People's Panels vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan

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ABSTRACT

On May 24, 2010, a nineteen-year-old American soldier stationed in Okinawa became the first American military serviceman to be tried by a group of lay assessors in Japan. In fact, he became the first American armed force personnel to be tried by the people's adjudicative panel in East Asia. After many years of the public demand for the establishment of equitable lay judge systems, the Japanese government finally introduced two systems of lay adjudication -- Saiban-in Seido (a lay assessor system) and a new Kensatsu Shinsakai (Prosecutorial Review Commissions (PRC) or a revised grand jury system) in 2009.

This paper argues that those twin systems of lay adjudication in Japan will have a significant democratizing effect in Okinawa. Given the fact that the Japanese public was rarely given an opportunity to present their sentiments or common sense judgments in a Japanese courtroom, the lay assessor system can revitalize Japan's democratic process in criminal justice proceedings. The new grand jury system (PRC) will equally be empowered to influence the prosecutor's use of discretion in making indictment decisions. Even the prosecutors will not be given unbridled authority, because, under the new PRC grand jury law, the Japanese prosecutors' non-indictment decisions in criminal cases involving military personnel can be challenged and possibly reversed by the citizen panel. The Japanese prosecutors will then be bound by the commission's decision to prosecute and must initiate the investigative process to again begin the prosecution of accused American servicemen. These two lay justice systems may then help to restore a strong sense of social independence, political sovereignty, and the right to self-determination for the people in the island of Okinawa.

INTRODUCTION

On September 4, 1995, American Marine Private Rodrico Harp, 21, spotted a twelve-year-old local girl dressed in school uniform going into a stationary store near their military base in Okinawa, Japan. After Private Kendrick Ledet, 20, suggested to abduct her, U.S. Navy Seaman Marcus Gill, 22, and Ledet grabbed and shoved the girl into a rented van, beat her, duct-taped her legs, hands behind her back, her eyes and mouth, pulled her shorts and underwear down to her ankles, and gang-raped her in the van on a remote roadside.[1] She was left for dead in a sugar cane field,

[1] *In Okinawa Rape Trial, A Plea From 2 Mothers*, N.Y. TIMES, Dec. 28, 1995,

bleeding profusely from the rape. The three were soon arrested by U.S. military police on September 6, 1995, and were held in U.S. custody.[2]

The Okinawa Prefectural Police made a formal request to the U.S. military to turn over the suspects, but the U.S. military refused the turnover, citing the Japan-U.S. Status of Forces Agreement (SOFA), which required that, until Japanese prosecutors issued a formal indictment, the U.S. military were not legally required to turn them over.[3]

Hundreds of thousands of people in Okinawa and other Japanese prefectures hosting American military bases were outraged, soon participating in massive demonstrations against the presence of military bases and demanding the revision of the Japanese-American SOFA.[4] Prime Minister Tomiichi Murayama raised the possibility of reductions in the size of the American bases and indicated that he planned to address the troop reduction to U.S. President Bill Clinton at their next meeting, boldly asserting that "the issue of Okinawa will be the issue that determines the fate" of his cabinet.[5]

Governor Masahide Ota of Okinawa Prefecture also announced that he would refuse to sign documents to extend leases on land used for the American bases.[6] On November 4, 1995, he sent an official letter to President Clinton to consider the possible revision of the Japanese-American SOFA. In responding to Article 17 of the SOFA, Governor Ota indicated that it should be altered to specify:

> [I]n cases where Japan exercises judicial authority, Japanese authorities can, in all situations, take into custody suspects who are members of the U.S. Armed Forces or who are civilian components of the military. . . . [Article 18 should also be revised to state that] when local residents are victimized by members of the U.S. Armed Forces, civilian components, or their dependents, the victim will receive appropriate compensation from the Japanese Government (which will later negotiate with the U.S. Military or the

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www.nytimes.com/1995/12/28/world/in-okinawa-rape-trial-a-plea-from-2-mothers.html.

[2] *Id.*

[3] *Thousands of Okinawans Protest Alleged Rape, U.S. Troop Presence*, L.A. TIMES, Sept. 27, 1995, articles.latimes.com/1995-09-27/news/mn-50558_1.

[4] Richard Lloyd Parry, *The Unwanted Yankees of Okinawa: The Rape of a Schoolgirl was the Final Straw. Now the Japanese are Fighting Back, Writes Richard Lloyd Parry*, INDEPENDENT (London), Oct. 20, 1995, at 4.

[5] Laura Garza, *U.S. Gov't Feels Heat on Okinawa Bases*, 59 THE MILITANT 44, Nov. 27, 1995, *available at* http://www.themilitant.com/1995/5944/5944_6.html.

[6] *Id*.

> assailant on the compensation) regardless of whether or not the injury was inflicted on official duty.[7]

On September 29, 1995, the three servicemen were formally charged and transferred from U.S. military custody to the Japanese authorities.[8] The trial of the three military soldiers began on November 7, 1995, in the District Court of Naha.[9]

Outside the courtroom, the victim's father declared: "If the existing law permits, I wish to kill these soldiers."[10] The testimony revealed that all were based at Camp Hansen and bought condoms and a roll of duct tape at a grocery store on a U.S. airbase, they then drove around a nearby town in search of prey.[11] Gill testified that they had embarked on the rape and had picked the girl out at random as she was leaving a stationary store. When Gill went into details of the assault, the testimony had to be stopped, as the court interpreter broke down with the harrowing account of the attack and the alleged role of the Marines.[12]

Meanwhile, U.S. Navy Admiral Richard C. Macke, the commander of all U.S. forces in the Pacific, stated at a press conference in Pearl Harbor that: "I think it was absolutely stupid. I have said several times: for the price they paid to rent the car [used in the crime], they could have had a girl [prostitute]," prompting another round of public anger.[13] Admiral Macke was soon forced into early retirement for his callous comment.[14]

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[7] Letter from Masahide Ota, Governor of Okinawa Perfecture, to William J. Clinton, President of the U.S. (Nov. 4, 1995) *available at* http://library.thinkquest.org/19981/data/text/chii-minaoshi-e.htm?tqskip1=1&tqtime=0508.

[8] Kevin Rafferty, *Japan charges US Marines with Rape: PM Demands No Repeat of Such a 'Painful Incident'*, THE GUARDIAN, Sept. 30, 1995, at 14.

[9] *Trial of Three U.S. Servicemen on Rape Charges Opens in Okinawa*,DEUTSCHE PRESSE AGENTUR, Nov. 7, 1995.

[10] Sharon Churcher, *The Rape of a Schoolgirl that is Driving Apart America and Japan*, MAIL ON SUNDAY (London), Nov. 12, 1995.

[11] Eric Talmadge, *U.S. Soldiers Confess in Rape: Outrage in Okinawa Persists*, SOUTHCAST TODAY, Nov. 8, 1995, *available at* http://archive.southcoasttoday.com/daily/11-95/11-08-95/1108rape.HTML.

[12] *Sailor Testifies About Raping Japanese Girl – Trial: Court Interpreter Breaks Down as Admitted Assailant Describes Okinawa Crime. He Denies Coercing His Co-Defendants*, L.A. TIMES, Dec. 28, 1995, http://articles.latimes.com/1995-12-28/news/mn-18706_1_court-interpreter.

[13] Dale Eisman, *Retired Pacific Admiral is Censured 'Unduly Familiar' Relationship with Marine Corps Office is cited*, VIGILANT PILOT. Oct. 15, 1996.

[14] *Id.*

On March 7, 1996, the Japanese court convicted all three servicemen of the rape, with Gill and Harp sentenced to seven years in a Japanese prison. Kendrick Ledet also received a six and half year sentence.[15] Japanese prosecutors had asked for sentences of ten years for each defendant, but the court decided to show leniency because all defendants "were young and showed regret."[16]

The whole event quickly embarrassed the American government and placed significant political and social pressure on the U.S. military to become more flexible in exercising their right to maintain exclusive custody of American soldiers prior to their indictment by Japanese prosecutors. President Clinton had been scheduled to hold the summit meeting with Prime Minister Maruyama in Osaka at the annual Asian Pacific Economic Cooperation forum meeting in November 1995. The political crisis involving the U.S. budget supposedly pressured the president to postpone his visit to Japan until April 1996. Meanwhile, Ryutaro Hashimoto, a pro-defense Liberal Democratic Party (LDP) member, replaced Prime Minister Murayama in January 1996.[17]

In February 1996, immediately after an emergency summit meeting between President Bill Clinton and Prime Minister Ryutaro Hashimoto in Santa Monica, California, the U.S. government finally made a political concession, offering a special "sympathetic consideration" (koiteki koryo) to Japanese requests to handover military personnel prior to an indictment, though only if he/she is suspected of a heinous crime.[18] Nonetheless, the ultimate decisions to turn over military suspects to the Japanese prosecutors still remained in the hands of the U.S. military, not the Japanese authority because the SOFA, which outlines the exterritorial agreement under which the U.S. forces operate in Japan, had not been changed.

Since 1996, the American military has yet to effectively comply with Japanese requests for pre-indictment handover of their officers who allegedly commit heinous criminal acts.[19] In less serious criminal offenses,

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[15] Teresa Watanabe, *Three U.S. Servicemen Found Guilty in Okinawa Rape*, L.A. TIMES, Mar. 7, 1996, at A1. The accused's expressive sign of regret or apology is important in receiving leniency in sentencing in Japan's criminal court. See generally Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986).

[16] *Id*.

[17] MICHAEL J. GREEN, U.S.-JAPAN RELATIONS IN A CHANGING WORLD 27-28 (Steven K. Vogel ed.1996)

[18] Thom Shanker, *U.S. and Japan Discuss Transfer of American Rape Suspect*, N.Y. TIMES, July 6, 2001, at Sect. A, p.3.

[19] See the subsequent discussions of recent criminal cases and an increase of pre-indictment handovers of military suspects to the Japanese authority. The Japanese government's response to the SOFA revision has been extremely slow. In July 2001, despite demands from Okinawa administrators for the change and revision of the SOFA,

the U.S. military also continues to refuse to hand over military suspects to the Japanese authority.[20]

Given the mounting public pressure, change in this policy is likely, despite the Japanese government's present limited power to exercise jurisdiction over military personnel in Okinawa. This is because the Japanese government's 2004 passage of both the Lay Assessor Act and the revised Prosecutorial Review Commission (PRC) Act have prepared and established important legal ground for both direct and indirect adjudications of alleged military felons by a judicial panel that includes Japanese citizens in Okinawa and other prefectures where U.S. military bases are stationed.

The foundation for this legal changeover is not yet well-known in the West, but Japan's new lay assessor system holds the potential to democratize the Japanese judiciary by transforming the purely professional, inquisitorial structure into an equitable justice system with greater transparency and accountability. The democratic effect of lay participation will become more self-evident, once Japanese citizens are asked to adjudicate charges of heinous crimes committed by military personnel. Historically, the vast majority of crimes committed by American soldiers have gone unprosecuted.[21] Those "unresolved" cases and so-called incidents left Okinawan victims with almost no means to provide redress for their sufferings.[22] The introduction of the new lay assessor system will likely promote a greater sense of accountability, in which charges of heinous crimes committed by military personnel are adjudicated by a judicial panel that includes Okinawan residents selected at random from local electoral rolls.

The lay assessor trial also has the potential to promote greater popular participation in the adjudicative process because the judicial panel

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particularly on the right to exercise jurisdictions over American military suspects, the Japanese government finally stated that they decided not to seek revisions to the SOFA. *See Gov't to stay put over Japan-US military agreement*, MAINCHI SHIMBUN, July 6, 2001.

[20] *See generally* CHALMERS JOHNSON, NEMESIS: THE LAST DAYS OF THE AMERICAN REPUBLIC (2008).

[21] *Editorial: Only the Removal of U.S. Bases Can Ensure the End of U.S. Military Crimes*, JAPAN PRESS WEEKLY, July 8, 2005, *available at* http://www.japan-press.co.jp/2005/2439/usf2.html. ("In many cases, [Japanese] victims were compelled to feel that they should resign themselves to doing nothing against the [American military] offender").

[22] *Id*. Even if Japan was given the primary jurisdiction, American soldiers' crimes were not adjudicated in Japan's court ("In many cases, however, the Japanese government hands over its jurisdiction to U.S. forces"). Even in some criminal cases adjudicated in Japan's criminal courts, the Japanese judges treated American felons very leniently. See Johnson, *supra* note 21 at 180 ("Japanese judges treat guilt … much more leniently than American criminal proceedings would").

is empowered to make decisions, not only in disputed or contested criminal cases, but also in uncontested criminal cases where the facts and issues identified by pre-trial procedure are undisputed.

The new Prosecutorial Review Commission equally offers the great potential to ensure that military personnel who commit heinous crimes against Okinawans will be fairly indicted and duly prosecuted.[23] After the Japanese prosecutors decide not to prosecute an American soldier, a local complaint made to the PRC about the non-prosecution decisions can initiate an inquiry process by the citizens' panel to review, challenge, and possibly reverse the prosecutors' decision. Due to the new binding authority bestowed upon the commission's resolution, once the commission twice decides that the indictment against American military personnel is proper, the prosecution will then be obliged to initiate the prosecutorial process. Such a legally binding resolution becomes the critical channel through which Okinawans' moral sentiment -- their sense of justice, fairness, and accountability -- will be expressed, articulated, and reflected in the deliberation of criminal cases.[24]

This paper details how these judicial processes are evolving in Japan. Part I examines a history of Japan's twin systems of lay participation -- the prosecutorial review commission (PRC) and the lay assessor trial. Those systems provide evidence of public sentiments into the decision making process.

Part II reviews the Japanese-American SOFA and examines the legal foundation for Japan's rights to exercise jurisdictions over military felons in Okinawa. Neither the Japanese-American SOFA nor the 1996 "sympathetic consideration" agreement specifies the adjudicative condition under which charged military felons must be tried and adjudicated. Thus the legal conditions specified by existing intergovernmental protocols and agreements make it possible for a judicial panel of both professional judges and ordinary Okinawans to try American servicemen and their associates who are charged with heinous crimes in Okinawa. The lay assessor trial, then, is designed to help create a sort of "quasi-public forum," with the opportunity to possibly reflect on, and offer evidence of, collective sentiments and shared opinions into the critical

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[23] The PRC will have the potential to influence the prosecutorial decisions despite the recent discovery of the secret SOFA that has been signed between the Japanese and American governments. Japanese historian Shoji Niihara discovered the 1957 secret agreement between both governments, in which the Japanese government renounced the jurisdiction over certain criminal offenses committed by military personnel. According to Niihara, such a bilateral agreement forced the Japanese prosecutors from making indictment decisions in many serious crimes committed by U.S. servicemen in the past.

[24] Hiroshi Fukurai, *Saiban-in Seido (Lay Assessor's System), Kensatsu Shinsakai (Prosecutorial Review Commission (PRC), and Okinawa's Quest for Self-Determination and Political Sovereignty*, 5 OKINAWAN JOURNAL OF AMERICAN STUDIES, 31 (2008).

evaluation of actions and conduct of soldiers and their dependents in Okinawa. The PRC can also be empowered to operate as an important institution for judicial oversight of military personnel in Okinawa.

Part III examines two recent decisions made by the new PRC, showing that the new PRC law allowed the reversal of the prosecutors' non-indictment decisions and successfully initiated the forced prosecution of a deputy police chief, as well as three past presidents of one of the most powerful and politically-connected companies in Japan. Part IV then examines political ramifications of the new grand jury decision on military personnel. This is followed by an assessment of its potential impact on the prosecutor's indictment decisions involving dependents of military personnel, as well as Japanese business personnel and their political allies who engage in egregious or unethical behavior detrimental to the interest of Okinawan populations.

The last section of the paper summarizes the social and political ramifications of these two lay justice systems in Okinawa, suggesting that they have the potential to create a greater sense of equity, self-determination and political independence in Okinawa and among its people.

I. JAPAN'S HISTORY OF LAY PARTICIPATION IN LAW

A. *The Prosecutorial Review Commission (Kensatsu Shinsakai)*

The Prosecutorial Review Commission (PRC) is the Japanese version of an American-style grand jury system.[25] Originally created by the Allied Forces occupying Japan after World War II, General Douglas McArthur saw the PRC as an important democratic institution for engaging the public. With American influence on its creation, the PRC then became a hybrid institution, adapting the American civil and criminal grand jury systems into Japanese culture and its legal milieu. This legal system became similar to that of America's civil grand jury in examining and inspecting the proper functioning of local public offices, including the prosecutor's office, the police department, and local jails. Also similar to the U.S. criminal grand jury, the PRC has an influence on decisions to indict. A total of 201 commissions have been established in each of Japan's fifty district court jurisdictions.

The principal function of the commission is to empanel a group of randomly chosen Japanese citizens to examine and review the appropriateness of the prosecutors' decisions not to bring indictment charges against possible violators of the law. Given the fact that nearly 100% of indictments lead to conviction in Japan, the commissions' ex-post facto examination of the appropriateness of non-prosecution decisions

[25] It is also referred as the Committee (or Commission) for the Inquest of Prosecution (CIP).

is quite important in checking the prosecutorial abuse of power.[26] The near-perfect conviction of indicted cases also indicates that if one can avoid the indictment, his "innocence" is factually established, therefore suggesting that the abuse of prosecutorial power by the Japanese government potentially lies in their discretion in decisions not to prosecute potential suspects or criminals.

Since its inception in 1948, Japanese grand jurors have examined many controversial political cases and engaged in civic investigative activities related to personal injuries, torts, and other civil matters. Not only has the PRC deliberated on criminal cases, but they also have examined prominent civil cases, white collar crimes, and allegations of egregious governmental misconduct. Their examinations have included controversial matters such as the Minamata mercury poisoning incidents; an organ transplantation case from a brain-dead donor; thalidomide scandals; incidents in which hemophiliacs contracted HIV virus from contaminated blood products; drug-induced sufferings of millions of Japanese who contracted the hepatitis C virus from unheated pharmaceutical products previously approved by the government; and illegal campaign donations and political briberies.[27]

The commission investigates cases in private by summoning petitioners, their proxies, and witnesses for examination, questioning prosecutors, asking them for additional information when necessary, and seeking special expert advice on a case. The investigative function only begins after a public complaint is filed against a decision by the prosecution not to indict. In other words, individuals or civic organizations in the public sectors are empowered to launch a first strike against the prosecution in the assessment of its decisions in criminal matters.[28]

After assessing and deliberating about the case, the commission then submits one of three recommendations: (1) the non-indictment is proper, (2) the non-indictment is improper, and (3) the indictment is proper. A simple majority is needed for either of the first two resolutions, while a special majority of at least eight of the eleven votes is needed to pass the third resolution. The commission then delivers a written recommendation to the prosecutor's office. In the past, because the prosecutor's office was the only institution with power to issue an

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[26] J. Mark Ramseyer & Eric B. Rasmusen, *Why the Japanese Conviction Rate so High?* 30 J. LEGAL STUD. 53 (2001) (conviction rates in Japan exceed 99 percent).

[27] Supreme Court of Japan, *Kensatsu Shinsakai no Gaiyo [Summaries of the Prosecutorial Review Commission*], available at http://www.courts.go.jp/kensin/seido/sinsakai.html (last visited on October 25, 2010).

[28] Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-jury and Grand Jury Systems: Cross-national Analysis of Legal Consciousness and Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J.315, 323-4 (2008).

indictment, the PRC recommendations were regarded as merely advisory. But this limited legal authority was finally enlarged by the 2004 PRC Act, which made the PRC decision legally binding.[29]

Nonetheless, the far-reaching influence and the importance of civic legal participation in the PRC have not been widely communicated to Japanese communities, suggesting that PRC duties remain virtually unknown in Japan. For example, in a 1990 national poll by the Japanese Cabinet Office, 68.8% of respondents had no knowledge of the PRC system or PRC's duties.[30] Even among those with knowledge of the PRC system, 73.8% of them did not know who could actually be selected for the commission.[31] Public unfamiliarity with the PRC system, PRC duties, and their civic importance has also caused panic and even hysteric reactions in those who have been summoned for PRC duty. For instance, a woman in Nagasaki Prefecture committed suicide after she received a summons for jury duty because she thought she was receiving something from the prosecutor's office.[32] In addition to its obscurity, strict confidentiality requirements and severe penalties imposed on PRC participants may further discourage, and even scare, many people from PRC duties.

B. *The Introduction of the Lay Assessor System*

Beginning in the late 1980s and 1990s, the pressure to change the existing legal system, including the introduction of lay judges in criminal cases, began to emerge.

The judicial reform then impacted the national agenda, and the demand for the judicial reform came from several sources, including (1) the Ministry of Justice, (2) the Secretariat of the Supreme Court, (3) the Japanese Federation of Bar Association (JFBA), (4) the Federation of Economic Organizations (FEO or "Keidanren") and the Japanese Association of Corporative Executives (JACE or "Keizai Doyukai"), two of Japan's most influential business organizations, and (5) the Liberal Democratic Party ("Jiminto") and the New Clean Government Party ("Komeito") -- the ruling political alliance of the Japanese government.

Since the early 1990s, those five interest groups acted as the exclusive set of policy makers in the regulation of the legal profession and

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[29] *Id*. at 324.

[30] NAIKAKUFU SEIFU KOHOSHITSU [CABINET OFFICE PUBLIC RELATIONS] KENSATSU SHINSAKAI SEIDO KANSURU SERON CHOSA [PUBLIC OPINION POLL ON THE PRC SYSTEM], October 1990 http://www8.cao.go.jp/survey/h02/H02-10-02-15.html.

[31] *Id*.

[32] Mitsuru Shinokura, *Shitteimasuka? Kensatsu Shinsakai [Have You Heard of Them? Prosecutorial Review Commissions]*, 205 SHOSAINO MADA 13, 14 (1991).

the formulation of policies affecting the judicial process, including the introduction of the system of popular legal participation.[33]

The Ministry of Justice and the Supreme Court first proposed the need to increase the number of both public prosecutors and judges. Their close alliance and collaborative relationship between the Supreme Court and the Justice Ministry arise from the historical fact that the Ministry of Justice once handled administration of the entire judiciary including the prosecutor's office.[34] After 1947, in an effort to promote judicial independence, the governance structure was changed to give the Supreme Court of Japan control over personnel issues involving judges and judicial staff. Still, both prosecutors and judges remain as an exclusive class of elite bureaucrats within the Japanese government. In order to achieve their objective, however, both groups also proposed to increase the number of legal applicants who passed the national bar exam in order to secure a sufficient number of successful candidates to fill positions of prosecutors, judges, and judicial officers. Despite the strong opposition from the JFBA, the National Bar Examination Act was nonetheless amended in 1991.[35]

Other pressures also intervened. With a prolonged recession at home and facing increasing business and legal challenges due to the globalization of the Japanese economy, many economic groups also shared the similar interest with the ruling LDP, the court, and the ministry. They all felt the need to expand the legal profession and allow legal practices by non-attorneys, such as judicial scriveners, patent agents, and non-attorney corporate legal staff, to represent parties in litigation.[36] In order to increase the efficiency in handling legal cases, the JACE, one of the most powerful economic interest groups, published a report in June 1994, followed by another report in January 1997 to promote significant legislative and judicial reforms designed to create a market-led economy in Japan.[37] Besides the expansion of the legal profession, those reports

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[33] Fukurai, supra note 29, at 321.

[34] *See generally* Setsuo Miyazawa, *The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PAC. L. & POL'Y J. 89 (2001).

[35] *Id*.

[36] The profession of Japan's judicial scriveners (Shiho Shoshi) involves the legal representation of their clients in real estate and commercial registrations and the preparation of official legal and court documents. They are also allowed to represent their clients in summary courts, arbitration, and mediation proceedings. See generally the homepage of the Japan Federation of Solicitor Associations, available at http://web.archive.org/web/20080114234106/www.shiho-shoshi.or.jp/index.html.

[37] JACE, GUROBARU KA NI TAIOSURU KIGYO HOSEI NO SEIBI WO MEZASHITE: MINKAN SHUDO NO SIJO KEIZAI NI MUKETA SEIDO TO RIPPO, SHINO NO KAIKAKI [TOWARD ESTABLISHING CORPORATE LEGAL STRUCTURE TO MEET THE CHALLENGES OF GLOBALIZATION: THE SYSTEM FOR MARKET LED ECONOMY & ACCOMPANYING LEGISLATIVE & JUDICIAL REFORMS], January 1997, available at

also emphasized the need for unification, so judges could be actively recruited from experienced practicing attorneys, who showed better understandings of contemporary business practices, international legal customs, and complex business laws.[38] Similarly, a think-tank established by the FEO also published its recommendation in December 1998, suggesting more flexible and expansive views of legal practices and efficient alternative dispute resolution procedures designed to deal with the increasing globalization of Japanese business and economy.[39]

The JFBA, representing Japan's practicing attorneys, similarly proposed the unification of the legal profession and the introduction of the all-citizen jury system in order to transform the bureaucratically controlled judicial system. The JFBA's proposal stems from recent criticism of judicial decisions, due to a series of wrongful convictions of innocent defendants in prominent criminal cases,[40] and that almost all indictment cases result in automatic convictions because Japanese judges almost never acquit criminal defendants.[41] They also argued that there are few checks-and-balances mechanisms in the judicial system necessary to ensure proper, fair, and equitable performance of Japanese judges or prosecutors.

The LDP and its Special Investigation Council ("Seido tokubetsu chosakai") held a series of meetings beginning on June 12, 1997 and invited a large group of concerned organizations and groups to present their views, including the FEO. They collectively published a report in November 1997, promoting comprehensive reform of the judicial system and legal profession.[42] Another report was also published in June 1998, promoting judicial reform with socially transparent rules and self-

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http://www.doyukai.or.jp/database/teigen/970122.htm.

[38] *Id*.

[39] FEO, SHIHO KAIKAKU NI TSUITE NO IKEN [PROPOSAL ON JUDICIAL REFORM], May 1998. Available at http://www.keidanren.or.jp/japanese/policy/pol173.html.

[40] Japan's four prominent wrongful convictions included the Menda, Zaidagawa, Matsuyama, and Shimada cases. For their case-specific information, see Chihiro Saeki, BAISHIN SAIBAN NO FUKATTSU [REINSTATEMENT OF JURY TRIAL IN JAPAN], 155-56 (1996).

[41] Daijiro Yasuda, One Aspect of Criminal Justice in Japan: Confession, Table 1, http://sydney.edu.au/law/anjel/documents/23Feb2005Conf/Yasuda2005_OneAspectOfCriminalJusticeInJapan.pdf (last visited on October 25, 2010). In 2003, 78,364 criminal cases resulted in guilty verdicts and 67 cases in not-guilty verdicts (a conviction rate of 99.91%).

[42] SHIHO SEIDO TOKUBETSU CHOSAKAI [The LDP Special Investigation Council on Judicial System, hereinafter Chosakai], SHIHO SEIDO KAIKAKU NO KIHONTEKINA HOSHIN [BASIC POLICY ON JUDICIAL REFORM] (Nov. 1997). For detailed discussions of the impact of major players including business leaders and the LDP on judicial reform, *see* Miyazawa, *supra* note 35, 99-103.

responsibility.[43] It also recommended a series of reforms and suggestions, including: (1) to strengthen the quality and quantity of legal professions and examine the introduction of law schools, (2) to examine the system of recruiting judges from among practicing attorneys and continuing education in the legal profession, (3) to strengthen the civic legal aid program, (4) to examine the criminal defense system, including the defense of suspects during pre-indictment stages, (5) to allow attorneys to open more than one office and incorporate law firms, (6) to examine the opening of multidisciplinary partnerships, (7) to examine public participation in deciding legal matters (i.e., jury or mixed court systems), (8) to broaden discussion on the judicial system beyond the three parties within the legal profession (i.e., judges, prosecutors, and practicing attorneys), fulfilling LDP's responsibility to discuss it in the Diet, (9) to examine the budget of the courts and the Justice Ministry, (10) to increase alternative dispute resolution systems, and (11) to examine the system of judicial review of administrative agencies.[44] The system of popular participation in law was discussed in the LDP proposal, though revising the existing system of popular legal participation including the PRC was not mentioned in the report.

The steps to reform were many, as until the late 1990s, and before the government committee was formed to create the judicial reform proposal in 1999, the system of popular legal participation ("shimin shiho sanka") exclusively meant the trial by an all-citizen jury, and the introduction of the mixed tribunal ("sanshin") or quasi-jury ("saiban-in") system was never mentioned, discussed, or elaborated in any of the reports published by the five exclusive groups of policy makers.

Then in 1999, in order to create the official guideline for Japan's judicial reform, the late Prime Minister Keizo Obuchi established "Shiho Seido Kaikaku Shingikai" (Justice System Reform Council (JSRC)).[45] The council had thirteen members who were recruited from different political and economic sectors. The analysis of the council members is important to understand the potential influence of various interest groups in shaping and influencing the future blueprint for Japan's judicial reform. For example, the interests of the Japanese government were expressed through two members of bureaucratic elites -- a former chief justice of Hiroshima high court and a former chief prosecutor of Nagoya Public Prosecutor's Office. The council also included two members from "Keidanren" (Federation of Economic Organizations (FEO)) and "Keizai Doyukai" (Japanese Association of Corporative Executives (JACE)) -- two of Japan's most influential business organizations, as well as a former

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[43] CHOSAKAI, 21-SEIKI NO SHIHO NO TASHIKANA SHISHIN [FIRM GUIDELINES FOR THE JUDICIAL SYSTEM IN THE TWENTY-FIRST CENTURY] (June 1998).

[44] *Id*. *See also* Miyazawa, *supra* note 35, at 101.

[45] TAKASHI MARUTA, SAIBAN-IN SEIDO [THE LAY ASSESSOR SYSTEM] 76 (2004).

president of JFBA, a president of the Federation of Private Universities, a female business professor from a private university, a female popular writer, a vice president of "Rengo" (a labor organization), a law professor at Tokyo University, a president of Surugadai University, and a president of "Shufuren" or the Federation of Homemakers (or Housewives). Kyoto University law professor Koji Sato chaired the council.[46] The governmental influence was evident because, besides a judge and prosecutor, six council members have previously served in various governmental committees and agencies, including a member who was a former first secretary of the Japanese embassy in Thailand.[47]

The term, "saiban-in" (lay judges), first emerged in a reference material presented by Tokyo Law Professor Masahito Inouye in the 51st public meeting on March 13, 2001. He then explained the need to establish the mixed court system. His document provided the six specific suggestions for the "saiban-in seido" (lay assessor system): (1) the role of saiban-in (lay judges), (2) the role assignment for professional and lay judges, (3) the selection method, rights, and duties of lay judges, (4) applicable criminal cases, (5) ideal methods of a trial procedure and judgment, and (6) an appellate procedure.[48] Interestingly, Inouye was later asked to chair the Investigation Committee to implement his own recommendations on the lay assessor system.

JSRC's final report came out at the 62nd meeting on June 1, 2001, recommending that the lay assessor trials examine all applicable cases, regardless of whether the defendants admit or deny the charges.[49] Similarly, it agreed that criminal defendants should have no right to refuse the lay assessor trial.[50] However, the report failed to specify the exact number of lay or professional judges to serve in the lay assessor trial. Instead, it stated the following:

> The number of judges and saiban-in on one judicial panel and the method of deciding the verdict should be determined appropriately, giving consideration to the need to ensure the autonomous and meaningful participation of saiban-in and the need to ensure the effectiveness of

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[46] *Id*. at 77.

[47] *Id*.

[48] *See Sosho tetsuzuki eno aratana sanka seido kokushi an [A New Mixed Court System in Criminal Procedure: A Suggestion for the Framework*], Mar. 13, 2001, *available at* http://www.kantei.go.jp/jp/sihouseido/dai51/51bessi1.html.

[49] *See Kokuminteki Kiban no Kakuritsu [Establishment of the Popular Base of the Justice System]*, June 1, 2001, *available at* http://www.kantei.go.jp/jp/sihouseido/dai62/pdfs/62-4.pdf.

[50] *Id*.

> deliberations, and also taking into account the seriousness of the cases to which this system will apply and the significance and potential burden of the system on the general public.[51]

In April 2002, in order to implement the recommendation, the Office for the Promotion of Justice System Reform (OPJSR) was established in the Cabinet Office. The OPJSR created eleven separate investigation committees to implement specific recommendations of the JSRC's final report.[52] The responsibility to deliberate on specific items of the judicial reform for the lay assessor system was delegated to the Lay Assessor/Penal Matter Investigation Committee ("Saiban-in Keiji Kentokai," hereinafter the Investigation Committee), including the task to determine the specific number of lay and professional judges for lay assessor trials.[53]

Attorney Satoru Shinomiya, the Director of the JFBA's Judicial Reform Investigative Commission, was selected to serve as one of the thirteen members in the Investigation Committee. His appointment and contribution to group discussions brought a significant civic influence in the formulation of the Lay Assessor Act because Shinomiya served for many years as the General Secretary of the powerful and influential grassroots organization called "Baishin Saiban o Kangaeru Kai" (Research Group of Jury Trials, hereinafter RGJT). This grassroots organization was co-founded by famous legal writer Chihiro Isa and his progressive civic group, including many lawyers and judges, in 1982.[54] Shinomiya has developed his deep appreciation of, and strong admiration for, community-wide representation of the all-layperson jury system and its

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[51] *See Recommendations of the Justice System Reform Council*, June 12, 2001, *available at* http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.

[52] Those committees include: (1) Labor Study Committee (rodo kentokai), (2) Legal Access Investigation Committee (shiho akusesu kentokai), (3) ADR investigation committee (ADR kentokai), (4) Arbitration Investigation Committee (chusai kentokai) (5) Administrative Litigation Investigation Committee (gyosei sosho kentokai), (6) Lay Assessor/Penal Matter Investigation Committee (saiban-in seido, keiji kentokai), (7) Public Defender System Investigation Committee (koteki bengo seido kentokai), (8) Globalization Investigation Committee (kokusaika kentokai), (9) Judicial Officer Training Investigation Committee (hoso yosei kentokai), (10) Judicial Officer System Investigation Committee (hoso seido kentokai), and (11) Intellectual Property Litigation Investigation Committee (chiteki zaisan sosho kentokai). *See Shiho seido kaikaku kentokai [Justice System Reform Investigation Committees]*, Nov. 15, 2006, *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/index.html.

[53] MARUTA, *supra* note 46, at 125-127.

[54] For the historical evolution of this grassroots organization, *see* Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-jury and Grand Jury Systems: Cross-national Analysis of Legal Consciousness and Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J.315 (2008).

deliberative and democratic adjudication. As an effective organizer and progressive legal activist in many civic organizations in Tokyo, Shinomiya helped organize the JFBA's research group to investigate a historical record of Okinawa's jury trials during the American occupation.[55] He also helped publish the pre-war jury guidebook ("Baishin Tebiki"),[56] which was one of the most important materials created for the purpose of public legal education and distributed by the Japan Jury Association ("Dai Nippon Baishin Kyokai") in the late 1920s.[57]

In 1995, in order to obtain firsthand knowledge of the functioning of jury trials, Shinomiya went to the U.S., spent nearly one and a half years as a visiting scholar at the Boalt School of Law, the University of California, Berkeley, and personally attended many jury trials in the Bay Area, as well as participated in collaborative research projects to examine the deliberative function of all-citizen jury trials in the U.S. Once he returned to Japan in 1996, Shinomiya helped assemble the JFBA's research committee in examining and observing Denmark's judicial system, because Denmark's criminal adjudicatory system co-hosted both all-citizen jury and lay assessor tribunals. After visiting Denmark, he then helped publish his analysis and research findings on Denmark's twin lay participatory systems.[58]

His thoughtful input and analytic contribution to the debates on the lay assessor act were significant because many members of the Investigation Committee already expressed their support for the active involvement of professional judges in the deliberative process. Shinomiya insisted on the minimal professional involvement in the deliberative process in order to maximize the citizen contribution and participation, similar to the functioning of all-layperson jury deliberations in the U.S. Nonetheless, the decision to use the collaborative joint panel of both professional and lay judges, rather than all-layperson juries, had been already made. Shinomiya understood the assertive influence of professional judges on lay opinions, and thus his effort was more directed towards limiting the extent of professional judge's participation in a deliberative process and collaborative activities. The compositional structure of the lay assessor system then became a key political

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[55] JFBA, OKINAWA NO BAISHIN SAIBAN [OKINAWA'S JURY TRIALS], (1992).

[56] SATORU SHINOMIYA, BAISHIN TEBIKI: HOTEI SANYO NISSHI TSUKI [THE JURY GUIDEBOOK: INCLUDES JOURNAL OF TRIAL PARTICIPATION] (1999).

[57] Anna Dobrovolskaia, *The Jury System in Pre-War Japan: An Annotated Translation of 'The Jury Guidebook' [Baishin Tebiki]*, 9Asian-Pac L. & Pol'y J. 231 (2008).

[58] Nihon Bengoshi Rengokai Siho Kaikaku Suishin Senta & Tokyo Daisan Bengosikai Baishin Seido Iinkai [JFBA's Judicial Reform Promotion Center and the Jury Trial Committee of the Third Tokyo Lawyers Association], DENMAKU NO BAISHINSEI SANSHINSEI [DENMARK'S JURY SYSTEM & LAW ASSESSOR SYSTEM] (1998).

battleground. In order to minimize the professional judge's involvement, Shinomiya proposed the establishment of a deliberative structure with only one professional judge. Others insisted on a greater participation of professional judges, in which two committee members suggested the minimum of at least two professional judges, while other five committee members supported the judicial panel of three professional judges.[59]

Shinomiya also supported the plan to dramatically expand the extent of lay participation by proposing to empanel eleven lay assessors, suggesting that the PRC – Japan's grand jury system and another lay participatory system – also consists of eleven laypersons.[60] The Investigation Committee actively solicited the public opinion -- many of which were indeed sent by active members of the RGJT and other grassroots organizations. Drawing on many supportive comments and suggestions in letters, emails, and scholarly statements, Shinomiya insisted that many concerned citizens and progressive legal scholars supported an expansive role of civic participation in the deliberative process.[61] With regard to the voting rule, the original draft proposal submitted to the Investigation Committee suggested the use of the simple majority rule. Shinomiya, however, insisted that such a voting rule may create undesirable results, fostering inequitable and unfair results for many criminal defendants and possibly leading to instances of wrongful convictions. He supported the use of a unanimity rule or special majority rule, arguing that, if a verdict may go against the defendant, it must depend on at least a two-third special majority vote to assure criminal convictions.[62] Shinomiya also supported the extended participatory rights beyond the citizenship to those with a permanent resident status, though such a plea was flatly rejected by the majority of other panel members.[63] Shinomiya further suggested greater expansive participatory opportunities to those who failed to complete compulsory education,[64] or relaxing strict confidentiality rules imposed on lay assessors on the disclosure of information obtained from deliberative discussions,[65] but such suggestions and proposals were summarily dismissed by other members.

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[59] *See Shiho Seido Kaikaku Kentokai [Lay Assessor/Penal Matter Investigation Committee, hereinafter Investigation Committee]* Mar. 11, 2003, *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai13/13gijiroku.html.

[60] *Id*.

[61] *Id*.

[62] Investigation Committee, Mar. 25, 2003, *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai14/14gijiroku.html.

[63] *Id*.

[64] Investigation Committee, Apr. 8, 2003, *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai15/15gijiroku.html.

[65] Investigation Committee, May 20, 2003, *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai18/18gijiroku.html.

Shinomiya's new proposals, progressive suggestions, and detailed documents supported his progressive agendas for the creation of the lay assessor system similar to all-layperson juries in the U.S. Nonetheless, his ultimate influence on the drafting of the lay assessor act unfortunately remained minimal at best. Majority of the committee members already supported the conservative governmental view on civic participation and the subservient role of lay persons in deliberative processes. They also supported the greater involvement of professional judges in nearly every phase of lay assessor trials including deliberative discussions, the adoption of conservative voting rules, and the continued practices of procedural regulations and rules that were more or less currently practiced by the Japanese prosecution and the police.

On January 29, 2004, the final committee proposal was reported at the thirty-first public meeting of the Investigation Committee[66] and was later submitted to the OPJSR in the Cabinet Office. On March 2, the Cabinet Office decided its final overall proposal on Japan's judicial reform entitled, "Recommendation of the Justice System Reform Council: For the Justice System to Support Japan in the 21st Century" and submitted it to the Diet on March 16.[67] On May 21, 2004, the Diet passed the proposal and announced that the first lay assessor trial would begin in May 2009.[68]

The Lay Assessor Act provides two different panels for the criminal trial. The panel of three professional and six lay judges is selected in a contested case, while one professional and three lay judges are chosen in an uncontested cases where facts and issues identified by pre-trial procedure are undisputed.[69] Since the 2004 law also requires that both the government and Supreme Court must draft court rules necessary to regulate lay assessor trial procedures and deliberations within the existing judicial framework, the practical and logistical operation of the lay assessor system, including the extent of evidentiary discovery, jury

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[66] Investigation Committee, Jan. 29, 2004, *available at* http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai31/31gijiroku.html

[67] Noboru Yanase, *Saiban-in Ho no Rippo-Katei (3) [The Legislative Process for the Establishment of the Lay Assessor Law, Part Three]*, 10 SHINSHU DIAGAKU HOGAKURONSHI [SHINSHU UNIVERSITY LAW JOURNAL]119, 123 (2008) (reviewing the legislative history of the Lay Assessor Act), *available at* https://soar-ir.shinshu-u.ac.jp/dspace/handle/10091/3875.

[68] *Id*.

[69] *Saiban-in No Sanka Suru Keiji Saiban Ni Kansuru Horitsu [The Act Concerning Participation of Lay Assessors in Criminal Trial]*, Law No. 63 of 2004. "Saiban-in Seido" is translated as the system of "the lay assessor" and/or "the quasi-jury." *See* Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6ASIAN-PAC. L.& POL'Y J. 233, 233-35 (2004) [hereinafter *Lay Assessor Act*]. *See Lay Assessor Act*, art. 2 (3).

compensation, among many others, went through further adjustments before its final implementation in May 2009.[70]

C. *The Newly Revised Prosecutorial Review Commission (PRC)*

For many decades, the JFBA insisted that the PRC decision be given a legally binding status instead of being treated in a mere advisory capacity to the Japanese prosecutor. The revision of the role of the PRC system and its lay adjudicative process was also examined by the Justice System Reform Council (JSRC). The revision of the PRC law, however, was not a primary objective of the council. Nonetheless, the necessity to revise the PRC law was first mentioned in JSRC's seventh meeting in November 1999.[71] However, it took another one and half years to hold another substantial discussion on the revision of the PRC law.

In the 55th meeting on April 10, 2001, the council members discussed the possibility of providing the legally mandatory status to the following two PRC resolutions --- "non-indictment is improper" and "indictment is proper."[72] The reference material submitted to the meeting showed the comparison of different strategies and opinions provided by the JFBA, the Supreme Court, and the Ministry of Justice. The Ministry of Justice, for instance, recommended that only the third resolution, "indictment is proper," should be considered legally binding, while the Supreme Court agreed to give the legally binding status to both resolutions. Nonetheless, the Supreme Court stated that that a unanimous decision is needed for the second resolution, "non-indictment is improper," to become legally binding. The JFBA suggested that the third resolution should carry the legally mandatory status and the decision require two thirds of the vote. The JFBA also asked to create the position of a "legal advisor" in support of the discussion and deliberation by the PRC members and that the advisor must be selected from the rank of practicing attorneys, not prosecutors or professional judges.[73]

Similar to its statement on the specification of the lay assessor system, the final JSRC proposal was vague on the revision of the PRC law. Nevertheless, the first chapter of the proposal was clear in providing the

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[70] *Id*, at *Supplementary Provisions*, arts. 2 & 3.

[71] *Shihoseido Kaikaku Shingikai: Dai 7 Kai Giji Gaiyo [JSRC, No. 7 Proceeding Outline]* Nov. 24, 1999, available at http://www.kantei.go.jp/jp/sihouseido/991126dai7.html.

[72] *Shihoseido Kaikaku Shingikai: Dai 55 Kai Giji Gaiyo [JSRC, No. 55 Proceeding Outline]* Apr. 10, 2001, available at http://www.kantei.go.jp/jp/sihouseido/dai55/55gaiyou.html.

[73] *Kensatsu Shinsakai No Itteino Giketu ni Taishi Hoteki Kosokuryoku o Fuyosurutameno Hosaku: Hoso Sansha no Iken no Hikaku [The Strategy to Provide a Legally Mandatory Status to a Particular Resolution by the PRC: Comparisons of Three Legal Professional Groups]*, Apr. 10, 2001, available at http://www.kantei.go.jp/jp/sihouseido/dai55/55bessi2.html.

legal mandatory power to the PRC resolution, stating that "a system of giving legally binding force to specific resolutions by the Inquests of Prosecution [i.e., PRC] shall be introduced so as to reflect popular will more directly."[74] The second chapter of the proposal also stated, "[a]lthough this system has been criticized by various groups, it has played a considerable role. While paying attention to the guarantee of the due process of law for suspects, a system should be introduced that grants legally binding effect to certain resolutions."[75] The third chapter further stated, "[m]echanisms should be introduced so as to enable the voices of people to be heard and reflected in the management of the public prosecutors offices, including reinforcing and making effective the system for proposals and recommendations from the Inquests of Prosecution [i.e., PRC] to chief public prosecutors regarding the improvement of prosecutorial affairs . . . and proposals and recommendations along with the responses to them could be made public."[76]

The OPJSR then delegated the authority to the Lay Assessor/Penal Matter Investigation Committee to deliberate not only on the establishment of the lay assessor system, but also on the revision of the PRC law. Chairman Inouye submitted the outline on the PRC reform on November 11, 2003.[77] The first reform item in the outline was to make the PRC's decision legally mandatory (Section 1(1)). The outline also recommended the selection of a legal advisor from the rank of practicing attorneys (Section 2(1)).[78] In April and May 2003, the Investigation Committee then ran articles in newspapers, government bulletins, and legal journals to solicit public opinions and feedback. They further set up a website to solicit public opinions on their new proposals and

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[74] *Kokumin no Kitai ni Kotaeru Shiho Seido [The Judicial System in Response to Expectation of Citizens]*, June 12, 2001, available at http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/iken-2.html. The English translation is shown in the report, "Recommendations of the justice system reform council – For a justice system to support Japan in the 21st Century," available at http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html.

[75] *Id*

[76] *Id*. The fourth chapter, "Establishment of the Popular Base," also suggested the need to reinforce the PRC system. It was also mentioned in the same section that asked for the expansion of a volunteer officer system for a probation program (Hogoshi Seido). The probation officer in Japan is administratively classified as a part-time national civil servant, but it is still a non-paid volunteer work.

[77] *Kangaerareru Kensatsu Shinsakai Seido Kaisei no Gaiyo ni Tsuite [The Outline on the PRC's Reform to Consider]* Nov. 11, 2003, available at http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai29/29siryou1.pdf

[78] *Id* at 2. *See* Section 2, *Kensatsu Iinkai no Soshiki, Kengen, Tetsuzuki no Arikata [Ideals for the PRC's System, Authority, and Procedure], (1) Rigaru Adobaiza (Kasho) no Izoku [Commission of Legal Advisor (A Tentative Title)]*.

guidelines.[79] Many grassroots activists from the RGJT were encouraged to send their opinions and suggestions to the committee's webpage.[80]

As results of greater calls for participation campaign and involvement, the public response was quite extensive. For example, a person who worked as a court clerk sent a letter, criticizing the Investigation Committee's failure to discuss specific strategies to recruit a sufficient number of lay participants for the commission to convene. He suggested that "in recent years, many PRC meetings had to be adjourned for the poor attendance. The PRC system is in crisis. Even the media reported it. However, measures to improve recruitment had not been discussed at all."[81] Another person from Nara Prefecture suggested eliminating the PRC rule of automatically disqualifying vision and/or hearing impaired candidates.[82] The JFBA also sent a very lengthy letter to the committee, suggesting that "there was not even a single PRC member ever punished for leaking case-specific information and there is absolutely no need to increase the penalty."[83] Another influential civic group called "Shimin no saiban-in seido tsukuro kai" (Citizens Committee for the Creation of a Lay Assessor System (CCCLAS)) also opposed the increased penalty against PRC members, suggesting that "no evidence exists to indicate that the current law failed to protect the secrecy of the PRC deliberation; thus, there is no need to revise the law on the punishment."[84] Both groups strongly supported the PRC resolution to be legally binding as well. Based on public input and feedback, the committee submitted its final proposal, and on May 28, 2004, the Japanese Diet enacted the Act to Revise the Code of Criminal Procedure, which also included the revision of the existing PRC Law.[85]

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[79] OPJSR, *Saiban-in Seido oyobi Kensatsu Shinsakai Seido ni Tsuiteno Ikenboshu no Kekka ni tsuite [Results of Public Opinions on the Lay Assessor and PRC Systems]* July 2003, available at http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/siryou/0307kekka.html.

[80] The first author also has sent, along with other RGJT members, a lengthy letter of suggestions to the homepage, calling for a greater civic involvement in the deliberation.

[81] *Saiban-in seido oyobi kensatsu shinsakai ni tsuiteno iken boshu no kekka gaiyo [Resulting outlines of public opinions on the lay assessor and PRC systems]* July 2003, at 9, available at http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai22/22siryou1.pdf.

[82] *Id*. at 47.

[83] *Id.* at 73.

[84] *Id*. at 42. Many active members of the CCCLAS were recruited from the RGJT. Indeed, there was a significant membership overlap between those two organizations. For the historical background of the RGJT and the CCCLSA and their activities, *see* generally Fukurai, *supra* note 29.

[85] *Keiji Soshohoto no Ichibu o Kaiseisuru Horitsu [Act to Revise the Code of Criminal Procedure] (hereinafter PRC Act)*, Law No. 62 of 2004, available at

The revised PRC Act gave the PRC resolution the legally binding authority to demand explanations for non-prosecution decisions and made it mandatory if the commission has twice recommended prosecution. Specifically, the revised law created the following two steps to make the PRC resolution legally binding. First, when the PRC decides that the indictment is proper, prosecutors will be obliged to reconsider the propriety of their non-indictment decision, although the commission's decision is not legally binding at this time. If prosecutors still decide not to prosecute or if they fail to indict within three months, prosecutors will be invited to explain their inaction or non-indictment decision to the commission.[86] The commission will then re-evaluate the case and can make a legally binding decision in favor of an indictment.[87] In the event of such a decision, the court must appoint a lawyer who will perform the prosecution's role until a ruling is reached.[88] However, the actual instruction to investigate authorities will be entrusted with the prosecutors.[89] The new revision of the PRC Act also created the position of a "legal advisor," who will be selected from the rank of practicing attorneys.[90] The legal advisor is appointed when the PRC considers it necessary to obtain legal knowledge and advice,[91] including the latter stage of the two-step process, where prosecutors decided not to follow the commission's first recommendation and the commission is required to re-evaluate prosecutors' second non-indictment decision.[92]

The twin systems of lay assessor trials and the PRC are designed to inject public opinions and shared public sentiments into judicial decision making, increase public trust and confidence in the judiciary and the criminal justice process, and create a strong democratic foundation for Japan's justice system. The following section examines how those new systems intersect with the prosecution of heinous crimes committed by American military personnel and their associates and examine the proper legal status of military felons within the framework of existing intergovernmental agreements between the U.S. and the Japanese governments.

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http://law.e-gov.go.jp/htmldata/S23/S23HO147.html.

[86] *PRC Act*, arts. 41 (2)(2), 41 (6) (2).

[87] *Id*. art. 41 (6) (1).

[88] *Id*. art. 41 (9) (1).

[89] *Id*. art. 41 (9) (3).

[90] *Id*. art. 39 (2) (1).

[91] *Id*.

[92] *Id*. art. 41 (4). It is legally "required" that the PRC acquires the assistance of a legal advisor in considering the second resolution on the same case.

II. THE U.S.-JAPAN STATUS OF FORCES AGREEMENT & THE RIGHTS OF "EXTRA-TERRITORIALITY"

Today, Okinawans anxiously wait for an adjudicative opportunity to partake in criminal trials of U.S. military personnel. The lay assessor (saiban-in) trial holds a special meaning with residents of Okinawa Island, which has one of the largest and highly concentrated U.S. military facilities in the world including the Kadena Air Base, the largest U.S. Air Force installation in the Far East.

The island of Okinawa hosts thirty-seven of the eighty-eight American military bases in Japan, covering a total area of 233 square kilometers, representing 75% of the territory occupied by U.S. military facilities in Japan.[93] This is despite the fact that Okinawa represents less than 1% of Japan's total land area.[94] Highly concentrated placement of the American military establishment in Okinawa historically created a multitude of social and legal problems, including the proliferation of crimes committed by military personnel. Indeed, Okinawa residents have witnessed a long history of their own community being victimized by foreign soldiers and their families stationed in the island. The Japan-U.S. SOFA nonetheless effectively shielded military felons by the extra-territorial application of U.S. law, effectively sidestepping Japanese law. So, whether or not the lay assessor trial is able to effectively adjudicate crimes committed by military felons represented a very important political and legal question in Okinawa.

Answering this question requires closer examinations of the Japan-U.S. agreements, including the Security Treaty, the SOFA, and secret intergovernmental protocols.

Article 6 of the Japan-U.S. Security Treaty states: "For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air, and naval forces of facilities and areas of Japan. The use of these facilities and areas as well as the status of the United States armed forced in Japan shall be governed by a separate agreement."[95] The Japan-U.S. SOFA then implements those bilateral agreements by specifying what Japan as a host nation has actually obligated itself to allow the U.S. to do.

It is important to note that the U.S. government so far has signed nearly 100 SOFAs with foreign governments in the world.[96] All SOFAs

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[93] JOHNSON, *supra* note 21, at 179.

[94] *Id*.

[95] The full text of the security treaty is available at http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html.

[96] R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* CONGRESSIONAL RESEARCH SERVICE, 1, June 18, 2009("The United States is currently party to more than 100 agreements that may be considered

differ in their jurisdictional scope; however, except SOFAs that the U.S. has signed with NATO nations in Europe, the majority of military agreements in non-European regions unilaterally award the primary jurisdiction to the United States if a crime was committed by one soldier against another or if a crime was committed in his or her duty. For instance, Poland joined the NATO in 1999, and the Polish government signed the Polish-American Status of Forces Agreement on December 11, 2009, which included provisions for U.S. troops to pay taxes in Poland, and American soldiers would come to be under the jurisdiction of Polish laws if American personnel commit any crimes outside the military bases.[97]

These so-called agreements were modeled after the pre-World War II provisions for juridical "extraterritoriality" imposed by western nations on their colonies and sphere of influence – which explains important features of unequal relations about legal jurisdictional matters at present U.S. military bases around the world. Only for off-duty crimes, for instance, the host nation is allowed to retain the right to exercise primary jurisdiction.

Japan is no exception to U.S. imposition of similar aspects of extraterritoriality. The Japanese-American SOFA signed in 1960 states that the U.S. retains the primary right to exercise its jurisdiction over crimes committed by American soldiers during their official duties. Article (1)(b) of the SOFA specifically states, "[t]he authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offences committed within the territory of Japan and punishable by the law of Japan." But Article 17(5)(c) also states, "[t]he custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged."

The SOFA and secret agreements were predicated on the assumption that, at least from the side of Japanese legal authority, the U.S. military itself would prosecute such offenses. However, the overwhelming majority of on-duty crimes have not been prosecuted by the American military authority. For instance, despite U.S. court martial attempts to rigorously maintain order in the military and reduce on-duty crimes, the disposition of those crimes has been quite lenient and the punishment against military perpetrators has been virtually non-existent.

SOFAs."). *See also* Department of Defense, *Treaties in Force, a List of Treatises & Other International Agreements of the U.S. in Force*, Nov. 1, 2008, *available at* http://www.state.gov/s/l/treaty/treaties/2007/index.htm.

[97] *Polish-American SOFA Signed in Warsaw*, NEWS FROM POLAND, Nov. 12, 2009, *available at* http://www.thenews.pl/international/artykul121749_polish-american-sofa-signed-in-warsaw.html.

Between 1998 and 2004, 2,024 military personnel either committed crimes or caused accidents in Japan while on official duty, most of which occurred on the Island of Okinawa; only one of them led to a court-martial. The U.S. commanders instead ordered administrative discipline in 318 cases, and the remaining 1,700 criminals presumably left unpunished.[98]

While Japan has the primary right to exercise jurisdiction over off-duty crimes, a recent revelation of the secret bilateral agreements indicated that Japan has already agreed to renounce its primary right of jurisdiction in crimes committed by military personnel.[99] On October 28, 1953, Justice Ministry spokesman Minoru Tsuda and Lt. Col. Alan Todd signed the agreement that Japan renounced its jurisdiction over criminal cases, unless it is "of material importance to Japan."[100] A similar agreement was signed to exclude from the Japanese jurisdiction some classes of off-duty crimes. The 1957 secret Japan-U.S. agreements, including one referred in a report, titled "United States Overseas Military Bases," was submitted to President Dwight David Eisenhower by Frank C. Nash, who was then Special Assistant to the President for National Security. The report indicates that, "Japan agrees that it will renounce its primary jurisdiction unless the case holds materially great significance to Japan." [101] Subsequently, acts of trespassing, molestation, battery, and theft committed by U.S. personnel were excluded from the Japanese jurisdiction.[102]

The SOFA and secret Japanese-American agreements thus explicitly stripped Japan of sovereign rights and helped create a climate of impunity, leading to long-term discontent and public opposition to the continued presence of the American military bases in Okinawa. The SOFA also specifies that the Japanese authorities are prevented from having access to military suspects unless they were properly "charged" or indicted by the Japanese prosecutor. Furthermore, because of the intergovernmental security protocol negotiated prior to the 1960 SOFA, the Japanese side was effectively prevented from exercising its authority in non-serious criminal cases.

How will then the question of Okinawa as part of Japan and its right to self-determination be resolved when it comes to U.S. military

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[98] Editorial, supra note 22..

[99] Beihei Hanzai no Daiichiji Saibankenhoki: Nichibeimitsuyaku no Genbun Hanmei [Renoucement of the Primary Right of Jurisdiction: Revelation of the Original Secret Agreement Document], AKAHATA, Oct. 24, 2008, available at http://www.jcp.or.jp/akahata/aik07/2008-10-24/2008102401_02_0.html.

[100] *Id*.

[101] *Japanese Government's Submission to U.S. Revealed in Dealing with U.S. Soldiers' Crimes*, JAPAN PRESS WEEKLY, *available at* http://www.japan-press.co.jp/2574/usforces_3.html.

[102] *Id*.

over-reach of legal authority? As stated earlier, the 1995 rape of a twelve-year-old girl by three American soldiers and the massive public demonstrations in Okinawa led to the 1996 "sympathetic consideration" agreement that changed the primary jurisdiction over American soldiers who allegedly committed heinous crimes while off duty.[103] The U.S. government has agreed in future criminal cases to give a special consideration to Japanese requests and made possible the pre-indictment turnover of military suspects to Japanese authorities.

The agreement, however, failed to provide the specific definition of "heinous crimes." For example, in 2001, twenty-four-year-old air force staff sergeant, Timothy Woodland, became the first military personnel to be turned over to Japanese prosecutors before his indictment.[104] Even then, the military refused to turn over the defendant for over four days after he was accused of rape and sodomy of a twenty-year-old Okinawan woman. He was subsequently interrogated over 30 hours and a Japanese judge sentenced him to two years and eight months in prison.[105]

Two other rape cases illustrate the unseemly U.S. army manipulations and different tactics used by the Okinawan prosecutors to prosecute military felons. In 2002, Major Michael J. Brown, 41, was accused of an attempted rape of a forty-year-old waitress, Victoria Nakamine. The military refused to turn him over to the Okinawan authorities, as the military insisted that the attempted rape was not a "heinous crime." The Okinawan authorities then moved swiftly and raided Brown's home in December 16, 2002, and three days later, Naha prosecutors indicted Brown.[106] Soon after $13,500 was secretly deposited into Nakamine's bank account, and she then denied the gravity of the rape incident and tried to withdraw her complaint.[107] But Okinawa's three judge panel determined that the original statement was believable, and Brown was subsequently given one year prison sentence suspended for three years and $1,400 fine.[108] In August 2005, Brown suddenly left Okinawa but was soon arrested in West Virginia for kidnapping an eighteen-year-old Chinese high school student, when he falsely identified

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[103] Shanker, *Supra* note 19.

[104] *U.S. Must Respect Okinawa Rules*, SEATTLE TIMES, July 10, 2001.

[105] *Sex Case Fuels Okinawans' Anti-US Sentiments*, WEEKEND AUSTRALIAN, Mar. 30, 2002.

[106] *Japan Prosecutors Indict US Marine on Rape Attempt*, BBC MONITORING ASIA PACIFIC, Dec. 19, 2002.

[107] David Allen, *Japanese Court Dismisses motion to disqualify Panel in Brown Case*, STAR & STRIPES, Oct. 23, 2003.

[108] *Id*.

himself as a federal law officer, telling her that he was investigating the sale of fraudulent coins.[109]

Other military felons also have been turned over to Japanese authorities and adjudicated in the Japanese criminal court. In July 2005, Armando Valdez, an air force staff sergeant, molested a ten-year-old Okinawan girl on her way to Sunday school and took photos of the upper part of her naked body.[110] In November, the Naha District Court in Okinawa sentenced him to eighteen months in prison, suspended for four years.[111] In the same month, six marines from Okinawa who had been dispatched to the Philippines to train Filipino soldiers allegedly raped a twenty-two-year-old in a van outside the former U.S. naval base at Subic Bay.[112] In December 4, 2006, a Philippine court convicted Lance Corporal Daniel Smith guilty of raping the woman and sentenced him to 40 years in prison,[113] while other defendants were acquitted for lack of evidence.[114]

In January 3, 2006, U.S. airman William Reese, a crew member of the Yokosuka-based U.S. aircraft career Kitty Hawk, allegedly killed Yoshie Sato, a fifty-six-year-old part-time worker outside the railroad station in Yokosuka.[115] An autopsy revealed that Sato was beaten so severely that her skull was nearly smashed.[116] This became the fourth time that a pre-indictment handover to Japan has been made of U.S. military personnel suspected of committing heinous crimes.[117] This case also became the first handover since the 2004 revision to the agreement that allowed U.S. military officials to be present when Japanese authorities interrogate military personnel.[118] In June 2006, the Yokohama District Court sentenced him to life in prison.[119]

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[109] David Allen, *Convicted on Okinawa, Marine Brown in Trouble in States*,STARS & STRIPES, Oct. 9, 2005.

[110] *U.S. Airman Gets Suspended Prison Term for Molesting 10-yr-old Girl*, JAPAN ECONOMIC NEWSWIRE, Nov. 16, 2005; David Allen, *Okinawa Airman Sentenced for Molesting 10-year-old Girl*, STARS & STRIPES, Nov. 19, 2005.

[111] *Id*.

[112] *6 US Marines Want Out*, PHILIPPINE DAILY INQUIRER, Nov. 10, 2005.

[113] David Allen, *Philippine Court Orders Marine into Local Custody*, STARS & STRIPES, Feb. 13, 2009.

[114] *U.S. Marine Found Guilty of Raping Filipina, Sentenced to Life*, JAPAN ECONOMIC NEWSWIRE, Dec. 4, 2006.

[115] *U.S. Sailor Held by Japan over Slaying*, ASAHI SHIMBUN, Jan. 9, 2006.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *U.S. Sailor Given Life Jail over murder of Woman in Kanagawa*, JAPAN ECONOMIC NEWSWIRE, June 2, 2006.

The case of Olatunbosun Ugbogu, a twenty-two-year-old Nigerian nationality became the fifth pre-indictment handover of the military personnel to Japan since the 1996 "sympathetic consideration" agreement. Ugbogu applied for military duty and was assigned to the USS Cowpens. He was declared "Absent Without Leave (AWOL)" by the U.S. military on March 10, 2008. On March 19, 2008, Ugbogu racked up a $195 cab fare, when he claimed that he heard voices in his head, telling him to stab and kill 61-year-old Masaaki Takahashi, a taxi driver in Yokosuka. He then pierced the taxi driver's neck with a kitchen knife and severed a major artery, while the taxi's motor was still running in an alley in Yokosuka's Shioiri neighborhood.[120] Ugbogu's credit card was later found below the driver's seat in the taxi, which had been suspended by a credit card company before the murder occurred.[121] He was indicted by the Yokohama District Public Prosecutor's Office and was later convicted and received a life sentence by Yokohama District Court on July 29, 2009.[122]

All these events and cases are indicia along the path to overturn U.S. extraterritoriality imposed on Japan's, and especially Okinawa's, emerging judicial authority. So today, once an indictment is issued, both the Japanese-American SOFA and subsequent agreement require that military felons be turned over to Japanese authorities. Those intergovernmental protocols still do not specify the adjudicative condition under which to try military personnel. Masanori Higa, prominent Okinawa attorney, who represented Marcus Gill, a key defendant in the rape of a 12 year-old-girl in 1995, indicated that he would be "cautiously optimistic" about the possibility of a fair and systematic adjudication of military personnel by a judicial panel of both professional and lay judges selected at random from local communities in Okinawa. Since the intergovernmental protocols made no specific provision for the type of adjudicative conditions or procedures to try military felons, both contested and uncontested cases involving American felons became subject to the adjudication in the new lay assessor trial.[123]

In the 1995 rape incidents, Attorney Higa disclosed that he encouraged Gill to plead guilty, because "the professional judge in the Japanese judicial system generally acts more leniently to those who plead guilty, admit guilt, and express their remorse."[124] Despite the initial

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[120] *U.S. Sailor Held over Taxi Murder*, DAILY YOMIURI, April 4, 2004.

[121] *Id*.

[122] Erik Slavin, *Sailor Gets Life Sentence in Japanese Taxi Driver's Death*, STARS & STRIPES, July 30, 2009, *available at* http://www.stripes.com/article.asp?section=104&article=63954.

[123] Telephone interview with Masanori Higa, Attorney, (Mar. 4, 2009) (interview records on file with the author).

[124] Interview with Masanori Higa, Attorney, at Okinawa-shi, Okinawa (July 9,

insistence of his innocence, Gill later pleaded guilty to the rape charge, while the other two American soldiers also pleaded guilty to conspiracy.[125] The judge then gave Gill and another defendant seven years of incarceration. Another G.I. received six and a half years in prison. The professional judge is no longer presiding over the comparable criminal trial. Since May 2009, a group of Okinawa residents is selected at random to participate in the sentencing phase of the lay assessor trial to determine the appropriate penalty for military felons who have admitted their guilt after committing heinous crimes in Okinawa.

A. *The Lay Assessor (Saiban-in) Trial of American Military Personnel*

After the Lay Assessor Act was enacted and introduced into practice in May 2009, American military officials and their legal teams on Okinawa have been closely watching the changes of adjudicative processes introduced by the new lay justice system.[126] Lt. Col. Douglas Power, head of Marine Corps Public Affairs in Japan, cautionary stated that "our legal members will see how it affects our Marines."[127]

The young U.S. marine then became the first American soldier designated for the lay assessor trial in Japan.[128] On August 1, 2009, Jonathan Kim, eighteen-year-old Korean American stationed at Camp Kinser, robbed the fifty-eight-year-old taxi driver with a knife in downtown Naha and stole a bag that contained 21,000 yen, USD$100 , and 6,000 yen worth of change.[129] He was soon arrested, detained in the jail of Camp Hansen, and reportedly confessed the details of his crime.[130]

2008) (interview records on file with the author).

[125] *Okinawa: US Serviceman Pleads Guilty to Okinawa Schoolgirl Rape*, BBC SUMMARY OF WORLD BROADCASTS, Nov. 7, 1995. *See also* Watanabe, *supra* note 16.

[126] David Allen & Chiyomi Sumida, *A New Order in Japan's Court: Civilian Jurors, Live Testimony Shake up Proceedings*, STARS & STRIPES, June 2, 2009 ("Military officials on Okinawa are closely watching the change."), *available at* http://www.stripes.com/news/a-new-order-in-japan-s-courts-1.92155.

[127] *Id*.

[128] *Zenkokuhatsu, Beihei o Kiso Saibanin Saibanjiken Takushigotochisho [First in Japan, Indictment of American Soldier for Saiban-in Trial: Robbery Resulting in Bodily Injury]*, RYUKYU SHIMPO, Oct. 21, 2009, *available at* http://ryukyushimpo.jp/news/storyid-151575-storytopic-1.html.

[129] *Id*. *See also* 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.

[130] *Takushigoto de Beihei o Shoruisoken: Beigunjin-hikoku de Kennaihatsu no Saibanin Saiban mo [Taxi Robbery and Committing an American Soldier to Trial: First American Soldier Defendant for the Lay Assessor Trial in the Prefecture]*, Ryukyu Shimpo, Aug. 25, 2009, *available at* http://ryukyushimpo.jp/news/storyid-148935-storytopic-1.html.

On October 20, 2009, he was formerly indicted by the Japanese prosecutor and handed over to the Japanese authority.

The public prosecutors then called for a court trial of the soldier in October 2009. Evidence of the soldier's crimes was then collected by the local police and prosecutors, and in February and March 2010, judges, prosecutors, and defense counsels conducted the pre-trial discussions on procedural plans for court hearings in order to carry out a lay assessor trial expeditiously and effectively.[131]

For this trial, six lay assessors – five women and one man – and two alternates were selected at random from the local community.[132] Jonathan Kim then became the first American soldier to be tried in Japan's lay judge tribunal. Japan once held jury trials from 1928 to 1943, but the military government decided to suspend it due to WWII; other all-layperson jury trials were also held in U.S.-occupied Okinawa during the 1960s and early 1970s. Nonetheless, American soldiers have never been tried in those lay participatory tribunals in Japan.

This historic trial began on May 24, 2010 at the Naha District Court. Local and national Japanese press and legal experts closely followed the trial. A group of the Korean media also attended the trial.[133]

At trial, as the defendant had already confessed, the court proceeding primarily focused on the sentencing phase of trial. The six lay judges sat next to three professional judges and heard the testimonies of witnesses and evaluated evidence. The lay assessors also asked a series of questions to the American defendant during the hearing. As the guilt had already been established in this criminal case, the deliberation of the professional judges and lay assessors primarily focused on the determination of the appropriate sentence. On May 27, the judicial panel of professional and lay judges decided to sentence the U.S. marine to three to four years in a Japanese prison for robbery and assault of a taxi driver.[134]

In the post-verdict interview, lay assessors stated that deciding the U.S. soldier's fate was extremely difficult.[135] They also conceded that they were able to set aside the anti-American or anti-military base sentiments in Okinawa, especially after the Okinawans recently organized the massive public protest against the Japanese government's recent

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[131] *Id*.

[132] *Id.*

[133] Interview with Ryota Ishikawa, Legal Reporter, Okinawa Times (July 10, 2010).

[134] *Id*. *See also* Allen & Sumida, *supra* note 127.

[135] Allen & Sumida, *supra* note 127.

decision to build a new Marine airfield in Henoko in the northern region of the Okinawa Island.[136]

The lay assessor trial thus empowered the local residents of Okinawa to adjudicate military crimes committed in their own communities. Despite the adjudicative opportunity given to local residents, several obstacles still remain in the lay adjudication of military felons. Such obstacles include the expressed reluctance of the Japanese prosecutors to prosecute military felons or due to procedural problems or structural inability to issue an indictment against military suspects. Since the "sympathetic consideration" failed to provide the legal definition of what a heinous crime represents, the Japanese prosecutors may be reluctant or even unable to issue an indictment against military personnel, depending upon the perceived severity of the crimes committed, the extent of investigative capacities or legal authority permitted to the Japanese prosecution and police, and/or the limited availability of witnesses or material and forensic evidence for criminal investigations. The new binding power of the PRC, however, can facilitate a critical investigation of the prosecutors' non-indictment decision, and challenge or even reverse the government's non-prosecution decision.

III. ILLUSTRATIVE POWER OF THE PROSECUTORIAL REVIEW COMMISSION

Until recent legal changes in the PRC law, the Japanese prosecutors have routinely ignored or paid little attention to the commission's recommendation. However, the PRC's legally binding authority given to its recommendation will influence the prosecutor's indictment decision in future criminal cases. The political utilization of the new power bestowed upon the PRC resolution can be illustrated in the following two examples. In both cases, the PRC's new mandatory power reversed the prosecution's non-indictment decisions and forced the prosecutor's office to initiate the investigative process against a government official and corporate executives.

A. *The Akashi Pedestrian Bridge Incident in 2001*

The PRC in Hyogo Prefecture had twice recommended the prosecution of both the Chief and Deputy Chief Officers of the Akashi Police Station for the injuries of 274 people and the death of nine children, ranging from five months to nine years of age, who were crushed to death in the stampede incident in Akashi city in Hyogo Prefecture. Following the PRC recommendations, the prosecutor's office re-investigated the incident and decided not to indict the officers. The deadly incident occurred on July 21, 2001, when a large crowd of 130,000 people attended a fireworks display organized by the Akashi Municipal government. A

[136] *Id*.

stampede occurred shortly after 8:30 p.m. on a six-meter-wide, 100-meter-long pedestrian bridge connecting a train station and seashore, where the fireworks display was held. The Akashi police initially blamed the incident on youths who were allegedly sitting and watching fireworks on the bridge and had caused unexpected overcrowding that triggered the deadly stampede.[137]

The report by the municipal investigative panel later discovered that those youths actually played a heroic role in rescuing victims, by climbing on top of the bridge, pulling children up, directing the crowd to safer places, and calling for help.[138] The report also found that the Akashi Police Station, the city government, and a security firm were together responsible for the incident by being "unbelievably reckless" in their preparations for the event.[139] The disaster was foreseeable because Akashi City previously held a millennium celebration in December 2000 at the same site and a similar situation resulted when nearly 3,000 people surged onto the footbridge.[140] The panel also found that top administrators of the Akashi Police Station in particular failed to place officers on the overpass or take any other measures to prevent the accident.[141]

Despite the findings of the panel and investigations by prosecutors, in December 2002, the prosecutor's office decided not to indict the two officers for the incident. Four months later, the families of the victims filed an appeal of the prosecutor's decision. In April 2004, the PRC issued an "indictment is proper" resolution and urged prosecutors to indict the two officers.[142] The committee stated that the two officers had the lead responsibility for drawing up security and crowd control plans for the event, and it was their failure to issue adequate instructions to subordinates that resulted in the fatal accident.[143]

The prosecutors again decided not to indict. The families filed another review of the non-indictment decision, and in December 2005, the PRC delivered another "indictment is proper" resolution. After another brief investigation, in June 2006, the prosecutors dismissed the PRC

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[137] *Youth Suspected in Akashi Fireworks Fatal Stampede*, KYODO NEWS SERVICE, July 23, 2001.

[138] *Akashi Hodokyo Jiko: Gokaisareta Yaneno Ueno Shinjitsu [Akashi Pedestrian Bridge Accident: Misunderstood the Above the Roof' Truth]*, KOBE SHIMBUN, Aug. 5, 2001.

[139] *Panel Finds City, Police at Fault in Fireworks Stampede*, JAPAN ECONOMIC NEWSWIRE, Jan. 30, 2002.

[140] *Police Must Assume Primary Responsibility for Crowd Control*, MAINICHI DAILY NEWS, Feb. 4, 2002.

[141] *Paper Sent on 12 in Overpass Disaster*, DAILY YOMIURI, May 10, 2002.

[142] *Indictment of Cops Urged in Bridge Deaths*, DAILY YOMIURI, Apr. 24, 2004.

[143] *Id.*

resolution, refusing for the third time to prosecute.[144] The families announced in November 2006 that they would file a third appeal of the prosecutor's non-indictment decision -- but only after May 2009, when the new PRC law will give the commission's decision legally binding status.[145]

On May 21, 2009, the day that new PRC law went into effect, the families filed another appeal of the non-indictment decision and the PRC determined, on July 30, 2009, that the "indictment is proper" for the third time.[146] As the Chief of the Akashi Police died in July 2007, the PRC's indictment decision only covered the prosecution of the former Deputy Chief. The Prosecutor decided, once again, after another brief investigation, not to indict the officer in October 2009.[147]

The victims of the Akashi incident re-filed the petition, and on December 7, 2009, the PRC began to deliberate on the fourth non-indictment decision by the Japanese prosecutors.[148] The petitioner's claim also included the specific request for the victims to speak out their opinions and issues on the case.[149] On January 8, 2010, as required by the new PRC law in case of disagreeing with the PRC's indictment decision, the representative of the Kobe Prosecutor's Office provided to the panel of eleven randomly chosen citizens, their explanation on the fourth non-indictment decision, as well as their professional opinions and current position on the criminal case.[150]

On January 27, 2010, after nearly eight years of PRCs' reviewing of the propriety of prosecutors' non-indictment decisions, the Kobe PRC

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[144] *Prosecutors Again Refuse to Indict Cops over Crush*, DAILY YOMIURI, June 26, 2006.

[145] *Moto Shochora no Kiso Motome 3 Dome no Mositate e [The Third Motion to be Filed to Prosecute the Former Chief]*, ASAHI SHIMBUN, Oct. 17, 2006.

[146] *Motofukushocho: 3domeno Kisosoto Giketsu [Third Indictment against Fomer Police Deputy Chief]*, KOBE SHIMBUN, July 30, 2009, *available at* http://www.kobe-np.co.jp/backnumber/asagiri/0003520188.shtml.

[147] *Akashishojiko Motofukushocho 4 Dome Fukiso: Izoku [Akashi Pedestrian Incidents: Non-Prosecution Decision for the Fourth Time against the Former Deputy Officer of the Akashi Police]*, KOBE SHIMBUN, Oct. 4, 2009, *available at* http://www.kobe-np.co.jp/backnumber/asagiri/0003520220.shtml.

[148] *Kensatsu Shinsakai ga Saishinsa Kaishi: Akashihodokyojiko [PRC Began to Deliberate on Akashi Pedestrian Bridge Incidents]*, KOBE SHIMBUN, Dec. 7, 2009, *available at* http://www.kobe-np.co.jp/news/shakai/0002566261.shtml.

[149] *Id*.

[150] *Akashi Hodokyo Jiko Kensatsukan ga Ikenchinjutu Motofukushocho no Shobun Chikaku Giketsu [On the Akashi Pedestrian Bridge Case, Prosecutor Made Statements and PRC's Decision Nears on the Disposition of Former Deputy Chief]*, NIFTY NEWS, Jan. 8, 2010, *available at* http://news.nifty.com/cs/headline/detail/sankei-e20100108053/1.htm.

finally issued the second recommendation of prosecution against the former Deputy Chief, reversing a series of previous non-prosecution decisions made by the Kobe Prosecutor's Office.[151] Specifically, the PRC's recommendation stated that the former Deputy Chief of Police Kazuaki Sakaki should be charged with professional negligence resulting in death and injury by failing to prevent a fatal stampede.[152] The Kobe PRC decision also became the first case of automatic indictment since the revised PRC law went into effect in May 2009. Three lawyers were appointed by the court to take on the role of prosecutors to initiate the criminal proceeding and finally began the formal prosecution of the officer.[153]

B. *The Fukuchiyama Train Derailment Incident in 2005*

Another explosive case on the disagreement of the prosecutorial decisions and PRC's deliberative outcome involves the 2005 train derailment that killed 107 people and injured 555 others.[154] Similar to the Akashi stampede incident, this massive victimization of civilians also took place in Hyogo Prefecture. The train derailment occurred on April 25, 2005, on the West Japan Railway (JR West) Fukuchiyama Line. Five of the seven cars derailed, and both the first and second cars slammed into an apartment building near the tracks. The first car crashed into a multi-story parking garage in the ground floor of the apartment and was compacted to half its original length, while the second car rammed into the building wall and was fractured into an L shape.[155]

On July 8, 2009, the prosecutors indicted the West JR President Masao Yamazaki after concluding that tragedy could have been prevented if the curve had the Automatic Train Stop (ATP) system which could have halted the train. He was indicted of professional negligence resulting in deaths and injuries.[156] Yamazaki also made the announcement, on the

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[151] *Akashi Hodokyo Jiko: Naze Koredake Jikanga Kakattanoka – Izoku Kaiken [Akashi Pedestrian Incidents: Why Did It Take This Long? – Testimony of Victims' Families]*, SANKEI NEWS, Jan. 27, 2010, *available at* http://sankei.jp.msn.com/affairs/trial/100127/trl1001272216017-n1.htm.

[152] *Id*.

[153] *Akashi Hodokyo Jiko: Shitei Bengoshi ga Kensatukanyaku – Muzukashii Kohanka [Akashi Pedestrian Incidents: Court Appointed Lawyers as Prosecutors – Difficult Court Proceeding Ahead]*, SANKEI NEWS, Jan. 27, 2010, *available at* http://sankei.jp.msn.com/affairs/trial/100127/trl1001272354020-n1.htm.

[154] *JR West, Victims' Relatives Mark Amagasaki Crash*, THE JAPAN TIMES, Oct. 26, 2005, *available at* http://search.japantimes.co.jp/cgi-bin/nn20051026a4.html.

[155] *Id*.

[156] *JR West President Indicted Over Crash*, THE JAPAN TIMES, July 9, 2009, *available at* http://search.japantimes.co.jp/cgi-bin/nn20090709a1.html.

same day of his indictment, that he would resign his post, while he remained a member of JR West's Board of Directors.

The prosecutors decided not to indict eight former JR West executives in charge of safety measures, three former managers, and the twenty-three-year-old driver who was killed in the accident.[157] In August 2009, families of victims submitted a complaint to the First Kobe PRC, indicating that two JR West past presidents also be indicted because of their collateral failure to install an advanced version of the ATS system at the site.[158] On October 22, 2009, the PRC decided that three past presidents of the JR West be indicted and submitted their recommendation to the Kobe Prosecutor's Office.[159] As Japan's most serious railway accident since the 1963 Yokohama rail crash, this derailment occurred when the Fukuchiyama Line train took a tight curve at excessive speed and slammed into a high-rise residential complex. The PRC determined that the major factor attributed to the accident was the company's management policy that making corporate profits, not the safety of its customers, was the firm's top priority.[160]

On December 4, 2009, after the brief investigative work on the case, the Kobe prosecutors decided not to indict the three former presidents, indicating that they bear no direct responsibility of instituting an advanced version of the ATS system at the curb of the derailment.[161]

In January 2010, victims' families filed another complaint to the prosecutors' non-indictment decisions against the three JR West former presidents.[162] The PRC then summoned the families of the victims and solicited their opinions on the case.[163] The prosecutors were also summoned to explain the PRC decisions based on their own investigation on the case.[164]

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[157] *Id*.

[158] *Amagasaki Crash Kin Push for Charges*, THE JAPAN TIMES, Aug. 22, 2009, *available at* http://search.japantimes.co.jp/cgi-bin/nn20090822a5.html.

[159] *Crash Inquest Panel: Indict Ex-JR West Heads*, THE JAPAN TIMES, Oct. 23, 2009, *available at* http://search.japantimes.co.jp/cgi-bin/nn20091023a1.html.

[160] *JR West's Actions Show Lack of Remorse, Resolve*, DAILY YOMIURI, Oct. 24, 2009, at 4.

[161] *JR Nishi no Rekidai 3 Shacho, Futatabi Fukisoni, Dassenjiko de Kobe Chisai [Non-Indictment Again for Three Past JR West Presidents, on the Derailment Incident, by the Kobe Prosecutors]*, NIKKEI NET, Dec. 4, 2009, *available at* http://www.nikkei.co.jp/news/main/20091204AT5C0401S04122009.html.

[162] *Fukuchiyamasen Dassenjiko: Kensatsu Shinsakai Izoku kara Ikenchoshu [Fukuchiyama Derailment Accident: The PRC Listens to Victims' Families] (hereinafter Fukuchiyamasen),* MAINICHI SHIMBUN, Feb. 25, 2010, *available at* http://mainichi.jp/select/jiken/news/20100225k0000e040043000c.html.

[163] *Id*.

[164] *Id*.

On March 26, the First Kobe PRC decided for the second time that the three former JR-West presidents be indicted for professional negligence resulting in injury and death.[165] On April 23, three court-appointed lawyers formally filed charges against the three presidents for their failure to take railway safety measures, thereby causing the fatal train derailment.[166]

Both Akashi and Fukuchiyama cases illustrate that the PRC enjoys enormous powers to insist on criminal charges brought against powerful government officials, political heavyweights, and economic elites. However, some questions on the efficacy of the PRC still remain. How do lay participants execute their civic duties and responsibilities in examining highly publicized cases involving American military personnel and their dependents in Japan? Is the PRC overwhelmed by the civic responsibility or able to meet the challenges of fair and equitable decision making? Does the PRC's investigation of military personnel generate the sufficient deterrence against future military crimes in Okinawa? The next section examines political ramifications of new PRC recommendations and investigates whether or not the PRC's legally binding decision influences military personnel's sense of shared responsibility and their perceptions and attitudes towards local residents, Japanese prosecutors, and the police.

IV. POLITICAL RAMIFICATIONS OF NEW PRC RECOMMENDATIONS ON AMERICAN MILITARY PERSONNEL

A. *Indictment of Military Personnel and Their Families*

For crimes committed by military personnel, the Okinawa PRC can critically examine the non-indictment decisions by the prosecution. With more than 140 islands in the Okinawa Prefecture, three prosecutorial review commissions are located in the following three separate Ryukyu islands: (1) the Naha PRC in Naha City, Okinawa's capital city in the Island of Okinawa; (2) the Hirara PRC in the Island of Miyako; and (3) the Ishigaki PRC in the Island of Ishigaki.[167] As the major American military bases are established and operated on the Okinawa Island, the PRC in Naha City will become the primary recipient organization of citizens'

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[165] *JR Nishi Rekidai 3 Shacho, Kyoseikisoe: Kobe Daiichi Kensatsuga Kiso Giketsu [Kobe PRC Decides on Indictment Against Three JR-West Presidents]*, SANKEI NEWS, Mar. 26, 2010, *available at* http://sankei.jp.msn.com/affairs/crime/100326/crm1003261636020-n1.htm.

[166] *JR Nishi no Rekidai 3 Shacho o Kyosei Kiso [Forced Prosecution of Three JR West Presidents]*, SANKEI NUSU, Apr. 26, 2010, *available a*t http://sankei.jp.msn.com/affairs/trial/100423/trl1004231600009-n1.htm.

[167] *Zenkoku no Kensatsu Shinsakai Ichiran Hyo [The List of Japan's PRC]*, SAIBANSHO [JAPAN'S COURT] SAIBANSHO [JAPAN'S COURT], (last visited on Nov. 18, 2009), *available at* http://www.courts.go.jp/kensin/seido/itiran.html.

complaints and grievances concerning criminal conducts of military personnel in Okinawa.

Individual citizens can initiate the potential prosecutorial process of alleged criminal activities of military personnel by submitting a complaint or accusatory claim to a public police officer or a prosecutor in Okinawa. Section 242 of the Japanese Criminal Code of Procedure requires that upon receipt of a complaint or accusation, a judicial police report is required to promptly forward the documents and related evidence to the attention of the public prosecutor. Similarly, Section 260 requires that, once the public prosecutor has made the non-prosecutorial decision, the prosecutor must promptly notify the original complainant of their non-indictment.[168] Section 261 also specifies that the prosecutor must promptly notify the reason for the non-indictment to an individual or a party who filed the original complaint or accusation.[169]

When the original claimant decides to pursue the case, he or she may then submit a complaint of prosecutors' non-indictment decision with the PRC. Then the judicial panel of local residents chosen at random from the local community is empowered to examine the merit of the complaint, summon witnesses if necessary, and deliberate on the prosecutor's non-indictment decision.

If the PRC's second decision recommends the indictment of military personnel, the Japanese government must begin the criminal prosecution of the American soldiers. Of course, the alleged crime committed by military personnel must be legally classified as heinous or in material significance, in order to support the adjudication of the lay assessor panel. Once a military serviceman is indicted, he or she will face the lay assessor trial, regardless of whether or not he/she admitted to the crime. In either case, the lay assessor panel with a differing membership will adjudicate the crime. If the solder insists on his or her innocence, the judicial panel of three professional and six lay judges will be procedurally empanelled to listen to witnesses, examine material or forensic evidence presented by both prosecutors and defense attorneys, and evaluate any other relevant material or evidence pertained to the case. If the defendant pleads guilty to criminal charges and there is no conflict to the evidence provided, the panel of one professional and three lay judges will then evaluate evidence and determine the severity of sentence.

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[168] KEISOHŌ, [Keiji Soshoho, Code of Criminal Procedure], art. 260. ("When a public prosecutor has instituted prosecution or made a disposition not to institute prosecution regarding a case with respect to which a complaint, accusation, or claim has been filed, the public prosecutor shall notify the person who filed the complaint, accusation or claim promptly.")

[169] KEISOHŌ, art. 261. (Where a public prosecutor has made a disposition not to institute prosecution regarding a case with respect to which a complaint, accusation or claim has been filed, the public prosecutor shall promptly notify the reason for the disposition upon the request of the person who filed the complaint, accusation or claim.")

In addition to the possible indictment of American soldiers, the PRC can also play an equally powerful role in evaluating the adequacy of activities and involvement of both American military headquarters in Okinawa and Japanese governmental policies or joint military projects. Such governmental endeavors include the American military construction of new installations and defense facilities in the island of Okinawa, as well as the extent of military practices and exercises that caused health hazards and physical harm resulting in injuries or even deaths of local residents.

B. *Okinawa & Environmental Devastations*

Worldwide, U.S. military bases and defense installations have caused significant environmental damage and pollution to nearby areas and surrounding regions.[170] Okinawa remains no exception to the harmful environmental effects of the military presence and routine exercises by the armed units of the American forces in the islands.

In 1947, base pollutions in Iheya Village of Iheya Island led to the death of eight people from arsenic poisoning.[171] Even after the reversion of Okinawa to Japan in 1972, oil and fuel spills continued to cause significant environmental damages near American bases. Today, local residents learn about the pollution and releases of harmful substances, only after damages spill to the area that transcends the boundary of military bases. At Kadena Air Base, the huge jet fuel spill which lasted for four days beginning on May 25, 2007 is one of the most recent examples of such fuel spills, causing serious environmental and ecological damages in nearby residential areas and regions.[172]

Serious environmental pollution and damages are still left behind at the former military bases areas that have been returned to Okinawa by the U.S. military.[173] The former U.S. Communication Station at Onna Point, which was returned to the Japanese government in November 1995, was found to have an extremely high level of toxic substances, such as polychlorinated biphenyl (PCB), cadmium, mercury, lead, and arsenic.[174]

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[170] Aaron Schwabach, *Environmental Damage Resulting from the NATO Military Action in Yugoslavia*, 25 COLUM. J. ENVTL.L., 1 (2000). *See generally* Judy Ehlen and Russell S. Harmon, The ENVIRONMENTAL LEGACY OF MILITARY OPERATIONS (2001).

[171] Kiminori Hayashi, Ken'ichi Oshima, and Masafumi Yokemoto, *Overcoming American Military Base Pollution in Asia: Japan, Okinawa, Philippine*, Asia Pacific Journal: JAPAN FOCUS, Oct. 2008, *available at* http://www.japanfocus.org/-Hayashi-Kiminori/3185.

[172] *Id*.

[173] *Id*.

[174] Executive Office of the Governor, Okinawa Prefectural Government, U.*S. Military Issues in Okinawa*, 2004, *available at* http://www3.pref.okinawa.jp/site/contents/attach/7005/pamphlet(English).pdf.

Numerous U.S. armed forces in the Fukuchi Dam's reservoir for river-crossing exercise have also polluted its water and threatened the daily activities of the majority of local residents in the island. The Fukuchi dam provides much of its water to the 1.2 million residents of the island. Recent investigations have found that the water has been polluted by grenades, flares, and hundreds of paintballs used by military personnel in training exercises.[175] In 1997, the U.S. Marine Corps also admitted using depleted uranium munitions on the mall islands west of Kume Island, deliberately violating the bilateral agreement on the Law for the Regulation of Nuclear Power in Japan.[176]

Despite significant environmental damages caused by the U.S. military, the American government remains immune to the potential prosecution or even the required restorative process to remedy the environmental devastation. Article 4(1) of the Japanese-American SOFA indicates that the U.S. military does not bear any responsibility in repairing or restoring any damages to the environment, specifying that "[t]he United States is not obliged . . . to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate Japan in lieu of such restoration."[177] This SOFA provision unilaterally allows the U.S. military to destroy with impunity the natural environment, natural resources, and delicate tropical ecosystems of the islands.

The new proposed construction of an offshore U.S. military base off the coast of a small fishing village of Henoko also endangers a unique subtropical ecosystem and biologically diverse marine life around the island of Okinawa. In 1996, the American government agreed to close the much criticized Futenma Marine Corps Air Station which was built in the middle of a very dense residential area in the city of Ginowan. The presence of the marine airfield has posed a serious health hazard and safety concerns to many local residents for many years. The American government, however, has insisted that its closure had to be contingent upon its relocation to Henoko in northern Okinawa.[178]

Henoko is located in Nago City, which is the home of the old Marine Corps base of Camp Schwab. A new, sea-based airfield facility would be constructed, including a 2,500 meter runway built on a coral reef,

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[175] *Okinawa Dams Checked for Dangerous Objects*, 2007, WEEKLY JAPAN UPDATE, Jan. 19, *available at* http://www.japanupdate.com/?id=7335.

[176] Ui Jun, 2003, *U.S. Military Bases and Environmental Problems*, ASIA-PACIFIC JOURNAL, JAPAN FOCUS, *available at* http://www.japanfocus.org/_Ui_Jun-U_S__Military_Bases_and_Environmental_Problems/.

[177] Archive for the Japanese U.S. SOFA (last visited on Nov. 19, 2009), *available at* http://www.niraikanai.wwma.net/pages/archive/sofa.html.

[178] David Allen and Chiyomi Sumida, *It's Done,' Rumsfeld Says of Troops Realignment Agreement for Okinawa,* STARS & STRIPES, Nov. 5, 2005.

in order to eliminate potential protests from nearby residents over the danger of serious accidents and noise pollutions on land.[179] Henoko's surrounding reef is home to the endangered dugong which is classified as "vulnerable" in the Washington Convention for International Trade in Endangered Species (CITES), requiring that the dugong and its habitat be dealt with under the strictest of regulations.[180]

After the Japanese government agreed to pay for the construction of the new airfield and began to create seabed drilling platforms over the coral reefs, nearly thirty thousand Okinawans and supporters from other Japanese prefectures and international environmental groups, including Greenpeace, began a sit-in that temporarily halted logistical work prior to full-scale construction process. Some civic activists in diving suits also tried to prevent the under-water construction by trying to use themselves as a barricade to government divers and/or local contractors hired by the State. In April 2004, under the authority given by Naha Defense Facilities Administration Bureau (NDFAB), which is part of the Japan Defense Facility Administration Agency (DFAA), the governmental agency and local companies subcontracted by the DFAA began to conduct extensive drilling surveys of the military construction site prior to the environmental assessment required by Japanese law.[181]

An underwater battle began. During the massive protest, a group of Okinawa activists and civic groups decided to physically prevent governmental drilling activities and under-water surveys. And on numerous occasions off the bay of Henoko, underwater activists were physically assaulted by Japanese Self Defense Force divers. Reverend Natsume Taira, one of the active protesters who tried to block the underwater environmental survey, was viciously attacked and assaulted by Japanese Self Defense Force divers who turned off the oxygen valve on his scuba air tank; he was nearly drowned. JSDF and contracted divers also attacked other protesting divers by beating them with hammers, kicking them, and pulling off their masks.[182]

The newly-installed power of the PRC resolution can offer a radically different strategy to protest and prevent the joint state-corporate

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[179] *Id*.

[180] Joint Declaration to Save the Dugong and Protect Yambaru Against Construction of an Offshore US Military Base and Inland Helipads," *Save the Dugong Fund*, 2000, *available at* http://sea-dugong.org/english/main/joint.html.

[181] Ryusaku Tanaka, *Henoko Kichi Hantai: Kokkai Mae ni Suwari Konde [Opposing the Henoko Base Construction: Sitting In Front of the National Government],* JANJAN, Dec. 4, 2008, *available at* http://www.news.janjan.jp/government/0812/0812042861/1.php.

[182]Chris Salzberg, 2007, *Japan: Protester Nearly Killed at Henoko Bay*, GLOBAL VOICES, July 29, *available at* http://globalvoicesonline.org/2007/07/29/japan-protester-nearly-killed-at-henoko-bay/.

project perceived as a detriment to the social and political interest of local residents in Okinawa. For instance, in order to take full advantage of the PRC's authority to review the prosecutor's decision, civic activists and Okinawa residents, including protesting divers, may be empowered to file complaints with the local prosecutor's office, alleging criminal behavior and felonious activities of JSDF divers, under-water specialists who were privately hired to conduct an environmental assessment, and private firms that provided logistical assistance to both private and government divers in a drilling survey of the coral reef.

After a group of activists files a complaint or accusation of criminal conduct to local police officers or prosecutors, the Japanese prosecutor is required to make a written statement of such a complaint or accusation, investigate the alleged misconduct, and determine whether or not to file charges against the divers and workers hired by governmental agencies and contractors.

The politically-motivated prosecutors may end up rejecting such arguments and return a non-indictment decision. The citizen's complaint then may be submitted to the PRC for reconsideration of the non-prosecution decision. The PRC must then call for a hearing, summon necessary witnesses, including civic activists who participated in the protest, government officers who issued environmental surveys, private contractors who hired divers, and JSDF and private divers who allegedly attacked protesting civic divers. The PRC can also question prosecutors and ask them for any additional evidence or information to the case if necessary. The judicial panel of eleven Okinawa residents, chosen at random from the local community, might then determine whether or not the prosecutors' exercise of discretion in a decision not to indict was a proper decision for a given case. If the commission determines twice that the prosecution of the accused is proper, the commission's resolution becomes legally binding and forces the prosecutors to reverse their previous non-indictment decision. The second recommendation also forces the prosecutors to begin criminal proceedings against both government and private divers and other relevant agencies, including private firms that provided the logistical assistance to the underwater environmental surveys.

In this case of forced indictment, Japanese prosecutors are required to work collaboratively with court-appointed lawyers in their supplementary investigations. On the basis of investigative materials and information, the lay assessors can then try a suspected party indicted under the forced indictment system and make a final determination on the charges of serious crimes. It may be a long, arduous path to protect Okinawans and their natural environment,but this is an effective legal avenue available to fight the U.S. and Japanese governmental efforts to keep Okinawa a neo-colonized military zone.

C. *The Legal Status of the PRC Resolution*

There are two major legal problems that can potentially hamper the PRC's ability to review and reverse the prosecutorial decision involving military personnel and their dependents.

The first barrier is a recent tendency by the judicial police officer or the public prosecutor to ignore, or even refuse to accept, an accusation or complaint filed by individual citizens. Even if the complaint or accusation were accepted, the public officer is often accused of altering the content of the complaint to make it less significant, deliberately deciding not to act upon it, refusing to write a formal complaint to be submitted for their superiors, or requesting the original party to withdraw the complaint submitted. A large number of neglected complaints or ignored accusations by public officers recently became a major source of citizens' complaints against the Japanese prosecutors and police officers. The following recent case illustrates one of such typical incidents.

In October 1999, twenty-one-year-old Japanese female college student Shiori Ino was murdered by the accomplice of her ex-boyfriend Kazuhiko Komatsu, a twenty-six-year-old who had a long history of stalking Ino. Her murder exposed a series of deliberate neglect of duties and obligations on the part of the prefectural police which, long before her murder, received multiple complaints of Komatsu's stalking behavior by Ino and her family.

Ino was followed for ten months and implored the local police to look into her case, stating that her boyfriend was constantly stalking her after their break-up and that his friends distributed hundreds of handouts defaming her. In July 1999, Shiori Ino decided to make a formal criminal complaint against the police for failing to look into the stalking and harassment allegations; however, the police refused to act on the complaint and falsified an official report to make it look as if no official complaint had ever been filed.[183] Furthermore, after receiving the complaint, officers at the police station wrote a final report that Ino was merely being harassed and thus neglected to do the extra work to draft a formal complaint to be submitted to their superiors.[184] The internal investigation also substantiated that three police officers altered a criminal complaint filed by Ino so they would not have to pursue the case.[185]

Ino's murder subsequently added momentum to the enactment of an anti-stalking law that finally took effect in November 2000. Nevertheless, the dereliction of duties by public police officers is still very

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[183] Yumi Wijers-Hasegawa, *Kin of Stalking Victim Seek Justice*, THE JAPAN TIMES, June 12, 2003, available at http://search.japantimes.co.jp/cgi-bin/nn20030612a2.html.

[184] *Id*.

[185] *Id*.

common. In 2005, the Japanese Federation of Bar Associations (JFBA) conducted a survey of trial lawyers about the dereliction of duties and obligations by the police or prosecutors. More than two thirds of lawyers (70%) reported that the police have refused to accept the complaint filed on behalf of their clients.[186] Such organized effort is necessary to ensure that police officers and prosecutors will properly review the content of complaints filed by individual citizens.

Another potential problem involves the question of prosecutorial uncertainty with respect to how the Japanese prosecutor's initial decision not to indict an American suspect is to be interpreted within the framework of the existing intergovernmental agreements, including the SOFA and other intergovernmental protocols, some of which still remain unearthed, but may have the potential to exert significant impact on the interpretation of the proper legal status of American military personnel in Japan's criminal proceeding.

A battle on the legal terrain may follow. The American government may insist that the original non-indictment decision by the prosecutors' office should be interpreted as the Japanese government's decision to forfeit the further prosecution of military personnel, thereby nullifying the legality of the PRC's subsequent recommendation for prosecution. The Japanese government, on the other hand, may insist that the American government must respect the Japanese judicial system and legal culture, including the new PRC law and a legally binding status of individual citizens' collective decision to indict and prosecute military personnel.

On April 22, 2010, when questioned about the role of the PRC's investigation of civic complaints filed against criminal allegations concerning American military personnel, Senior Vice-Minister of Justice Koichi Kato stated that the PRC is legally empowered to investigate not only off-official duty crimes committed by military personnel, but on-duty crimes as well.[187] While the U.S. government currently holds the rights to exercise the primary jurisdiction over on-duty crimes and/or accidents caused by military personnel, Kato challenged this notion and insisted on Japan's jurisdictional preponderance by recognizing the PRC's propriety to investigate all civic complaints, including the allegation of on-duty military crimes. When questioned on the status of legally binding power of the PRC's second resolution concerning military felons, Kato also stated that "it [the legality of the PRC resolution] is one of the major

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[186] *Bengoshi no 53% ga Fuman: Keisatsu no Kokuso eno Taio (53% of Lawyers Dissatisfied the Police Treatment of Complaints)*, CHUNICHI SHIMBUN, May 15, 2006, *available at* http://www6.big.or.jp/~beyond/akutoku/news/2006/0514-27.html.

[187] *Beihei Hanzai: Komu Mo Sinsakai Taisho [American Military Crimes: On-Duty Crimes Similarly Subject to PRC Investigations],* AKAHATA, Apr. 23, 2010, *available at* http://www.jcp.or.jp/akahata/aik10/2010-04-23/2010042302_02_1.html.

[legal] questions to be clarified."[188] His statement was in response to the internal memo previously circulated among the Ministry of Justice personnel. The memo entitled "Tsutatsu, Shitsugi Oto, Shiryo Shu [Communications and Q&A-Related Support Materials]" indicated that the original non-indictment decision by the Japanese prosecutors may forfeit Japan's original jurisdiction over crimes or accidents caused by American armed forces personnel.[189] Kato's statement clearly indicates that the Japanese government still must determine the interpretive boundaries of applicable Japanese laws in determining the proper legal status of American military personnel and the extent of the PRC's power to initiate forceful prosecutions in military-related crimes.

In either case, legal questions and possible political contestation over the interpretive boundaries of applicable American and Japanese laws in determining the proper legal status of American military felons should be welcomed and further facilitated, as they tend to expose the balance of unequal power embodied in intergovernmental agreements and legal inequities as part of the unilateral imposition of extra-territoriality, which operates to undercut local law and jurisdiction.

Given the long history of Okinawan residents' victimization at the hands of American military personnel and their dependents, and the failure of the American military to punish them properly, the PRC's legally binding recommendations help create a public forum on the island of Okinawa. At question are the equity of intergovernmental agreements on the special immunities and unilateral exemption from local prosecutorial processes, police interference, and/or other measures of legal constraints. The public debate over the jurisdictional inequalities may force both the American and Japanese governments to hold discussions on the redeployment of military personnel and the reconstitution of military facilities within Japan.

D. *Korea's Jury Trials and Military Crimes*

The intense public attention to military crimes and demand for governmental negotiations on the jurisdictional authority over military felons could ultimately lead to the possible revision of the SOFA in Japan and in other East Asian countries with substantial U.S. military installations. South Korea, which also introduced all-citizen jury trials in 2008, currently holds approximately 28,500 U.S. military troops in the U.S. Eight Army, Seventh Air Force, and U.S. Naval Forces Korea.[190]

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[188] *Beiheihanzai Kiso Ni Seiyaku: Kensatsushin Giketu no Koryoku Tadasu [Limit to the PRC's Forceful Prosecution: Clarifying the Power of the PRC],* AKAHATA, Apr. 25, 2010, available at http://www.jcp.or.jp/akahata/aik10/2010-04-25/2010042504_01_0.html.

[189] *Id*.

[190] *Jung Sung-ki, "Obama Hints at Rotating Troops in South Korea to Afghanistan,* KOREA TIMES, November 20, 2009, *available at*

The original SOFA between South Korea and the U.S. was signed in 1966 and has had numerous revisions over the years, with the most recent revision in 2000-2001.[191]

In December 2000, the Korean Government finally reached the new accord with the U.S. government, after eleven rounds of talks since 1995, in which the Korean police were given the right to detain American servicemen suspected of rape and murder as part of a revised agreement governing U.S. troops stationed throughout the country.[192] Under the revised treaty, U.S. soldiers accused of murder, rape, arson, drug trafficking and other serious crimes are to be turned over to South Korea upon indictment.[193] In murder or rape cases, South Korean police have the right to arrest and detain U.S. military suspects. Under the old treaty, the U.S. military held custody of accused soldiers until all appeals had been through the South Korean legal system.[194] The Korean government, however, still has no legal jurisdiction over American military personnel involved in accidents or misconduct while on duty, similar to the SOFA signed with the Japanese government.[195]

Nonetheless, those arrests are still rare and not enforced in South Korea. The U.S. government continues to try its military personnel in its own military tribunals, and oftentimes they are acquitted or punished very lightly. For example, the 2002 murder of two Korean schoolgirls by American servicemen was adjudicated, not in a Korean court, but in the U.S. military tribunal. In June 2002, an armored vehicle driven by Sergeant Mark Walker and Sergeant Fernando Nino of the 8th U.S. Army 2nd infantry division fatally ran over two thirteen-year-old schoolgirls on a civilian road in a northern Korean village.[196] The killing of these two young girls was classified as an accident while on official duty. In December 2002, a U.S. internal tribunal acquitted the two offenders from the charge of negligent homicide.[197]

A Korean Congressional report indicated that between 1967 and 1998, 50,082 crimes were committed by U.S. military personnel, and 56,904 American soldiers and their families were involved in crimes,

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http://www.koreatimes.co.kr/www/news/nation/2010/07/205_55867.html.

[191] Mason, supra note 86, at, 12.

[192] San-hun Choe, *U.S. South Korea Agree on New Rules Governing U.S. Troops*, *NORTH COUNTY TIMES*, Dec. 29, 2000.

[193] *Id*.

[194] *Id*.

[195] *Id*.

[196] *US Soldiers Charged for Korean Deaths*, BBC NEWS WORLD EDITION, Jul. 5, 2002, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/2097137.stm.

[197] *Id*.

including murder, brutal rapes and sexual abuse.[198] The report also stated that the actual figure might be much higher if military crimes that were not handled by the South Korean police have been incorporated. The report suggested that the total number of crimes committed by U.S. soldiers since September 8, 1945, when American troops were first stationed in Korea, was estimated to be around 100,000.[199] The study by the South Korean Ministry of Justice also showed that, between 1967 and 1987, 45,183 American soldiers were involved in 39,452 criminal cases, but the South Korean government was able to exercise its jurisdiction only in 234 cases, punishing only 351 American soldiers, in which 84 soldiers were convicted of rape and 89 were convicted of murder and robbery.[200]

Many rape cases were also intentionally hidden and forgotten in South Korea, while countless cases of rape were committed by American soldiers, including a woman gang raped by four soldiers in March 1946; a fourteen-year-old schoolgirl raped in 1956; a daughter and a mother both raped in 1967; a woman raped by eight soldiers in the mountains in 1971; a one-month pregnant teacher raped in 1986 by five soldiers in the middle of Team Spirit military exercise; a handicapped schoolgirl sexually assaulted in 1996; and a six-year-old girl sexually harassed in 1997.[201] Former U.S. government official Gregory Henderson, who served at the American Embassy in Seoul, South Korea in the 1950s and 1960s, stated in his thesis, "Politically Dangerous Factors in U.S. Troops Exercising Operation and Control Right in Korea," that "every U.S. soldier from officer down enjoys material indulgence in Korea. Material indulgence includes abundant supply of fresh bodies of young local women."[202] In trying to eliminate the sexual victimization of local women, the civic organization called Durebang (My Sister's Place) was established in 1986 and provides advocacy and assistance for sex workers, former sex workers, and women who are living with U.S. servicemen in South Korea.[203]

The 1995 gang rape of the twelve-year-old schoolgirl in Okinawa, and the long history of sexual crimes committed in both Okinawa and South Korea are indicative of continued sexual exploitation and predatory military culture present at U.S. military bases in East Asia. While the

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[198] Statistics *on Crimes Committed by US Troops in South Korea*, REPORT ON US CRIMES IN KOREA 1945-2001, presented at the Korean International War Crimes Tribunal, Jun. 23, 2001, New York, *available at* http://www.iacenter.org/Koreafiles/ktc-civilnetwork.htm.

[199] *Id*.

[200] *Id*.

[201] *Id*.

[202] *Id*.

[203] DURABANG, http://www.durebang.org/htm/esub1-1.htm (last visited Aug. 1, 2010)

South Korean government introduced the all-citizen jury trial in 2008 for the first time in its legal history, heinous crimes committed by American soldiers are yet to be subject to the adjudicative process through Korea's jury system. Since the consent of the defendant is required for all jury trials in South Korea, such a *de facto* requirement prevents lay adjudication of military felons in South Korea.[204] Equity demands that the South Korean government change and eliminate the defendant's consent requirement when it reviews the Jury Law in 2013.[205]

V. CONCLUSIONS

How can one prevent military personnel from committing crimes against innocent civilians in Okinawa? What can the civilians do to make military felons accountable for the crimes they committed? In December 2009, a federal judge in Washington, D.C. threw out all charges against five Blackwater operatives involved in the 2007 Nisoor Square massacre that killed seventeen innocent Iraqi civilians.[206] While Blackwater is a private security firm under contract with the U.S. Department of Defense and their operatives are not subject to the prosecution under the Uniform Code of Military Justice, the federal court decision may illustrate that the American judicial apparatus has been extremely reluctant to exercise its punitive power in the adjudication of heinous crimes committed overseas by military personnel including mercenary operatives.

The question of accountability for military crimes committed by American soldiers is quite relevant in Okinawa because its tiny island now hosts three-quarters of the entire U.S. military facilities in Japan, and the highly concentrated placement of the military establishment has accentuated the proliferation of serious crimes committed by military personnel and their associates on the island. Okinawa was once an independent kingdom until the Japanese government annexed it in 1879. When the island was devastated in the 1945 battle of Okinawa, the U.S.

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[204] Act on Citizen Participation in Criminal Trials (hereinafter the Jury Law). Act No. 8394, art. 8 (1). Under the "Ascertainment of Intention of Defendant," the law states "[A] court shall inquire a defendant of an eligible case, in writing or by other means without exception, of whether he/she desires a participatory trial."). The English translation of Korea's Jury Law is available at http://people.ucsc.edu/~hfukurai/documents/ACT_ON_CITIZEN_PARTICIPATION_IN_CRIMINAL_TRIALS1_000.pdf.

[205] Jae-Hyup Lee, *Getting Citizens Involved: Civic Participation in Judicial Decision-Making in Korea*, 4 *E. ASIA L. R.* 177, 181 ("In 2013, the final format and scope of the [jury] system will be determined.").

[206] Matt Apuzzo, *Blackwater Shooting Charges All Dismissed by Judge*, HUFFINGTON POST, Dec. 31, 2009, *available at* http://www.huffingtonpost.com/2009/12/31/blackwater-shooting-charg_n_408604.html.

military powerfully moved onto the island, bulldozed expropriated lands, and forcibly relocated many Okinawan landowners to South America.

The first ever trial of an American serviceman by Japan's lay assessor court represented the first effort to decolonize the island of Okinawa. There will be more American military defendants to be subject to this judicial process, as lay adjudication begins to play an important role in placing the burden of responsibility on military personnel's activities, functioning as effective judicial oversight of the activities of American military personnel in Okinawa. Similarly, the investigative function of the PRC can provide another effective political strategy to take away the Japanese government's control over the indictment process and insert people's common sense judgments, shared sentiments, and varied life experience into the critical examination of military crimes in Okinawa. Thus, the twin systems of lay adjudication can potentially serve as very powerful vehicles to alter people's consciousness and perception about lay participation in the justice system and create new strategies to establish popular sovereignty and social independence in the islands of Okinawa. They also have the potential to alter the nature of the political and legal relationship between Okinawa and the "occupying forces" of both Japanese and American governments.