

# THE RAPE CONTROVERSY: IS A REVISION OF THE STATUS OF FORCES AGREEMENT WITH JAPAN NECESSARY?

## INTRODUCTION

Four young men met at a local disco and discussed getting a girl and having some "fun." They discussed hiring a prostitute, but the men had no money. One man then proposed rape instead.<sup>1</sup> The others thought he was joking until the discussion grew more serious. They drove their rented white Subaru to a grocery store to buy adhesive tape and condoms. At this point, one of the men left after realizing his associates were serious about the rape. He later helped identify the other three men.<sup>2</sup>

Around 8:00 p.m., the three young men spotted a girl walking alone on a street. The twelve-year-old girl had walked just five minutes away from her home to buy a notebook for school. She had just started sixth grade.<sup>3</sup> Two of the men got out of the car. While one man approached her and pretended to ask her directions, the other man hit her in the face and grabbed her from behind. They covered her eyes and mouth and bound her hands and feet with tape. After throwing her in the back seat, they beat her in the chest and face, causing injuries requiring two weeks of medical treatment. After driving to a remote farm road surrounded by fields, the man who proposed the act went into the back seat and raped her. The other men, for various reasons, did not penetrate the girl. The rape was over at 8:20 p.m. The men dumped the girl in the field and drove off.<sup>4</sup>

Unfortunately, this story is common in today's world. However, this particular crime set off an international furor because the sixth-grade schoolgirl is Japanese and the three men are United States (U.S.) servicemen stationed in Okinawa, Japan. The rape occurred at a time when both anti-American sentiment in Okinawa was growing, and the United States and Japan were planning to renew the security alliance between the two nations.<sup>5</sup>

The uproar the rape created in Japan has people from both nations calling for a revision of the security alliance between the United States and Japan. At the heart of the debate is the Status of Forces Agreement, which states that members of the American armed forces suspected of crimes will

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1. Edward W. Desmond, *Rape of an Innocent, Dishonor in the Ranks*, TIME, Oct. 2, 1995, at 51.

2. Andrew Pollack, *One Guilty Plea in Okinawa Rape; 2 Others Admit Role*, N.Y. TIMES, Nov. 8, 1995, at A3.

3. Desmond, *supra* note 1, at 51.

4. Pollack, *supra* note 2, at A3.

5. *Id.*

not be turned over to Japanese authorities until after they are formally indicted by Japanese prosecutors.<sup>6</sup>

Okinawans, in particular, claim that this agreement allows many U.S. servicepersons stationed in Okinawa to commit crimes and avoid prosecution.<sup>7</sup> However, top U.S. and Japanese officials have stated there is no need to revise this part of the security agreement. Instead they created a bilateral group of experts to explore ways to improve the current agreement.<sup>8</sup>

This note will discuss the ramifications of a possible revision of the Status of Forces Agreement (SOFA) between the United States and Japan. The discussion includes an examination of the history and nature of SOFA's and the Japanese criminal system. This discussion will demonstrate why a revision of the Japanese SOFA is unnecessary. It also will explore the similarities between the Japanese SOFA and the SOFA's the United States has with other nations. Also, a discussion of the Japanese criminal system will demonstrate why the Japanese SOFA is vital to protect the rights of U.S. military personnel in Japan. First, however, a brief historical overview of modern Japan and a discussion of why this rape case has created an international dilemma will be considered.

## I. HISTORICAL OVERVIEW

Japan began to modernize with the Meiji Restoration in 1868. Japan established a new government and began a vigorous policy of "westernizing" by learning as much as possible from Europe and the United States. The previous government, the Tokugawa-bakufu system (1639-1868), had closed Japan to foreign relations, permitting only limited contact with Dutch and Chinese traders at one southern Japanese port.<sup>9</sup>

During this seclusion period, Japan was peaceful and prosperous. However, Japan's seclusion policy isolated the island nation from the progress of the rest of the world, particularly the industrialization occurring in Europe and the United States.<sup>10</sup> The Tokugawa period of seclusion ended in 1853 when Matthew C. Perry of the United States arrived in Japan with

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

7. *Id.*

8. *Strengthen Japan-U.S. Alliance*, THE DAILY YOMIURI, Sept. 22, 1995, at 13, available in LEXIS, Nexis Library, AP File.

9. 2 HARUMI KOJO & MAKOTO KOJO, THE LEGAL SYSTEM OF JAPAN, MODERN LEGAL SYSTEMS CYCLOPEDIA Ch. 6 § 2.2(A) (Kenneth R. Redden ed. 1989).

10. *Id.*

four warships. He carried a letter from President Millard Fillmore urging Japan to open the country to trade.<sup>11</sup>

In 1854, Japan signed a treaty of peace and friendship with the United States. Similar treaties followed with Russia, the Netherlands, and the United Kingdom. This, however, ended the period of internal peace and created over a decade of political turmoil which ended with the Tokugawa-bakufu being overthrown for the new Meiji government. The root of the political division was the opening of Japan to trade and avoiding the colonization of Japan, such as had happened in China.<sup>12</sup>

In 1868, a group of southern daimyos (feudal lords) took political leadership, re-established the emperor as the head of the nation, and organized the new Meiji government. The most important task of the new government was to strengthen the country both economically and militarily. This was accomplished by inviting foreign scholars to teach modern science and technology and by sending Japanese students to Europe and the United States to be trained in modern western methods. Additionally, a modern legal system was implemented as an important step to strengthen Japan.<sup>13</sup>

In 1889, the Meiji Constitution was promulgated, and it took effect in 1890. Modeled after the Prussian Constitution, it contained both provisions providing for a strong, centralized government and elements of a modern democracy. This enabled Japan to claim it had a civilized system of government and was therefore entitled to treaty revision with other nations. While the constitution made the emperor the divine and sovereign head of state, it also created the Imperial Diet to limit the emperor's power.<sup>14</sup>

However, the new Meiji Constitution provided no mechanism to control the military. The military was directly subordinate to the Emperor and could act independently of the Diet in his name.<sup>15</sup> This set the stage for the aggressive expansionist and colonization policies of Japan during the next half century.

The unchecked power of the military, coupled with Japan's strong desire to become a world power, led to Japan's policy of expansionism. In 1904, Japan went to war with Russia over conflicts of interest in Korea and in Chinese territory.<sup>16</sup> Japan's victory over Russia<sup>17</sup> surprised the world because it marked the first time a non-European power had defeated a

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11. *Id.* However, the warships sent a message that the United States was not going to take no for an answer. The United States wanted to be the first nation to open trade with Japan to gain an advantage over its European competitors.

12. *Id.*

13. *Id.*

14. *Id.* § 2.2(E)(1).

15. *Id.*

16. SYDNEY GIFFARD, JAPAN AMONG THE POWERS 1890-1990, 30 (1994).

17. *Id.* at 32.

European power. From its victory, Japan gained control of the Korean peninsula, the Liatong peninsula, and the southern half of the Sakhalin peninsula.<sup>18</sup> Japan also took footholds in Manchuria, Taiwan, and Shantung.<sup>19</sup> The Japanese wanted these territories for raw materials and protection by creating a buffer zone around the nation. During World War II, Japan took a large part of East Asia and was advancing on Australia.<sup>20</sup> By 1942, the Japanese Empire stretched from the Kuriles in the north, to the Marshall Islands in the east, to New Guinea in the south, and to Burma in the west.

This expansion was halted, however, by the eventual victory of the Allies over the Japanese forces. After Japan's surrender on September 2, 1945, the Allied Powers began a period of occupation.<sup>21</sup> Although it was officially an Allied Powers occupation, the American forces were actually in command. General Douglas MacArthur was the Supreme Commander for the Allied Powers (SCAP) and oversaw the twin objectives of the occupation. Those objectives were demilitarization and democratization. This policy was pursued to ensure that Japan could never again pose a threat to international security and to introduce a responsible government in Japanese society.<sup>22</sup> Individual freedom and democratic government were encouraged along with the development of the Japanese economy on a peaceful basis.<sup>23</sup> A few of the transformation measures included: demobilization of the military, demilitarization of industry, land reform, liberalization of political activities, reform of the education system, and revision of the old constitution.<sup>24</sup>

A revised constitution was promulgated in 1946 and took effect in 1947.<sup>25</sup> Formally, it was an amendment to the Meiji Constitution due to the utilization of that document's amendment procedures. It was, however, a totally new constitution because it was based on popular sovereignty, rather than the principle of "divine sovereignty" of the emperor.<sup>26</sup> A large part of the 1946 constitution was based on American ideas and on pacifism, provided for in the Preamble and in Article 9 of the Japanese constitution.<sup>27</sup> These provisions renounce war as a sovereign right of Japan and the threat to use force to settle international disputes. However, this was soon interpreted as permitting the maintenance of sufficient forces for self-

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18. *Id.*

19. *Id.* at 37, 41. Shantung was a part of China.

20. *Id.* at 121. This area was deemed the Greater East Asia Co-Prosperity Sphere.

21. *Id.* at 132-33.

22. *Id.* at 133.

23. NISUKE ANDO, SURRENDER, OCCUPATION, AND PRIVATE PROPERTY IN INTERNATIONAL LAW - AN EVALUATION OF US PRACTICE IN JAPAN 11 (1991).

24. *Id.*

25. GIFFARD, *supra* note 16, at 136.

26. KOJO & KOJO, *supra* note 9, § 2.2(E)(2).

27. GIFFARD, *supra* note 16, at 136-37.

defense,<sup>28</sup> now known as the Japanese Self-Defense Forces (SDF).<sup>29</sup> This interpretation came in light of the outbreak of the Korean War in 1950. At that time MacArthur authorized the creation of the SDF.<sup>30</sup> Today, the SDF has the third largest defense budget in the world and the largest budget among non-nuclear powers. Japan maintains fleets comparable to those of the United Kingdom and the United States, despite Japan's defense spending being only one percent of its GNP.<sup>31</sup>

## II. OKINAWA AND THE CURRENT RAPE CONTROVERSY

The preceding discussion of modern Japanese history gives a good background for discussion of the current rape controversy. The rape of the schoolgirl not only caused tensions between Japan and the United States, but it also emphasized the problems between Okinawa and the Japanese government.

When Navy Seaman Marcus D. Gill confessed to raping the Okinawan girl and Marine Private first class Rodrico Harp and Kendrick Ledet admitted to helping him in the Naha District Court on November 7, 1995,<sup>32</sup> Americans were both shocked and dismayed by their actions. If charged with the maximum sentence for rape resulting in injury, the servicemen would face life in prison in Japan.<sup>33</sup> To many Okinawans, the rape is just one example of the many crimes committed by United States servicemen throughout the years.

Okinawa is home to the largest Marine base outside the United States, containing 29,000 of the 45,000 American troops in Japan.<sup>34</sup> Including civilians and dependents, there are 54,000 Americans who live a relatively isolated life from the rest of the Okinawans. Most do not venture far from the base, unless visiting a nearby bar. In light of the recent rape, discipline has been tightened, the sale of alcohol has been restricted after 8:00 p.m.,<sup>35</sup> military police patrols have been increased, and a large entertainment district

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28. *Id.*

29. James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 LAW & CONTEMP. PROBS. 171, 179 (1990).

30. *Id.* at 176.

31. *Id.* at 184.

32. Eric Talmadge, *U.S. Servicemen Admit Plotting Girl's Rape*, INDIANAPOLIS STAR, Nov. 8, 1995, at A5.

33. Peter Landers, *Okinawa's Governor Steps Up Pressure Despite Handover of U.S. Suspects*, Associated Press, Sept. 29, 1995.

34. Andrew Pollack, *Marines Seek Peace with Okinawa in Rape Case*, N.Y. TIMES, Oct. 8, 1995, at A3.

35. *Id.*

near Kadena Air Base is off limits for U.S. soldiers after midnight.<sup>36</sup> However, this might just be a bandage for the problem, especially when one considers that the rape occurred at 8:00 p.m. The Okinawan government reports that 4700 crimes have been committed by military personnel since Okinawa's reversion to Japan in 1972, including 509 particularly heinous crimes.<sup>37</sup> Americans in Okinawa account for 4.2 percent of the population but committed 11.5 percent of felonies such as murder, rape, and robbery.<sup>38</sup> However, crimes significantly declined from more than 300 a year during the 1970's to 98 in 1994.<sup>39</sup> The Defense Facilities Administration Agency confirms these figures but notes that they reflect crime throughout all of Japan, not just the Okinawan prefecture.<sup>40</sup>

Okinawans see the current rape case as just one of a long list of crimes committed over the past fifty years. Thus, even before the rape, concern about the conduct of U.S. troops was building. Examples of the more heinous crimes committed during the last forty years include:

- In 1955, a six-year-old girl was raped and murdered in the Kadena area. A U.S. sergeant was arrested and eventually sentenced to forty-five years heavy labor. This is known as the Yumikochan incident.<sup>41</sup>
- In 1974, a sleeping woman was beaten to death with a cement block by a U.S. serviceman intending to commit robbery.<sup>42</sup>
- In 1985, a man was stabbed to death by a U.S. serviceman.<sup>43</sup>
- On September 16, 1995, a U.S. sailor exposed himself to a sixth-grade schoolgirl.<sup>44</sup>

These crimes are just a few of the many crimes Okinawans claim are an everyday part of their lives. The same types of crimes have occurred both before and after Okinawa's 1972 reversion to Japan. While Okinawa comprises only 0.6 percent of Japan's land mass, it houses nearly seventy-

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36. Eric Talmadge, *After Alleged Rape, U.S. Soldiers Face Restrictions*, Associated Press, Oct. 11, 1995.

37. Landers, *supra* note 33.

38. *Id.*

39. *Id.*

40. *U.S. Forces Involved in 1,264 Crimes Since '85*, Japan Economic Newswire, Sept. 19, 1995, available in LEXIS, Nexis Library, AP File.

41. *List of Main Crimes Committed and Incidents Concerning US Military on Okinawa*, OKINAWA TIMES, Oct. 12, 1995, available in the Internet, <http://www.infor yukyu.or.jp/~koj/rape/index-e.html>. This list was compiled by an Okinawan newspaper and might be biased since the Okinawans are trying to reduce the U.S. presence on Okinawa.

42. *Id.*

43. *Id.*

44. *U.S. Sailor Accused of Exposing Himself to Schoolgirl*, Japan Economic Newswire, Sept. 22, 1995, available in LEXIS, Nexis Library, AP File.

five percent of U.S. military bases and operations, taking up nearly twenty percent of Okinawan land. Additionally, thirty-one zones of the sea surrounding Okinawa are reserved for U.S. military use.<sup>45</sup> Okinawans claim that their subjection to such American control is a result of the second-class perception they have among the Japanese and Americans.

The Okinawans have a real sense of being deprived of their culture and history. Okinawa, a tropical island south of the main part of Japan, was annexed by Japan in the 1870's.<sup>46</sup> Its king was forced to abdicate, and his subjects were assimilated into the Japanese Empire.<sup>47</sup> At the close of World War II, Okinawa was the site of one of the bloodiest battles of the war, which cost the island one-quarter of its civilian population. After the Japanese surrendered, Okinawa was sacrificed for political expediency. Even though the occupation of Japan ended in 1952, the United States retained control over Okinawa, with Tokyo's consent, until 1972.<sup>48</sup>

Okinawans claim Tokyo continues to treat them like second-class citizens by burdening the island with nearly seventy-five percent of the U.S. military facilities. The Okinawan people, including their governor, Masahide Ota, have called for the reduction and realignment of the U.S. bases to the rest of mainland Japan.<sup>49</sup> The Okinawan government has even taken out a large advertisement in the *New York Times* pleading with the American public to help them in their fight to reduce and realign U.S. bases located on their island.<sup>50</sup> Okinawans allege U.S. bases are a hotbed for crime and violence. Nearly 85,000 protestors turned out on October 21, 1995, in the biggest protest ever against U.S. bases. The protestors claimed that brutal crimes, such as the rape, show a decline in U.S. forces' discipline and indicate an occupation mentality.<sup>51</sup> Governor Ota and many local assemblies in Okinawa have also called for a revision of the SOFA.<sup>52</sup>

The SOFA between the United States and Japan is the main source of conflict. This provision is part of the larger Treaty of Mutual Cooperation and Security. Under Article 17, Paragraph 5(c) of the 1960 treaty, the United States is obliged to hand over criminal suspects only after they have been indicted.<sup>53</sup> Thus, when the Japanese police arrived to take custody of the three servicemen, the U.S. military police denied the request. This

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45. Desmond, *supra* note 1, at 52.

46. Pollack, *supra* note 34, at A3.

47. *Id.*

48. *Id.*

49. Landers, *supra* note 33.

50. N.Y. TIMES, Nov. 15, 1995, at A13.

51. David Elsner, *85,000 Okinawans Turn Out to Protest U.S. Presence*, CHI. TRIB., Oct. 22, 1995, at C11.

52. Pollack, *supra* note 6, at A3.

53. Desmond, *supra* note 1, at 52.

decision angered many Okinawans who claim the SOFA puts the American military above the law, making it more difficult for Japanese police to apprehend them. For example, two years ago an American soldier accused of raping a Japanese woman escaped to the United States after being held on his base. The man was eventually brought back to Japan, but the charges against him were dropped by the accuser.<sup>54</sup> However, Foreign Minister Yohei Kono said there was no need to revise the agreement because it was not impeding the investigation.<sup>55</sup> Thus, there is a true discrepancy between the viewpoints of Okinawa and the Japanese government in Tokyo regarding the possible revision of the SOFA. Even so, critics contend that the SOFA makes it hard to investigate. Also, they have accused the U.S. military of using exemptions in the SOFA to avoid paying full compensation to Japanese civilians injured by American soldiers.<sup>56</sup>

The United States made the suspects in the rape case available to Japanese investigators whenever necessary, which was a step to stop criticism that the investigation was being hampered by time restrictions. The three men were driven from a Marine facility to police headquarters in Naha for daily sessions with investigators.<sup>57</sup>

In an effort to calm a nationwide uproar in Japan against American military bases, the United States agreed on October 25, 1995, to new criminal procedures allowing Japanese officials to gain early custody of U.S. military suspects in rape and murder cases.<sup>58</sup> This is the first time the Japanese have been able to request early custody of suspects. The United States pledged to give sympathetic consideration to requests concerning rape and murder cases. The accord gives Japan the same process given Germany, which resolved a major complaint that Japan has been receiving unequal treatment compared to European nations.<sup>59</sup>

The United States also has decided to consider redeployment of the troops currently in Okinawa to other areas of Japan.<sup>60</sup> The United States has announced this move in an effort to reduce tensions on the island and to keep plans intact of reaffirming the security relationship between the United States and Japan when President Clinton visits Japan in November 1995. However, the move would only occur if Tokyo agrees to finance construction of new

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54. Pollack, *supra* note 6, at A3.

55. *Id.*

56. Charles Smith, *Rape Sparks Call to Review US Pact*, S. CHINA MORNING POST, Sept. 22, 1995, at 12.

57. *Id.*

58. Teresa Watanabe, *U.S., Japan OK Pact on Military Crime Suspects*, L.A. TIMES, Oct. 26, 1995, at A1.

59. *Id.*

60. Art Pine, *U.S. Willing to Cut Troops on Okinawa*, L.A. TIMES, Oct. 28, 1995, at A23.



military facilities elsewhere in Japan. Analysts state that they do not expect Japan to accept this idea because of the cost of the plan. Moreover, the Japanese traditionally have not been enthusiastic about keeping large numbers of U.S. troops on their home territory.<sup>61</sup> This statement is in accordance with what many Okinawans believe — that the Japanese think of them as second-class citizens. The message from Tokyo seems to be that U.S. troops will be tolerated as long as they do not interfere with the home territory. Currently, Japan pays the United States about five billion dollars a year to help finance the cost of stationing troops in Japan, which is about seventy percent of the total cost of the operation.<sup>62</sup>

This historical background, along with the current rape case, illuminate the discord in Okinawa. To fully understand the problem, this note next examines the issues of the Japanese criminal system and why the United States has a SOFA with Japan or any other nation.

### III. THE JAPANESE CRIMINAL SYSTEM

The modern Japanese criminal system is an assimilation of criminal codes from other countries. Japan is a nation that aggressively studies the practices of other nations and modifies those practices to fit into the Japanese way of thinking. After the Tokugawa period ended in 1868, the Japanese studied the Western codes of jurisprudence so they could model their new system of government after these “modern” systems. Early in the Meiji period, Japanese law was strongly influenced by French law. In the 1880’s, the German influence became visible. In the 1900’s, German legal theories came to have an overwhelming influence and superseded the French influence. Thus, scholars introduced German legal theory as a guide to interpret Japanese codes.<sup>63</sup>

The Code of Criminal Procedure of 1880 was drafted by the French scholar Boissonade and introduced modern fundamentals of criminal justice. Strongly influenced by the French inquisitorial system, the code encouraged a very limited role for the defense counsel throughout the proceedings. Although a new German-influenced code was introduced in 1922, the strong French influence was not eliminated. The limited role of defense counsel and the insufficient protection of the suspect remained unchanged.<sup>64</sup> Although a new code was promulgated in 1948 under the heavy influence of American law by giving suspects more rights and protections, the French and

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61. *Id.*

62. *Id.*

63. KOJO & KOJO, *supra* note 9, § 2.2(C).

64. *Id.* § 2.2(G).

German traditions still are evident in actual practice by the Japanese police and prosecutors.

Daniel Foote classified Japan's criminal justice system as "benevolent-paternalism."<sup>65</sup> During the Tokugawa period, close questioning of suspects and intensive pretrial questioning of suspects guarded against the possibility of an acquittal, which was seen as a disgrace to the shogunate, and it could also have undermined respect for the government itself.<sup>66</sup> Confessions also played a central role in the Tokugawa period as confession was regarded as the best evidence of the truth. Further, torture was accepted and even codified as a means to extract a confession. Confessions also maintained the public's trust in the shogunate criminal process.<sup>67</sup>

Under the influence of European scholars during the Meiji period, the idea that criminal behavior could be attributed to an identifiable cause became more accepted. Thus, the primary role of penalties became not punishment but rehabilitation. Yet confessions, extracted through intimidation and physical abuse, were still the centerpiece of the Japanese criminal system. However, keeping with the new prominence of rehabilitation in Japan, true confessions were deemed to play an important role in the rehabilitation of suspects and their reintegration into society.<sup>68</sup>

As mentioned, the new constitution, adopted after the American occupation, set forth ideas of protection against self-incrimination, the right to refuse to answer questions, and prohibitions against admission at trial of coerced confessions.<sup>69</sup> However, in practice, these statutory and constitutional reforms were interpreted narrowly by Japanese courts.

Authorities have wide discretion when investigating a person under suspicion of criminal conduct. This discretion leaves the potential for intrusion into a person's privacy rights. Police may request that individuals voluntarily submit to questioning and to voluntarily accompany the police to the station. This police power, to suggest voluntary accompaniment, has been broadly interpreted by the courts.<sup>70</sup> However, the distinction between a compulsory and a voluntary questioning and accompaniment does not relate to the use of physical force. The authorities can use physical force to "persuade" a suspect to comply with a request to cooperate.<sup>71</sup> The

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65. Daniel H. Foote, *The Benevolent-Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 317 (1992).

66. *Id.* at 328. A shogun is a chief military commander who governed Japan, and a shogunate is the office or rule of a shogun. The Emperor played only a minor role in the government during this period.

67. *Id.* at 329.

68. *Id.*

69. *Id.* at 330.

70. *Id.* at 334.

71. William B. Cleary, *Criminal Investigation in Japan*, 26 CAL. W. L. REV. 123, 125 (1989).

prosecutor is given wide latitude when investigating and interrogating a suspect. Although the exercise of this power is usually done with concern for the individual's rights, abuse of this power has occurred. The purpose of the interrogation is to obtain a confession. In order to effectively accomplish this, the suspect is isolated from family and legal counsel for up to twenty-three days.<sup>72</sup>

Police prefer that a suspect voluntarily agree to questioning because there is no provision in the Code of Criminal Procedure to limit the length of time the police can question someone. Although the suspect has the right to refuse to be questioned, this right is rarely exercised.<sup>73</sup> If an arrest is made, police have forty-eight hours to question the person. After that, the police must either release the person or refer the person to the prosecutor. The prosecutor then has one day to decide whether to release the suspect or to seek a warrant for the suspect's detention.<sup>74</sup>

Even though the criteria appear narrow for the extension of detention time, an overwhelming majority of detention requests are granted by judges<sup>75</sup> 99.7 percent of the time.<sup>76</sup> The length of the first detention is ten days from the time prosecutors petitioned the court for the writ of detention. This detention period can be extended for another ten days upon the request of the prosecutor. Thus, suspects may be detained for a total of twenty-three days without a formal charge against them. After a prosecutor has indicted a suspect under a criminal charge, the prosecutor has all the detention time desired because suspects are seldom released on bail.<sup>77</sup> Police refer over ninety percent of suspects to the prosecutors, and the prosecutors request detention for about eighty-five percent of those suspects with ten days of additional detention time requested for approximately one-third of them.<sup>78</sup>

Arrest is merely the beginning of the criminal investigation. The suspect's detention time is used to build the prosecution's case. The police and prosecutors, who work together as a unit, view the suspect as the center of the investigation, relying on the confession instead of extrinsic evidence gathered through investigative skill.<sup>79</sup> In the United States, arrest usually occurs after an extensive investigation which reveals enough extrinsic evidence to indict a person. Prosecutors in Japan have freely admitted that

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72. *Id.* at 123-24.

73. *Id.* at 126.

74. Foote, *supra* note 65, at 335.

75. Christopher J. Neumann, *Arrest First, Ask Questions Later: The Japanese Police Detention System*, 7 DICK. J. INT'L L. 253, 257-58 (1989). See Keiji Soshōhō (Code of Criminal Procedure) art. 60 § 1.

76. Foote, *supra* note 65, at 335.

77. Neumann, *supra* note 75, at 258.

78. Foote, *supra* note 65, at 335.

79. Neumann, *supra* note 75, at 259.

the purpose of this pre-indictment detention period is to "demand a confession."<sup>80</sup>

There are no restrictions the police must follow when interrogating a suspect. Questioning may exceed ten hours per day. Judges do not have authority to interfere with the police and prosecutors' interrogations during the detention period.<sup>81</sup> Under the Code of Criminal Procedure, the suspect has the right to remain silent and must be informed of this right.<sup>82</sup> However, under a literal reading of the Code, there is an inference that a suspect has no right to leave the interrogation room, and there is no requirement that investigators stop questioning if a suspect invokes the right to silence. Thus a duty to submit to questioning has resulted. This is the duty to sit in the interrogation room and listen to questions and comments of the investigators during the twenty-three day detention period. In cases where the suspect has invoked the right to silence, investigators have applied the maximum pressure, which leads to the problem of coerced confessions.<sup>83</sup>

The Japanese make a distinction between the investigation and the trial. Until a person is formally indicted, there is no litigation and no adversarial relationship between any parties. The Japanese view it as logical that because there is no litigation, just an investigation, there is no need for legal counsel. A suspect, therefore, has virtually no right to legal counsel during the investigative phase of the case.<sup>84</sup>

This practice might seem contrary to Article 34 of their constitution which states: "No person shall be arrested or detained without being at once informed of the charges against him or without being granted the right to retain the services of legal counsel."<sup>85</sup> However, the language of Article 39(3) of the Code has been used by investigators to circumvent this constitutional guarantee. The article states: "a prosecutor may . . . designate the dates, places, and times for interviews."<sup>86</sup> Under this article, a system has been created where visits are permitted at the convenience of the investigators and are usually very brief. Some critics have noted this practice results in false confessions.

Under the Code, investigators may impose conditions on meetings between the suspect and legal counsel. Meetings with counsel can be limited to fifteen minutes once every four or five days, and this is not even likely to occur until after prosecutors have finalized their case. The Supreme Court of Japan has upheld this practice as well. In *Sugiyama v. Osaka*, an attorney

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80. Foote, *supra* note 65, at 336.

81. Neumann, *supra* note 75, at 260.

82. Foote, *supra* note 65, at 336.

83. *Id.*

84. Cleary, *supra* note 71, at 141.

85. Neumann, *supra* note 75, at 261.

86. *Id.*

filed suit after being consistently denied access to his client. The court held that although it is very important for an attorney to meet with his client, the prosecution must be given wide discretion to control contact with anyone on the outside in order to regulate the investigation and interrogation of suspects.<sup>87</sup>

During these interrogation periods, the investigators may barter with the suspect for "privileges" such as food, water, or bathroom visits. Some suspects have been subjected to other forms of cruel and degrading treatment in order to extract confessions.<sup>88</sup> Why is the confession so vital to the investigators in Japan? It relates to the maxim that confession is good for the soul.

Japan has one of the lowest crime rates in the world. Its conviction rate is more than 99.8 percent, but fewer than five percent are sentenced to prison, and those who do go to prison serve an average sentence of less than two years.<sup>89</sup> An explanation for the low crime rate is the emphasis in Japanese society on affiliation with a group. Society's norms and mores subject the individual to the needs of the entire group. Thus, individuals act with the group in mind. There typically is a strong commitment to uphold the honor of one's family, employer, and nation. Consequently, an individual is cautious not to commit an act which could cause the loss of prestige or honor to any group to which the individual belongs, or else expulsion from the group may occur.<sup>90</sup>

An apology is used extensively for misconduct. It serves not only as an admission of guilt, but also as a promise to refrain from committing the offense again. There are strong ethical norms in Japanese society to acknowledge one's guilt. "Police often adjust their reaction to misconduct based on the repentance of the individual."<sup>91</sup> This once again demonstrates the great amount of discretion the police possess when dealing with suspects.

Japan's criminal justice system places emphasis on the reintegration and rehabilitation of the offender. Maintenance of order is achieved through this "specific prevention" method. Japan's system resembles an inquisitive family that insists on keeping tabs on its relatives and learning everything about the person if the person should come under suspicion. Thus, great trust must be placed in the authorities. This is the paternalistic part of Daniel Foote's model.<sup>92</sup> The display of concern for the rehabilitation and reform of the individual is the benevolent part of Foote's model. The model would not

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87. Cleary, *supra* note 71, at 142-43. See *Sugiyama v. Osaka*, 32 Minshū 820 (Supreme Court 1978).

88. Neumann, *supra* note 75, at 253.

89. Foote, *supra* note 65, at 318.

90. Neumann, *supra* note 75, at 254-55.

91. *Id.* at 255.

92. Foote, *supra* note 65, at 321.

only permit but would expect public officials to maintain a careful watch over members of society. It also would allow officials to intrude on the personal autonomy of suspects so they could determine the most suitable means for reformation and reintegration into the community.<sup>93</sup>

Foote also describes Japan as following more of a crime-control model of criminal justice, than a due process model, which the United States more closely follows.<sup>94</sup> The crime-control model emphasizes the repression of criminal conduct, which is seen as the most important function to be performed by the criminal process. The main features of this model are speed, finality, and uniformity. The process is based on the assumption that the suspect is probably guilty. Mistakes are accepted as long as the mistakes do not interfere with the efficiency seen as essential to repressing crime.<sup>95</sup>

Foote describes Herbert Packer's due-process model as emphasizing the rights of the individual. The model stresses reliability rather than efficiency, demonstrated by its concern for avoiding mistakes and limiting official power. The model also establishes many restrictions on the fact-finding procedure by excluding evidence. By placing primacy on the individual, the due-process model shows a concern for "equality of justice and a [general] skepticism [of] the morality and utility of the criminal" process itself.<sup>96</sup>

Foote notes that although Japan's criminal justice system appears no different from the crime-control model, there are some crucial differences. Speed and finality are not regarded in Japan as essential for deterrence purposes. The Japanese system does allow one level of full review of both the facts and the law on the motion of either the prosecution or the defense. The Japanese system does not emphasize uniformity but stresses the importance of individualized determinations. It places great weight on achieving rehabilitation without resorting to incarceration, basing itself on specific prevention. Incarceration is only resorted to when the gravity of the crime, such as rape, commands no other viable alternative.<sup>97</sup> Thus, Japan's system, according to Foote, is a mixture of the benevolent-paternalism model with the influence of the crime-control model.

In Japan, informal social controls play as much a part of deterring crime as the public officials. In Japan, offenders are more willing than those in the United States to throw themselves on the mercy of the police, prosecutors, and judges because reconciliation with one's group is considered more important than the process of legal vindication.

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93. *Id.* at 327.

94. *Id.* at 319. These two models are based on an exposition by Herbert Packer. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-73 (1968).

95. Foote, *supra* note 65, at 323.

96. *Id.* at 323-24.

97. *Id.* at 340-41.

Investigators not only expect a confession but act in a way to reinforce the norm of confessions. Hence, a moral obligation is created in Japanese society to confess one's misdeeds.<sup>98</sup>

An involuntary confession may still be upheld at trial as valid because the judge has the discretion to decide whether specific items in the confession are true or not.<sup>99</sup> In Japan, complex case trials, such as rape cases, are often comprised of separate hearings held between long intervals. In the current rape case, the trial opened on November 7, 1995, but the next date for the trial is in December 1995. There are no jury trials in Japan. Instead, in cases such as rape, a three judge panel in a district court presides over the case. The acquittal rate in trials during 1987 was less than one percent.<sup>100</sup>

In Japan, the concept of individual freedom and liberty is secondary to the perceived necessity for public safety and social control. Thus, the criminal investigative procedures described are not seen as an extreme violation of an individual's rights. Although too much reliance is placed on the confession, it is seen as a vital first step at rehabilitating the offender. The Japanese believe the extraction of a confession will help the individual feel remorse and encourage him to conform with the standards of society.

Now that the Japanese criminal system has been examined, the discussion will turn to the need for a SOFA between the United States and Japan. It is interesting to note that while modern Japanese criminal law has been heavily influenced by French and German law, American criminal law is a direct descendant of the English criminal codes. This could explain the divergent views between the United States and Japan on the issue of criminal justice.

#### IV. STATUS OF FORCES AGREEMENTS AND WHY THEY ARE NECESSARY

The voluntary acceptance by a host nation of large, foreign land forces on a permanent basis is a new historical development, unique to the twentieth century. Until World War I, there was no clear customary rule of international law relating to the status of visiting friendly foreign forces. The conditions of that war made it necessary to create international law to resolve this uncertainty in international relations.

Under most World War I agreements, the law of the flag was dominant. Fighting forces were not subject to the host nation's jurisdiction. It was felt that if they were subject to the host nation's sovereignty, the exercise of disciplinary power which is an essential part of military organization would be lost. Thus, the United States received exclusive

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98. Neumann, *supra* note 75, at 255.

99. *Id.* at 256.

100. *Id.* at 259.

jurisdiction over its forces in France. However, France's desire to receive allies during the war made it easy for France to yield its interests of jurisdiction. The United Kingdom, however, was in a much stronger bargaining position during the First World War. The United Kingdom maintained its territorial jurisdiction over visiting forces and did not surrender to the law of the flag.<sup>101</sup>

World War II presented a different situation. The United States was in a strong position, while the United Kingdom was much weaker. The United States received exclusive jurisdiction over its troops while in Britain. The lessons of both world wars left a lasting impact on European nations. The structure of a jurisdictional agreement will depend on the relative bargaining power of each nation. "When both states are not politically and economically equal, the more powerful state will obtain a broader right of jurisdiction, even in peacetime."<sup>102</sup> The more a nation needs the presence of foreign troops, the more likely it will be to grant more jurisdiction to the sending state.

Thus in 1949, with a concern over a growing threat from the Soviet Union, five European nations signed the Brussels Pact. This pact became the predecessor to the NATO SOFA. The main clause in the agreement stated: "Members of a foreign force who commit an offense in the 'receiving State' against the laws in force in that state can be prosecuted in the courts of the 'receiving State.'"<sup>103</sup>

The United States was a party to the NATO SOFA signed in 1951. It has served as the prototype for numerous bilateral SOFA's and has remained the benchmark from which all other SOFA's are measured. Its main themes are reciprocity and concurrent jurisdiction. The NATO SOFA provides exclusive jurisdiction when the laws of only one state have been broken. In all other cases, concurrent criminal jurisdiction is granted. This arrangement is outlined in Article VII of the NATO SOFA.<sup>104</sup>

Concurrent jurisdiction calls for the sending state to exercise primary criminal jurisdiction over its personnel for official duty offenses and for offenses against it or members of the sending state force. The receiving state maintains primary jurisdiction in all other cases. "The state with primary

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101. Maj. Manuel E.F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, 1994-MAY ARMY LAW. 3, 8.

102. *Id.* at 9. See SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 45 (1971).

103. Supervielle, *supra* note 101, at 8. This passage is taken from Article 7 of the Brussels Treaty SOFA to which Belgium, France, Luxembourg, the Netherlands, and the United Kingdom were parties.

104. *Id.* at 10.



jurisdiction must give sympathetic consideration to a request by the other state to waive its primary right, but is not required to grant the request.”<sup>105</sup>

The NATO SOFA is reciprocal, meaning whatever is granted to one nation's forces, the other nation receives the same grants. Thus, forces from France would be under the same jurisdictional agreement in the United States as U.S. forces would be in France. However, some U.S. bilateral SOFA's are comprehensive. Although modeled after the NATO SOFA with regard to jurisdictional formulas, these agreements are nonreciprocal. Under a nonreciprocal SOFA, military personnel of the receiving nation are not provided SOFA protection if they visit the sending state. The SOFA between the United States and Japan is a comprehensive nonreciprocal agreement.<sup>106</sup>

The United States has traditionally insisted on obtaining SOFA's for its troops overseas, yet resists providing SOFA protection to foreign military personnel in the United States. The NATO SOFA is the only reciprocal SOFA to which the United States is a party. When the threat of communism was high, many non-NATO allies accepted these nonreciprocal SOFA's because the American presence and protection were worthwhile to them. Protection from the communist threat was worth the cost of partial waiver of jurisdiction over American troops without reciprocal rights for their troops in the United States. However, “[w]ith the end of the Cold War, the need for United States military presence, . . . may not seem as obvious to [these] foreign [nations].”<sup>107</sup> In the future, foreign politicians might not be so willing to acquiesce to U.S. demands of nonreciprocal SOFA's. The United States might have to offer reciprocity in exchange for the jurisdictional concessions it wants from the receiving state.

The built-in equality of a reciprocal SOFA gives a universal sense of fairness not found in nonreciprocal SOFA's. The terms of a nonreciprocal bilateral SOFA often reflect the unequal bargaining power between the two nations.<sup>108</sup> The United States often gives practical and legal reasons against reciprocity. One reason is that foreign nations needed the presence of American troops in their countries much more than the United States needed the presence of foreign military personnel in America. The United States cites that they have often carried a disproportionately high cost of maintaining the defense against the Communists and other threats in foreign nations. The United States considers nonreciprocal SOFA's as partial compensation by the foreign nation for the protection the United States has provided.<sup>109</sup>

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105. *Id.*

106. *Id.* at 12.

107. *Id.* at 14.

108. *Id.*

109. *Id.* at 15.

U.S. lawmakers assume that the American legal system will treat all parties equitably, regardless of nationality. Yet the inverse assumption is often made of foreign legal systems. Thus, the conclusion has been that foreign troops in the United States do not need the protection of a SOFA, but American troops do need a SOFA to guarantee minimum due process fairness overseas.<sup>110</sup> A SOFA requires the receiving state to yield some territorial jurisdiction to the sending state, therefore losing some of its power to exercise jurisdiction. The United States benefits from having the SOFA protection for its troops while not being legally required to reciprocate by international agreement. The U.S. insistence on nonreciprocal SOFA's generates the perception that the United States is not "playing fair" and that the United States believes it is "superior" to foreign nations. Thus, a feeling that the United States is biased toward European governments, and biased against nonwhite, Asian, Arab, or African people and governments has resulted.<sup>111</sup> Foreign governments may view nonreciprocity as a matter of principle and symbolism. Their point is that equal sovereign states should treat each other with mutual respect, even if one nation is more powerful.

SOFA's define the status of U.S. forces in the territory of friendly states, but do not authorize the presence or activities of those forces. The purpose of the agreement is not to immunize a serviceperson from criminal sanctions in the host nation, but to protect individual rights and liberties. SOFA's are intended to strike a balance between the jurisdictional rights and demands of the sending and receiving states. There is a balancing of the justification of stationing troops abroad against the possibility of any deprivation of constitutionally protected rights when a serviceperson is subjected to foreign local law which does not conform to American law.<sup>112</sup> SOFA's work to retrieve jurisdiction for the United States.

Under international law, which is a part of U.S. law, visiting forces are subject to the unlimited jurisdiction of the receiving sovereign unless that receiving state has agreed to partially waive some of its jurisdiction over visiting forces. The absolute jurisdiction of a nation was established in *The Schooner Exchange v. M'Faddon*, in which the court stated that a nation's jurisdiction is susceptible to no limitation not imposed by itself.<sup>113</sup> Thus, it is clear that a host nation would have the right under international law to take custody of a U.S. serviceperson and try him for violations of that nation's

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110. *Id.*

111. *Id.* at 18-19.

112. Donald T. Kramer, *Criminal Jurisdiction of Courts of Foreign Nations Over American Armed Forces Stationed Abroad*, A.L.R. FED. 725, 747 (1973).

113. *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 136 (1812). In *Schooner Exchange*, the Supreme Court held that a war vessel in the service and possession of a foreign power (France) could not be subject to libel while in the port of another nation (United States) as the host country is presumed to have consented to such immunity under international law.

criminal laws, in the absence of any agreement.<sup>114</sup> The court in *Underhill v. Hernandez* emphasized this point:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances . . . must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>115</sup>

The Supreme Court in *Wilson v. Girard* held a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it consents to waive its jurisdiction.<sup>116</sup> *Wilson* involved an American serviceman who was to be tried in Japan for murder under the SOFA between the United States and Japan. The United States initially claimed primary jurisdiction, but later decided to waive it at the request of Japan. After an indictment, the serviceman brought a petition for habeas corpus challenging the legality of the waiver. He claimed he would be denied a fair trial in Japan and would not be afforded his due process rights. The Supreme Court refused to consider his due process claim, thus indicating that an American serviceman being tried in a foreign court pursuant to a SOFA cannot successfully assert in an American court that the procedures in the foreign court do not comply with due process.<sup>117</sup> The court also held that it found no constitutional barrier or statutory barrier to the Security Treaty<sup>118</sup> between the United States and Japan.<sup>119</sup>

The court in *Gallina v. Fraser* addressed the question of constitutional protection in a foreign court. The court stated that foreign court processes differing from those used in the United States is not a sufficient ground upon which to impeach a foreign judgment.<sup>120</sup> Thus, based on the decisions in *Wilson* and *Gallina*, the trial of an American serviceperson for offenses committed abroad by the courts of nations having different systems of jurisprudence than the United States is not violative of the serviceperson's rights under the U.S. Constitution. However, in *Starks v. Seaman*, the district court held that adherence by a foreign court to the due process

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114. Brig. Gen. C. Claude Teagarden, *Status Of Forces Agreements: An International and Domestic Obligation to Return Military Personnel from the United States to Foreign Countries for Criminal Prosecution and Confinement*, 26 A.F. L. REV. 21, 24 (1987).

115. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

116. *Wilson v. Girard*, 354 U.S. 524, 529 (1957).

117. *Id.* at 530.

118. See 3 U.S.T. § 3329 (1952).

119. Teagarden, *supra* note 114, at 24.

120. *Gallina v. Fraser*, 177 F. Supp. 856, 866 (D.C. Conn. 1959).

requirements is nevertheless a condition precedent to the release of American servicemen to the jurisdiction of foreign courts.<sup>121</sup>

Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States deals with the use of facilities and areas by the U.S. armed forces in Japan, as well as the status of the U.S. forces stationed in Japan.<sup>122</sup> This agreement, entered into force June 23, 1960, also replaced the Security Treaty of 1952 between Japan and the United States.<sup>123</sup> A supplementary agreement to this 1960 treaty, called the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security, became effective at the same time.<sup>124</sup> Article XVII of this agreement is the heart of the current dispute concerning the criminal jurisdiction of accused U.S. military personnel. The provision closely follows the NATO prototype. It sets forth the rules of exclusive and concurrent jurisdiction with respect to each nation. Most objections concern paragraph five of Article XVII. It states that U.S. military authorities and Japanese authorities will assist one another in the arrest of U.S. military personnel when Japan is exercising its primary jurisdiction. Also, the Japanese authorities are to promptly notify U.S. military authorities when any American serviceperson has been arrested. Section (c) of paragraph five states: "The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan."<sup>125</sup> This provision of the SOFA is what the Japanese and Okinawans claim impedes their investigations and allows many U.S. offenders to go free.

Paragraph nine outlines guarantees granted to a member of the U.S. armed forces at trial in Japanese courts. Some of these guarantees include: to receive a prompt and speedy trial; to be informed in advance of trial of the specific charges against him; to be confronted with the witnesses against him; to have legal representation; and to communicate with a representative of the U.S. government and to have the representative present at his trial.<sup>126</sup> It should be noted, however, that the Japanese Constitution provides many of these same "protections" for its citizens, yet the above discussion has demonstrated how narrowly the Japanese courts have read these provisions. There are also no provisions in the SOFA concerning the investigative techniques of Japanese authorities.

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121. *Starks v. Seamans*, 334 F. Supp. 1255 (1971).

122. 11 U.S.T. § 1632, 1634 (1960).

123. *Id.*

124. 11 U.S.T. § 1652 (1960). The full name of the agreement is Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan. *Id.*

125. Article XVII, Paragraph 5, Section (c). *Id.* at 1665.

126. Article XVII, Paragraph 9, Sections (a), (b), (c), (e), and (g). *Id.* at 1666.

It is not clear whether the recent agreement between Japan and the United States is violative of the 1960 treaty. The new agreement, as discussed above, gives Japan the option to request the United States turn over U.S. military personnel suspected of committing particularly heinous crimes, such as rape and murder, before Japan issues any indictments. The United States is only obliged to give "sympathetic consideration" to the request.<sup>127</sup> Article XVII, 5(c) of the 1960 treaty states that the suspect will remain with the United States *until* he is charged. It does not state whether or not the United States may, at its discretion, turn over a suspect to Japanese officials before he is charged.

This new accord gives Japan the same process given to Germany, thereby addressing the complaint that the United States was treating Japan unequally compared to the treatment given to European nations. However, it could be argued that U.S. servicemen being tried in German courts have more rights than a serviceman being tried in a Japanese court. The 1965 German Code of Criminal Procedure includes safeguards for the accused that parallel those guaranteed by *Miranda v. Arizona*.<sup>128</sup> The accused, at all stages of the investigation, must be informed of the charges against him and of his right to counsel. Although the right to remain silent and right to free counsel are not clearly included in the German Code, a U.S. serviceman being tried in Germany is afforded most of the protections guaranteed by *Miranda* when the rights in the code are coupled with the rights guaranteed in the U.S.-German SOFA.<sup>129</sup> The *Miranda* protections covered by the German Code do not exist in the Japanese Code of Criminal Procedure, nor in the SOFA with the United States. Thus, an accused U.S. serviceman in Japan is not given exactly the same protection to his rights as an accused U.S. serviceman is given in Germany.

Now that both the Japanese criminal system and Status of Forces Agreements have been discussed, the ramifications of revising the current SOFA between the United States and Japan will be considered.

## V. ANALYSIS AND CONCLUSION

Both United States and Japanese government officials have said that there is no need to revise the Status of Forces Agreement. The Okinawans

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127. Watanabe, *supra* note 58, at A1.

128. James S. Fraser, *Some Thoughts on Status of Forces Agreements*, 3 CONN. L. REV. 335, 346-48 (1971). See *Miranda v. Arizona*, 384 U.S. 436 (1966). That case provides that an accused must be warned of his right to remain silent, that he has the right to counsel, and that if he is indigent, the government will appoint counsel for him.

129. *Id.* at 347-48. In the Supplemental Agreement, the same rights that are afforded the accused in the Japan-U.S. SOFA are provided for in this provision to the Germany-U.S. SOFA.

want a revision. There is growing disenchantment and resentment in Okinawa against both the American and the Japanese governments. This was evident by the mass demonstration in October 1995. By the United States agreeing to possible early release of accused U.S. servicemen to Japanese authorities, it was acknowledging the Okinawans' complaints.

The new accord served two functions. First, it sought to ease tensions between the two nations prior to the security summit held November 20, 1995. Secondly, the move was an effort to appease the Okinawans' claims that the current SOFA allows many American servicemen to escape justice under the Japanese criminal system. The United States wants to maintain good relations with Japan, and especially with the Okinawans. Seventy-five percent of U.S. military facilities in Japan are located on Okinawa, and there are growing demands from the Okinawans for the realignment and reduction of U.S. military bases there. It would be costly for both the United States and Japan to move any facilities to another part of Japan. Thus, it appears that the vow by the U.S. government to consider such a move seems hollow because both Japan and the United States realize this would be too costly a measure to implement.

The current rape controversy comes at a crucial time in U.S.-Japanese relations. The rape caused a storm of apologies from almost every level of the U.S. government and military. But does this one rape case signify that the SOFA is so repressive of Japanese officials' ability to investigate crimes committed by U.S. servicepersons that it must be revised? The new agreement should satisfy many critics of Paragraph 5(c) of the treaty. It gives the Japanese the ability to request early release of suspects from U.S. custody, which brings Japan's rights into harmony with those granted to Germany and other European nations by the United States. This was the heart, it seemed, of the criticism regarding the current rape case. However, it appears that more concessions are wanted, especially by the Okinawans.

Although there is nothing in Paragraph 5(c) which forbids early release of suspects into Japanese custody, nothing in the treaty allows it either. The treaty states that suspects are to stay in U.S. custody until the Japanese file formal charges against the American suspect. One could read the treaty narrowly and construe it to be exclusive of granting any early release. The treaty does state sympathetic consideration should be given to Japan when the United States has primary jurisdiction; however, the United States does not have primary jurisdiction in this case. The sympathetic consideration provision also did not expressly relate to the custody of suspects. Thus, this appeasement agreement that the United States has entered could be interpreted as violative of Article XVII of the Treaty of Mutual Cooperation and Security.

If the United States' aim is to ease tensions, it could revise the treaty in such a way to maintain the current SOFA, but make it reciprocal. Japan is one of the strongest economic world powers. It could demand reciprocity

on the basis of the desire to be recognized and treated by the United States as a sovereign nation legally equal to both the United States and its NATO allies. It would be presumptuous of the United States to assume that foreign troops will automatically receive a fair trial in American courts.

Currently Japan pays for approximately seventy percent of the operating costs of U.S. military facilities there, amounting to about five billion dollars a year. Japan might not be willing to continue paying for these operating costs or the cost of relocating facilities on Okinawa to other areas of Japan. This fact could become especially potent at the upcoming security summit. However, this unwillingness might be lessened if Japan was given a sign from the United States government that they were equal partners. This could be attained through a reciprocal SOFA. The United States needs to be a consensus builder and a partner. The United States wants all countries to bear their fair share of military responsibility. Thus, it is counterproductive for the United States to demand greater equality in military responsibility, yet hang on to the unequal policy of nonreciprocal SOFA's. Although the strong presence of the United States is still needed in Japan and East Asia, Japan could easily place itself in the better bargaining position for full reciprocity or no SOFA at all due to the sensitive situation created by the rape case and the anti-U.S. sentiment in Okinawa.

The Status of Forces Agreement was promulgated to protect the rights and liberties of U.S. service personnel stationed in Japan. As discussed above, the Japanese criminal system follows a different theory than the United States' system of criminal justice. While the U.S. system's primary objective is the maintenance of the suspect's due process rights, the Japanese system is more concerned with eradicating crime from society and rehabilitating the offender through the use of the confession. Without the SOFA, American servicemen could be forced to endure up to twenty-three days of potentially inhumane investigative techniques before even being charged with a crime. Also, due process at trial would not be guaranteed and the serviceman probably would not be allowed to communicate with anyone from the outside world. The SOFA is meant to protect Americans from violations of the individual's personal rights. The SOFA attempts to maintain as many of the U.S. serviceman's rights granted under the U.S. Constitution as possible when being tried in Japan. However many of these rights are narrowly interpreted by the Japanese courts, even with the SOFA. It is not hard to imagine the violations that could ensue if the SOFA did not exist as it does currently.

In many ways, the SOFA with Japan and the SOFA with the NATO allies are nearly identical. The Japanese SOFA and its criminal code do not, however, provide for some rights like those of the NATO nations. The *Miranda* rights are an example of this difference. U.S. troops stationed in Germany have these rights, while those stationed in Japan do not have these

explicitly. However, unlike the German SOFA, the Japanese SOFA is not reciprocal.

In order to maintain the current security relationship with Japan, it is not necessary to revise the current SOFA. However, to promote the furtherance of this security relationship, the United States should consider making the SOFA with Japan a reciprocal agreement, thus demonstrating the equality between the sovereigns.

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\* J.D. candidate, 1997, Indiana University School of Law-Indianapolis; B.S., 1994, Indiana University-Bloomington. Special thanks to my wife, Amy, and my parents, Randy and Beverly Norman, for their love, encouragement, and understanding.