

# Okinawa's Citizen Judge Panels vs. U.S. Military Hegemony: WikiLeaks' Secret U.S. Cable Document on the Lay Adjudication of American Soldier Criminal Cases in Japan's *Saiban-in* Trials<sup>1)</sup>

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## Introduction

In 2009, the Japanese government finally introduced the much-anticipated system of lay adjudication called *saiban-in seido* (a quasi-jury system). For the first time in Japan's legal history, this quasi-jury system enabled the adjudication of crimes committed by American military personnel in Japan's lay court. A recently exposed Wikileaks document revealed that, prior to the introduction of the lay adjudication system in 2009, the American Consulate in Okinawa sent a diplomatic cable to the U.S. State Department in Washington, D.C., examining both positive and negative impacts of the lay adjudication in Okinawa. The report also suggested a set of creative strategies to counteract and rectify jurors' anti-American prejudices and anti-base biases.

This paper examines the U.S. Government's assessment of the impact of Japan's quasi-jury system on the lay adjudication of military crimes in Japan. Part 1 examines the content of the U.S. State Department cable and its assessment of the potential impact of *saiban-in* trials. This section also examines the American Consulate's analysis of the Okinawan people's perception of U.S. Armed Forces bases in Japan and military personnel stationed on the island.

Part II provides analytic results of two opinion surveys conducted about views and opinions on the lay adjudication of crimes committed by military personnel. These large surveys were conducted at the end of 2010 and the beginning of 2011, including: (1) a nationwide survey (n=800), and (2) another representative survey of residents of the Island of Okinawa (n=800).

Part III explores important questions with respect to Okinawa's search for judicial sovereignty and political independence from both the U.S. and Japanese governments. Okinawa was once an independent kingdom that was forcefully annexed by Japan in 1879. After WWII, the island remained as a virtual U.S. military colony.

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Part IV concludes that lay adjudication of American military personnel trials in 2010 and 2011 helped express indigenous voices and created a possible path for attaining Okinawa's political independence and judicial sovereignty.

### **Part I: Analysis of the U.S. State Department Cable on *Saiban-in Seido***

In November 2010, a total of 251,287 secret U.S. diplomatic cables were released by Wikileaks, a non-profit organization that publishes confidential materials sent from anonymous whistleblowers, encompassing multitudes of reports and analyses of international affairs from 274 U.S. embassies from December 28, 1966, to February 28, 2010.<sup>2)</sup> Specific contents of the diplomatic cables include: (1) external political relations (n=145,451); (2) internal government affairs (n=122,896); (3) human rights (n=55,211); (4) economic conditions (n=49,044); (5) terrorists and terrorism (n=28,801); and (6) the U.N. Security Council (n=6,532).

In terms of the absolute number of diplomatic cables by country, Japanese-related cables ranked third, following ones regarding Iraq and Afghanistan. While a large number of cables related to Iraq and Afghanistan seems inevitable due to the U.S. military's active involvement in military conflicts in those countries, the fact that peacetime Japan had the third largest number of U.S. diplomatic cables may elucidate the strategic significance of Japan's unique geo-political relation to America's overall plans for global political, economic, and military governance (Johnson, 171).

Some contents of the Japan-related cables were extremely sensitive and involved questions of public safety, national security, and potential corporate liability for proprietary technologies, including nuclear reactors and electric power plants built in Japan. For example, in substantiating Japan's violation of nuclear safety regulations and, perhaps, predicting the nuclear disaster and meltdowns of nuclear plants in Fukushima and other regions, the U.S. diplomatic cable dated December 17, 2008, indicated that an IAEA (International Atomic Energy Agency) official learned that "safety guides for seismic safety (in Japan) have only been revised three times in the last 35 years . . . [substantiating that] recent earthquakes in some cases have exceeded the design basis for some nuclear plants, and that this is a serious problem" (US Cable, 183350). Another cable disclosed how the Japanese government opposed a court order to shut down a nuclear power plant in Shiga Prefecture, which was only "built to withstand a magnitude 6.5 earthquake" (US Cable, 58190). The Shiga nuclear power plant was commissioned in 1993 using the General Electric BWR (Boiling Water Reactor) design, which is the same type used in the construction of the Fukushima nuclear power plant, which was originally built in 1971. In 1976, three GE nuclear scientists blew the whistle on safety problems of the BWR design specifically used to construct the Fukushima nuclear plants (US Cable, 149131, Section 29). The U.S. cable clearly recognized the structural flaw of the nuclear power plant in Shiga, while the same nuclear design was used for the Fukushima plant more than two decades earlier. The March 11 earthquake, 81 miles off the shore of Japan, was a magni-

tude 9.0 tremor that ultimately destroyed the four nuclear power plants in Fukushima.

Another cable was also sent from the U.S. Embassy in Naha, Okinawa, to the U.S. State Department one year before the *saiban-in seido* was introduced. Kevin Maher, a top American diplomat at the U.S. Consulate in Okinawa, prepared the diplomatic cable, dated April 9, 2008 (US Cable, 149131, Section 23). Maher carefully analyzed the potential impact of the new system of lay participation upon the adjudication of military crimes in Japan. Maher had a thirty-year career as a foreign-service officer at the U.S. Department of State with a focus on Japan and East Asia. Maher had spent a total of eighteen years in Japan and also served as the Minister-Counselor for Environment, Science, and Technology at the U.S. Embassy in Tokyo, which included oversight of the nuclear energy relationship between Japan and the U.S. In Okinawa, Maher examined governmental documents and interviewed Japanese legal experts, practitioners, and ordinary citizens, including college students. The 2008 U.S. cable then summarized varied impacts of the quasi-jury system on the adjudication of military crimes in Japan's lay court.

#### **(A) American Analyses of Japanese People's Attitudes Toward the New Lay System**

In preparing careful analyses of the potential impact of *Saiban-in* trials on U.S. military crimes, Kevin Maher first relied on the Japanese Cabinet Office Survey of February 2007 to examine attitudes toward the citizen judge system. The report indicated that eighty percent of nearly two thousand respondents knew about the new system, and many of them "wanted nothing to do with the system" (US Cable, 149131, Section 23), summarizing that Japanese citizens' objections to participating in the *Saiban-in* trial fell into the following three categories: (1) invasion of privacy; (2) burden of secrecy; and (3) financial impact (US Cable, 149131, Section 24).

Privacy concerns, according to Maher, involved the courts' access to voter registration records, obligation to submit to polling and candidate interviews at a courthouse, and forced participation in a deliberation process requiring the sharing of their opinions about the case with eight other strangers, i.e., three professional and five other lay judges. The burden of secrecy involved the indefinite prohibition of the disclosure of deliberative discussions and contents with others. Lastly, the financial burden involved a cap of "\$100 per day" on the stipends of lay judges who might have to serve several weeks, thereby overburdening many jurors including the self-employed (US Cable, 149131, Section 24).

Maher interviewed many Japanese citizens, including Chief Prosecutor Yaichiro Yamashiki of the Naha District Public Prosecutors' Office in Okinawa, undergraduate law students at the University of the Ryukyus, and community members enrolled in adult education programs who had watched a Japanese government-produced movie on *Saiban-in* trials. Maher suggests that hearing details about serious and violent crimes in a courtroom might be a traumatic experience for some lay judges. Maher also wonders whether or not Japanese citizens should contribute to the trial at all, as they may have nothing in common with individuals involved in serious and violent crimes. Lay judges may even fear a potential retaliation from the defendants, who may track down and harm

them and their families. As results, Maher concludes that many citizens might do whatever they could in order to avoid *saiban-in* participation (US Cable, 149131, Section 25).

Maher also provides a detailed analysis of two different views of foreign commentaries on the new system. One view is that the new system will provide accountability and transparency to traditional criminal justice proceedings, indicating that the new trial procedure will result in greater media coverage of verdicts and sentences “because the results are released while the public still remembers the incident at issue” (US Cable, 149131, Section 26). The second view is that Japanese are too status conscious for some lay participants to engage in any meaningful deliberation and have any significant impact on the trial outcome. Maher emphasizes that Japanese culture reinforces the subordination of lay judges to professional jurists who have higher status and prestige, indicating that “lay judges are [merely classified as] *saiban-in*, directly translated as ‘justice members,’ [while] career judges retain the title *saiban-kan*, or ‘justice authorities [or professionals]’” (US Cable, 149131, Section 26). Maher follows that “Career judges retain their robes, their central location on the bench, and power to decide who will serve with them as lay judges, ergo, overwhelming control of the outcomes of trial” (US Cable, 149131, Section 26). Whether or not lay judges would feel inferior to, or even intimidated by, professional judges will be examined in the next section.

### **(B) *Saiban-in* Deliberations, Verdicts, and Sentencing**

Maher warns that Japanese prosecutors were also deeply concerned about the uncertainty regarding the extent of effects introduced by lay participation. After interviewing Okinawa's Chief Prosecutor Yaichiro Yamashiki, who was later moved as chief prosecutor to Hiroshima in 2011, Maher concludes that Japanese “prosecutors took comfort from the checks the professional judges would still have on lay judge's deliberations” (US Cable, 149131, Section 17). Maher again emphasizes the professional judges' ability to check and exert control over lay participants during deliberations, but each judge, whether a professional or lay judge, has the same one vote. Lay judges' alleged subservience to the opinions and persuasion by professional judges still needs to be examined.

By examining the difference between the U.S.-style all-citizen jury and the hybrid nature of Japan's jury panel, Maher argues “what is arguably the most significant difference between these systems is “the issue of participating citizen's freedom from outside influence” (US Cable, 149131, Section 18). The American jury system was seen as a “fool-proof” institution that keeps judges from affecting the jury deliberations, which occur in an excluded environment outside of courtroom, and where the jury deliberations only begin after all evidence and facts have been presented in court. In Japan, according to Maher, instructions to lay judges on applicable laws become subject to the professional judges' discretion throughout all phases of trial. American jury instructions are only determined in advance of a trial or in an interval between the end of the trial and the beginning of jury deliberations. Throughout the entirety of lay trial proceedings in Japan, however, lay judges are constantly exposed to the effect of the judges' direct and indirect

decisions and rulings on the admission of evidentiary information, expert testimony, crime victim statements, and other key issues.

Lastly, Maher warns that many Japanese legal experts from business, media, and educational sectors have expressed serious doubts about lay judges' ability to put specific cases and complex information into a much broader social and legal context. Maher concludes by stating that "this is just one of many misgivings about the new system" (US Cable, 149131, Section 22). Nonetheless, Maher's skeptical view of people's ability to apply a proper perspective and sense of justice to the deliberations is indeed counter-intuitive and even contradictory to jury research conducted in the U.S. and elsewhere. Jury research has shown sizeable agreement between jury verdicts and the decisions of judges, supporting the idea that juries are quite competent (Vidmar & Hans, 168). Jury research also indicates that professional judges, like lay participants, are also subject to many of the same cognitive illusions that characterize human decision-making, and professional judges are not immune to the same fallacies in the complexity of trial processes (Vidmar & Hans, 169).

### **(C) Positive and Negative Consequences of *Saiban-in* Trials**

Maier provides both positive and negative consequences of lay adjudication in Japan. As positive consequences, the introduction of lay adjudication in the criminal process shortens the length of trials, demands a higher quality of in-court testimony and exchange, and requires a pre-determined set of issues and charges to be examined in court. Because many soldiers do not stay in Japan for an extended period, these changes will benefit American military personnel. Maher predicts that the implementation of a speedy trial process benefits American military defendants, even more so than Japanese defendants, under the new criminal justice proceeding. Maher notes, for example, that traditional collegial bench trials tend to "drag on at the rate of about one day per month. . . [D]efendants contesting the charges . . . could languish in jail for years, as they received their monthly day in court" (US Cable 149131, Section 9). Maher cites one recent example in which "the Tokyo District Court acquitted an American couple of murder after seven years and nine months of trial" (US Cable, 149131, Section 9).

Military defendants' right to mount a full defense depends on the ability to summon witnesses, the timeliness of investigating relevant materials, as well as the availability of family, colleagues, and other military support groups, including defense attorneys. Maher notes that the newly streamlined trial procedures and additional protections given to criminal defendants will make it possible for American military defendants to prepare a meaningful and substantive defense while their family and friends still remain in Japan to support them.

The recent judicial reform of criminal procedure also provides added legal protections to military defendants in Japanese courts, according to Maher. The basic rights of American military personnel were already protected under the U.S.-Japan Status of Forces Agreement (SOFA). The introduction of *saiban-in* trials led to the introduction of both the

National Public Defender System and the Japan Legal Support Center (Ho-Terasu) in 2006 in order to provide additional legal support and counseling to criminal defendants. The Crime Victim Participation System was also implemented in 2008, and crime victims and their proxies were allowed to voice their opinions, question the defendant and witnesses, and offer suggested sentences for the accused in court. The revised system of Prosecution Review Commissions (PRC or Japan's grand jury system) was also introduced in 2009 (Fukurai, 517).

Maier argues that the most negative consequence of the *saiban-in* trial is that it allows the introduction of ordinary citizens' strong anti-American biases and prejudices into the deliberations. Maier also expresses his strong doubt about the ability of lay participants, not professional judges, to remain impartial and emotively neutral toward American soldiers, who often victimize local residents. Maier points out that the *saiban-in* trial may run "the risk of discriminatory verdicts and sentencing [by lay judges]" (US Cable, 149131, Section 29). According to Maier, Japan's professional judges have many years of experience in a vast array of criminal trials and understand that Japanese citizens, not American soldiers, commit the great majority of serious and violent crimes in Japan. On the other hand, lay judges have virtually no comparable experience but are suddenly summoned and randomly chosen from local communities to adjudicate a single criminal case. They have also often been exposed to many sensationalized headlines of crimes committed by American soldiers, their dependents, and military employees. These citizens are thus more likely to adjudicate the case on the basis of negative stereotypes and strong anti-American sentiments. The report specifically states that Japan's lay judges "may believe that the first and only foreign defendant they see is just one member of a vast foreign crime wave" (US Cable, 149131, Section 29). Maier thus concludes that the risk is particularly heightened in Okinawa, where local newspapers continue to print overly anti-military stories and editorials.

In his conclusion, Maier suggests that effectively countering lay judges' biases must rest upon the professional judges' ability to combat and control the lay judges' expression of bias and prejudice during deliberations. Maier specifically states that it is important to ensure the "career judges' [strong and exerted] influence over lay judges [in deliberations]" (US Cable, 149131, Section 30). The professional judges' pressure, supervision, and personal influence "will suffice to counter [lay judges'] anti-foreign propaganda," Maier declares in the conclusion of his report to the State Department (US Cable, 149131, Section 30).

Indeed, in many criminal cases involving American soldiers and families, Japanese judges have been known to treat them very leniently (Editorial, no page). Even in cases where Japan was given the primary jurisdiction to adjudicate American military personnel's crimes, the cases were often not adjudicated in a Japanese court because the Japanese court routinely handed over its jurisdiction to the U.S. military. Prominent scholar Chalmers Johnson also agreed that Japanese judges treat guilt much more leniently than American criminal proceedings would (Johnson, 180).

Maher's ultimate suggestion to eradicate the negative consequence of lay adjudication thus takes full advantage of Japan's judicial system's subservience to American military interests. Many Japanese legal scholars have substantiated Japanese judges' subservience to the Japanese government and its political interests (Ii, 73). The Secretariat of the Supreme Court exerts significant oversight and quality control over professional judges by means of periodic merit assessments and court assignment decisions. Political parties and their policies are also known to influence the judges' decisions because the dominant political party (i.e., the Liberal Democratic Party or LDP) appointed Supreme Court justices, thereby indirectly affecting the careers of lower-court judges as well (Ramseyer & Rasmusen, 268). Since support of the presence of U.S. military bases in Japan has always been part of the LDP's policy, lenient decisions and treatment of American military defendants became inevitable and even necessary consequences of the unequal power dynamic between the Japanese bureaucracy and U.S. military interests. After all, it was the LDP that signed the SOFA with the U.S. government in 1960 and facilitated the construction of three-quarters of Japan's U.S. military facilities on the tiny Island of Okinawa. This is despite the fact that Okinawa occupies less than 1% of Japan's total land area.

Japanese courts' decisions to give lenient criminal punishment to American soldiers and a sense of impunity that developed among American military personnel have led to the massive victimization of many residents of Okinawa. The Japanese Defense Facilities Administration Agency reported in 2005 that from 1952 to 2004, American military personnel committed crimes or caused accidents in a total of 201,481 cases that resulted in 1,076 deaths (Hayashi, no page).

The introduction of *saiban-in* trials can possibly transform the history of unequal power dynamics between Okinawa residents and American military personnel stationed in Okinawa. For the first time, the *saiban-in* trial allows Okinawa residents to directly adjudicate crimes committed by American military personnel. Maher predicts that Japanese professional judges' effective control over lay judges will suffice to counter their anti-foreign sentiments and prejudices. The next section examines the opinions and attitudes of Okinawan residents about *saiban-in* trials and lay adjudication of crimes committed by American military personnel.

## **Part II: Lay Adjudication of Military Cases in *Saiban-in* Trials and the PRC's Review of Military Crimes: Empirical Questions and Public Responses**

This section examines Japanese citizens' opinions and views about the system of lay adjudication introduced in 2009, i.e., *saiban-in* trials. The analysis is extended to another lay adjudication system called the revised Prosecution Review Commissions (PRC, *Ken-satsu Shinsakai*, or Japan's grand jury system). The PRC reviews a prosecutor's decision not to indict criminal suspects. Upon the request of a citizen, victim, or his/her proxy, the PRC reviews the propriety of the prosecutor's failure to prosecute criminal suspects. The

PRC also has the legally binding authority to potentially reverse the prosecutor's non-indictment decision and initiate the forced prosecution of criminal suspects. The PRC's legally binding decisions play a very significant role in the prosecution of American soldiers because Japanese prosecutors often decide not to indict them, regardless of the severity of their crimes and/or the presence of evidentiary records (Fukurai, "Japan's Prosecution Review Commission," 1-3). The prosecutors' non-indictment decisions may be potentially appealed to the local PRC, and a panel of eleven members chosen randomly from local communities has the authority to review the case. While the PRC's recommendation for the initiation of forced prosecution was regarded as merely advisory, the revised PRC Act in 2009 allowed the PRC's second prosecution decision to become legally binding (Fukurai & Park, 68-70).

#### **A. Two Samples:**

At the end of 2010 and the beginning of 2011, two representative samples were chosen to examine Japanese citizens' attitudes towards lay adjudication of military felony cases in Japan. First, eight hundred adult Japanese citizens between the ages of 20 and 69 (402 men and 398 women) were sampled nationwide from a pool of more than 1.2 million individuals who were registered as panelists with on-line survey and public relations companies in Japan.<sup>3</sup> The distribution of age, sex, and residential district of the overall sample was matched in ratio with that of the general population in Japan. Among 47 prefectures from which individuals were chosen for the study, Tokyo had the largest number of sampled individuals (n=129), followed by Kanagawa Prefecture (n=89). The mean age of the subjects in the sample was 44.9, while the median and mode were 45 and 60, respectively. The mode of education was college graduate (n=318), followed by high school graduate (n=245), with 35 holding post-college graduate degrees. The mode for household income range was from four to six million yen (i.e., \$40,000 to \$60,000), representing 23.4% of the sampled individuals, followed by two to four million yen (\$20,000 to \$40,000 with 21.9%), and six to eight million yen (\$60,000 to \$80,000 with 14.8%).<sup>4</sup>

The majority of sampled individuals were married (67.0%) and had children (59.3%). The mode for occupation was white-collar clerical work (n=291). Government bureaucrats represented only 0.3% (i.e., judges, prosecutors, police officers, or other bureaucrats) who were ineligible to serve as jurors; 3.5% were public servants eligible for jury service; 8.8% were self-employed; and 19.5% were homemakers.

Another eight hundred Okinawa adults (404 men and 396 women) were also sampled from residents of Okinawa Island. The age and sex distribution of the sample also matched the ratio of Okinawa residents as a whole. The mean age of the subjects in the sample was 38.2, while the median and mode were 37 and 36, respectively. Compared with the sampled individuals in the nationwide survey, the age of the respondents in Okinawa was younger than the national average. The mode of education in Okinawa was college graduate (n=267), closely followed by high school graduate (n=235). The per-



percentages of individuals who had completed high school or college (29.4% and 33.4%) were lower than the national average. The mode for household income range was from two to four million yen (\$20,000 and \$40,000), representing 46.8% of the sampled individuals, followed by 15.9% with an income of less than two million yen (\$20,000), suggesting that more than the three-fifths of the individuals made less than \$40,000 per year, much below the national average.

More than half of them were married (56.8%), while less than half had children (45.9%). Similar to the national sample, the mode for occupation was white-collar clerical work (n=320), followed by homemakers (n=106). Government bureaucrats represented 0.5%, while 5.5% were public servants eligible for jury service, and 10.8% were self-employed.

### **B. Attitudes Towards U.S. Military Bases in Their Own Communities**

The overwhelming majority of Japanese citizens do not support American military bases being built in their residential neighborhoods, despite a statistically significant gender difference in attitudes toward the military bases (only 18.4% and 11.1% of male and female respondents, respectively, support U.S. bases in their own communities), suggesting that women are less likely than males to favor the construction of U.S. bases in their communities ( $p < .001$ ). In Okinawa, similar findings were observed although more than one quarter of residents supported the establishment of U.S. military bases (26.5% and 27.5% for males and females), suggesting that while the majority of both Japanese and Okinawa residents still do not wish to have American bases in their communities, Okinawa residents are more tolerant than the average Japanese citizen towards the presence of American bases in their communities.

A notable finding is that Okinawa residents with the lowest annual household income are more likely than higher income groups to support American military bases in their communities. Another important finding is that younger Okinawans born after Okinawa's reversion from the U.S. military occupation to the Japanese government in 1972 (i.e., those less than 40 years of age) are more tolerant than older generations (21.1%) of military bases in their communities (29.9%).

Nearly all Japanese citizens and Okinawa residents also perceived American military crimes as a great social problem in their communities (mostly high 80s and 90s in percentage points for all cognizable groups). Many respondents also supported the prosecution of military personnel accused of felonies. If prosecutors decided not to indict military personnel, the majority of Japanese citizens and nearly all Okinawa residents supported having the PRC review the Japanese prosecutors' non-indictment decisions against alleged military suspects. There is not a single statistically significant difference in gender, age, income, occupation, or educational groups, suggesting that nearly all respondents, regardless of demographic and socio-economic distinctions, supported the PRC's review of non-prosecution decisions involving crimes committed by military personnel. Yet, Okinawa residents expressed even greater support for the PRC's critical role in

reviewing non-prosecution decision against alleged military offenses.

### **C. Lay Adjudication and the Prosecutorial Review Commission**

When local residents realized that American soldiers had victimized their own community members, the great majority of both Japanese and Okinawa residents felt that they should have the right to participate in the trials as lay judges. More women than men supported the right of local residents to adjudicate military crimes ( $p < .001$  and  $p < .01$  for nationwide and Okinawa residents, respectively). On the other hand, when they were asked for their personal commitment to serve as jurors in trials with American military defendants, women were less willing than men to serve for these trials ( $p < .000$  in both Japan and Okinawa). People who were born after the 1972 Reversion of Okinawa were also more willing than the older generation to serve as jurors in such trials ( $p < .01$ ). Those with college degrees were also the most willing to join the trials ( $p < .01$ ). Conversely, homemakers were the least willing to serve for trials of U.S. soldiers ( $p < .000$ ).

When respondents were asked to put themselves in the shoes of American military defendants and their preference was then solicited regarding whether cases should be adjudicated in an American military court or Japanese civilian court, the majority of them preferred a U.S. court as the ideal site for the adjudication of their crimes. The majority of Japanese respondents also felt it difficult to try American soldiers because of potential biases and prejudice against them. The great majority of Japanese respondents also felt that they would be overwhelmed if they had to make a judgment on a military crime. Both Japanese and Okinawa women were more likely than men to be overwhelmed by lay judges' judicial responsibilities in such trials ( $p < .000$ ), but college graduates felt less likely than high school graduates to feel overwhelmed by such judicial responsibilities ( $p < .01$  and  $p < .000$  for Japanese and Okinawa residents, respectively).

### **D. The Legitimacy of U.S. Military Bases in Okinawa and Elsewhere**

The U.S. government has established military bases in 130 countries and dispatched military personnel to 156 countries around the world (Johnson, "The Arithmetics of America's Military Bases Abroad," no page). When asked whether or not the global deployment of American soldiers is important for maintaining world peace, the majority of both Japanese and Okinawa residents expressed their support for the global presence of U.S. military personnel and troops. Women, older respondents (40 or older), and homemakers were less likely to support such a view than their counterparts at the national level ( $p < .001$ ). Again, Japanese women were less likely than men to support America's global military policies ( $p < .001$ ). For Okinawa residents, less than a quarter of both males and females supported the U.S. military policies that enabled the presence of massive military installations in Okinawa (23.6% and 24.4% for males and females, respectively).

The majority of Japanese citizens in various socio-demographic categories opposed the transfer of American military bases in Okinawa to other Japanese prefectures or overseas. On the other hand, the majority of Okinawa residents supported such base transfers

(opponents merely accounted for 36.1% (government employees) at the lowest and 47.4% (women) at the highest). Given the high concentration of military bases in Okinawa and the many military-related crimes and accidents occurring on the island, it is not surprising that Okinawa residents are more likely than the average Japanese citizen to endorse military base transfers from Okinawa to other Japanese regions.

#### **E. Cost and Consequences of U.S. Military Bases in Japan: Financial and Environmental Effects**

Recent reports indicate that the Japanese government pays seventy percent of the U.S. military maintenance cost (Hays, no page). Although the great majority of both Japanese citizens and Okinawa residents supported the idea that American taxpayers, not Japanese taxpayers, should bear the greater financial burden for the maintenance of U.S. military bases in Japan, Okinawa residents were even more likely to do so (mostly in the 80s and 90s in percentage points for all cognizable groups). A similar pattern is found with respect to the view that Okinawa's regional government should have a more prominent role than the central Japanese government in directly negotiating with the U.S. government about the operation of American military bases in Okinawa.

Many Okinawa residents thus wanted to see a more prominent political role played by their own regional government, possibly bypassing or even removing the Japanese central government from negotiations with the U.S. government. More Okinawans than Japanese residents, and more women than men, supported such views at a statistically significant level. Another notable finding was that the great majority of college-graduated Okinawans supported greater American financial responsibility in the maintenance of military bases in Japan (84.8%) and the right of the Okinawan government to directly negotiate with the U.S. government (89.7%), while two-thirds (67.1%) and three-quarters (76.3%) of Japanese college graduates shared these views.

A large majority of Japanese and Okinawa residents were also well aware of the significant environmental pollution and hazardous contamination in communities near military bases. No statistically significant differences were found among cognizable groups in gender, age, occupation, and educational characteristics among Japanese and Okinawa respondents, suggesting that people showed uniform and consistent concern about significant base-related environmental damage and pollution.

Aircraft crashes, auto accidents, and crimes committed by American soldiers, their dependents, civilian employees, and military contractors, are other major problems created by the presence of American military bases in Japan. The great majority of both Japanese and Okinawa residents felt that the U.S. military had not properly prosecuted military crimes. Such a view was shared more prominently among the lowest income Okinawa residents. Overall, the perception of inequities in the adjudication of military crimes was shared more widely and strongly among Okinawa residents than the average Japanese citizenry.

#### **F. Deterrent Effects of Lay Adjudication**

If the proper adjudication of American military crime in traditional Japanese courts is perceived to be ineffective, the new quasi-jury trial may offer an alternative avenue for the criminal prosecution of military crimes. The large majority of both Japanese and Okinawa residents shared the belief that a quasi-jury trial is an effective and proper legal tool to adjudicate military crimes in Japan. Except for private employees, Okinawa residents in all other cognizable groups felt more strongly than the average Japanese resident that *saiban-in* trials can effectively adjudicate military crimes. On the other hand, with respect to the deterrent effect of lay adjudication, more Japanese residents than Okinawa people felt that lay adjudication helps prevent future military crimes in their own communities. More women than men showed faith in the effective deterrent role of lay adjudication against future military crimes, while Japanese citizens with higher education and higher income were less likely to believe in the deterrent effect of lay adjudication.

The majority of respondents also expressed strong concerns about potential retaliation or threats from defendants and their families once they served in a trial. Women, those with lower income, homemakers, and the less educated were more likely to be concerned about potential threats of retaliation. Nonetheless, nearly all Japanese and Okinawa residents supported their duty to serve as a juror in a trial when it is required. In particular, all Okinawa respondents in the highest income range (100.0%), women, and the more educated expressed their willingness to serve in *saiban-in* trials in their own communities.

#### **G. The Future of Lay Participation: Extension to Non-Heinous Crimes, American Lay Participants, and Victim Participation in Military Trials**

The overwhelming majority of both Japanese and Okinawa residents felt that the lay judge system should be extended to all military crimes beyond serious and violent offenses. Currently, the *saiban-in* trial is only allowed to adjudicate heinous crimes, such as murders, robberies, rapes, arsons, and child molestation. Okinawa residents in all socio-demographic groups are more likely than the average Japanese citizen to support the extension of lay adjudication to other non-heinous crimes committed by military personnel.

While the SOFA allows Japan to exercise their right to adjudicate criminal offenses committed while off-duty, Japanese and Okinawa residents also supported Japan's right to extend its jurisdiction to on-duty accidents and crimes as well. Both Japanese and Okinawa residents overwhelmingly supported the modification of the SOFA in order to extend Japanese jurisdiction not only to misdemeanors and other non-felony crimes but also to on-official-duty accidents and crimes.

When the respondents were asked about broad, community-wide participation in jury service, nearly all Japanese and Okinawa residents uniformly support the egalitarian and all-inclusive view of lay adjudication. However, when they were asked whether or not it was fair for family members of American soldiers to participate in the *saiban-in* trial as potential jurors, the majority of Japanese and Okinawa residents opposed their participa-

tion in trials.

Lastly, nearly all Japanese and Okinawa respondents supported the application of the recently adopted victim participation program in trials of military defendants (80s and 90s in percentage points for all groups across gender, age, income, occupation, or educational differences). Since 2008, crime victims and their families were allowed to participate in trials, question defendants and witnesses, and express their views. The new reform thus gave victims and survivors much more voice in criminal trials than they previously possessed (Saeki, 149). Survey results also indicated that more Okinawa residents (regardless of socio-demographic differences) than average Japanese citizens, and more women than men, are supportive of the legal system that allows families of crime victims to participate in *saiban-in* trials.

### **Part III: Okinawa's Search for Political Independence and Judicial Sovereignty**

Both the nationwide and Okinawa opinion surveys revealed that the large majority of Japanese and Okinawa people supported the adjudication of a wide range of military crimes, including on-duty crimes and non-felony offenses. Many of them also supported the modification of the SOFA in order to broaden Japan's right to exercise primary jurisdiction over a wide range of military crimes and accidents in lay courts. Okinawa residents also supported direct local government negotiations with the U.S. military, bypassing the central government of Japan. Nearly three-quarters of American military facilities in Japan were constructed exclusively on the island of Okinawa, and Okinawa residents supported the potential transfer of military bases to other regions or overseas. Furthermore, Okinawa people supported the PRC's role in reviewing Japanese prosecutors' non-indictment decisions involving military crimes, thereby enabling the PRC to directly challenge and potentially reverse the prosecutor's decision and initiate the forced prosecution of military suspects.

Since *saiban-in* trials were introduced in 2009, two American soldiers were tried in lay court, convicted, and sent to Japanese prison. Nineteen-year-old Jonathan Kim became the first American military person ever tried in a Japanese lay court in 2010 (Fukurai, "Japan's Quasi-Jury and Grand Jury System," 792). This Marine private first class was sentenced to three to four years in a Japanese prison for robbing and injuring a fifty-eight-year-old taxi driver in Okinawa. Immediately after sentencing the young soldier to a Japanese prison, Okinawa's six lay judges asked the chief judge to read the following statement to the young defendant: "[W]e want you to reflect and think why you committed such a crime. . . . We know you can rehabilitate. You have strength to become a good, law-abiding citizen. We believe in you" (Allen & Sumida, no page). His mother was in the courtroom when the message was read. She came all the way from Philadelphia to give support to her son during the trial. Phillip Edward Sawyer then became the second American soldier to be tried in a *saiban-in* court in Okinawa only three months after the Kim trial ended. He was convicted of sexually assaulting an Okinawa woman

and sent to a Japanese prison. He appealed the guilty decision, but the Naha Branch of the Fukuoka High Court denied his appeal in May 2011 (Fukurai, "Lay Prosecution of U.S. Military Crimes in Japan," 143).

As anticipated by Okinawa residents, the PRC, another lay adjudication system, also began to play a prominent role in investigating military crimes and reversing non-indictment decisions rendered by the Japanese prosecutors. In January 2011, a vehicle driven by Rufus J. Ramsey III, a military employee of the Army and Air Force Exchange Services (AAFES), killed nineteen-year-old Koki Yogi, who returned to Okinawa to attend the so-called official adulthood ceremony of his twentieth birthday. The Japanese prosecutor did not indict Ramsey because the accident took place while Ramsey was on official duty, i.e., outside the judicial reach of Japanese prosecution. Yogi's mother then filed a complaint with the local PRC in Okinawa and asked the citizens' panel to investigate the case and review the non-indictment decision against Ramsey ("Fukiso Izoku," no page).

The Naha PRC soon reversed the non-prosecution decision and announced that Ramsey should be prosecuted for his crime. What is truly remarkable in the PRC announcement of its decision is the fact that the PRC did an extensive analysis of criminal cases and court rulings involving the disposition of military employees in similar cases in the U.S. and other foreign countries. For instance, the PRC cited the 1960 U.S. Supreme Court ruling that civilian employees, military contractors, and soldiers' dependents were not subject to the same military rules and regulations governed by the Uniform Code of Military Justice (UCMJ), thereby excluding them from the privileges granted under the SOFA. The PRC also cited the provision from the NATO SOFA, where the U.S. military has limited jurisdiction over its civilian components such as military employees during peacetime ("Kisosoto," no page). Okinawa's eleven member civic panel also cited the fact that the Supreme Court of South Korea recently decided that the U.S. military has no right to exercise its jurisdiction over civilian employees of U.S. military bases during peacetime, a decision similar to the U.S. Supreme Court ruling.

Despite the fact that the U.S.-Japan SOFA explicitly stipulates that the Japanese prosecution has no right to exercise primary jurisdiction over military crimes or accidents that occurred while on-duty, the PRC was able to investigate U.S. and foreign court rulings in similar cases and reversed the Japanese prosecutor's non-indictment decision. Kevin Maher, who did an extensive analysis of the impact of *saiban-in* trials in his detailed report to the State Department, nonetheless overlooked the potential impact of the PRC and its power to challenge Japanese prosecutors' non-indictment decisions involving military crimes. After the Naha PRC reversed the Japanese prosecutor's non-indict decision, both the Japanese and U.S. governments decided to meet in November 2011 and reached a new agreement that allows Japanese courts to try civilian military employees even though they were on official duty at the time of a crime or accident. Two days after the announcement of the new agreement, the Naha prosecutors' office indicted Ramsey ("U.S. Civilian Worker in Okinawa Indicted For Fatality," no page). In February,

the Okinawa District Court sentenced the defendant to eighteen months in prison for vehicular manslaughter (Tritten & Sumida, no page).

As the Okinawa survey revealed, residents supported the PRC's revolutionary role in challenging and reversing Japanese prosecutors' decisions, and the eleven-member civil panel was able to force both the Japanese and U.S. governments to come together and modify the SOFA to allow the adjudication of on-duty crimes and accidents.

Kevin Maher assumed that Japanese professional judges' power and privilege would be effective and sufficient in "supervising" lay participants and generating lenient sentences. Nonetheless, a nineteen-year-old military defendant, who was considered a minor under Japan's legal system, was tried in a regular criminal court, where one male and five female lay judges ultimately convicted and sentenced him to a Japanese prison.

Maher's analysis overlooked another important legal development and reform that exerted significant impact on the adjudication of military crimes, i.e., the crime victim participation program that began in 2008. This legal reform was also incorporated into *saiban-in* trials and allowed victims and/or survivors to make statements and question defendants and witnesses in court. The overall community sentiment surrounding the crime was then introduced into the courtroom and shared by a panel of lay participants chosen randomly from the same local community. The question of whether or not such strong local sentiments and emotive feelings have adversely affected the objective evaluation of criminal cases must be critically examined. Post-verdict interviews, nonetheless, showed that lay judges were able to apply their objective judgment in the adjudication of the case. One female juror who served in the Kim trial stated in a post-verdict interview, "While I do not have a good impression of the U.S. forces due to the base issue, I was not swayed by my emotions as an Okinawa resident in the deliberations." The twenty-five-year-old sole male juror also said that he hoped the three to four year sentence in a Japanese prison "would serve as a deterrence" to American military personnel who otherwise commit crimes in Okinawa (Allen & Sumida, no page). As jury research in the U.S. and elsewhere has shown, lay participants have repeatedly demonstrated great competence and ability to judge a case objectively and fairly (Vidmar & Hans, 147-150).

The Okinawa survey also showed that people were well aware of their anti-American prejudices or feelings, and the majority of those surveyed thus did not want to participate in a *saiban-in* trial with military defendants. While only 38% of Okinawa women wanted to serve in a trial with military defendants, five out of six lay judges chosen for Kim's trial were women. In the post-verdict interview, the majority of lay judges stated that the decision was extremely difficult (Allen & Sumida, no page). As indicated above, they also stated that they were able to set aside anti-American or anti-military sentiments in adjudicating the case, again demonstrating their ability to apply their judgment fairly and equitably.

Maher expected that a large majority of Japanese citizens would be reluctant to participate in a *saiban-in* trial. Similarly, he predicted that many jurors would not enjoy the experience of jury service, another reason for them to avoid jury duty. The government

report, however, describes the opposite trend. By the end of December 2009, a total of 5,054 citizens were called to serve in 138 jury trials, and nearly eighty percent of them reported to the courthouse (78.7%) (Supreme Court Office, 1). In evaluating their jury experience, nearly all jurors indicated that they were satisfied with their involvement in the trial process (96.7% and 96.1% in 2009 and 2010, respectively) (Supreme Court Office, 6).

## Conclusions

Crimes committed by American soldiers and their dependents have long victimized people on Okinawa Island. The introduction of *saiban-in* trials in Okinawa, nonetheless, began to change the mindset of Okinawans on the island.

The lay adjudication of American military cases in 2010 and 2011 helped express indigenous voices and create a possible path for attaining Okinawa's political independence and judicial sovereignty (Fukurai, "Lay Prosecution of U.S. Military Crimes in Japan," 159). There will be more military defendants subject to these judicial processes as lay adjudication and PRC review begin to play an important role in placing the burden of responsibility squarely on the shoulders of military personnel, thereby functioning as an effective judicial oversight of the activities of military personnel in Okinawa. Whether the quasi-jury trial and PRC can continue to create an important public space in which to articulate effective decolonial voices and an image for the future of the island is something to be examined in coming years.

## Notes

- 1) This research was originally supported by a 2009 Toyota Foundation Grant (D9-R-0081). English translations are my own unless otherwise provided.
- 2) Wikileaks U.S. Embassy Cables: New Documents Released, *Huffington Post*, Nov. 28, 2010.
- 3) As of October 1, 2007, a total of 1,241,426 people were registered as panelists for on-line surveys with three firms, from which a sample of 800 was chosen. The company called Borders was responsible for the selection of individual panelists from the following three on-line opinion survey firms: (1) Borders, with a panel of 67,994 (June 2007); Chan Shuit Company, with a panel of 943,119 (June 2007); and Chopirichi Company, with a panel of 230,313 (June 2007). The panelists were renewed every year in April and May. The file containing sampling information from Borders is on file with the author.
- 4) The currency conversion was based on the rate of ¥100 per one U.S. dollar. The income is measured by the following bracketed categories: (1) less than 2 million yen; (2) 2–4 million yen; (3) 4–6 million yen; (4) 6–8 million yen; (5) 8–10 million yen; (6) 10–12 million yen; (7) 12–15 million yen; (8) 15–20 million yen; and (9) more than 20 million yen.

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