil. *Id*.

[179] *Id*.

[180] *Id.* at 155.

deal.[181] However, Japan maintains a 10% interest in the oil field, and there remains reason to believe "that oil and the Middle East could continue to strain the alliance."[182]

Oil is not the only resource concern of Japan. In general terms, the economic interests of Japan are not necessarily aligned with those of the United States.[183] The relative monetary U.S. share of Japanese trade has steadily declined. In 2002, the United States was Japan's top trade partner.[184] By 2009, China had firmly replaced the United States in that category, with Japanese exports and imports with China nearly two times that of the United States.[185] With this trade shift, there is an increasing recognition by Japanese leaders that economic relations with China, in the long term, must remain positive.[186]

Finally, underlying all of these unique perspectives is the 1946 Japanese Constitution. Article IX of the document proclaims: "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes."[187] Consistent with this aspiration and renunciation, the Article further declares that "war potential will never be maintained."[188] This clause has perhaps been the most influential factor in modern Japanese foreign security policy.

For many decades, the clause was interpreted quite literally. For example, in 1959 a Japanese district court found the presence of U.S. Forces to be unconstitutional.[189] Likewise, in 1973, a district court found the existence of the Japanese Self-Defense Forces (JSDF) to violate

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[181] *Id.*
[182] *Id.*
[183] KENNETH B. PYLE, JAPAN RISING 338 (2007).
[184] MINISTRY OF INTERNAL AFF. & COMM., STATISTICAL HANDBOOK OF JAPAN ch. 11 (2010) (Japan).
[185] *Id.*
[186] PYLE, *supra* note 183, at 338.
[187] NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 2 (Japan).
[188] *Id.*
[189] Japan v. Sakata, Tokyo Chiho Saibansho [Tokyo D. Ct] March 39, 1959, 89 Hanrei Taimuzu 79 (Japan), *reprinted in* JAPANESE LAW IN CONTEXT 157 (Curtis J. Milhaupt, J. Mark Ramseyer & Michael K. Young eds., 2001).

Article IX.[190] Although higher Japanese courts would later reverse these decisions,[191] there remains a significant contingent of Japanese politicians and citizens who insist the clause prohibits most, if not all, military capabilities.[192]

An important consequence of Article IX has been the reluctance of the country to develop and utilize JSDF. It was not until the turn of the 21st century, in response to rising international turmoil and the September 11, 2001, attacks, that Japan engaged JSDF in non-combat support activities.[193] However, significant limitations remain due to "pacifist" political beliefs.[194] Currently, the Japanese government officially recognizes that "the Constitution allows Japan to possess the

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[190] Ito v. Minister of Agric., Forestry and Fisheries, Sapporo Chiho Saibansho [Sapporo D. Ct] Sept 7, 1973, 712 Hanrei Jiho 24 (Japan), *reprinted in* JAPANESE LAW IN CONTEXT 163 (Curtis J. Milhaupt, J. Mark Ramseyer, & Michael K. Young eds., 2001).

[191] Sakata v. Japan, Saiko Saibansho [Supreme Ct., Grand Bench] March 39, 1959, 13 Keishu 3225 (Japan), *reprinted in* JAPANESE LAW IN CONTEXT 161 (Curtis J. Milhaupt, J. Mark Ramseyer & Michael K. Young eds., 2001) (stating that "we, the people of Japan, do not maintain the so-called war potential provided in paragraph 2, Article IX of the Constitution," and that Article IX "does not prohibit our country from seeking a guarantee from another country in order to maintain the peace and security of the country. . . ."); Minister of Agric., Forestry and Fisheries v. Ito, Sapporo Koto Saibansho [Sapporo High Ct] Sept 7, 1976, 27 Gyosai Reishi 1175 (Japan), *reprinted in* JAPANESE LAW IN CONTEXT 168 (Curtis J. Milhaupt, J. Mark Ramseyer & Michael K. Young eds., 2001). The Court compared the SDF with the war capabilities of other nations, finding that the SDF was not "clearly aggressive." *Id*. On this reasoning, the court said "the primary duty of the SDF is the defense of the nation," and "is exclusively for self-defense." *Id*.

[192] *See* KAWASHIMA, *supra note* 140, at 6–7; Kosuke Takahashi, *Pyongyang Shakes up Pacifist Japan*, ASIA TIMES ONLINE, May 30, 2009, http://www.atimes.com/atimes/Japan/KE30Dh01.html.

[193] KAWASHIMA, *supra* note 140, at 8.

[194] *Id*. Kawashima notes that former Prime Minister Koizumi suggested "the opposition's legal arguments against (JSDF legal reforms) were as relevant as medieval theological debates." *Id*. Nevertheless, "the issue has not been clearly sorted out." *Id. See also* Canon Pence, *Reform of the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, 32 N.C.J. INT'L L. & COM. REG. 335 (Winter 2006) (discussing proposals of Japanese Art. IX constitutional reform and challenges to those proposals, including political and popular pacifist sentiment); *Abe Calls for Bold Review of Constitution*, N.Y. TIMES, May 3, 2007, *available at* http://www.nytimes.com/2007/05/03/world/asia/03iht-japan.1.5546774.html?_r=1 (describing polls showing continuing Japanese pacifist ideals and resistance to change of Article IX of its constitution, despite an increasingly active self-defense force); *Yomiuri Shimbun March 2008 Opinion Polls*, MAUREEN & MIKE MANSFIELD FOUND., http://www.mansfieldfdn.org/polls/2008/poll-08-06.htm (showing that a majority of Japanese do not support changing the renunciation of the war clause, nor do they support changing the clause prohibiting Japan's maintenance of armed forces capability).

minimum level of armed force" needed to exercise "Japan's inherent right to self-defense," while limiting the right based on "the principle of pacifism is enshrined in the Constitution."[195] Thus, Japan may not "possess certain armaments . . . [which] would cause its total military strength to exceed the constitutional limit," including "intercontinental ballistic missiles (ICBM), long-range strategic bombers, or attack aircraft carriers."[196] Although Japan recognizes that international law permits the right of collective self-defense, it specifically finds this right impermissible under its own Constitution.[197]

Since 9/11 in particular, the United States has encouraged Japan to effectively participate in collective self-defense.[198] If Japan were able to disregard pacifist ideology and politics, increased military operational capabilities might become a positive reality. It would appease current U.S. desires, increase Japan's ability to protect against imminent threats, and, if desired, enable the country to assert independence from the United States. On the other hand, a more militaristic Japan would have a significant "real dollar" economic cost and might alienate the United States. Also, an increase in military capacity would alarm China, resulting in increased tension between the region's powers.[199]

However, the status quo also presents potential problems for the alliance. While Japan and China harbor mutual animosity, "a number of forces encourage Beijing and Tokyo to pursue closer collaboration."[200] Foremost is economics. If an otherwise viable China-Japan economic relationship were truly threatened, Japan might see the financial costs of a reduced U.S. presence as inconsequential. Another commonality between the countries is suspicion of the United States. One analyst warns that "many Japanese leaders, as well as Chinese leaders, bridle at displays of unilateralism in U.S. policy and the hubris they often detect in official U.S. pronouncements . . . [and] empathize with China's . . . desire to check America's preponderance."[201] Another analyst posits:

> [T]he irony of the Japan-U.S. alliance is that the United States poses nearly as great a threat to Japan as any hostile neighbor

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[195] KAWASHIMA, *supra* note 140, at 8.
[196] *Id*.
[197] *Id*. at 138.
[198] SAMUELS, *supra* note 137, at 82.
[199] *See* PYLE, *supra* note 183, at 339.
[200] *Id*. at 338.
[201] *Id*.

> . . . . If Japan chooses to resist U.S. overtures to join . . . in military operations abroad or to deny the United States use of its bases, it risks abandonment. Without U.S. protection, Japan would have to increase its military spending considerably and would likely become a nuclear power itself, destabilizing the entire region. On the other hand, by joining the United States and declaring its security role to be global, Japan risks becoming entangled in wars not of its own choosing.[202]

D. Instability of the Status Quo

Fundamental to two-level game theory is the idea of win-sets: when one country enters into international negotiations, they have certain acceptable outcomes, or win-sets, that sufficiently satisfy both domestic and international concerns.[203] Each country attempting to reach an international agreement with another will have their own win-sets, and agreement between two or more countries "is possible only if . . . win-sets overlap, and the larger each win-set, the more likely they are to overlap."[204] The common security threats of China and North Korea enlarge and create overlap between the win sets of the current structure of U.S. military basing in Japan. Japan cannot effectively address those threats alone, due in part to pacifist aspects of its law, politics, and culture. However, Japan has foreign security perspectives distinct from the United States—the threats of China and North Korea are more immediate. Likewise, Japan has international trade considerations distinct from the United States—a relatively larger amount of trade with China and its differing approach to oil issues. These differences both lessen the overall size of Japan's U.S. military-basing win-set and reduce the overlap of its military basing win-set with the win-set of the United States. In turn, alternatives to the current U.S. military basing agreement, as well as the U.S-Japan alliance in general, may become more attractive. With such alternatives available, Japan's domestic issues, including the Japanese public's acceptance, or lack thereof, of the U.S.-Japan SOFA, with its attendant FCJ rules and procedures, are that much more influential in the outcome of the United States-Japan two-level military basing game.

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[202] SAMUELS, *supra* note 137, at 151.
[203] *See* Putnam, *supra* note 131, at 438.
[204] *Id.*

IV. Two-Level Game: Japan's Domestic Perspective

A. Introduction

In any two-level game, international cooperation occurs smoothly only when international agreements are domestically "ratified."[205] Ratification is not necessarily parliamentary consent, but acceptance through "[political] parties, social classes, interest groups (both economic and noneconomic), legislators, and . . . public opinion and elections . . . ."[206] It is not a one-time event, but an ongoing process in which "domestic factors can unravel previously reached agreements . . . ."[207] Generally, domestic ratification is more important in democracies than in autocracies, and one particular aspect of domestic politics may be more important than the other, depending on its influence in the domestic political system.[208]

In the decades following World War II, Japanese ruling elites "had extraordinary freedom to manage both domestic and foreign policy.[209] As the 2009 election of the DPJ demonstrated, this has changed:

> [S]everal factors [have made] the political process more responsive to electoral politics, including a sharp decline in party loyalty among voters; growing disenchantment with backroom politics; corruption, and policy failures; and electoral reforms that encouraged a more issue-oriented politics, and the proliferation of volunteer organizations. A new breed of young politicians who were more attuned to popular issues took advantage of the disarray in the bureaucracy to seize the initiative.[210]

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[205] *Id.* at 436.
[206] *Id*. at 432.
[207] JEFFREY S. LANTIS, DOMESTIC CONSTRAINTS AND THE BREAKDOWN OF INTERNATIONAL AGREEMENTS 5 (1997).
[208] *See generally* Carles Boix & Milan Svolik, Non-Tyrannical Autocracies (Apr. 2007) (unpublished paper presented at the UCLA Comparative Politics Seminar), http://www.sscnet.ucla.edu/polisci/cpworkshop/papers/Boix.pdf. An examination of U.S. military bases found that the United States places a many of its bases in non-democratic, dictatorship-led countries, and provides active support to those dictatorships. *See* CALDER, *supra* note 35, at 228. In such countries, host nation domestic influences are much less important in two-level games. *See* Boix & Svolik, *supra*, at 2–3.
[209] Pyle, *supra* note 183, at 356.
[210] *Id*. at 357.

Reflective of the trend, previously dormant non-governmental organizations (NGOs) have risen in prominence,[211] encouraged by technological advances in communication abilities and increased awareness of issues beyond one's immediate locale.[212] In particular, anti-military basing NGOs rose in influence following the 1995 Okinawa rape,[213] and now focus on several effects of military basing.[214] As information technology brings these actors together, "base politics becomes a mass political phenomenon," making base political issues "more volatile and confrontational than would otherwise be true."[215]

As in the international level of the military-basing game, catalysts are crucial on the domestic level. Several impacts of U.S. military bases serve as domestic catalysts for change, including military-related environmental degradation,[216] economic effects,[217] accidents, and crime.

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[211] KEIKO HIRATA, CIVIL SOCIETY IN JAPAN: THE GROWING ROLE OF NGOS IN TOKYO'S AID AND DEVELOPMENT POLICY 8 (2002).

[212] *Id*. at 63.

[213] CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE 42 (2000).

[214] *See* Kim D. Reimann, *Security Issues and New Transnational Peace-Related Movements in East Asia, the 1990s and 2000s*, 13 INT'L J. OF PEACE STUD. 59, 66–70 (2008).

[215] CALDER, *supra* note 35, at 165.

[216] The routine operations of Japanese military bases often cause environmental pollution in the form of "oil spills, the dispersion of pesticide, and the disposal of waste and ammunition." Hayashi Kiminori et al., *Overcoming Military Base Pollution in Asia*, ASIA-PAC. J. JAPAN FOCUS, July 13, 2009, *available at* http://www.japanfocus.org/-Hayashi-Kiminori/3185. The biggest environmental objection of the local populace has been noise pollution emanating from air bases. For decades, the Japanese civil court system has routinely rewarded significant monetary damages in cases of noise pollution throughout Japan, with the Japanese government paying these damages. *See, e.g.*, Hana Kusumoto, *Plaintiffs Unite to Fight U.S. Jet Noise in Japan, Okinawa*, STARS & STRIPES, Sep. 8, 2009, *available at* http://www.stripes.com/news/plaintiffs-unite-to-fight-u-s-jet-noise-in-japan-okinawa-1.82796 (listing a number of noise pollution lawsuits against U.S. bases and the outcomes). Additionally, there have been ongoing calls for the United States to amend the SOFA, establishing "procedures to prevent and eliminate pollution." *U.S. Willing to Mull Base-Related Environment Pact with Japan*, BREITBART NEWS, November 7, 2009, http://www.breitbart.com/article.php?id=D9BQF7J80&show_article=1. The United States has indicated a willingness to explore SOFA changes with Japan. *See id*. The Japanese government's routine compensation of victims of such damage pursuant to the U.S.-Japan SOFA seems to have limited public outrage. *See* Kiminori et al., *supra*.

[217] The foreign "security blanket" of the United States has allowed Japan to keep defense expenditures at or below 1% of GDP since 1967, a positive influence on Japan's opinion of U.S. military bases. Akira Kawasaki, *Japan's Military Spending at a Crossroads*, 33 ASIAN PERSP. 129, 131 (Meri Joyce trans., 2009). However, Japan spends more in direct support of U.S. military bases than any country in the world. '*Sympathy budget': Japan's*

While each plays an important role in the two-level game, military-related crime and accidents most ignite the passion of the populace, invoke perceptions of U.S. affront to national sovereignty, and pose the greatest danger to military-basing stability.

B. Okinawa's History of FCJ Custody Disputes

A prime example of the interaction of catalysts and the two-level game was the 1995 Okinawa[218] rape, perpetrated by three U.S. servicemembers stationed at Marine Corps Air Station, Futenma. The crime was "painful" in many senses, "shaking both the United States and Japanese governments."[219] Then-U.S. President Bill Clinton and other U.S. officials apologized to Japan.[220] Reportedly, Okinawa citizens "staged the largest protest in history against a U.S. military base."[221] In

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Extraordinary Generosity to US Forces, JAPAN PRESS, Dec. 22, 2010, http://www.japan-press.co.jp/modules/news/index.php?id=1377. In fiscal year 2010, this amounted to some ¥188 billion ($2.27 billion). *Id*. These expenditures, often called the "sympathy budget," include utilities, local base employee salaries, facilities construction, and training relocation costs. MINISTRY OF DEF., DEFENSE OF JAPAN 2009, at 295 (2009) (Japan), http://www.mod.go.jp/e/publ/w_paper/2009.html. It has been an ongoing point of controversy amongst the Japanese, with objections founded on Japanese budgetary constraints, perceptions of unfairness, and overall objections to the U.S. military presence in Japan. *See US Begs Japan for Continuation of 'Sympathy Budget,'* JAPAN PRESS, Oct. 11, 2010, http://www.japanpress.co.jp/2010/2690/usf2.html; COOLEY, *supra* note 26, at 193–95; Yoshio Shimoji, *The Futenma Base and the U.S.-Japan Controversy: an Okinawan Perspective*, ASIA-PAC. J.: JAPAN FOCUS, May 3, 2010, *available at* http://japanfocus.org/-Yoshio-SHIMOJI/3354; CALDER, *supra* note 35, at 133–36, 173–74. In the military-basing two-level game, base-related economics seems an ambiguous factor, with the overall defense savings to Japan and its local, base-supported, businesses in favor of the status quo. Other base-related expenditures and their symbolism are against it.

[218] Okinawa hosts approximately 23,000 U.S. servicemembers. *See Living in Okinawa*, III MARINE EXPEDITIONARY FORCE, MARINE CORPS BASES JAPAN, http://www.marines.mil/unit/mcbjapan/Pages/Living/Living.aspx (last visited Mar. 2, 2010). Of these, 15,000 are Marines. Eric Talmadge, *Marines in Iraq Brace for Japan Restrictions*, MARINE CORPS TIMES, Feb. 19, 2008, *available at* http://www.marinecorpstimes.com/news/2008/02/marine_080219_restrictions/.

[219] Yasutaka Hanashiro, *Rape of Schoolgirl in 1995 Is the Origin of Futenma Issue*, JAPAN TODAY, 2010, http://www.japantoday.com/category/commentary/view/rape-of-schoolgirl-in-1995-is-origin-of-futenma-issue.

[220] Brooks, *supra* note 3, at 4; Mary Lee, *U.S. Apologetic over Okinawa Rape*, CNN, Sep. 19, 1995, http://www.cnn.com/WORLD/9509/japan_rape/index.html.

[221] Gher, *supra* note 120, at 242. Estimates put the number of protestors between 85,000 and 90,000. *See id.*; *90,000 Okinawans Call for Removal of U.S. Base from Prefecture*,

addition to demanding the withdrawal of U.S. forces from Okinawa,[222] the Japanese populace asserted U.S. custody practices were unfair, affording "the accused special treatment since local investigators could not conduct a traditional Japanese interrogation."[223]

In response to public reaction to "the horrible rape,"[224] U.S. officials started talks with Japan to change both FCJ provisions of the SOFA and the distribution of force levels throughout Okinawa.[225] First, in 1995, the United States conceded part of its extraterritorial criminal jurisdiction, agreeing to "give sympathetic consideration to any request for the transfer of custody prior to indictment of the accused which may be made by Japan in specific cases of heinous crimes of murder and rape."[226] Second, in April 1996, the countries reached an agreement to close U.S. Marine Corps Air Station Futenma[227] and relocate its assets to a less populated area of Okinawa.[228] Neither agreement ended basing controversy.

JAPAN TODAY, Apr. 25, 2010, http://www.japantoday.com/category/national/view/okinawans-hold-mass-rally-seeking-removal-of-base-from-prefecture.

[222] Brooks, *supra* note 3, at 4.

[223] John W. Egan, *The Future of Criminal Jurisdiction Over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements*, 20 EMORY INT'L L. REV. 291, 334 (Spring 2006).

[224] *See Newsmaker: Walter Mondale, U.S. Ambassador to Japan*, PBS, January 16, 1996, http://www.pbs.org/newshour/bb/asia/mondale_interview_1-10.html. Ambassador Walter Mondale stated:

> We have agreed to review . . . several matters surrounding our bases in Okinawa. This was triggered by the horrible rape that you've mentioned, and we are meeting now with Japanese officials. . . . Our bases in Okinawa are very important, and over this next year, we're going to see what we can do to make certain that we're as good a neighbor as we can possibly be in Okinawa, and yet be able to do what we must do. I think we're going to be able to get that done, and I hope the people of Okinawa will see the sincerity of our efforts.

Id.

[225] *See DoD News Briefing: Dr. Joseph Nye, ASD/ISA*, U.S. DEP'T OF DEF., Oct. 27, 1995, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=184.

[226] Press Release, U.S. Embassy in Japan, *supra* note 16.

[227] This base is home to approximately 4000 U.S. Marines and Sailors. *See Futenma Marine Corps Air Station, Okinawa, Japan*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/facility/futenma.htm (last visited Mar. 2, 2011).

[228] Brooks, *supra* note 3, at 16. However, the Futenma agreement did not specify a site for relocation, an "ambiguity which would return to haunt the alliance." *Id*.

In 2001, after four days in U.S. custody, the U.S. military turned over an Air Force staff sergeant to Japanese authorities in a case of suspected rape.[229] The crime and the custody issues aggravated the Japanese, prompting a senior Japanese official to state: "[C]rimes in Japan should be treated in accordance with Japanese law. Privileges should not be applied in this case just because the suspect is a serviceman."[230] In 2002, the Okinawa governor publicly denounced a U.S. Marine Corps major's alleged attempted rape of a Japanese-Filipina national.[231] Despite requests from the central Japanese government, the United States refused to release custody of the Marine in the pre-indictment stage.[232]

United States FCJ policy was further amended in 2004, expanding pre-indictment waivers to include attempted murder and arson.[233] In return, Japan agreed to "allow a representative to be present during all stages of interrogation of a pre-indictment transferee."[234] Nevertheless, controversy continued. In 2009, the United States refused to remit pre-indictment custody of a soldier involved in a fatal hit-and-run, despite Japan's primary right of jurisdiction and the Japanese Prime Minister's public demand for custody.[235] Since the 2004 agreement did not cover this type of offense, there was no turnover, and more FCJ-based protests emerged.[236]

Over the same time period of these offenses, Okinawa continued its fight to end the U.S. military presence. All proposed Futenma relocation sites within Japan met with great resistance from local communities.[237] Moreover, many Japanese prefectural and central officials urged the removal of all U.S. forces in Okinawa despite the 1996 relocation

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[229] *U.S. Airman Jailed for Okinawa Rape*, BBC NEWS, Mar. 28, 2002, http://news.bbc.co.uk/2/hi/asia-pacific/1898004.stm.
[230] *Okinawa Rape Suspect Under Arrest*, BBC NEWS, Jul. 6, 2001, http://cdnedge.bbc.co.uk/1/hi/world/asia-pacific/1425181.stm.
[231] *See Japan Wants U.S. Marine Handed Over*, JAPAN TIMES ONLINE, Dec. 5, 2002, http://search.japantimes.co.jp/cgi-bin/nn20021205a5.html.
[232] *Id.*
[233] Stone, *supra* note 17, at 254–55.
[234] *Id.*
[235] *See U.S. Soldier 'Sorry' for Japan Hit-and-Run Death: Lawyer*, ASIAONE NEWS, Nov. 20, 2009, http://www.asiaone.com/News/AsiaOne%2BNews/World/Story/A1Story20091120-181303.html.
[236] *Okinawans Call for Handover of U.S. Serviceman over Hit-and-Run*, JAPAN TIMES ONLINE, Dec. 14, 2009, http://search.japantimes.co.jp/cgi-bin/nn20091214a2.html.
[237] Brooks, *supra* note 3, at 16–22.

agreement.[238] In the years to follow, both Japanese and U.S. politicians would argue about relocation details, with environmental and business interests asserting themselves.[239]

Finally, after years of publicly scrutinized military crime and a 2004 U.S. Futenma-based helicopter crash into Okinawa International University, an agreement was reached.[240] By 2014, Futenma operations would be relocated to Henkoku, a coastal Okinawa area in a more remote relocation.[241] Also by 2014, about 8000 Marines and their 9000 dependents would be relocated to Guam, a more than 50% reduction in Marine Corps forces in Okinawa.[242]

The post-1995-rape U.S. military basing story in Okinawa epitomized two-level game concepts. In response to a catalytic event, the domestic ratification of U.S.-Japan military basing agreements unraveled, with the populace demanding change. National-level Japanese politicians gained personal and party political capital in aggressively responding to the demands. Domestic uprisings gave Japan's leaders the bargaining leverage needed to pressure the United States to modify base agreements. Also, both the United States and Japan saw utility in preserving what it could of existing Okinawa security arrangements. The result was an international-level compromise on force number and FCJ issues.

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[238] *Id.*

[239] *See id.* at 22–37.

[240] The crash, which further angered Okinawans, did not cause any injuries to Japanese nationals. *See Background Brief on CH-53 Helicopter Accident*, U.S. EMBASSY, TOKYO, Aug. 27, 2004, http://webcache.googleusercontent.com/search?q=cache:XKYtM9oQxOUJ:tokyo.usembassy.gov/e/p/tp-20040827-61.html+Background+Brief+on+CH53+Helicopter+Accident&cd=1&hl=en&ct=clnk&gl=us&source=www.google.com. The accident was associated with SOFA revision on two fronts: (1) pursuant to implementing SOFA agreement, Japanese authorities were not allowed to investigate the crash scene; (2) U.S. servicemember crime. *See id.*; C. Douglas Lummis, *The U.S. Status of Forces Agreement and Okinawan Anger*, ASIA-PAC. J.: JAPAN FOCUS, Oct. 26, 2008, *available at* http://www.japanfocus.org/-C__Douglas-Lummis/2933. As for the criminal aspect, the case was one of "official duty," and thus one in which the United States had the primary right of jurisdiction. *See* David Allen & Chiyomi Sumida, *Okinawa Police Suggest Charges for 2004 Helicopter Crash*, STARS & STRIPES, Aug. 4, 2007, http://www.stripes.com/news/okinawa-police-suggest-charges-for-2004-helicopter-crash-1.67254. The military disciplined four Marines mechanics for "dereliction of duty." *Id.*

[241] Brooks, *supra* note 3, at 85–86.

[242] *See id.*

C. Accidents and U.S.-Japan Jurisdictional Disputes

Military-related accidents are a constant strain on the U.S.-Japan alliance.[243] Ship and aircraft crashes tend to raise the most animosity in the Japanese community.[244] Another critical source of angst is off-base car accidents involving U.S. Forces personnel. For example, in 2006 a sailor in the Tokyo-area hit and injured three Japanese children.[245] Although the Japanese police arrested the driver, the sailor's custody was quickly remitted to military authorities pursuant to a U.S. assertion of official duty.[246] While in recent years, the United States has avoided truly alliance-threatening official duty cases in Japan, such cases have occurred in other countries. For example, in 2002, several soldiers driving an armored vehicle hit and killed two teenage Korean nationals.[247] A subsequent U.S. official duty declaration prevented Korean prosecution of the vehicle operators, resulting in massive anti-American and anti-military demonstrations.[248]

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[243] One U.S. approach to accidents and potential official duty controversy has been avoidance: lowering force numbers in populated areas. Often called the "lily pad" basing strategy, it is first aimed at "creating a network of smaller bases closer to potential hot spots of the globe," with the desire of "taking the fight to the enemy." Ehsan Ahrari, *China's View of US 'Lily Pad' Strategy*, ASIA TIMES ONLINE, Aug. 24, 2004, http://www.atimes.com/atimes/China/FH24Ad04.html. In addition to these operational goals, U.S. policymakers have indicated that such bases "will minimize the U.S. military's footprint in host countries and avoid some of the social problems and accidents that surround larger bases . . . ." COOLEY, *supra* note 26, at 239. However, the United States has also expressed a reluctance to further reduce force levels in Japan. *See* Julian E. Barnes & Yuka Hayashi, *Gates Calls U.S.-Japan Ties Key to Asian Security*, WALL ST. J., Jan. 14, 2011, *available at* http://online.wsj.com/article/SB10001424052748703583404576080131813395682.html. *See also* Talmadge, *supra* note 22. Thus, for the indeterminate future, the risk of controversial accidents will continue.

[244] *See, e.g.*, Jaymes Song, *Nine Remain Missing After US Sub Hits Japanese Fishing Boat*, INDEPENDENT, Feb. 10, 2001, http://www.independent.co.uk/news/world/americas/nine-remain-missing-after-us-sub-hits-japanese-fishing-boat-691244.html; Sanechika Yoshio, *Anger Explodes as a U.S. Army Helicopter Crashes at Okinawa International University*, ASIA-PAC. J.: JAPAN FOCUS, Aug. 27, 2004, *available at* http://japanfocus.org/-Sanechika-Yoshio/1816.

[245] Allison Battdorff, *Navy on Accident: Three Kids Darted into the Street*, STARS & STRIPES, Jan. 2, 2006, *available at* http://www.stripes.com/news/navy-on-accident-three-kids-darted-into-the-street-1.43116.

[246] *See id.*; *U.S. Sailor in Hit and Run Freed Unjustifiably*, JAPAN PRESS WKLY., Jan.4, 2006, http://www.japan-press.co.jp/2006/2462/usf2.html.

[247] *See* Yougjin Jung & Jun-Shik Hwag, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT'L L. REV. 1103, 1105 (2003).

[248] *Id.*

Not all accidents will implicate FCJ concerns. In some, such as negligent ship collisions and airplane crashes, the nexus between the duty and the accident will be high, as will U.S. operational interests in exercising as much jurisdiction as possible. However, the U.S. definition of official duty is expansive, "and one that American authorities tend to broaden even further to the greatest extent possible, precisely in order to assert the primary right to exercise jurisdiction in the greatest number of cases."[249] If a traffic accident explodes into international conflict, the Tri-Service regulation limits the ability of U.S. military officials to weigh U.S. interests in a particular case, and potentially surrender jurisdiction.[250] In turn, this creates a risk of unnecessary aggravation of the host nation populace.

D. Two-Level Games in Mainland Japan

Foreign policy analysts have sometimes viewed mainland Japan[251] and Okinawa as two separate issues.[252] Unlike mainland Japan, Okinawa was the sight of brutal World War II battles and under U.S. military control until 1972, "infusing its antimilitarist culture with a sense of betrayal of mainland Japan, as well as resentment toward contemporary U.S. military presence."[253] Okinawa is a small island with a relatively larger per capita United States basing presence, while mainland Japan's central government deals directly with the United States and is thus relatively more influenced by international pressures.[254]

Thus, historically, catalytic incidents on mainland Japan have produced relatively less political opposition to basing arrangements.[255]

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[249] LAZAREFF, *supra* note 70, at 172.

[250] *See* TRI-SERVICE REG., *supra* note 32, at 1-7(c) ("Military authorities will not grant a waiver of U.S. jurisdiction without prior approval of TJAG of the accused's service.").

[251] Mainland Japan hosts U.S. Naval Base in Yokosuka City, a base supporting 24,000 active duty servicemembers, civilians, and dependents. *See About*, CNIC, COMMANDER FLEET ACTIVITIES YOKOSUKA, https://www.cnic.navy.mil/Yokosuka/AboutCNIC/index.htm (last visited Jan 9, 2011).

[252] *See, e.g.*, Alexander Cooley & Kimberly Martin, *Base Motives: The Political Economy of Okinawa's Antimilitarism*, 32 ARMED FORCES & SOC'Y 566 (July 2006).

[253] *Id*. at 568–69.

[254] *See id*. at 572.

[255] *See* James Brooke, *Sailor's Case Reflects a Shift in U.S. Image for Japanese*, N.Y. TIMES, Jan. 23, 2006, *available at* http://www.nytimes.com/2006/01/23/international/asia/23sailor.html?_r=1 (noting the gap in attitudes in Yokosuka and Okinawa following

However, the mainland's two-level game is no longer this simple. In 2006, an intoxicated sailor from Yokosuka robbed a middle-aged female local national, fatally beating her in the process.[256] The incident prompted public apologies from a number of senior U.S. officials, including the Secretary of Defense.[257] Although there was concern the incident would have serious negative impacts on military relations in the mainland area,[258] Japanese media scrutiny, protests, and calls for reform were relatively limited.[259] Nevertheless, the Japanese judge presiding over the case stated that the killing "shocked residents near the base and caused them great anxiety,"[260] and the Yokosuka City Assembly demanded reform of the FCJ provisions of the U.S.-Japan SOFA.[261]

A subsequent murder created more controversy. On March 19, 2008, a U.S. Navy deserter used a large kitchen knife to stab a taxi driver, thereby avoiding payment of the taxi fare.[262] The incident angered local residents, who demanded that "U.S. forces strengthen their supervision of servicemen. . . ." The Yokosuka mayor publicly demanded that in the future the United States notify the Japanese government of deserting servicemembers.[263] Japan's Foreign Minister urged the U.S. Ambassador

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a murder perpetrated by a U.S.-based sailor and the relatively little media coverage it received in the mainland press); COOLEY, *supra* note 26, at 210–11 (discussing the contrasts between Tokyo and Okinawa in the context of U.S. servicemember criminal incidents).

[256] *U.S. Sailor Convicted of Murder in Japan*, USA TODAY, June 2, 2006, *available at* http://www.usatoday.com/news/world/2006-06-02-sailor-murder_x.htm. This incident marked the first murder case in which the United States relinquished pre-indictment custody of U.S. servicemember to Japanese authorities pursuant to the 1995 post-Okinawa rape agreement. Chris Hogg, *Japan Jails US Sailor for Murder*, BBC NEWS, June 2, 2006, http://news.bbc.co.uk/2/hi/asia-pacific/5039754.stm.

[257] *Rumsfeld, Top U.S. Brass Regret Slaying*, JAPAN TIMES ONLINE, Jan. 13, 2006, http://search.japantimes.co.jp/cgi-bin/nn20060113a4.html.

[258] Sheila Smith, *Arrest of U.S. Sailor in Japan Murder Case Complicates U.S.-Japan Realignment Efforts*, EAST-WEST CTR., Jan. 9, 2006, http://www.eastwestcenter.org/news-center/east-west-wire/archived-news-wires/?class_call=view&news_ID=306.

[259] *See* Brooke, *supra* note 255.

[260] *U.S. Sailor Convicted of Murder in Japan*, *supra* note 256.

[261] Hana Kusumoto & Allison Batdorff, *Yokosuka City Lawmakers Call for SOFA Revision*, STARS & STRIPES, Mar. 10, 2006, *available at* http://www.stripes.com/news/yokosuka-city-lawmakers-call-for-sofa-revision-1.46037. The USFJ public affairs response: "the SOFA does not need revision . . . . The SOFA is a document that was drafted with great care and deliberation, and has been an effective instrument for many years." *Id.*

[262] *See U.S. Sailor Held Over Taxi Murder*, DAILY YOMIURI (Tokyo), Apr. 4, 2008, at 1.

[263] Zenta Uchida, Yasushi Kaneko & Satoshi Ogawa, *U.S. Side Failed to Reveal Desertion in Time*, DAILY YOMIURI (Tokyo), Apr. 5, 2008, at 3; *Yokosuka Residents Angered at Alleged Murder by U.S. Sailor*, JAPAN TODAY, Apr. 3, 2008, http://www.japan

to "do something about discipline."[264] The then-leading opposition party, the DPJ, asked for revision of the SOFA, including FCJ procedures.[265] Although a major revision would not happen, the United States agreed to immediately notify Japan of any servicemembers entering a deserter status.[266]

The mainland murders did not generate the same angst in Tokyo as they would have in Okinawa. However, there seemed to be a slight shift in Tokyo's two-level game, with central government politicians gaining mainland support for proposed changes in U.S.-Japan basing agreements. Moreover, by the time of the 2009 elections, Okinawa's concerns had clearly become a Tokyo matter. Military basing issues played a prominent role in the DPJ's historic victory, including promises of FCJ revisions and the outright closure of Futenma in addition to the Guam move.[267]

However, the United States refused to lose any more troops in Okinawa, firmly standing behind the 2006 Futenma relocation agreement.[268] The DPJ's Prime Minister Hatoyama would be forced to resign due to his failure to deliver on his Futenma promises and divisions within the relatively new DPJ.[269] New leadership would take a more U.S.-friendly tact, further reinforced by North Korea's frightening use of

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today.com/category/crime/view/yokosuka-residents-angered-at-alleged-murder-by-us-sailor.

[264] Blaine Harden, *U.S. Sailor's Murder Reignites Anger in Japan*, WASH. POST, Apr. 4, 2008, at 15.

[265] *Envoy Says No Need to Revise Accord on U.S. Forces over Crimes*, FREE LIBR., Apr. 7, 2008, http://www.thefreelibrary.com/LEAD%3A+Envoy+says+no+need+to+revise+accord+on+U.S.+forces+over+crimes.-a0177990360.

[266] Reiji Yoshida, *U.S. to Notify Japan About Any Deserters*, JAPAN TIMES ONLINE, Apr. 12, 2008, http://search.japantimes.co.jp/cgi-bin/nn20080412a1.html.

[267] *See* Daniel Leussink, *Okinawans Try to Vote Base Out*, ASIA TIMES ONLINE, Dec. 2, 2010, http://www.atimes.com/atimes/Japan/LL02Dh01.html; Wendell Minnick, *U.S. Military Relations with Japan will Remain Tricky*, DEF. NEWS, Dec. 14, 2009, *available at* http://www.defensenews.com/story.php?i=4417465; John Brinsley, *Hatoyama Seeks "Yukio-Obama" Rapport, China Ties*, BLOOMBERG, Sep. 1, 2009, http://.bloomberg.com/apps/news?pid=newsarchive&sid=aMQHSVfm4asE; *Japan's August 30 Parliamentary Election*, COUNCIL ON FOREIGN REL., Aug. 27, 2009, http://www.cfr.org/japan/japans-august-30th-parliamentary-election/p20104.

[268] CHANLETT-AVERY ET AL., *supra* note 8, at 2.

[269] *See generally* Terashima Jitsuro, *The U.S.-Japan Alliance Must Evolve: The Futenma Flip-Flop, the Hatoyama Failure, and the Future*, ASIA-PAC. J.: JAPAN FOCUS (John Junkerman trans., Aug. 9, 2010), *available at* http://www.japanfocus.org/-Terashima-Jitsuro/3398.

force against South Korea.[270] Nevertheless, the United States continues to be concerned with the future direction of the ruling DPJ, including its continuing policy stances on SOFA revision and cutting financial support of U.S. military basing.[271] Prime Minister Hatoyama's ambitious stances may well be seen as "a historic pivot in Japan that many view as inevitable: a gradual but unmistakable reordering of Tokyo's relationship with Washington and a reorientation of its foreign policy with an emphasis on the emerging power in East Asia."[272]

E. Role of FCJ since the 1995 rape

Some observers have downplayed the role of servicemember crime and FCJ in U.S. military basing-stability, claiming one particular criminal incident "rarely [has] long-term political repercussions."[273] However, the 1995 rape was the "one exception to this pattern,"[274] seeming to jumpstart the engine of military-basing protest in Japan. Since then, the seriousness and numbers of military-related crimes have not necessarily worsened,[275] yet each publicized crime has seemed to accelerate the engine of protest. After a 2008 U.S. Marine's alleged rape of a Japanese female, an activist effectively summed up this accumulative effect: "The U.S. military apologizes and promises us that it won't happen again, but it always does."[276]

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[270] *See* Kosuke Takahashi, *Testing Times for Japan-South Korea Ties*, ASIA TIMES ONLINE, Jan. 12, 2011, http://www.atimes.com/atimes/Japan/MA12Dh01.html; *U.S., Japan, South Korea Reply to Pyongyang in Unison*, NEWSROOM MAG., Dec. 8, 2010, *available at* http://newsroom-magazine.com/2010/governance/state-department/u-s-japan-south-korea-reply-to-pyongyang-in-unison/.

[271] EMMA CHANLETT-AVERY ET AL., CONG. RESEARCH SERV., RL33436, JAPANESE-U.S. RELATIONS: ISSUES FOR CONGRESS 9 (Oct. 6, 2010), http://assets.opencrs.com/rpts/RL33436_20101006.pdf.

[272] Bill Powell, *Hatoyama Failed as PM but Set Japan on a New Course*, TIME, Jan. 2, 2010, *available at* http://www.time.com/time/world/article/0,8599,1993402,00.html#ixzz1FHWLX6Pm.

[273] *See* COOLEY, *supra* note 26, at 260.

[274] *See id.*

[275] *See U.S. Troops in Japan Commit Less Crimes than Locals*, GOOGLE NEWS, July 15, 2008, http://afp.google.com/article/ALeqM5h7soxV14UlCnBFzEPsI9b8BCcMCw ("US forces in Japan commit half as many serious crimes on average as the general public, their commander said."). *See also* Jiyoung Cha, *Comparison and Analysis of Korea and Japan Status of Forces Agreements and Their Implications for Iraq's SOFA*, 18 CARDOZO J. INT'L & COMP. L. 487, 516 (Spring 2010). ("Between 1972 and 1995, there were over 4,500 U.S. military crimes against [Okinawa] locals, including 12 murders.").

[276] Justin McCurry, *Rice Says Sorry of US Troop Behaviour on Okinawa as Crimes Shake Alliance with Japan*, GUARDIAN, Feb. 28, 2008, at A17.

In some of these criminal cases, maximization policies have been truly at issue. In others, they have not. Yet, as exemplified in 2009 DPJ platforms, Japanese media and political groups now associate many FCJ-irrelevant criminal cases, as well as non-criminal basing issues, with FCJ revision.[277] In short, U.S. maximization policy represents more than de facto jurisdictional control. It is one of the symbols of all perceived negative impacts of U.S. military bases, ingrained into the core of Japanese anti-base discourse.

F. Domestic Ratification and U.S.-Japan Bargaining

In the sense of domestic acceptance, U.S.-Japan FCJ arrangements can no longer be considered "ratified." After the 1995 and 2004 reforms to FCJ practice, calls for revision have continued. U.S. measures to lessen both the frequency of servicemember crime and its quantitative military basing presence have not stopped the calls for reform. This in turn has changed the cooperative dynamics of the U.S.-Japan alliance, empowering Japanese negotiators when pushed to the bargaining table for renegotiation of military basing terms.

A critical concept in two-level games is the bargaining notion of "domestic constraints." An international agreement cannot be successful unless one party's international win set overlaps with its domestic win

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[277] *See, e.g.*, David Allen & Chiyomi Sumida, *Okinawa Official in U.S. for SOFA, Futenma Talks*, STARS & STRIPES, Nov. 6 2009, *available at* http://www.stripes.com/news/okinawa-official-in-u-s-for-sofa-futenma-talks-1.96166 (associating FCJ issues, SOFA environmental provisions, and Futenma relocation); Yoshida, *supra* note 266 (associating the 2008 Yokosuka murder, custody turnover, and SOFA revision with political opposition to extension of "Japan's host nation support budget for U.S. military installations"); David Allen & Chiyomi Sumida, *Japanese Officials Propose SOFA Revisions*, STARS & STRIPES, Mar. 16, 2008, *available at* http://www.stripes.com/news/japanese-officials-propose-sofa-revisions-1.76448 (describing Japanese political proposal to reform FCJ in response to an alleged rape, a rape in which Japanese police arrested the military suspect before the United States, nullifying potential FCJ issues); *Cases Highlight Custody Issues*, *supra* note 118 (associating the quick custody turnover in the Yokosuka 2006 murder with the future stationing of a U.S. nuclear-powered aircraft carrier at Yokosuka Naval Base); John R. Anderson, *Okinawa Governor Making Drastic New Proposal in Fight Over U.S. Military Presence*, STARS & STRIPES, Mar. 19, 2005, *available at* http://www.stripes.com/news/okinawa-governor-making-drastic-new-proposal-in-fight-over-u-s-military-presence-1.30697 (associating FCJ reform and the removal of all Marines from Okinawa).

set.[278] On the international-level of U.S.-Japanese basing negotiations, the domestic non-ratification of FCJ arrangements constrains the Japanese negotiator. Assuming the overall goal of the United States is the status quo, this constraint narrows the overlap of U.S.-Japanese international-level win-set. With lesser options available, the Japanese negotiator is better able to "coax a deal from their counterparts closer to their preferred outcome."[279] Concurrently, however, there is an increase in the danger of both non-agreement and inefficient agreement.[280]

Of course, Japan's side of the game is full of influences other than U.S. maximization policy. Since the DPJ's 2009 election, variables such as Japan's international security concerns have risen in importance, reducing the influence of the FCJ variable. However, as the last 15 years demonstrate, the FCJ issue has been firmly established as a constant and crucial variable in military-basing equation, one that can rise to dominance at any time.

V. Two-Level Game: U.S. Interests

A. Introduction

The U.S. rationale for its military bases in Japan is foremostly an international one: such basing furthers critical U.S. security interests. As in Japan's two-level game, the U.S. Government "must often reconcile obligations to domestic interest groups with the demands of international relations."[281] The rationales for adherence to its maximization policy are both international and domestic in character. This section first analyzes the validity of the idea that U.S. maximization policy promotes good order and discipline and is consistent with U.S. moral obligations toward its SOFA personnel. Next, it examines a purported U.S. fear underlying

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[278] Putnam, *supra* note 131, at 437–38. *See also* Tom Ginsburg, *National Courts Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, 20 EUR. J. INT'L L. 1021, 1024 (2009).

[279] *See* Chien-Peng Chung, *Resolving China's Island Disputes: A Two-Level Game Analysis*, 12 J. CHINESE POL. SCI. 49, 51 (2007).

[280] *See* Robert J.Schmidt, *International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission*, 26 ENVTL. L. 95, 117 (Spring 1996).

[281] Dafna Hochman, *Rehabilitating a Rogue: Libya's WMD Reversal and Lessons for US Policy*, PERSP. 63, 70 (Spring 2006).

both these notions: "[United States] servicemen would receive second-class justice at the hands of foreign courts."[282]

B. "Military Good Order" and "Morality" Rationales

Some assert the maximization policy is intended to maintain the "good order and discipline" of its forces, thereby making those stationed abroad more effective in all missions, including the furthering of U.S. international security interests.[283] Under this rationale, the jurisdiction of a host nation will unduly "limit the commander's disciplinary powers over the force."[284] In addition, "it creates a situation where U.S. forces personnel . . . are subject to unfamiliar laws and procedures of another country. This can affect morale and be extraordinarily time consuming for the command."[285]

These propositions are questionable. As for discipline, intuitively, the possibility of prosecution in a foreign criminal system is a significant deterrent. Wresting jurisdiction from host nation authorities may decrease the incentive a member has to avoid off-base violations of host nation law, contradicting a critical goal of any military unit stationed abroad.[286] As for host nation exercise of jurisdiction being "extraordinarily time consuming," there are arguably as many or more military resources invested in trying to obtain custody and jurisdiction than would be if these matters were merely ceded to the host nation.[287] Finally, insofar as "morale" is impacted by facing "unfamiliar laws and procedures of another country," this is already rectified through current procedures utilized in those many cases where the host nation fully exercises its right to primary jurisdiction. In Japan, such forms of assistance include an explanation of rights prior to every case, translator assistance, trial observation, and command assistance in meeting with Japanese authorities and victims.[288]

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[282] WOODLIFFE, *supra* note 39, at 182.
[283] *See* AIR FORCE OPERATIONS & THE LAW, *supra* note 57, at 151.
[284] *Id*. at 151.
[285] *Id*.
[286] *See* U.S.-Japan SOFA, *supra* note 4, art. 16 ("It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of Japan and to abstain from any activity inconsistent with the spirit of this Agreement . . . .").
[287] *See* FLECK ET AL., *supra* note 31, at 388; *infra* Part II.F.
[288] *See* U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68.

A second rationale stems from nationalistic and moral motives: it is wrong for the United States to order a soldier abroad and then willingly subject that soldier to a foreign criminal system.[289] Unfortunately, military soldiers are often subject to the reprehensible conditions of foreign systems, facing potential imprisonment and death at the hands of the enemy. While risk mitigation is undertaken to the fullest extent, U.S. soldiers bravely volunteer to face these dangers in the name of American national and international interests. Through the FCJ scheme of the SOFA itself and its 1995 and 2004 FCJ policy changes, the United States has negotiated away much of the risk protection in exchange for the ability to maintain military assets in Japan. Over the decades that have followed, in Japan and in other states, the trend of whittling away these protections has continued.[290] Moral or not, it is a fact that soldiers are subject to foreign systems of criminal justice.

Underlying both the "good order and discipline" and "morality" arguments is the perceived unfairness of Japanese system of criminal justice. If a host nation's criminal system carries with it unfair procedures and punishments, soldiers tried under that system might question the proportionality of their punishment in relation to their fellow soldiers. Moreover, servicemembers and civilians alike may experience lowered morale if subject to an unjust system.

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[289] In the 1953 Senate debate of the NATO SOFA, one senator's comments reflected this moralistic sentiment: "there is a general feeling, or some feeling among members, and I think perhaps the American people, that when a serviceman abroad is charged with a crime by that country, that somehow he is just thrown by us to the wolves and we have lost him, forgotten him, have no interest in him." Williams, *supra* note 76, at 14 (quoting Representative Harrison Williams, 86th Cong., 1st Sess. 20 (1959)).

[290] *See generally* Egan, *supra* note 223 (analyzing recent changes in the FCJ provisions of a number of bilateral SOFAs, which show a tendency toward changes in favor of host nation interests).

C. Perceived Unfairness of Japan's Criminal Justice System

1. Criticisms

On the surface, the American and Japanese systems of justice appear to have much in common. Japanese trials "are open to the public, and after the judge provides the defendant with his or her rights . . . the procurator and the defense present their cases."[291] Although "vestiges of inquisitorial procedure remain," the Japanese prosecutor has greater discretion than his European counterparts to dismiss cases, a discretion "similar to the power of the American prosecutor."[292] Furthermore, the two systems afford similar procedural rights.[293]

Differences arise because U.S. and Japanese courts "have not interpreted [criminal justice] provisions similarly."[294] Proponents of FCJ status quo assert the Japanese criminal system is "structurally deficient and incompatible with the American idea of due process and an individual's right to defend themselves."[295] The system places an overemphasis on confessions, and "the . . . orientation of the Japanese criminal system towards rehabilitation and reintegration instead of punishment" is not consistent with ideals of the American system.[296] This in turn constitutes "fodder for critics who argue that the Japanese system's effect is to treat foreigners unfairly."[297] One legal scholar has

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[291] HARRY R. DARMER, ERIKA FAIRCHILD & JAY S. ALBANESE, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 156 (3d 2006).
[292] *Id*. at 157.
[293] J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE 99 (2003).

> Although courts hesitate to mandate a blanket exclusionary rule, they do exclude confessions on reliability grounds, they impose a presumption of innocence, and they demand proof at levels close to the reasonable doubt standard at U.S. trials. They enforce a right to counsel at trial (with state-appointed counsel for the poor), a right to remain silent, and a right to interrogate witnesses, and they require warrants for searches and seizures. . . . Moreover, if defendants do happen to be acquitted at trial, they receive indemnity from the state as compensation for their trouble, unlike in the United States . . . ."

Id.
[294] PHILIP A. REICHEL, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 373 (1994).
[295] Stone, *supra* note 17, at 238.
[296] Lieutenant Commander Ian Wexler, *A Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq*, 56 NAVAL L. REV. 43, 67 (2008).
[297] *Id.*

compared Japanese criminal procedure with that of Iraq, citing a common "ingrained lack of an adversarial relationship between the defense and the government during the investigatory and subsequent phases of the criminal trial," one in which the "governments' version of events go virtually unchallenged."[298] Furthermore, "detentions in Japan can last as long as 23 days without access to an attorney, and physical abuse and food deprivation are not uncommon,"[299] Finally, Japanese trials are a mere judicial ratification of prosecutorial and police actions.[300] For these reasons, the U.S. military is reluctant "to turn over U.S. servicemembers to Japanese authorities."[301]

The following sections evaluate the current validity of these assertions. Japanese justice is fairer than critics allege.

2. Arrest and Bail

The most common source of criticism of Japanese criminal procedure stems from its pre-indictment detention system. As in the United States, the general rule in Japan is that arrest requires a judge-issued warrant substantiated with probable cause.[302] According to the U.S. Department of State, Japanese officials properly review warrants prior to issuance.[303] Unlike criminal suspects in the United States, where "arrest initiates most criminal cases,"[304] Japanese law enforcement arrests approximately 20% of suspects.[305] This reflects Japan's "institutionalization of informal sanctioning," where it is preferred to dispose of crimes through the process of apology and compensation,[306] a system conducive with U.S.

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[298] *Id.* at 68.
[299] *Id.* at 67.
[300] Stone, *supra* note 17, at 239.
[301] Wexler, *supra* note 296, at 67.
[302] UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, CRIMINAL JUSTICE IN JAPAN 17 (2004) [hereinafter UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS]. Japanese exceptions to the warrant requirement include the ability to apprehend an offender who is committing or has just committed a suspected crime, and suspected serious offenses where, due to "great urgency," a warrant cannot be obtained. *Id*.
[303] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN (Mar. 11, 2010), http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135993.htm ("Persons were apprehended openly with warrants based on sufficient evidence issued by a duly authorized official.").
[304] DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE 13–14 (2002).
[305] *Id*.
[306] REICHEL, *supra* note 294, at 374–75.

interests in jurisdictional control.[307] Moreover, in the minority of cases where Japan does make an arrest, more than half are pursuant to judicially approved warrants,[308] while 95% of U.S. arrests are without warrant.[309] Finally, upon arrest, Japanese police "must immediately inform [the suspect] of the alleged offense and their right to defense counsel."[310]

Once arrested, Japanese detention procedures resemble those of U.S. military pre-trial confinement (PTC). In Japan, police may hold a suspect for twenty-four hours prior to prosecutorial review, and a total of seventy-two hours prior to judicial review. [311] A U.S. military commander reviews pre-trial confinement at the forty-eight and 72-hour intervals,[312] with independent review by a "neutral and detached officer" not required for seven days.[313] The Japanese judicial review and U.S. military officer review have consistent legal standards: reasonable grounds/probable cause to believe the suspect committed the offense and may flee or may commit another offense.[314] Unsurprisingly, the suspect's chance of release is slim under both the Japanese[315] and military

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[307] *See* U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29, paras. 2, 3.5.

[308] In 2007, Japanese police obtained a warrant in 50.1% of all arrests. *See* NAT'L POLICE AGENCY, CRIMES IN JAPAN IN 2007, at 82 (Police Poly Res. Ctr. Nat'l Police Acad. & Alumni Ass'n for the Nat'l Police Acad. eds., Oct. 8, 2008), http://www.npa.go.jp/english/seisaku5/20081008.pdf.

[309] ROLANDO V. DEL CARMEN, CRIMINAL PROCEDURE: LAW AND PRACTICE 184 (7th 2007).

[310] UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 302, at 17. *See also* MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 168 (1999).

[311] UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 302, at 18.

[312] *See* Major Brian P. Gavula, *Locking Down Pretrial Confinement Review: An Argument for Realigning RCM 305 with the Constitution*, 202 MIL. L. REV. 1, 1–6 (Winter 2009).

[313] *Id*. Not all military services require the military reviewing officer to have legal training. *See id.*

[314] Under Japanese law, a judge may order continued detention if "there are reasonable grounds to believe that the suspect has committed the offense, and: (1) the suspect has no fixed dwelling; (2) there are grounds to believe the suspect may destroy evidence; or (3) there are grounds to believe the suspect may try to escape." UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 302, at 18. Under the UCMJ, the reviewing officer must have probable cause to believe the suspect committed a triable offense, and further confinement is needed because the suspect may not appear at trial or will engage in serious misconduct. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (2012) [hereinafter MCM].

[315] JOHNSON, *supra* note 304, at 62 (stating that in 1992, Japanese judges refused 1 out of every 705 prosecutorial detention requests).

systems.[316] Once arrested, Japanese prosecutors must either indict or release the suspect within 23 days,[317] while under the military system preferral and referral of charges is subject to lengthier speedy trial rules.[318]

Another criticized aspect of the detention process is the lack of bail.[319] In Japan, the right to bail attaches after an indictment is made,[320] which Japanese courts usually grant at a rate of nearly 20%.[321] This rate is near percentages of the U.S. Federal system,[322] and reflects a much better probability of bail than that of military-based PTC, which carries no right to bail.[323] Moreover, the U.S. military will potentially provide assistance

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[316] *See* Gavula, *supra* note 312, at 33–35 (explaining that the forty-eight and seventy-two-hour reviews are not meaningful and the seven-day review is often a matter of "checking the block").

[317] UN & FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 302, at 18.

[318] A servicemember placed in military pretrial confinement need not be charged and tried until 120 days after confinement, subject to excludable delay and the requirement of prosecutorial "reasonable diligence." *See* Colonel Tomas G. Becker, USAF, *Games Lawyers Play, Pre-Preferral Delay, Due Process, and the Myth of Speedy Trial in the Military Justice System*, 45 A.F. L. REV. 1, 14–20 (1998); MCM, *supra* note 315, R.C.M. 707(a); 10 U.S.C. § 810 (2006). In Japan, while a detainee must be formally charged within three weeks of arrest, there is no absolute speedy trial requirement. In 2007, the average trial length, including trials for those not under arrest, was three months. SUPREME CT. OF JAPAN, TABLE 3 ANNUAL COMPARISON OF THE OF PERIOD TIME FOR TRIALS, AVERAGE TERM OF TRIALS, AND AVERAGE NUMBER AND INTERVAL OF TRIAL DATES, http://www.courts.go.jp/english/proceedings/pdf/statistics_criminal_cases/table03.pdf (last visited Mar. 14, 2011). Although the United States does not often express "speedy trial" concerns given the U.S.-Japan SOFA's special procedural rights, see *supra* note 347, the newly instituted lay-judge system is expected to further speed up trials. *See* Matthew Wilson, *The Dawn of Criminal Jury Trials in Japan: Success on the Horizon*, WIS. INT'L L. J. 835, 857 (2007); Part V.C, *supra*.

[319] *See* Melissa Clack, *Caught Between Hope and Despair: An Analysis of the Japanese Criminal Justice System*, 31 DENV. J. INT'L L. & POL'Y 525, 535 (Fall 2003).

[320] JOHNSON, *supra* note 304, at 62.

[321] *See id.* In 2007, of those Japanese police arrested, detained for twenty-three days, and actually prosecuted at public trial, 18% were released prior to trial, 86% of whom were freed pursuant to bail. MINISTRY OF JUST., WHITE PAPER ON CRIME 2008: CIRCUMSTANCES AND ATTRIBUTES OF ELDERLY OFFENDERS AND THEIR TREATMENT pt. 2, ch. 3, sec. 3 (Nov. 2008) [hereinafter WHITE PAPER ON CRIME 2008], *available at* http://hakusyo1.moj.go.jp/en/57/nfm/mokuji.html.

[322] In 2008, defendants arrested and pending Federal charges were granted pretrial release in 28.5% of cases. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231822, FEDERAL JUSTICE STATISTICS 2008-STATISTICAL TABLES tbl.3.1 (Nov. 2010), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1745.

[323] Gavula, *supra* note 312, at 30. Under State systems, a military servicemember would have a better chance of release: In 2004, of felony defendants in the seventy-five largest

in both obtaining and funding bail.[324] Regardless, bail is often a non-issue—while prosecutorial discretion in Japan is frequently criticized, it has its benefits. Once a case reaches the prosecutorial level, prosecutors may "'suspend' prosecution [prior to trial] or simply drop the charges,"[325] even when they believe the case has enough evidence to support a successful prosecution.[326] In 2007, prosecutors disposed of approximately 50% of their cases in this manner.[327]

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urban U.S. counties, 58% were released prior to trial. THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228944, STATE COURT PROCESSING STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 6 (May 2010), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2193. There are many likely reasons for the difference between U.S. state and federal rates: (1) state rates include misdemeanors and less severe crimes than are typical in the federal sphere; (2) the 1984 Bail Reform Act places a relatively higher burden on federal defendants; and (3) immigration offenses somewhat raise the federal rate. *See* Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 46–53 (2005).

[324] U.S. FORCES JAPAN, INSTR. 51-1, *supra* note 68, para. 4.5.3. For examples of SOFA personnel granted bail under the Japanese system, see, e.g., Chiyomi Sumida, *Soldier Charged in Okinawa Traffic Death Granted Bail*, STARS & STRIPES, Apr. 9, 2009, *available at* http://www.stripes.com/news/soldier-charged-in-okinawa-traffic-death-granted-bail-1.100644; Allison Batdorff & Hana Kusumoto, *Yokosuka Civilian Released on Bond*, STARS & STRIPES, Feb. 25, 2007, *available at* http://www.stripes.com/news/yokosuka-civilian-released-on-bond-1.60801; Chiyomi Sumida, *Three-Year Sentence Sought for Man Who Kept Rifles in Okinawa Home*, STARS & STRIPES, Jul. 23, 2006, *available at* http://www.stripes.com/news/three-year-sentence-sought-for-man-who-kept-rifles-in-okinawa-home-1.51909; Erik Slavin, *Japan's High Court Blocks Marine's Appeal*, STARS & STRIPES, Jul. 9, 2005, *available at* http://www.stripes.com/news/japan-s-high-court-blocks-marine-s-appeal-1.35572.

[325] CARL F. GOODMAN, THE RULE OF LAW IN JAPAN 412 (2d ed. 2008).

[326] Motoo Noguchi, *Criminal Justice in Asia and Japan and the International Criminal Court*, 6 INT'L CRIM. L. REV. 585 (2006). In 2004, "the rate of non-prosecution of cases that [had] sufficient evidence . . . was 52% of all cases." *Id*.

[327] WHITE PAPER ON CRIME 2008, *supra* note 321, pt. 2, ch. 2, sec. 3. In addition to this 50%, Japanese prosecutors referred 29.3% to administrative-type Summary Courts (in which a fine is typically the maximum penalty), 9.3% to family courts, and did not prosecute another 5.5% for other reasons. *Id*. In short, of the more than 1.9 million suspects whose cases made it past the police level to the prosecutorial level, only 6.6% were indicted for criminal trial. *Id*. For examples of Japanese authorities arresting SOFA personnel, then subsequently releasing them prior to criminal indictment, see, e.g., David Allen & Chiyomi Sumida, *Okinawa Marine has Trespassing Case Dropped*, STARS & STRIPES, Mar. 1, 2008, http://www.stripes.com/news/okinawa-marine-has-trespassing-case-dropped-1.75710. Allison Batdorff & Hana Kusumoto, *U.S. Sailor Accused of Punching Two Women Released*, STARS & STRIPES, Dec. 23, 2007, *available at* http://www.stripes.com/news/u-s-sailor-accused-of-punching2-womenreleased-1.72704; Allison Batdorff & Chiyomi Sumida, *Yokosuka Sailor Fined for Touching Girl, 15*, STARS & STRIPES, Jul. 12, 2006, *available at* http://www.stripes.com/news/yokosuka-sailor-fined-for-touching-girl-15-1.51448; Allison Batdorff & Hana Kusumoto, *Sailor*

3. Interrogations

Critics state that police and prosecutors only release a suspect upon confession, a show of remorse, and cooperation with investigators, notions purportedly incompatible with American ideas of criminal process. [328] This is partly true: in Japan, a suspect's cooperative and remorseful attitude will likely increase the chance police and prosecutors will drop the case against him.[329] However, this system is consistent with U.S. practices such as plea bargaining, a process that does not formally exist in the Japanese criminal system.[330] From a U.S. suspect's perspective, a plea bargain is essentially a trade: an admission of guilt for leniency.[331] Japan's informal system serves the same function, with the suspect's defense lawyer gathering "evidence to persuade the prosecutor that suspension [of prosecution] is appropriate."[332] At the level of police interrogation, there is also little practical difference between the two nations: U.S. courts typically allow interrogators to imply (but not explicitly state) to a suspect that "a sentencing judge would look at the cooperation and remorse . . . as a mitigating factor."[333] Recent reforms forbid Japanese police from explicitly "granting favors or proposing to do so, or making promises" to elicit a confession.[334]

Nevertheless, critics assert Japanese prosecutors are overly reliant on confessions, increasing the incentives for coercive interrogation techniques. At first glance, this appears true: in 2007, 91.3% of suspects

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Free After Paying Fine for Trespassing in Yokosuka, STARS & STRIPES, Apr. 15, 2006, *available at* http://www.stripes.com/news/sailor-free-after-paying-fine-for-trespassing-in-yokosuka-1.47683.

[328] *See* Stone, *supra* note 17, at 240–43; Clack, *supra* note 319, at 532–37.

[329] *See* HALEY, *supra* note 110, at 79.

[330] HARRY R. DAMMER & ERIKA FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 156 (3d ed. 2006).

[331] *See* GOODMAN, *supra* note 325, at 381, 418; Jean Choi DeSombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of the Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103, 144–45 (Fall 1995) (comparing the differing philosophies of the U.S. and Japanese criminal systems, and concluding U.S. plea bargaining moves its system away from procedural to a substantive focus, making it similar to the Japanese system).

[332] *See* GOODMAN, *supra* note 325, at 418.

[333] Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. 191, 199–200 (Spring 2005).

[334] *See* NAT'L POLICE AGENCY, POLICY ON ENSURING PROPRIETY OF EXAMINATION IN POLICE INVESTIGATIONS (Jan. 2008), *available at* http://www.npa.go.jp/english/index.htm.

criminally prosecuted in Japan confessed,[335] while "50% of all interrogations yield incriminating evidence" in the United States.[336] At trial, however, a similar percentage of defendants admit guilt under both the Japanese and U.S. federal systems.[337] Prosecutors in both countries have the same two general goals: "to convince the court to convict . . . [and] decide whom to prosecute."[338] In Japan, prosecutors spend vast amounts of time individually and collectively analyzing cases prior to making decisions to ensure a loss will not result.[339] In the most serious Japanese cases, cases in which the court utilizes three judges rather than one,[340] the confession rate was about 68%.[341] This suggests that in cases carrying higher public scrutiny and social importance, prosecutors have less ability to "cherry-pick" cases where the defendant has confessed.

Further criticisms target the length of interrogations, lack of a right to counsel, and an elusive right to silence.[342] To some extent, these

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[335] SUPREME CT. OF JAPAN, TABLE 2. ANNUAL COMPARISON OF RATE OF THE ACCUSED WHO CONFESS—ORDINARY CASES IN THE FIRST INSTANCE, http://www.courts.go.jp/ /english/proceedings/pdf/statistics_criminal_cases/table02.pdf (last visited Mar. 14, 2011).

[336] Paul Shechtman, *An Essay on Miranda's Fortieth Birthday*, 10 CHAP. L. REV. 655, 658 (Spring 2007).

[337] In 2007, 93.2% of all defendants prosecuted in Japanese court admitted guilt, and in 95.7% of all convictions the defendant had admitted guilt. *See* SUPREME CT. OF JAPAN, TABLE 4. ANNUAL COMPARISON OF NUMBER AND RATE OF THE ACCUSED FOUND NOT GUILTY OR PARTIALLY NOT GUILTY, http://www.courts.go.jp/english/proceedings/pdf/ statistics_criminal_cases/table04.pdf (last visited Mar. 14, 2011). By comparison, in 2004, 86.5% of all defendants in U.S. federal cases pled guilty and 96% of the cases resulting in conviction "were resolved by guilty pleas." Elkan Abramowitz & Barry A. Bohrer, *Thoughts on Federal Plea Bargaining, Trials, Acquittals*, 239 N.Y. L.J., No. 7 (Jan. 10, 2008).

[338] *See* Eric Rasmusen, Manu Raghav & Mark Ramseyer, *Conviction versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECON. REV. 47, 48–50 (Spring 2009).

[339] DANIEL H. FOOTE ET AL., LAW IN JAPAN 347 (2007).

[340] *See* UN AND FAR EAST ASIA INST. FOR THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, *supra* note 301, at 7 ([C]riminal cases involving possible sentences of death, life imprisonment, or 'imprisonment for a minimum period of not less than one year' are handled by a collegiate court of three judges, as well as any other cases deemed appropriate.").

[341] *See* SUPREME CT. OF JAPAN, TABLE 2. ANNUAL COMPARISON OF RATE OF THE ACCUSED WHO CONFESS—ORDINARY CASES IN THE FIRST INSTANCE, http://www.courts.go.jp/ english/proceedings/pdf/statistics_criminal_cases/table02.pdf (last visited Mar. 14, 2011); SUPREME CT. OF JAPAN, FIGURE 5, NUMBER OF CASES HANDLED BY SINGLE-JUDGE AND BY THREE-JUDGE PANEL—ORDINARY DISTRICT COURT CASES IN THE FIRST INSTANCE, 2007, http://www.courts.go.jp/english/proceedings/pdf/statistics_criminal_cases/fig05.pdf (last visited Mar. 14, 2011).

[342] Stone, *supra* note 17, at 242–43.

criticisms have merit. In the pre-indictment stage, suspects do have a right to consult counsel and remain silent,[343] but invocation does not terminate police questioning.[344] A suspect may refuse to talk to investigators and ask for a lawyer, but investigators may continue to ask questions to the suspect.[345] As for counsel, police and prosecutors may limit consultation times.[346]

However, SOFA protections are of great assistance at the interrogation stage.[347] First, it requires that Japanese police promptly notify U.S. authorities be upon the arrest of SOFA personnel.[348] Upon notification and prior to questioning, U.S. authorities travel to the police station to talk with the suspect, discussing his rights under the SOFA and his right to remain silent.[349] Soon after, a representative visits the suspect to discuss "condolence" procedures.[350] The suspect has the right to the services of a competent interpreter during interrogation,[351] and U.S. Government representatives can visit the suspect at any time.[352] Such ongoing access obviates many fears of abuse and coercive tactics, as does Japanese police officers' fear of causing tensions in U.S.-Japan

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[343] RAMSEYER & NAKAZATO, *supra* note 319, at 169. Although some scholars assert there is no right to pre-indictment counsel, several reforms from 2004 to 2009 resulted in the provisions of free pre-indictment counsel in any case punishable by a prison term of at least one year. *See* GOV'T OF JAPAN, COMMENTS BY THE GOVERNMENT OF JAPAN CONCERNING THE CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE AGAINST TORTURE 6 (May 2008), http://www.mofa.go.jp/policy/human/torture_com.pdf.

[344] GOODMAN, *supra* note 325, at 437–39.

[345] *Id.*

[346] REICHEL, *supra* note 294, at 359.

[347] The U.S.-Japan SOFA sets forth the following rights: (a) prompt and speedy trial; (b) notice in advance of trial of the specific charges against him; (c) confrontation with the witnesses against him; (d) compulsory process for obtaining witnesses in his favor; (e) legal representation in defense; (f) services of a competent interpreter; and (g) communication with a U.S. representative and right to have such representative present at trial. *See* U.S.-Japan SOFA, *supra* note 4, art. 17, para. 9. In addition, the Agreed Minutes guarantee that a defendant will have all rights afforded under the Japanese Constitution, including the right to be informed of the charges and a "show cause" hearing upon arrest, right to a public and impartial trial, right not to be compelled to testify against himself, a full opportunity to examine all witnesses, and right not to be subject to cruel punishments. Agreed Minutes, *supra* note 69, art. 17, para. 9. Finally, the United States is granted the right to have access to SOFA personnel at any time. *Id.*

[348] U.S.-Japan SOFA, *supra* note 4, art. 17, para. 5(b).

[349] U.S. FORCES JAPAN, INSTR. 31-203, *supra* note 100, para 9.2.

[350] *See generally* U.S. FORCES JAPAN, INSTR. 36-2612, *supra* note 29.

[351] U.S.-Japan SOFA, *supra* note 4, art. 17, para. 9(f).

[352] Agreed Minutes, *supra* note 69, art. 17, para. 9.

international relations.[353] While SOFA protections do not absolutely guarantee U.S.-style 4th and 5th Amendment rights, additional protections are ensured.

Moreover, Japan has recently reformed the interrogation system, lessening the potential of abuse in the interrogation process. Police are subject to the oversight of the National Public Safety Commission, who has the authority to dismiss senior police officers.[354] In 2008, the Commission issued new rules and procedures to eliminate the abusive practices of police.[355] First, it expressly prohibited "police from touching suspects (unless unavoidable), exerting force, threatening them, keeping them in fixed postures for long periods, verbally abusing them, or offering them favors in return for a confession."[356] Second, new guidelines expressly limit interrogation to eight hours a day and forbid overnight interrogation.[357] To enforce the policies, a supervisor from an independent agency was placed in each police station for the specific purpose of monitoring interrogation.[358] In addition, "police are liable for civil and criminal prosecution, and the media actively publicizes police misdeeds."[359]

Further obviating fears of coercion, recent trends show Japanese residents are much less willing to confess than in the past.[360] The Department of State recently found that "safeguards exist to ensure that suspects cannot be compelled to confess to a crime while in police

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[353] *See* Williams, *supra* note 76, at 48 (applying the same logic to the importance of U.S. military trial observers). In the modern day, there are virtually no reports of physical abuse of SOFA personnel during interrogations. *See, e.g.*, Wexler, *supra* note 296, at 67 n.172.

[354] Dr. Robert Winslow, *A Comparative Criminology Tour of the World: Japan*, CRIME & SOC'Y, http://www-rohan.sdsu.edu/faculty/rwinslow/asia_pacific/japan.html (last visited Mar. 14, 2011).

[355] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN, *supra* note 303. *See also Policing the Japanese Police*, JAPAN PROBE, Mar. 3, 2008, http://www.japanprobe.com/2008/03/28/policing-the-japanese-police/.

[356] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN, *supra* note 303.

[357] *Id.*

[358] NAT'L POLICE AGENCY, POLICY ON ENSURING PROPRIETY OF EXAMINATION IN POLICE INVESTIGATIONS (Jan. 2008), *available at* http://www.npa.go.jp/english/index.htm.

[359] Winslow, *supra* note 354.

[360] *See* FOOTE ET AL., *supra* note 339, at 360–61 (noting the increasing reluctance of Chinese suspects to confess, and that the "propensity to confess has declined among Japanese suspects as well").

custody."[361] Also, one legal scholar, who is generally suspicious of the interrogation process, believes there is "little evidence of actual physical force used in interrogation sessions."[362]

A number of scholars have differentiated the Japanese and U.S. systems in the following manner: The U.S. system is based on rights, Japan's on "truth,"[363] or, as one Japanese scholar characterized it: "America cares more about the procedure itself and less about the outcome."[364] Perhaps, but as the U.S. Supreme Court has declared, "(t)here is no gainsaying that arriving at the truth is a fundamental goal of our legal system."[365] Likewise, Japanese judges do not completely ignore the rights of the defendant: they routinely examine the voluntariness of confessions and sometimes suppress them.[366]

4. Trial

In 2007, Japanese police received reports of nearly 2.7 million crimes.[367] In the same year, Japanese prosecutors conducted approximately 69,400 public trials in district courts,[368] with over 99% convicted, and more than 40,000 of those cases resulting in suspended

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[361] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN, *supra* note 303. Unfortunately, false confessions have occurred under the Japanese system. *See* Hiroshi Matsubara, *Confession-Based Convictions Questioned*, JAPAN TIMES ONLINE, Apr. 15, 2003, http://search.japantimes.co.jp/cgi-bin/nn20030415b3.html (discussing five cases of suppressed confessions). However, they also occur under the United States system. *See* Shechtman, *supra* note 336, at 659 (citing a study finding 125 confirmed U.S. cases of false confession since the institution of *Miranda* rights). Reliable comparative data is lacking.

[362] GOODMAN, *supra* note 325, at 438 n.1256.

[363] *See, e.g.*, FOOTE ET AL., *supra* note 339, at 345.

[364] Takuya Katsuta, *Japan's Rejection of the American Criminal Jury*, 58 AM. J. COMP. L. 497, 514 (Summer 2010).

[365] United States v. Havens, 446 U.S. 620, 626 (1980).

[366] *See* NAT'L POLICE AGENCY, POLICY ON ENSURING PROPRIETY OF EXAMINATION IN POLICE INVESTIGATIONS (Jan. 2008), *available at* http://www.npa.go.jp/english/index.htm (explaining that 2008 Japanese interrogation reforms resulted from a recent spate of acquittals in serious cases); Hiroshi Matsubara, *Confession-Based Convictions Questioned*, JAPAN TIMES ONLINE, Apr. 15, 2003, http://search.japantimes.co.jp/cgi-bin/nn20030415b3.html (discussing five cases of suppressed confessions); RAMSEYER & RASMUSEN, *supra* note 292, at 99 (explaining that Japanese courts "do exclude coerced confessions on reliability grounds . . .").

[367] WHITE PAPER ON CRIME 2008, *supra* note 321, tbl.1-1-1-2.

[368] *Id*. tbl.2-3-1-3.

sentences.[369] Despite an approximate 2.6% chance of facing public trial when a crime is reported, and a 1.1% chance of imprisonment, many observers believe the 99% conviction rate indicates unjustness.[370]

First, some incorrectly assert judges are biased toward the prosecution.[371] High conviction rates stem from prosecutor diligence. Recognizing the social stigma a prosecution imports on a suspect, "prosecutors examine the evidence of cases extremely carefully and in principle do not prosecute cases if there is the slightest possibility of a not-guilty judgment."[372] Judges attribute high conviction rates to this diligence, while often expressing a genuine wish that more doubtful cases were tried and the evidence would allow them to acquit more often.[373] A study of Japanese judges found that conviction rates were not "due to any biased judicial incentives: judges do not suffer a career hit for acquitting defendants."[374] Finally, this "shocking" rate, when compared with rates in military courts-martial and federal cases, is not dissimilar when guilty pleas are included. For example, in FY09, the U.S. Navy-Marine Corps rate was 98.9%.[375]

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[369] *Id.* Of those pleading not guilty, 3% were acquitted. SUPREME CT. OF JAPAN, TABLE 4. ANNUAL COMPARISON OF NUMBER AND RATE OF THE ACCUSED FOUND NOT GUILTY OR PARTIALLY NOT GUILTY, http://www.courts.go.jp/english/proceedings/pdf/statistics_criminal_cases/table04.pdf (last visited Mar. 14, 2011).

[370] In comparison, in the United States, 4% of reported crimes go to trial. Rasmusen, Ragahv & Ramseyer, *supra* note 338, at 48–49. However, this number includes only contested, non-plea bargain cases. *Id*. In Japanese public trials, about 93% of defendants pled guilty. SUPREME CT. OF JAPAN, TABLE 4. ANNUAL COMPARISON OF NUMBER AND RATE OF THE ACCUSED FOUND NOT GUILTY OR PARTIALLY NOT GUILTY, http://www.courts.go.jp/english/proceedings/pdf/statistics_criminal_cases/table04.pdf (last visited Mar. 14, 2011).

[371] *See* JOHNSON, *supra* note 304, at 219–20.

[372] Noguchi, *supra* note 326, at 594. *See also* FOOTE ET AL., *supra* note 339, at 347 ("[M]any suspects who would be tried in other systems never get indicted in Japan. . . . [T]he high conviction rate reflects prosecutors' preference for the risk that an uncharged offender will re-offend over the converse risk that a charged suspect will be acquitted.").

[373] *Id.*

[374] Rasmusen, Ragahv & Ramseyer, *supra* note 338, at 47 (citing Ramseyer & Rasmusen, *supra* note 292).

[375] Annual Report of the Code Committee on Military Justice, U.S. Court of Appeals for the Armed Forces (Oct.1 2008–Sep. 30, 2009), *available at* http://www.armfor.uscourts.gov/annual/FY09AnnualReport.pdf. In the FY08 report, the Army convicted at the rate of 93.5% and the Coast Guard at 98.3%. Annual Report of the Code Committee on Military Justice, U.S. Court of Appeals for the Armed Forces (Oct.1 2007–Sep. 30, 2008), *available at* http://www.armfor.uscourts.gov/annual/FY08AnnualReport.pdf. In FY07, Air Force courts-martial convicted in 92.7% of its criminal cases. Annual Report of the Code Committee on Military Justice, U.S. Court of Appeals for the Armed Forces (Oct.1 2006-Sep. 30, 2007), *available at* http://www.armfor.uscourts.gov/annual/FY09

A second area of criticism concerns the limitations on the defense's ability to obtain discovery. In 2009, Japan began the "saiban-in" (lay-judge) system, "a monumental event for it was the first time in sixty years that Japanese citizens were allowed to participate in a criminal trial."[376] The system consists of three professional judges and six lay judges, with jurisdiction over felony-level crimes such as homicide, robbery, assaults, arson, kidnapping, and driving resulting in death.[377] Decisions are made by majority, requiring at least one professional judge and one lay judge to convict.[378]

The commencement of the system was quickly followed by significant changes to Japanese criminal procedure. First, the court has developed an exclusionary rule of hearsay evidence, in particular the statements contained within prosecutorial interrogation records.[379] Second, the court has initiated a system of pre-trial disclosure, whereby prosecutors are "forced to open up their evidentiary records for the defense attorneys."[380] Also of importance, the system has moved trials

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AnnualReport.pdf. In 2004, the federal conviction rate was 90%. Abramowitz & Bohrer, *supra* note 337. One legal scholar conducted a study of Japanese conviction rates covering the years 1989 to 1998, attempting to correct somewhat for the lack of plea bargaining in the Japanese system and comparing the results with conviction rates in other countries. JOHNSON, *supra* note 304, at 216–18. He found that the gap between "the propensity of American juries and Japanese judges to acquit . . . is far narrower than most commentators have supposed . . . ." *Id*. at 218. Moreover, while Japanese rates are higher than most Western countries, they are generally in line with the rates of many Asian countries. *See id*.

[376] Makoto Ibusuki, *Quo Vadis?: First Year Inspection to Japanese Mixed Jury Trial*, 12 ASIAN-PAC. L. & POL'Y J. 24, 25 (2010).

[377] *Id*. at 28–29.

[378] *Id*. at 32. Conversely, in order to acquit, the vote of a professional judge is not required.

> To combat the potential for judicial dominance, Japan established a voting system that could reduce such influence. Each of the nine jurors has a vote, but even if all three professional judges vote guilty, five of the lay jurors can essentially "veto" the judges by voting not guilty. However, if all six lay jurors vote guilty, they need at least one professional judge on board to prevail.

Raneta Lawson Mack, *Jury Trials in Japan: Off to a Good Start, But . . .*, JURIST, Aug. 21, 2009, *available at* http://jurist.law.pitt.edu/forumy/2009/08/jury-trials-in-japan-off-to-good-start.php.

[379] Ibusuki, *supra* note 376, at 50.

[380] *Id*.

away from mere paper procedures toward one in which trial and defense lawyers are expected to exercise effective oral advocacy.[381]

As of May 21, 2010, 1,881 cases had been tried.[382] A number of trends continued from the prior system, including strong prosecutorial evidence, defendant's acknowledgment of guilt, high conviction rates, and high rates of suspended sentences.[383] However, recent procedural changes have hit on many criticisms of the Japanese system, with likely further movement towards greater procedural rights.[384]

5. Corrections

Unlike the pre-trial and trial realms, criticisms of the corrections stage of the Japanese process are relatively quiet. The Department of State recently concluded that "prison conditions generally met international standards," while noting several deficiencies.[385] However, the SOFA affords U.S. Forces inmates unique protections, making the general state of Japanese prisons somewhat irrelevant. Addressing SOFA prisoners, SOFA Agreed View 23 requires Japan to "pay due consideration to the differences in language and customs between Japan and the United

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[381] *Id*. at 47.

[382] *Id*. at 36. On May 24, 2010, in Okinawa, the first trial of a U.S. military servicemember took place. Hiroshi Fukurai, Kay-Wah Chan & Setsuo Miyazawa, *The Resurgence of Lay Adjudicatory Systems in East Asia*, 12 ASIAN-PAC. L. & POL'Y J., at i. (2010). The jury sentenced the member, a Private First Class Marine, to three to four years in prison. David Allen & Chiyomi Sumida, *Kinser Marine Gets Jail Time for Robbing Cabbie*, STARS & STRIPES, May 29, 2010, *available at* http://www.stripes.com/news/kinser-marine-gets-jail-time-for-robbing-cabbie-1.104603. Demonstrating restorative goals of the Japanese system, the jury stated, "we know you can rehabilitate. You have strength to become a good, law-abiding citizen. We believe in you." *Id*.

[383] *See generally* Ibuski, *supra* note 376.

[384] *See* David T. Johnson, *Early Returns from Japan's New Criminal Trials*, ASIA-PAC. J.: JAPAN FOCUS, Sep. 7, 2009, *available at* http://www.japanfocus.org/-David_T_-Johnson/3212. Johnson discusses the system's already apparent positive effects on raising the performance standards of defense lawyers and bringing greater scrutiny to pretrial processes. *Id*. The institution of the lay judge system and the involvement of civilians in the criminal process have been moving Japan toward the electronic recording of all interrogations. *Id*. *See also Prosecutors to Try Audiovisual Recordings of Interrogations from March*, BREITBART, Feb. 23, 2011, http://www.breitbart.com/article.php?id=D9LIG7PO1&show_article=1.

[385] U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: JAPAN, *supra* note 303. *See also* Sheryl WuDunn, *Prisons in Japan are Safe but Harsh*, N.Y. TIMES, July 7, 1996, *available at* http://www.nytimes.com/1996/07/08/world/prisons-in-japan-are-safe-but-harsh.html.

States, and, shall not impose conditions of detention which because of those differences might be prejudicial to the health of such detained persons."[386] The Tri-Service regulation further requires that SOFA prisoners receive "the same or similar treatment . . . of personnel confined in U.S. military facilities."[387]

In practice, SOFA prisoners receive "legal assistance, visitation, medical attention, food, bedding, clothing, and health and comfort supplies."[388] Military representatives, including chaplains, visit each inmate at least once every 30 days, and U.S. military hospitals provide medical treatment.[389] Status of Forces Agreement prisoners have amenities such as individual cells, high-calorie diets, and, sometimes, televisions.[390] In short, the prison conditions of SOFA personnel are generally "equal to, or exceed conditions at similar US institutions."[391]

6. Fear of Unequal Application of Criminal Laws

Some have asserted that the Japanese criminal system may unfairly apply criminal procedures and laws in their disposition of SOFA personnel.[392] Such criticism is unfounded. Outside pressures bear little influence on courts, as "[j]udicial independence is ensured in terms of the institutional Government structure and actual practice, as well as in the judicial administration such as personnel and budgetary controlling

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[386] U.S. FORCES JAPAN, PAM. 125-1, *supra* note 68, at 19.
[387] TRI-SERVICE REG., *supra* note 32, para. 3-1.
[388] *Id.*
[389] *Id.*
[390] *See Preferential Treatment for U.S. Soldiers in Japanese Jails*, JAPAN PROBE, Apr. 18, 2008, http://www.japanprobe.com/2008/04/18/preferential-treatment-for-us-soldiers-in-japanese-jails/; Allison Batdorff, *A Helplessness that a Mother Can't Imagine*, STARS & STRIPES, Aug. 28, 2007, http://www.stripes.com/news/a-helplessness-that-a-mother-can-t-imagine-1.68166 ("SOFA prisoners live at a different standard than their Japanese peers, with more food, Western toilets, heaters, and English reading materials . . . .").
[391] *See 50 years of Japan-US Alliance SOFA, the Darkness—Part VII Japan Gives Special Privileges to US Personnel in Jail*, JAPAN PRESS WKLY., Apr. 9, 2010, http://www.japan-press.co.jp/modules/feature_articles/index.php?id=5.html (quoting a 1985 USFJ command history).
[392] Stone, *supra* note 17, at 241 (questioning whether prosecutorial benevolence in terms of dismissals and suspensions is "equally applied to foreigners," while acknowledging that SOFA provisions obviate concerns); *but see* Wexler, *supra* note 296, at 68 (stating the Japanese criminal justice system is alleged to have "a history of bias against foreigners . . .").

mechanisms."[393] In cases that draw media attention, SOFA personnel are more likely to receive lenient sentences in foreign courts than at courts-martial.[394] A number of publicized cases demonstrate the benefit SOFA personnel derive from the benevolence of the Japanese system at police, prosecutorial, and trial stages.[395] Finally, in Japan "[c]ases of corruption involving judges and prosecutors are very rare. Ordinary citizens would never imagine that they could influence court judgments. . . ."[396]

Moreover, while public opinion is negative towards aspects of U.S.-Japan bilateral relations,[397] polls do not indicate anti-Americanism, but a narrowed focus on military bases and the issues associated with them.[398] This notion was evident in a 1996 opinion poll taken a year after the Okinawa rape, with 70% of Japanese people supporting the U.S.-Japan alliance and 67% favoring a reduction in the number of U.S. military bases.[399] When SOFA personnel commit crimes, the public's desire

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[393] Noguchi, *supra* note 326, at 589. *See also* Rasmusen, Raghav & Ramseyer, *supra* note 338, at 47–48 (explaining that the high conviction rates in Japan are "not due to any biased judicial incentives: judges do not suffer a career hit for acquitting defendants").

[394] *See* Cha, *supra* note 275, at 506–10.

[395] *See, e.g.*, *Suspended Prison Term Given to U.S. Navy Officer over Accident*, JAPAN TODAY, Oct. 2, 2010, http://www.japantoday.com/category/crime/view/suspended-prison-term-given-to-us-navy-officer-over-accident; Peter Alford, *Marines Charged over Okinawa Rape*, AUSTRALIAN, Feb. 16, 2008, http://www.theaustralian.com.au/news/marines-charged-over-new-okinawa-rape/story-e6frg6t6-1111115563622 (describing a case in which Japan declined to prosecute an Okinawa rape despite public anger); David Allen, *Brown Convicted of 'Attempted Indecent Act,'* STARS & STRIPES, Jul. 10, 2004, http://www.stripes.com/news/brown-convicted-of-attempted-indecent-act-1.21709. *See infra* note 30; note 329 n.331.

[396] Noguchi, *supra* note 326, at 589.

[397] *See* Weston S. Konishi, *The United States Image of Japan: Is It Winning or Losing the Popularity Contest?*, MAUREEN & MIKE MANSFIELD FOUND. (2010), *available at* http://www.mansfieldfdn.org/polls/pdf/konishiusimageinjapan.pdf.

[398] In one recent poll, nearly 80% of the Japanese populace expressed a positive attitude towards the United States. Opinion Poll, The Maureen & Mike Mansfield Found., Nikkei Shimbun Cabinet Office of Japan 2009 Public Opinion Survey on Diplomacy (P09-35) (Dec. 2009), *available at* http://www.mansfieldfdn.org/polls/2009/poll-09-35.htm. Polls taken during the same general time frame have reflected an invariably negative view of the Futenma basing issue, with a majority of the populace against any relocation within Japan. *See, e.g.*, Opinion Poll, Maureen & Mike Mansfield Found., Mainichi Shimbun February 2010 Public Opinion Poll (P10-04) (Feb. 2010), *available at* http://www.mansfieldfdn.org/polls/2010/poll-10-04.htm.

[399] *See* Hosokawa, *supra* note 169.

seems focused on ensuring justice is done within their system, not on obtaining revenge against the U.S. military.[400]

7. The Irony of the "Unfairness" Rationale

Although U.S. habeas corpus proceedings have firmly established that Constitutional protections do not apply to foreign criminal proceedings in the SOFA context,[401] U.S. policy is to make them applicable as far as practicable. Ironically, however, in effectuating this interest through custody and waiver maximization, the U.S. has forced its leadership to ignore certain Constitutional protections.

The SOFA requires the United States to cooperate with Japan in investigations and ensure the presence of the suspect for both investigation and trial.[402] In ensuring presence, forms of restraint will often be placed on the suspect's freedom of movement, which in some cases includes confinement.[403] During such "SOFA confinement," the servicemember does not have the right to UCMJ-based review of the confinement, as an order of release would defeat SOFA requirements.[404] Moreover, the suspect may not have a right to defense counsel, despite the fact that the interest of maximizing jurisdiction may not be consistent with the suspect's own interests.[405] While such restrictions logically relate to international interests of the SOFA, they also directly contradict the rationales behind the maximization policy: availing SOFA personnel of constitutional protections and protecting the member from unfair treatment.

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[400] *See* Reimann, *supra* note 214, at 66–70 (explaining that the Korean NGO activities targeting military bases have been anti-American in nature, while Japanese NGOs have had more of an issue-based focus).

[401] *See generally* Holmes v. Laird, 459 F.2d 1211 (1972) (discussing Supreme Court precedent on the issue and finding that (1) the Constitution not apply to foreign trials involving servicemembers, and (2) the Constitution does not prevent the United States from handing over custody to foreign authorities pursuant to the NATO SOFA).

[402] U.S.-Japan SOFA, *supra* note 4, art. 17, paras. 5, 6. The NATO SOFA also requires such cooperation. NATO SOFA, *supra* note 34, art. 7, paras. 5, 6.

[403] FLECK ET AL., *supra* note 31, at 199.

[404] *See* Major William K. Lietzau, *A Comity of Errors: Ignoring the Constitutional Rights of Service Members*, ARMY LAW., DEC. 1996, at 3.

[405] Captain Robin L. Davis, *Trial Defense Service Notes: Waiver and Recall of Primary Concurrent Jurisdiction in Germany*, ARMY LAW., May 1988, at 30, 34.

8. Practical Effect of Maximization

Assuming *arguendo* that Japan's criminal system is suspect in terms of fairness, the U.S. military's most serious offenders are already subject to that system. In the catalytic 1995 Okinawa rape case and the two Tokyo murders some ten years later, defendants were subject to the gambit of the oft-criticized Japanese system, from interrogation, to trial, to imprisonment. Military-wide, in fiscal year 2009 there were 451 trials of U.S. forces personnel.[406] In the most politically sensitive cases, maximization policies have little effect. In Japan, these cases will even require pre-trial custody turnover. Yet irrelevant maximization procedures will be associated with these heinous cases to the detriment of United States relations.[407] The procedures may also work to the detriment of the suspect, creating the impression that the SOFA serves to "undermine the sovereignty of the host nation," thereby creating a more hostile atmosphere toward a particular defendant as well as military bases in general.[408]

D. Increased Fairness of the Japanese System

In the last five years, the Japanese criminal process has undergone tremendous change. Japan has shown a clear movement toward the procedural protections afforded in America. The process does not mirror U.S. constitutional mandates, but the general notion of "fairness" suggested by the NATO SOFA and its implementing directives is so met. In the two-level game, the United States is over-valuing this "fairness" constraint and losing potential international gains.

VI. The International Bargaining Table

A. Introduction

In the debates on the Senate Floor, U.S. Senator Bricker, a staunch opponent of the NATO SOFA's concurrent scheme of jurisdiction,

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[406] Annual Report of the Code Committee on Military Justice, U.S. Court of Appeals for the Armed Forces (Oct. 1 2008–Sep. 30, 2009), *available at* http://www.armfor.uscourts.gov/annual/FY09AnnualReport.pdf.
[407] *See supra* note 277.
[408] *See* Cha, *supra* note 275, at 492.

commented that the Senate's reservations stemmed from "a feeling that . . . we had 'given up' something and this was an attempt to get a little of it back."[409] The comment epitomized the U.S. approach to future FCJ controversy: keep as much as we can and give up only what we have to. This philosophy has outlived its usefulness. The United States should give up custody and jurisdictional rights if it results in an overall gain to the country.

B. Maximization Policy in Play

Like Japan, when the United States sits at the negotiating table and FCJ is an issue, it asserts a number of constraints that narrow its win-sets. Concerns of international security require that the current number of U.S. military forces in Japan remain roughly the same, but the asserted unfairness of Japan's criminal system places FCJ tradeoff somewhat off-limits. In addition, the United States may argue constraints stemming from the 1953 Senate Resolution[410] and a fear that revision may "extend its influence to similar agreements between the United States and any other country."[411]

The latter three constraints are problematic in terms of two-level game credibility. In order for any claimed constraint to provide power to a negotiator, it must be credible, or at least, the other side must think it is credible.[412] Somewhat ironically, the 1953 Senate Resolution and implementing DoD policy are not credible constraints because of the U.S. 1995 and 2004 FCJ concessions. If the United States can bend its asserted firm maximization policy in highly publicized heinous cases, it can bend in lesser ones. This in some part explains why Japanese

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[409] Williams, *supra* note 76, at 10 (citing 99 CONG. REC. 8780–82 (1953) (remarks of Senator Bricker)).

[410] *See, e.g.*, Weston S. Konishi, *Washington Japanwatch; SOFA Debate Threatens Security Alliance*, YOMIURI SHIMBUN, Oct. 26, 2004 at 4; *see generally* Murat Karagoz, *US Arms Embargo Against Turkey—After 30 Years an Institutional Approach Towards US Policy Making*, PERCEPTIONS 107 (Winter 2004–2005) (discussing the role of legislative constraints on executive deal-making in the two-level game).

[411] FLECK ET AL., *supra* note 31, at 415. Such was the justification behind keeping the Okinawa rape-related 1995 amendment to pre-trial custody procedures in the realm of an "informal" modification, fearing formal amendment "might provoke activities of other countries towards a major revision of existing agreements regarding the status of U.S. forces." *Id.*

[412] *See* Ahmer Tarar, *International Bargaining with Two-Sided Domestic Constraints*, 45 J. OF CONFLICT RESOLUTION 320, 331 (2001).

politicians have never had to remove FCJ desires from the table. For similar reasons, the constraint of "international FCJ uniformity" lacks credibility. Countries such as South Korea and the Philippines know of the 1995 and 2004 concessions, and have publicly demanded to be granted the same.[413] Yet, the United States has successfully resisted the demands.[414] Finally, the willingness of the United States to submit serious offenders to Japanese justice discredits its general stance against further modifications due to a perception that the Japanese system is unfair.

Both the United States and Japan know U.S. FCJ policy can be modified—the question remains as to whether the United States should modify its policy. The criminal system of Japan is fundamentally fair and does not significantly undermine military good order and discipline. Meanwhile, U.S. insistence on maximizing jurisdiction often accomplishes little more than aggravation of the Japanese populace in the most publicized and heinous crimes. While the utility of "maximization powers" to the United States is low, Japan values them highly. Thus, the United States should trade them off to enhance its win-set. Depending on the win-sets of Japan at the time of bargaining, this could be a tradeoff for additional servicemember constitutional-type protections. This tradeoff could provide gains in another international realm, such as additional Japanese financial support for U.S. military operations. In the least, such a tradeoff would be a strong step toward ensuring the status quo of U.S. Force levels in Japan in the event Japan's win-sets regarding the issue shrink in the future.

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[413] *See Philippine Senators Urge Manila to Demand Custody of U.S. Soldiers*, BBC MONITORING ASIA PAC., Jan. 9, 2006 (describing Philippine senators' demands to the United States for custody turnover arrangements similar to those of U.S-Japan); *Rules on U.S. Forces Needs Revision*, KOREA HERALD, Dec. 2, 2002 (demanding revisions to the U.S.-ROK SOFA "to get it to the level of agreements the United States signed with Japan and Germany").

[414] In 2001, the United States allowed South Korea to presumptively maintain pre-indictment custody over active duty servicemembers in certain types of cases, if South Korea was the first country to arrest. *See* Egan, *supra* note 223, at 319–20. Unlike the U.S.-Japan 1995 and 2004 arrangements, the 2001 South Korean revision does not contemplate U.S. pre-indictment transfers. *See id*. Since then, the United States has successfully resisted Korean demands to further reform FCJ provisions of the U.S.-ROK SOFA. *See* Rijie Ernie Gao, *Between a Rock and a Hard Place: Tensions Between the U.S.-ROK Status of Forces Agreement and the Duty to Ensure Individual Rights Under the ICCPR*, 33 FORDHAM INT'L L.J. 585, 618 (2009).

The state of Japanese win-sets is crucial to the next question: knowing the United States can relinquish FCJ power and should make this power available for tradeoff, when should it do so? The answer is now. The last fifteen years of U.S-Japan relations demonstrate the volatility of the issue. Unless the United States imposes furthers restrictions on all servicemembers in Japan, a problematic and unlikely possibility,[415] SOFA personnel will continue to interact with Japan society. During this interaction, another disastrous crime could occur, and U.S. maximization policy will again rise to prominence. As in the past, it will become a virtually immovable domestic constraint straddling the outer edges of Japan's U.S. military basing win-set. In such situations, Japan's bargaining power is at its strongest, increasing the chance of non-agreement if the United States refuses to bend far enough. Similar to the 1995 rape, the United States may be forced to agree to FCJ concessions, and undesired troop reductions in the thousands, with little in return.

The current bargaining situation is ideal for both the United States and Japan. The 2009 DPJ landslide has lost its momentum, as has the momentum of their proposed FCJ reforms. International security concerns have, for the moment, become an imperative concern, enhancing the stability of U.S. military bases. Most importantly, no truly heinous rape or murder has occurred in the last few years. However, the symbolic nature of the FCJ issue, as well as the aforementioned "disastrous crime" scenario, ensures its ongoing utility to Japanese negotiators. Thus, the United States can maximize its gains now, with Japanese domestic constraints relatively low, Japan's bargaining power relatively weak, and its valuation of FCJ power relatively high.

VII. Proposed Reforms

The U.S.-Japan military-basing two-level game reveals existing inefficiencies. United States FCJ power has low utility to the United States and high utility to Japan, yet there has been no tradeoff. If a tradeoff is to be made, the final question is how the United States may legally implement the new relationship.

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[415] Among many envisioned problems, the ongoing restriction to base of all SOFA personnel would likely damage the morale of U.S. forces, raise significant complaints within the DoD civilian and dependent communities, and perhaps have a negative impact on recruiting objectives.

First, the United States should allow USFJ the discretion to formulate its own region-specific FCJ policy. This may require revision to the Tri-Service regulation, or an exception to it. The 1995 and 2004 FCJ modifications indicate U.S. officials have previously made piecemeal exceptions to this instruction. The exception should become a blanket one. This would not conflict with the 1953 Senate Resolution or the DoD Directive on SOFA policies, as neither mandates the U.S. maximization policy.

Second, the SOFA scheme in Japan of concurrent jurisdiction should remain, with America exercising primary jurisdiction when it possesses the right, and exercising secondary jurisdiction when Japan chooses to allow it. The U.S. military in Japan should cease attempts to obtain jurisdiction over offenses when Japan has the exclusive or primary right. Moreover, in accord with the facial jurisdictional scheme of the U.S.-Japan SOFA, the primary right of jurisdiction in official duty cases should remain with the United States. However, in the context of Japan, the Tri-Service Regulation's prohibition on U.S. relinquishment of this primary right should be eliminated, allowing leading USFJ and U.S. diplomatic officials to weigh U.S. interests and waive the primary right when appropriate.

Third, pre-indictment custody should be turned over, on demand, to Japanese authorities when they have the primary right of jurisdiction. When the military apprehends a servicemember and it is clear that Japan has the primary right of jurisdiction, Japanese authorities should immediately be notified and given the opportunity to take custody of the suspect if they so desire, regardless of the categorization of the offense.

Finally, the alliance-enhancing process of "condolences" should continue. This process will often result in waivers of jurisdiction. In the Japanese system, "condolences" are not a jurisdictional-avoidance mechanism, but a method by which justice is achieved.

VIII. Conclusion

Since World War II, Japan has developed into an ally of the United States in a volatile East Asian region, and fortunately so: U.S.-military bases in Japan serve as a deterrent to Chinese and North Korean aggression, as well as enable a more effective military response to such aggression if required. However, the history of U.S. bases in other

countries, as well as recent changes to U.S. basing presence and troop-levels in Japan, suggest that the U.S. military presence in Japan cannot be taken for granted—the next crime or series of crimes could set off further unwanted changes. The United States can mitigate the risk by making several revisions to its FCJ-policies, revisions that do not significantly affect U.S. interests in protecting the rights of U.S. servicemembers.

The revisions proposed in this article will not eliminate the tension involved in U.S.-Japan base politics. There will continue to be adverse responses to crimes and accidents. However, on a domestic level, such revisions will allow the Japanese to exercise control over issues that are very much a Japanese matter, improve U.S.-Japan relations, and create a more effective alliance. In turn, this will help ensure that it is the United States, not Japan, who decides if and when it is time for the U.S. presence in Japan to be withdrawn.