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A RE-EXAMINATION OF THE UNITED STATES-JAPAN STATUS OF FORCES AGREEMENT

IAN ROBERTS McCONNEL.*

Abstract: On August 13, 2004, a United States Marine Corps helicopter crashed on the campus of Okinawa International University. The helicopter crash and the resulting U.S. military investigation served to reinvigorate pent up resentment and anger towards the U.S. military presence in Okinawa, threatening to destabilize the long standing relationship between the two nations. This Note discusses the U.S.-Japan Status of Forces Agreement which, among other things, apportions jurisdictional authority over off-base U.S. military accidents that occur on Okinawa. This Note argues that the U.S.-Japan Status of Forces Agreement (U.S.-Japan SOFA) should be a reciprocal agreement and that the United States should amend the Agreed Minutes of the U.S.-Japan SOFA to allow for a joint effort in investigating and securing off-base military accident sites. Altering the U.S.-Japan SOFA will be a substantial step in demonstrating that the United States views Japan as an equal partner in the effort to encourage peace and prosperity in the Asian hemisphere.

INTRODUCTION

On August 13, 2004, a United States Marine Corps Sea Stallion helicopter crashed on the campus of Okinawa International University.1 When looked at in isolation, the helicopter crash and the United States’s handling of the aftermath appears to be a relatively innocuous and benign incident.2 There were no casualties, and the wreckage was cleaned up in less than a week.3 Yet, the helicopter crash and the resulting U.S. military investigation are set within the larger context of

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2 See U.S. Chopper Crash, supra note 1.

3 U.S. Chopper Crash, supra note 1.
almost sixty years of pervasive U.S. military presence in Okinawa. As a result, this seemingly minor accident has served to reinvigorate pent up resentment and anger towards the U.S. presence in Okinawa, threatening to destabilize the long standing relationship between the two nations.

This Note discusses whether the U.S.-Japan Status of Forces Agreement (U.S.-Japan SOFA) that defines the scope of U.S. jurisdiction over U.S. forces in Okinawa should be revised. Part I provides a historical background of the U.S. military presence in Okinawa and the recent helicopter accident that occurred August 13, 2004. Part II gives the historical background of SOFAs. Part II also introduces and discusses the Treaty of Mutual Cooperation and Security and the U.S.-Japan SOFA which supports that treaty. Part III provides a resolution to the issue of whether the U.S.-Japan SOFA should be altered and, if so, what the recommended changes should entail.

I. BACKGROUND AND HISTORY

A. The U.S. Military Presence in Okinawa

On March 26, 1945, the last large battle of World War II began with the commencement of the U.S. assault for control of Okinawa. Approximately three and a half months later, the Japanese government signed a surrender agreement, beginning the formal occupation of Okinawa by U.S. military forces. In 1952, the Japanese government signed the Japanese-American Security Treaty, permitting the United States to retain control over Okinawa in exchange for ending the U.S. occupation of the Japanese mainland.

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5 See Japan to Demand Investigatory Power Over U.S. Military Accidents, Nihon Keizai Shimbun, Sept. 18, 2004, 2004 WL 89302672; Anti-U.S. Military Rally at Crash Site Draws 30,000 Okinawan Protesters, supra note 1; Johnson, supra note 4, at 37; Millard, supra note 4, at 98.

6 Johnson, supra note 4, at 38; Masahide Ota, Re-Examining the History of the Battle of Okinawa, in Okinawa: Cold War Island 13, 13 (Chalmers Johnson ed., 1999).

7 Ota, supra note 6, at 13–14.

8 Johnson, supra note 4, at 38. Originally, the 1952 agreement between Japan and the United States envisioned Okinawa becoming a United Nations Trusteeship, "but the United States abandoned this arrangement and retained complete control over the island." See Andrew Daisuke Stewart, Kayano v. Hokkaido Expropriation Committee Revisited: Recognition of Ryukyuans as a Cultural Minority Under the International Covenant on Civil
After twenty years of U.S. military rule, the Japanese government negotiated the official return of Okinawa to Japanese control in 1972. Nevertheless, from 1952 until the present, the United States has continued to maintain an expansive military presence on Okinawa. While the island of Okinawa is approximately the size of Los Angeles and is less than one percent of Japan’s total land mass, there are over 26,000 U.S. personnel stationed in Okinawa. This is roughly half of all the U.S. forces stationed in Japan. Approximately seventy-five percent of the land the United States occupies for its bases in Japan is situated on Okinawa, and the U.S. military bases cover approximately twenty percent of the entire island.

Not surprisingly, the large U.S. military presence in such a relatively small geographic area has created friction with the local populace. In Mike Millard's essay Okinawa, Then and Now, he catalogues a series of incidents involving U.S. military personnel and Okinawan citizens:

In 1955, an American military officer raped and killed a six-year-old girl; in 1959, a jet fighter crashed into an elementary school killing 17 children and injuring 121 others; in 1963, a high-school girl was killed by a U.S. military truck; in 1965, a fifth-grade schoolgirl playing in her garden was killed by a U.S. military trailer dropped from a helicopter; in 1968, a B-52 heading for Vietnam crashed just after takeoff, creating an anti-U.S.-military movement on the island; in 1970, a car driven by an American civilian struck an Okinawan pedestrian and military police fired shots to intimidate the crowd that gathered, setting off riots in which 73 vehicles were set afire. In the past twenty-five years since Okinawa’s reversion to Japan, there have been 127 aircraft accidents,
137 brush fires caused by military exercises, and 12 cases of Okinawans killed by American personnel.\textsuperscript{15}

Finally, in 1995, three U.S. military personnel brutally assaulted and raped a twelve-year-old Okinawan schoolgirl.\textsuperscript{16}

B. The Helicopter Crash

It is within this context that the August 13, 2005 helicopter accident occurred.\textsuperscript{17} After controlling the fire at the crash site, local Okinawan police detectives and local political leaders were barred from having any access to the accident.\textsuperscript{18} After repeated requests from the Japanese government to be allowed access to the area, the U.S. military finally permitted local Okinawan officials and Japanese investigators to enter the crash site.\textsuperscript{19} Not a single scrap of the aircraft remained for the Okinawan officials to investigate.\textsuperscript{20} “Even surface dirt had been removed with shovels.”\textsuperscript{21}

On September 12, 2004, 30,000 Okinawan citizens rallied to protest the accident and the handling of the aftermath.\textsuperscript{22} They demanded the closure of the Futenma U.S. Marine Corps Air Station, which is situated adjacent to the university campus and a fundamental revision of the U.S.-Japan SOFA.\textsuperscript{23}

II. Discussion of Issues

A. Development of Status of Forces Agreements (SOFAs)

SOFAs are agreements entered into by two or more states that delineate the explicit legal rights and obligations of military forces present in foreign countries.\textsuperscript{24} While they may appear to be merely an

\textsuperscript{15} Id.
\textsuperscript{16} Id. at 96.
\textsuperscript{17} See Millard, supra note 4, at 97–98; Anti-U.S. Military Rally at Crash Site Draws 30,000 Okinawan Protesters, supra note 1.
\textsuperscript{18} U.S. Chopper Crash, supra note 1.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22}30,000 Rally to Shut Down Futenma Air Station, INT’L HERALD TRIBUNE, Sept. 14, 2004, 2004 WL 85020009.
\textsuperscript{23}Id. This rally was “the largest anti-base gathering since outrage spread across Okinawa Prefecture over the [1995] abduction and rape of a local schoolgirl by U.S. servicemen.” Id.
administrative convenience, SOFAs establish “the foundation for diplomatic reciprocity and a ‘smooth working relationship’ between the sending and receiving nations.” SOFAs not only apportion criminal jurisdiction between the sending and receiving nations, but they also address “civil jurisdiction, claims, taxes, duties, services provided by each party, and procuring supplies and local employees.”

SOFAs are a relatively recent development in international law. Prior to the SOFA entered into by NATO in 1951, a comprehensive document did not exist that delineated the legal rights of U.S. military forces situated in alien territory. Rather, the common law doctrine of the “law of the flag” governed the jurisdictional authority over U.S. military forces stationed abroad. First articulated in The Schooner Exchange v. McFadden, the “law of the flag” states that when a sovereign country permits a friendly foreign sovereign to enter its territory, it implicitly consents to the jurisdictional immunity of the visiting sovereign. Up until the conclusion of World War II, the dominant practice of the United States was that U.S. forces stationed abroad were completely immune from the host country’s jurisdictional reach.

After World War II and beginning with the Cold War, NATO states began to station permanent troops within each other’s territory. As a result, NATO Member States entered into a reciprocal SOFA to provide a more formal arrangement between sovereigns regarding jurisdictional authority of foreign forces stationed within their territory. The NATO SOFA is the model upon which the United States structured its jurisdictional relationship with other non-NATO host nations. Currently, “absent express waiver of jurisdiction through an agreement

28 Hemmert, supra note 24, at 217.
29 Id. at 218; see The Schooner Exchange v. McFadden, 11 U.S. 116, 147 (1812).
30 Id. at 219.
31 Id. at 219–20.
32 See Eichelman, supra note 26, at 23.
such as a SOFA, the receiving state should have complete peacetime jurisdiction over all foreign troops inside its territory."\(^{35}\)

**B. The U.S.-Japan SOFA**

In 1960, the United States and Japan signed the Treaty of Mutual Cooperation and Security as well as the SOFA that supports that treaty.\(^{36}\) The U.S.-Japan SOFA delineates the scope of jurisdiction over U.S. forces in Japan.\(^{37}\) Unlike the NATO SOFA, however, the U.S.-Japan SOFA is a comprehensive, non-reciprocal agreement.\(^{38}\) The term “non-reciprocal” means that the U.S.-Japan SOFA applies unilaterally to Japan.\(^{39}\) If Japanese troops were stationed in U.S. territory, the U.S.-Japan SOFA would not apportion jurisdictional authority between the two nations; rather, the Japanese military personnel would simply be subject to U.S. jurisdiction.\(^{40}\)

In contrast, the U.S.-Japan SOFA curtails the scope of Japanese jurisdictional authority over U.S. forces stationed in Japan.\(^{41}\) For example, Article XVII of the U.S.-Japan SOFA states that U.S. military personnel suspected of committing a crime in Japanese territory will remain in the custody of the U.S. military until they are formally indicted by the host nation.\(^{42}\) Moreover, if a criminal act is committed by U.S. service personnel during the performance of an “official duty,” the United States has primary criminal jurisdiction over that person.\(^{43}\)

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\(^{35}\) Hemmert, supra note 24, at 220.


\(^{37}\) See U.S.-Japan SOFA, supra note 36, at 1664.

\(^{38}\) See Gher, supra note 25, at 236–37. “Currently, few non-NATO countries are parties to reciprocal SOFAs with the United States.” Id. at 236; see Norman, supra note 27, at 733.

\(^{39}\) Gher, supra note 25, at 236–37.

\(^{40}\) See Gher, supra note 25, at 236–37.

\(^{41}\) See U.S.-Japan SOFA, supra note 36, at 1665; Norman, supra note 27, at 733.

\(^{42}\) U.S-Japan SOFA, supra note 36, at 1665; William K. Lietzau, Using the Status of Forces Agreement to Incarcerate United States Service Members on Behalf of Japan, 1996 Army Law. 3, 4–5 (Dec.). As a result of this provision, Japanese officials investigating the 1995 rape of an Okinawan schoolgirl were initially unable to take custody of the three U.S. servicemen suspected of committing the crime, inciting mass protests and local outrage. See Norman, supra note 27, at 723–24.

\(^{43}\) U.S.-Japan SOFA, supra note 36, at 1664; Eichelman, supra note 26, at 24. Which activities are considered an “official duty” is determined unilaterally by the United States. Eichelman, supra note 26, at 24.
Regarding accidents in Okinawa involving U.S. personnel and U.S. property, the Agreed Minutes to the U.S.-Japan SOFA states:

The Japanese authorities will normally not exercise the right of search, seizure, or inspection with respect to any persons or property within the facilities and area in use by and guarded under the authority of the United States armed forces or with respect to property of the United States armed forces wherever situated, except in cases where the competent authorities of the United States armed forces consent to such search, seizure, or inspection by the Japanese authorities of such persons or property.\footnote{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 Forces in Japan, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1749, 1754 [hereinafter Agreed Minutes to the U.S.-Japan SOFA].}

The United States has viewed the partial waiver of jurisdiction in non-reciprocal SOFAs as compensation for the large cost associated with maintaining U.S. forces abroad.\footnote{See Norman, supra note 27, at 733.} Non-NATO Member States have agreed to these agreements, in part, because of a concern over the spread of Communism and the desire to have U.S. forces stationed in their country to mitigate that perceived threat.\footnote{See id.}

C. Perspectives Regarding the U.S.-Japan SOFA

Japanese critics of the U.S.-Japan SOFA have viewed the limitations on Japan’s jurisdictional authority and the fact that it is a non-reciprocal agreement to be a fundamental infringement upon Japanese sovereignty.\footnote{See Eichelman, supra note 26, at 27; Gher, supra note 25, at 239.} They perceive “the United States’ refusal to turn over its criminal suspects, even in cases where the Japanese had the primary jurisdictional right to prosecute, as a means to impede their investigations and enable U.S. service members to escape justice.”\footnote{Eichelman, supra note 26, at 27.} The inequality associated with the U.S.-Japan SOFA has left the impression on many Okinawans that the United States is not “playing fair” and views itself as “superior” to the host nation.\footnote{See Norman, supra note 27, at 734.}

The United States’s reluctance to enter into an agreement that apportions jurisdictional authority more equitably is predicated upon...
a concern regarding the Japanese criminal justice system. The Japanese legal system provides wide discretion to investigating authorities, permitting them “to investigate and to ‘persuade’ the accused to comply with their efforts.” Furthermore, suspects in Japan do not have many of the Miranda rights that are available to criminal suspects in the United States. Suspects in Japan may be detained for up to twenty-three days without being formally charged. “Throughout this time, the suspect is isolated from both family and legal counsel and subject to unrestricted police interrogation.” American proponents for the current U.S.-Japan SOFA argue that the unequal apportionment of jurisdictional authority between the two states better safeguards a U.S. serviceperson’s constitutional right to due process under the law.

III. Analysis

In addressing previous complaints regarding the jurisdictional apportionment of the U.S.-Japan SOFA, the United States has taken few if any substantive steps towards correcting the inherent inequality in the agreement. In response to public outrage regarding the rape of an Okinawan schoolgirl by three U.S. servicemen in 1995, the United States established the Special Action Committee on Okinawa (SACO). This Committee was established to recommend actions to reduce the impact of U.S. forces in Okinawa. While the SACO proposed several improvements to the procedures of the SOFA, it did not recommend a fundamental reassessment of the agreement. Moreover, the SACO Final Report was a non-binding agreement that the United States was not obligated to implement.

More recently, in response to the helicopter crash on Okinawa International University, the United States and Japan have established “guidelines,” which purport to permit Japanese police to maintain

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50 Eichelmen, supra note 26, at 28.
52 See Eichelmen, supra note 26, at 28.
53 Id.
54 Id.
55 Gher, supra note 25, at 244.
56 See GAO Report, supra note 10, at 54, 55.
57 Id. at 2.
58 Id. at 2–3.
59 See generally id. at 54–55.
60 See id. at 18.
control of off-base accident sites. Under the new guidelines, when a U.S. military accident occurs outside a U.S. military base, two circular perimeters will be established around the crash site. The Japanese authorities will control the outer perimeter and both countries will jointly control the inner perimeter. Nevertheless, Japanese authorities cannot regulate U.S. military officials when they enter the crash site, and the United States retains exclusive control of the crashed aircraft. While these new guidelines may be an improvement, they do not address the issue of inherent inequality in the current U.S.-Japan SOFA. In light of the current global war on terrorism, the ability to forward deploy U.S. forces to Okinawa may be strategically important to the United States now more than ever before. The United States places its critical relationship with Japan in jeopardy by not adequately addressing the Okinawan concerns over the fundamental inequality of the U.S.-Japan SOFA.

The United States should alter the current SOFA in two ways. First, the U.S.-Japan SOFA should be a reciprocal agreement. "Drafting a SOFA does not merely create a legally binding document, but rather fosters a partnership, embracing another culture and sharing human values." By making the arrangement reciprocal, the United States will recognize that Japan is a legally equal sovereign, and this recognition may ease some of the tension between the two nations.

Second, the United States should amend the Agreed Minutes of the U.S.-Japan SOFA to allow for a joint effort in investigating and securing off-base U.S. military accident sites. The new guidelines recently set forth regarding U.S. military accidents outside U.S. military bases on Okinawa are just that: "guidelines." The new policies and procedures should be directly incorporated into the U.S.-Japan SOFA to

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62 Id.
63 Id.
64 Id.
65 See id.
66 See Wilhelm, supra note 11, at 15, 17.
67 See Anti-U.S. Military Rally at Crash Site Draws 30,000 Okinawan Protesters, supra note 1; Japan to Demand Investigatory Power Over U.S. Military Accidents, supra note 5.
68 See Gher, supra note 25, at 256; Norman, supra note 27, at 740.
69 Id.
70 Gher, supra note 25, at 250.
71 See Norman, supra note 27, at 738.
72 See Japan to Demand Investigatory Power Over U.S. Military Accidents, supra note 5.
73 See US Agrees to Let Japan Control Civilian Sites After Military Accidents, supra note 61.
ensure that they are binding on both parties.\textsuperscript{74} By requiring U.S. military officials to cooperate with Japanese officials regarding U.S. military accidents that occur off-base, friction with the local populace and perceptions of malfeasance on the part of U.S. investigators will be further reduced.\textsuperscript{75}

Lieutenant General Thomas Waskov, the commander of U.S. Forces in Japan, defended the United States’s handling of the helicopter accident by stating at a press conference that the conduct of the investigation was “precisely in the confines of the agreement we have with the government of Japan.”\textsuperscript{76} While this statement may be legally accurate, it fails to recognize the need to adapt the legal framework of the U.S.-Japan SOFA to an increasingly important and evolving relationship.\textsuperscript{77}

**Conclusion**

The August 13, 2004 U.S. helicopter crash on Okinawan International University has forced the United States to reexamine the allocation of jurisdictional authority under the current U.S.-Japan SOFA. Recognizing the continued importance of the U.S.-Japan relationship, the United States should seize this opportunity to reassess its inherently unequal approach to jurisdictional apportionment. Although altering the U.S.-Japan SOFA may not entirely assuage the lasting resentment of the Okinawan populace towards sixty years of continued U.S. military presence in Okinawa, it will be a substantial step in demonstrating to the Okinawans, and the Japanese people in general, that the United States views Japan as an equal partner in the effort to encourage peace and prosperity in the Asian hemisphere.

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\textsuperscript{74} See id.


\textsuperscript{77} See Gher, supra note 25, at 256; Norman, supra note 27, at 740.