of thinking *saiban-in* into the courts.[42] Judges and prosecutors, as a result, might need to learn this "freshness" from the *saiban-in* and remember their original intentions for serving in the justice system.

The principle of trial including presumption of innocence and the hearsay rule must be adhered to. Sentencing should be scrutinized in light of its effect on defendant's reformation, aside from precedents which had been produced in the interplay between judges and prosecutors with no legitimate reason. Community correction and continuous social care for the defender are pending issues to prevent second offence, about which most *saiban-ins* worry. The situation of public safety in Japan should also be judged accurately based on criminal statistics, which show a recent decrease of offence. *Saiban-ins'* direct experience of seeing and judging defendants in the courtroom is precious and their findings should be made known to the public, instead of being at the mercy of sensational information supplied by the mass media. It is expected that lay participation in the justice system will have an impact on criminal justice as well as Japanese society as a whole in the long run.

42. Hiroshi Yasuhara, "Saiban-in Seido Dōnyū no Igi ni Tsuite Kangaeru [Taking the Significance of the *Saiban-in* System Seriously]", in Tōru Motobayashi et al., eds., *Shimin no Shihō wo Mezashite [Searching for the Judiciary for the People]* (Tokyo, 2006): 448–452.

Lay Prosecution of U.S. Military Crimes in Japan by Prosecutorial Review Commissions and the *Saiban-in* Trial

Hiroshi Fukurai[1]

Introduction

On January 12, 2011, nineteen-year-old Koki Yogi returned from Tokai City of the Aichi Prefecture to his hometown of Kitanaka Gusuku in Okinawa to attend the official adulthood ceremony of his twentieth birthday organized by the local government.[2] A few days before the ceremony, at 9:43 p.m., a vehicle driven by a twenty-three-year-old American military serviceman from the Army and Air Force Exchange Service (AAFES) suddenly swerved into the oncoming lane, striking the compact car driven by Koki Yogi.[3] The AAFES employee was taken to U.S. Naval Hospital Okinawa on Camp Lester but soon released, while Yogi was taken to Chubu Tokushukai Hospital and died the next morning.[4]

AAFES spokesperson Sergeant First Class Jon Cupp gave an official statement on the incident, stating that because the driver was a civil-

1. Professor of Sociology and Legal Studies, University of California, Santa Cruz. This research was supported by the 2009 Toyota Foundation Grant (D9-R-0081). Appreciation is extended to Tom Ginsburg at the University of Chicago, William Qiu at the University of California, Berkeley and Wendy Martyna at the University of California, Santa Cruz for their valuable suggestions and comments on the original manuscript. Finally, English translations are my own unless otherwise provided.

2. "Beiheihanzai Fukiso ni Kogi [Protest against Non-Prosecutorial Decision]," *Akahata Shinbun*, April 19, 2011, http://www.jcp.or.jp/akahata/aik11/2011-04-19/2011041904_01_1.html; "Japanese Man Died After Vehicle Collision with AAFES Employee on Okinawa" *Stars & Stripes*, January 13, 2011, http://www.stripes.com/news/pacific/okinawa/japanese-man-dies-after-vehicle-collision-with-aafes-employee-on-okinawa-1.131710 (hereinafter AAFES).

3. AAFES.

4. Ibid.

ian employee of the U.S. military, he would remain in U.S. custody and not be handed over to the Japanese authorities.[5] Sergeant Cupp refused to disclose additional information regarding the driver's name, background, or the probable cause of the accident –including the possibility of drunk driving.[6]

As Yoki's mother Manami Kamiya prepared for her son's funeral in Kitanaka Gusuku, she was informed on March 24th by the Okinawa Prosecutor's Office that it had decided not to indict the American soldier, explaining that the traffic collision took place while the soldier was on official duty. The Japanese prosecutor cited Article 17 of the U.S.-Japan Status of Forces Agreement (SOFA), which gives the the American military the primary right to exercise jurisdiction over all accidents or crimes committed by its service members on official duty, thereby legally precluding the Japanese authorities from prosecuting the soldier.[7] Meanwhile, the U.S. military announced that it had decided to punish the American military employee by suspending his driving privileges in Japan for the next five years.[8]

On April 25, nearly a month after the Japanese prosecution's non-indictment, Kamiya filed a complaint with the local Prosecutorial Review Commission (PRC)—Japan's grand jury system—in Naha, requesting a citizens' panel to review the Japanese prosecutors' non-indictment decision.[9] The PRC Law specifically allows victims' families or their proxy to file a petition with an eleven-member civic panel to examine whether or

5. Ibid.

6. Ibid.

7. The term, SOFA (or U.S.-Japan SOFA in this article), refers to the Agreement under Article VI of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan; Article 17(3)(a)(ii), http://www.mofa.go.jp/mofaj/area/usa/sfa/pdfs/fulltext.pdf; See also Keiko Itokazu, "Shitsumon Shuisho [Main Question Document]," House of Councilors, the National Diet of Japan, April 1, 2011.

8. "Beigunzoku, Kisosoto Chiikyotei ga Hikokusekini ["Indictment is Proper" for Military Employee: SOFA is on Defendant's Seat]," *Okinawa Times*, May 29, 2011, http://www.okinawatimes.co.jp/article/2011-05-29_18467. See also "Beihei Hanzai: Gunzoku Meitei: Izoku "Karui" Okinawa-shi Jiko Fukiso Beigawa Shobun ni Ikidori [American Soldier Crime: Driving Suspension is "Too Light" Victim's Family Upset on Non-Indictment in Okinawa City Auto Accident]," D-Navi, May 18, 2011, http://d-navi.org/node/2087.

9. "Beigunzoku Fukiso Izoku, Kenshin ni Fufuku Mositate [Victim's Family File Complaint to the PRC Against the Non-Indictment of American Military Employee]," *Ryukyu Shinpo*, April 25, 2011, http://ryukyushimpo.jp/news/storyid-176467-storytopic-111.html.

10. "Drinking at U.S.F 'Official Event' is Regarded as Party of 'Official Duty,'" *Japan Press Weekly*, April 24 and 26, 2011, http://www.japan-press.co.jp/modules/news/index.php?id=1784.

11. "Beikugunzoku no Otokofukiso: Kengikai ga Kengikai ga Kogiketsugi Sibo Jikode [Non-indictment of Air Force Soldier in Deadly Accident: Protest by the Prefectural Assembly]," Asahi.com, April 26, 2011, http://mytown.asahi.com/areanews/okinawa/SEB201104250017.html.

12. Ibid.

13. "Traffic Fatality Victim's Mother Angry at Court," *Weekly Japan Update*, April 14, 2011, http://www.japanupdate.com/?id=11075.

14. "Beigunzoku Kisosoto," *Okinawa Times*.

15. Ibid.

not this decision was legitimate or appropriate on the basis of evidence and investigative materials submitted to, and gathered by, the civic panel. During this investigation, it came to light that the American driver consumed alcohol at an official party prior to the accident.[10]

The next day, on April 26, the Okinawa Prefectural Assembly voiced support for the local prosecution of the serviceman by issuing a statement, condemning both the driver's actions and the subsequent non-indictment by the Japanese prosecutors.[11] The assembly also demanded equitable revisions of the U.S.-Japan SOFA and a significant reduction of American military bases in Okinawa.[12] The victim's mother announced that she also planned to meet local women's groups, as well as members of the Japanese Diet, local assemblies, and local grassroots organizations to demand the revision of the SOFA, stating that "the courts dropped the case in a one-side[d] decision, and I'm not going to accept that in silence."[13]

On May 25, after long deliberation, the Naha PRC reversed the Japanese prosecutors' non-indictment decision and determined that the indictment is proper for the given case.[14] The PRC specifically cited a 1960 U.S. Supreme Court decision which found that in military-related crimes and incidents overseas, civilian employees and contractors of U.S. military bases, as well as dependents of military service-members were not subject to military rules and regulations governed by the Uniform Code of Military Justice (UCMJ), thereby excluding them from the privileges granted under the SOFA.[15]

The PRC also reasoned that in the NATO SOFA signed with European countries, the U.S. military had accepted a similar limited juris-

diction over its civilian components, such as family members, civilian employees, and contractors during peacetime.[16] The PRC also cited a case in the South Korean Supreme Court which stipulated that the U.S. military has no right to exercise its jurisdiction over civilian employees of American military bases during peacetime, a decision similar to the 1960 U.S. Supreme Court ruling.[17]

Political Pressure to Modify the U.S.-Japan SOFA

In August, a group of Japanese governors representing fourteen U.S. military-occupied prefectures urged Cabinet ministers to establish a new system of tracking U.S. military crimes.[18] On November 21, Japan's new Prime Minister Yoshihiko Noda announced during a Diet session that the SOFA policy "needs to be reviewed immediately and... to speed up the talks."[19] On November 23, under tremendous pressure from the Japanese government, politicians, Okinawan communities, and the victim's mother and her large group of supporters, the Japanese and U.S. governments then reached a new agreement that allowed Japanese courts to try American civilian employees of U.S. military bases even if they were on duty at the time of the crime or accident.[20] Specifically, the new agreement first allowed U.S. authorities to determine whether or not they will bring criminal prosecution over a case and notify the Japanese side of their decision. If they decide not to prosecute, the Japanese authorities can request a trial within 30 days after the U.S. notification.[21] Two days later on November 25, the Naha District Public Prosecutor's Office indicted the American military civilian who worked at a supermarket inside Camp Foster.[22]

16. Ibid.

17. Ibid.

18. "Local Officials Seek More Information on U.S. Military Crimes in Japan," *Stars & Stripes*, August 1, 2011, http://www.stripes.com/news/pacific/local-officials-seek-more-information-on-u-s-military-crimes-in-japan-1.150806.

19. Travis Tritten, "U.S., Japan Review SOFA Rules on How DOD Civilians are Tried for Crimes," *Stars & Stripes*, November 22, 2011, http://www.stripes.com/news/u-s-japan-review-sofa-rules-on-how-dod-civilians-are-tried-for-crimes-1.161421.

20. "Okinawa Prosec Indict U.S. Base Employee," *House of Japan*, November 25, 2011, http://www.houseofjapan.com/local/okinawa-prosec-indict-us-base-employee.

21. "U.S. Civilian Worker in Okinawa Indicted for Fatality," *Asahi Shimbun*, November 25, 2011, http://ajw.asahi.com/article/behind_news/politics/AJ201111250057.

22. Ibid.

It is important to note that the new agreement only applies to the crime or accident caused by the civilian component of American military personnel, and is not applicable to members of U.S. Armed Forces. Furthermore, U.S. authorities must still give their consent for such cases to move to Japanese courts. Additionally, for accidents or crimes committed by on-duty military personnel, the Naha District Public Prosecutor's Office still faced a difficult decision on whether or not to issue the indictment against the soldier.[23] If the Japanese side chooses not to indict, it was most likely that someone like Yogi's mother would have to file another complaint to the local PRC, asking the civic panel to review the appropriateness of the prosecutors' reluctance to prosecute. If the PRC decides for the second time that the indictment is appropriate in the given case, the PRC Act mandates that the Japanese prosecutors be forced to initiate the prosecutorial action against the American defendant. Such a decision would then possibly provoke an even greater legal controversy whereby the U.S. side insists on its legal right to exercise primary jurisdiction over its own personnel against the PRC's binding authority to continue with the prosecution of the American soldier in Japanese court.

Indeed, this impasse will certainly create new legal disputes with regard to litigation, possibly challenging different jurisdictional conditions specified by the SOFA and the PRC Act. There is, however, some ambivalence on this issue. While the U.S. military considers official duty in cases where a person is driving directly home from work or a military function, it has—at least in public—suggested that such jurisdictional conditions contained in the SOFA may be open for review.[24]

This paper examines the political roles of Japan's new twin systems of lay adjudication in the prosecution of military crimes in Japan. The structure of this paper is as follows. Part I provides the historical development of Japan's twin systems of lay adjudication, i.e., a *Saiban-in Seido* (a quasi-jury system) and a new Prosecutorial Review Commission (PRC or Japan's grand jury system). The Japanese government introduced both systems in 2004 and implemented them in 2009.

Part II reviews the broader investigative application of the PRC's authority to review and examine non-indictment decisions rendered by

23. Chiyomi Sumida, "Okinawans Protest U.S.-Japan Status of Forces Agreement," *Stars & Stripes*, June 29, 2011, available at http://www.stripes.com/news/pacific/okinawa/okinawans-protest-u-s-japan-status-of-forces-agreement-1.147755.

24. Ibid.

Japanese prosecutors on incidents/crimes committed by U.S. Armed Forces personnel regardless of their official duty status. The PRC Act does not discriminate the investigation of criminal cases based on duty status. If the PRC decides twice that the indictment is imminent in a given case, the PRC decision becomes legally binding, thereby initiating the forced prosecution of military personnel. This section examines how the legal status of military personnel possibly influences the PRC's power to engage in the forced prosecution of American military personnel.

Part III examines SOFA modifications needed in order to bring about proper accountability for American soldiers' actions and behaviors in Japan, as well as to restore the primary right to exercise jurisdiction over their crimes, regardless of the classification of their official duty status. And lastly, Part IV summarizes the potential modification of the SOFA in an attempt to bring equitable legal recourse to the victims of U.S. military crimes in Japan.

I. Historical Evolution of Japan's Twin Systems of Lay Adjudication: *Saiban-in Seido* and *Kensatsu Shinsakai*

The Japanese government first introduced the lay adjudicatory legislation in 2004 and established two new systems of lay participation in legal institutions: (1) a *Saiban-in Seido* (a quasi-jury system)[25] and (2) a new *Kensatsu Shinsakai* (new Prosecutorial Review Commission (PRC) or a Japanese-style grand jury system).[26] Those two systems were then implemented in 2009.

The Saiban-in Seido (the Quasi-Jury System) and Kensatsu Shinsakai (the PRC)
On May 28, 2004, the Japanese Diet passed the Act Concerning Participation of Quasi-Jurors in Criminal Trials ("Quasi-Jury Act").[27] This law created a new system of lay adjudication in Japan. While Japan had once adopted the American-style jury system in 1923, which operated briefly from 1928 to 1943, the Japanese government abolished such classic all-citizen jury trials before the end of WWII, and professional judges were

25. See Hiroshi Fukurai, "The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.," *Cornell International Law Journal* 40 (2007): 315.

26. Ibid.

27. "*Saiban-in* no sanka suru keiji siban ni kansuru horitsu," Law No. 63 of 2004, http://law.e-gov.go.jp/announce/H16HO063.html.

then asked to adjudicate all criminal cases.[28] The return to the system of lay adjudication in 2004 to determine the culpability of the criminally accused is thus a significant departure from the exclusive reliance on the professional judge trial in Japan since 1943.

This quasi-jury system consists of two different panels of professional and lay participants to adjudicate the most serious and violent crimes. In a trial where there is no dispute on evidence, a group of one professional and three lay judges are asked to determine both the conviction and sentence phases of the trial.[29] In a trial with disputed evidence and testimony, a group of three professional and six lay judges are empaneled to determine both the conviction and sentence of criminal defendants. All lay participants are to be chosen at random from the list of registered rolls in local communities.[30]

Since its introduction in May 2009, the quasi-jury trial has drawn nationwide attention.[31] In 2010, a total of 1,506 defendants received sentences by quasi-jury panels.[32] Nearly nine thousands (n=8,673) participated as lay judges in *saiban-in* trials. The majority of them were male (54.6%), middle-aged (23.0%, 21.5%, and 20.2% for those in 30s, 40s, and 50s, respectively), and full-time employees (54.8%).[33] Nearly 70% of trials ended in less than four days (70.3%) and two-thirds of lay participants said that they had no problem in understanding the trial proceeding (63.1%).[34] Almost all of lay participants also felt that the experience of lay adjudication was very positive (95.2%).[35] All available statistical indications suggested that the collaborative panel of both lay and professional judges has seemed to function rather smoothly in Japan since its first introduction in 2009.

28. Fukurai, "Rebirth" (reviewing historical and current roles for lay participation in Japanese justice including the former all-citizen jury system).

29. Ibid.

30. Ibid.

31. See Makoto Ibusuki, "'Quo Vadis?' First Year Inspection to Japanese Mixed Jury Trial," *Asian-Pacific Law & Policy Journal* 12 (2010): 25 (reviewing the first year operation of the *saiban-in* trial in Japan).

32. Supreme Court of Japan, "Saiban-in Seido no Jisshi Jokyo ni Tsuite [Actual Implementation of a *Saiban-in Seido*]," April, 2011.

33. Ibid.

34. Ibid.

35. Ibid.

In addition to the *saiban-in* system, the Japanese government also revised its criminal procedure and introduced a new grand jury system (Prosecutorial Review Commissions or PRC) in 2004. On the day that the Japanese Diet enacted the Quasi-Jury Act, it also passed the Act to Revise the Code of Criminal Procedure (hereinafter "PRC Act").[36] A total of 165 commissions were created with at least one in each of Japan's fifty district court jurisdictions.[37] Prior to the PRC Act, a total of 201 commissions functioned as civic review panels; the new law streamlined the function of grand jury participation. As with the quasi-jury panel, commission members are selected at random from voter rolls.[38] However, unlike the quasi-jury trial, its deliberation is conducted exclusively by lay judges themselves without professional judges' participation. Furthermore, in order to take advantage of full citizen participation, each commission member is asked to serve for six months.

A case comes to the PRC when a victim, his/her proxy, or a commission itself brings a complaint against the Japanese prosecutor's office for their failure to issue an indictment to pursue the prosecution of an alleged offense.[39] The lay oversight of the Japanese prosecution system originally evolved as a response to the post-war American occupation reformers who had advocated the necessity of establishing the American-style grand jury system in order to restrict what they perceived as the excessive power and overreaching influence of Japanese prosecutors in criminal affairs prior to the end of WWII.[40] The PRC was first introduced in 1948, representing the hybrid of both an American-style grand jury proceeding and lay elements of a Japanese criminal jury trial first introduced in 1928.[41]

36. "Keiji soshohoto no ichibu o kaiseisuru horitsu," Law No. 62 of 2004, http://law.e-gov.go.jp/htmldata/S23/S23HO147.html.

37. See Supreme Court of Japan, http://www.courts.go.jp/kensin/q_a/q3/index.html (providing general overviews of the PRC system, including a total number of PRCs in Japan).

38. PRC Act, Arts 4, 14, 21.

39. PRC Act, Art. 2(3), 30.

40. Mark West, "Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion," *Columbia Law Review* 92 (1992): 695–96. See also David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan* (New York, 2002) (examining the enormous power imbedded in Japan's prosecutors and their influence in criminal matters).

41. See generally Fukurai, "Rebirth."

Much like America's civil grand juries, the all-citizen panel has the right to review and investigate the proper functioning of a local government, including local jails, educational boards, police units, prosecutors' offices, and other offices in a local county government, as well as civic complaints against government offices or civil servants filed by local residents in the community. The Japanese prosecutors are legally required to respond to criminal complaints filed by citizens against government officials and business establishments. The prosecutor's failure to issue an indictment against the accused allows concerned citizens to file another complaint to the local PRC to pursue prosecution. Much like the U.S. grand jury, the PRC has the authority to indict criminal alleged criminal offenders. Since 1948, more than a half-million Japanese citizens have participated in the PRC and reviewed the non-indictment decisions made by the Japanese prosecution.

Based on the evaluation of evidence, the PRC then issues prosecutors one of the following three non-binding recommendations: (1) non-indictment is proper (i.e., the prosecutor's decision was appropriate); (2) non-indictment is improper (i.e., the prosecutor should reconsider the non-charge decision); and (3) indictment is proper (i.e., the prosecutor should have prosecuted the accused).[42] Prior to 2009, however, the commission's recommendations were regarded as merely advisory and the Japanese prosecution rarely acted on them. In response to the public demand to modify the adjudicatory power of the PRC decision, the new PRC Act was put into effect in 2009 to establish the second PRC prosecutorial decision as legally binding.

The most distinct feature of Japan's grand jury system is its ability to extend the investigative jurisdiction beyond criminal cases to potentially civil or even administrative matters. With the PRC's new ability to issue a legally binding resolution, the PRC thus became the important institution of civic oversight in examining the allegation of corporate predation and governmental abuse of power.

As of December 31, 2010, the PRC had deliberated a total of 156,419 cases, including 142,967 petitions filed by proxies or families of victims and 13,452 cases in which the PRC initiated its own investigation.[43] The

42. PRC Act, Art 39(5).

43. Supreme Court of Japan, "Kensatsu Shinsakai no Juri Kensu Giketsu Kensuto [Petitions and Deliberations of the Prosecutorial Review Commission]" (2011).

PRC made the indictment decisions in 2,366 cases (1.5% of all non-indictment reviews). In 2009, the year when the new PRC Law was put into effect, the PRC deliberated 2,613 cases and recommended the forceful prosecution in a total of 11 cases (0.4% of all non-indictment cases).[44]

In 2010, the commission also deliberated a total of 2,663 cases (2,613 requested and 50 self-initiated reviews)[45] and issued eleven forced prosecution decisions, including the following three prominent indictment decisions, involving: (1) the Deputy Police Chief of the Akashi Police Station in Hyogo Prefecture in January; (2) three past presidents of the West Japan Railway Company (JR-West) in March; and (3) Ichiro Ozawa, the former secretary of the Liberal Democratic Party and currently a prominent member of the ruling Democratic Party of Japan (DPJ) in October.[46]

Despite numerous calls for the prosecution of the Akashi Deputy Police Chief for his failure to institute effective police oversight to prevent a deadly stampede incident in Akashi City in 2001, the Japanese prosecution refused to prosecute him on numerous occasions.[47] This particular incident resulted in the injuries of 274 people and deaths of nine children, ranging from five months to nine years of age, who were crushed to death in a crowded pedestrian bridge in Hyogo Prefecture.[48] The PRC had deliberated on the same case on numerous occasions, each time deciding that the officer should be indicted for prosecution, but local prosecutors continued to ignore the PRC recommendations. Their indifferent reaction to the PRC decision continued until 2009, when victims' families resubmitted their complaint to the PRC which, followed by another indictment decision, finally forced the local prosecutors to indict and prosecute the chief police officer.[49]

44. Ibid.

45. Ibid.

46. "Akashi Hodokyo Jiko: Naze Koredake Jikanga Kakattanoka—Izoku Kaiken [Akashi Pedestrian Incidents: Why Did It Take This Long?—Testimony of Victims' Families] (hereinafter Akashi)," *Sankei News*, Jan. 27, 2010.

47. See Hiroshi Fukurai, "Japan's Prosecutorial Review Commissions: Lay Oversight of the Government's Discretion of Prosecution," *East Asia Law Review* 6 (2011): 15–18 (reviewing the 2001 Akashi stampede incident, including the chronology of prosecutorial non-indictment decisions and PRCs' repeated recommendations to indict the officer).

48. Ibid.

49. "Akashi," *Sankei News*.

The PRC also issued a forced indictment to three former presidents of the JR-West in 2010, one of Japan's largest and most powerful corporations.[50] After setting a new precedent with the indictment of the deputy police chief, the PRC in the same prefecture went on to deliberate on the corporate malfeasance case involving a train derailment incident that killed 107 and injured 555 others.[51] As expected, after the brief investigation on the case, the Japanese prosecutors decided not to indict the three former presidents of JR West, indicating that they were not directly responsible for failing to institute the Automatic Train Stop (ATP) system which could have prevented the speeding train from slamming into a multi-story parking garage in the ground floor of a nearby apartment building.[52] But the PRC determined that the major factor contributing to the deadly accident was the company's disregard for customer safety in its official management policy.[53] In March of that year, it decided for the second time that the three former JR-West presidents should be indicted for professional negligence resulting in injuries and deaths.[54]

The last of the three significant PRC decisions was a forced prosecution of Ichiro Ozawa in October 2010. Ozawa previously served as a powerful chief Secretary of the Liberal Democratic Party (LDP) and has been dubbed as a "shadow shogun" of the Japanese polity, in which the political stature of Ozawa was often equated to that of former U.S. Vice President Dick Cheney. The PRC returned an indictment against him in a case involving illegal financial records of his organization called Rikuzankai.[55] Three of his staff members had already been indicted for the violation of the Political Fund Control Law for failing to report a ¥400 million (US$4 million) loan from Ozawa to Rikuzankai in its final report.[56] In October, the Tokyo High Court appointed three attorneys to prosecute

50. "JR Nishi Rekidai 3 Shacho, Kyoseikiso-e: Kobe Daiichi Kensatsuga Kiso Giketsu [Kobe PRC Decides on Indictment Against Three JR-West Presidents] (hereinafter JR Nishi)," *Sankei News*, Mar. 26, 2010.

51. "JR West, Victims' Relatives Mark Amagasaki Crash," *Japan Times*, Oct. 26, 2005, http://search.japantimes.co.jp/cgi-bin/nn20051026a4.html.

52. Ibid.

53. "JR West's Actions Show Lack of Remorse," Resolve, *Daily Yomiuri*, Oct. 24, 2009, at 4.

54. "JR Nishi," *Sankei News*.

55. Takano Takahashi, "Ozawa Sues Government Over Indictment Process," *Japan Times Online*, Oct. 16, 2010.

56. Ibid.

Ozawa.[57] The continued PRC investigation of non-indictment decisions by the Japanese prosecution thus represents a significant step towards establishing the effective civic oversight of Japanese criminal justice system in the prosecution of Japan's power elites.

II. The Prosecutorial Review Commission and Its Ability to Examine the Prosecutor's Non-Indictment Decisions on Alleged Military Crimes in Japan

Saiban-in Trials of Military Personnel in Okinawa

The first-ever trial of American military personnel in a lay-judge court in Japan took place on May 24, 2010 in the Naha District Court in Okinawa.[58] After three days of trial, Jonathan Kim, a Korean American and nineteen-year-old Marine, was sentenced to three to four years in a Japanese prison for robbing and injuring a fifty-eight-year-old taxi driver.[59] After the sentencing, the Japanese lay judges asked a chief judge to read a statement directed at Kim: "[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."[60] His Korean-born mother also traveled from their home in Philadelphia to observe the quasi-jury trial of her son in Okinawa.[61]

Three months after this first ever lay judge trial, Phillip Edward Sawyerr became the second American soldier to be tried in lay court in Okinawa. He also became the first American soldier to be adjudicated by

57. Yuka Hayashi, "Japan's Ozawa Indicted Over Political Funds Law," *Wall Street Journal*, Jan. 31, 2011, http://online.wsj.com/article/SB10001424052748703833204576115181733628572.html (noting that Ozawa was formerly indicted on the basis of the PRC's recommendation on January 31, 2011).

58. Hiroshi Fukurai, "Japan's Quasi-Jury and Grand Jury Systems as Deliberate Agents of Social Change: De-Colonial Strategies and Deliberate Participatory Democracy," *Chicago-Kent Law Review* 86 (2011): 789. See also Hiroshi Fukurai, "People's Panel vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Base in Japan," *Asian-Pacific Law & Policy Journal* 12 (2010): 95 (reviewing the 1995 rape of a twelve-year-old girl by three American soldiers in Okinawa).

59. David Allen and Chiyomi Sumida, "Kinser Marine Gets Jail Time for Robbing Cabbie," *Stars & Stripes*, May 29, 2010, http://www.stripes.com/news/kinser-marine-gets-jail-time-for-robbing-cabbie-1.104603.

60. Ibid.

61. Ibid.

the lay judges for an alleged sexual assault in Japan.[62] From an immigrant family like Kim, Sawyerr was born in the United Kingdom, immigrated to the United States with his parents when he was thirteen, and later gained U.S. citizenship.[63] After his father left the family, Sawyerr lived with his mother and two brothers. While in college, he was physically assaulted and suffered serious injuries.[64] In order to pay for his medical expense, he decided to join the Marines in 2004, soon to become a sergeant and dispatched to a military base in Okinawa where he met and wed his Japanese wife.

On August 3, 2010, Sawyerr—who would later be assigned to the Marine Corps Air Station at Iwakuni in Yamaguchi, a prefecture thirty miles west of Hiroshima—arrived in Okinawa for vacation at the Kadena Air Base.[65] He made an arrangement for sleeping accommodations on the base, where he met a new friend named "Dee." That night, Dee invited Sawyerr for a drink in Naha City, and they visited two nightclubs late at night, both of which were already closed. Sawyerr later testified that that he did not drink that night, but he smoked a "cigarette" given to him by Dee; Sawyerr himself suspected that there was a strong possibility that this was in fact an illicit drug of sorts. They both then drove back to the base whereupon Sawyerr saw a woman walking home. He parked the car and followed the woman to her apartment stairs.[66]

At 3:43 am on August 4, he sneaked up on the twenty-six-year-old woman from behind, as she tried to enter her second floor apartment.[67] Sawyerr then forced his way into her apartment, pushed her into a room, covered her mouth with his hand, and inappropriately touched her as she struggled to escape.[68] Her neighbor heard screams coming from the apart-

62. David Allen and Chiyomi Sumida, "Marine Indicted on Sexual Assault and Trespassing charges on Okinawa," *Stars & Stripes*, August 25, 2010, http://www.stripes.com/news/pacific/okinawa/marine-indicted-on-sexual-assault-and-trespassing-charges-on-okinawa-1.115882.

63. Naha District Court, "Hanketsu Shushi [Summary Judgments]," Dec. 2, 2010 (file with the author).

64. Ibid.

65. Ibid.

66. Ibid.

67. Ibid.

68. David Allen, "Police Recommend Sexual Assault Charges against Iwakuni-based Marine," *Stars & Stripes*, August 5, 2010, http://www.stripes.com/news/pacific/okinawa/police-recommend-sexual-assault-charges-against-iwakuni-based-marine-1.113506.

ment and immediately called the police. Once the police arrived, they spotted Sawyerr jumping from the second-story entryway into a parking lot and attempting to run away. Sawyerr ran a short distance before he was apprehended. The victim stated that she did not know Sawyerr and was treated for minor injuries, which required a week of recovery.[69]

Sawyerr was taken into custody but denied the accusations against him. Since his crime was committed while off-duty, the Naha Police Department claimed the primary right to exercise jurisdiction over his alleged offense, and Phillip Sawyerr was held in the Naha Detention Center.[70] After twenty-one days, prosecutors faced the decision to indict or release him, and on August 24, Sawyerr was formally charged with illegal entry and sexual assault.[71]

On November 30, 2010, Phillip Sawyerr was tried in the lay court in Naha, and he appointed a Japanese public defender to represent him. In the trial, lay judges asked Sawyerr why he attacked the woman, but he remained silent and failed to respond to the question.[72] Jurors also asked Sawyerr to describe the situation in full detail and Sawyerr responded by saying that he could not remember the details of the whole event. Nonetheless, Sawyerr told the court that he remembered climbing the stairs, the woman striking him and the police handcuffing him. He testified that he could not remember much and denied that he physically attacked and assaulted the victim. Sawyerr told jurors that he believes that the cigarette given to him by Dee affected his behavior and was the main reason for his irrational action.

The jurors also asked Sawyerr how he thought the victim felt after this incident, and he responded in remorse.[73] Finally, jurors asked Sawyerr if he could assure the jury that he would never commit any such crime again, and he said yes.[74] After three days of trial, on December 2, 2010, the lay court found Phillip Sawyerr guilty, and he was sentenced to three years and six months in a Japanese prison.[75] Sawyerr also paid the victim ¥80,000 (US$800) in compensatory damages for the injuries

69. Allen and Sumida, "Marine Indicted."
70. Ibid.
71. Ibid.
72. Naha District Court, "Hanketsu."
73. Ibid.
74. Allen, *supra* note 68.
75. Ibid.

she suffered.[76] Sawyerr did not have sufficient funds in his savings, so the majority of the money came from his mother, and the rest came from his Marine Corps salary. Sawyerr appealed the guilty decision, but the appeal was denied by the Naha Branch of the Fukushima High Court in May 2011.[77]

Aside from the significant installation of American military bases, the island of Okinawa already houses thirty-five Japanese self-defense forces bases and military installations.[78] Japanese military personnel have also committed many crimes, victimizing the residents of Okinawa.[79] The second-ever quasi-jury trial in Okinawa involved a twenty-four-year-old member of the Japanese Maritime Self-Defense Force (JMSDF) who sexually assaulted an Okinawan woman in June 2009.[80] This case became the first ever quasi-jury trial on the allegation of sexual assault in Okinawa.[81] The mixed panel consisted of three women and three men lay judges. In January of 2010, the lay court found the Japanese soldier guilty of rape resulting in bodily injuries and gave him a three-year prison sentence, suspended for five years.[82] A close observer of the case disclosed that, in order to create the most favorable impression with professional and lay judges, the defendant's two male defense attorneys had to persuade him to ex-

76. Ibid.
77. "Kyosei Waisetu Chisho Beihei no Koso Kikyaku [Denial of Appeal Made by American Soldier Convicted of Sexual Assault]," *Okinawa Times*, May 11, 2011, http://www.okinawatimes.co.jp/article/2011-05-11_17637/.
78. "Kichi no Gaikyo: Okinawa no Beigun Kichi Oyobi Jieitai Kichi (Tokeishiryo) [Military Base Conditions: U.S. Military Bases and Japanese Self-Defense Forces Bases in the Prefecture of Okinawa: Statistical Data]," Military Base Affairs Division, in the Prefectural Office of Okinawa, March 2009, 4, http://www3.pref.okinawa.jp/site/view/contview.jsp?cateid=14&id=19687&page=1.
79. "Recent Incidents Involving Japanese Self Defense Forces," Okinawa Peace Network of Los Angeles (OPNLA), March 18, 2001, http://www.uchinanchu.org/history/sdf_incident.htm.
80. "JMSDF Sailor Nabbed for Attempted Rape," *Weekly Japan Update*, June 18, 2009, http://www.japanupdate.com/?id=9573.
81. "Seihanzai to *Saiban-in*: Higaisha no Hogo ni Banzen'o [Sexual Crime and Quasi-jurors: Absolute Protection to Crime Victim]," *Okinawa Times*, January 16, 2010, http://www.okinawatimes.co.jp/article/20100116_1699/.
82. "Motojieikan ni Yuyokei: *Saiban-in* Saiban [Suspended Sentence for Former Self-Defense Force Personnel: The Quasi-Jury Trial]," *Okinawa Times*, January 16, 2010.

press his remorse and sympathy towards the victim in court.[83] The same Japanese soldier had previously committed a similar crime in Hawaii.[84]

Other Japanese Self-Defense military personnel who have also engaged in predatory crimes in other regions include a fifty-two-year-old Sergeant Major Sadao Sakai, who was convicted on February 8, 2011 of grand larceny for stealing ¥13.2 million worth of valuables in Akita Prefecture;[85] a twenty-two-year-old, former Ground Self-Defense officer Jun'ichi Kojima, who was convicted of indecent assaults involving a fourteen-year-old, middle-school female student in Ohita Prefecture on May 11, 2011;[86] and a twenty-two-year-old, former Self-Defense Officer Akihiro Okumoto, who was sentenced to death by a quasi-jury panel for killing three members of his family on December 7, 2010 in Miyazaki Prefecture.[87] While the media's attention was more prominently focused on serious and violent crimes committed by American military personnel, Japanese self-defense personnel have been equally, if not more prominently, culpable of violent and serious criminal offenses in Okinawa and other regions with heavy military presence.

The PRC and the U.S.-Japan Status of Forces Agreement (SOFA)

Once a military personnel is indicted for a serious and violent offense, the quasi-jury panel is asked to adjudicate his or her crimes and determine both the conviction and the severity of sentence. Yet, successful criminal prosecution initially depends on the ability of the Japanese police and prosecutors to engage in competent investigations of alleged criminal offenses, and the panel must issue an indictment on the basis of investigative materials, testimony, and other evidence.

83. Ryota Ishikawa, June 10, 2010 (the author's person-to-person interview with Ryota Ishikawa, a reporter for Okinawa Times who followed the trial). The interview was conducted in Naha, Okinawa, on July 10, 2010.

84. Ibid.

85. "Jieikan ni Choeki 3nen 6gatu: Renzoku Setto de Akita Chisai Hanketsu [3 years and 6 months Imprisonment to Japanese Self-defense soldier: Akita District Court Decision on Successive Larcenies]," 47 News, February 8, 2011, http://www.47news.jp/localnews/akita/2011/02/post_20110208094524.html (this case did not involve a quasi-jury proceeding).

86. "Kyosei Waisetu nadono Moto Jieikan ni Yuzai Hanketsu [Conviction to Former Self-Defense Officer on Indecent Assault Charges]," Oita Broadcasting System, May 11, 2011, http://genkichanz.blog.fc2.com/blog-entry-110.html; See also "Jieitai-in: 14sai Odoshite Hadaka no Shashin Okuraseru [Self-Defense Officer: Forced the 14 Year Old to Send a Naked Picture]," *Sponichi Annex*, October 6, 2010, http://www.sponichi.co.jp/society/news/2010/10/06/kiji/K20101006Z00002270.html.

87. "Miyazaki, Kazoku 3 nin Satsugai: Bengogawa Sikeikaihi Shucho Kososhin Hajimaru [Miyazaki: Murder of Three Family Members: Defense Arguments to Avoid Death Penalty: Appeal Process Begins]," *Mainichi Shinbun*, May 20, 2011.

As stated earlier, when the Japanese prosecution decides not to indict the suspect, the PRC can begin its investigation of the non-prosecution decision by recourse to one of two methods. First, victims (or their families or proxies) can submit a complaint to the review commission which then determines whether or not to proceed with their own investigation of the complaint behind the closed doors.[88] Second, the PRC can also carry out an investigation on its own initiative, upon a majority vote of its eleven members.[89]

There are, however, three potential problems with respect to the PRC's ability to review prosecutor's non-indictment of American military personnel. First, according to the SOFA, the U.S. military is the primary judge in determining whether or not military accidents or crimes took place while the offender was on-duty or off-duty. The SOFA also stipulates that the U.S. military has the primary right to exercise jurisdiction over incidents that occur during on-official duty, while off-duty crimes and accidents are adjudicated by the Japanese authority. Many Japanese grassroots organizations and civic groups rightfully complain about the ostensible abuse of this particular power, given that while many accidents and crimes take place outside of military compounds—before or after they completed their daily official duties at the base—military authorities have classified virtually all of them as on-duty incidents.[90]

Second, even in instances where U.S. authorities do classify an incident as off-duty whereupon the Japanese authority then holds the primary right to exercise jurisdiction, it often fails to exercise its jurisdiction to investigate these alleged offenses when either the suspects flee to and hide behind military bases or witnesses simply refuse to cooperate. When

88. PRC Act, Art 30.

89. PRC Act, Arts 2(3).

90. "Beiheihanzai ni Tachimukatte [Stand Up Against American Military Crimes]," *Okinawa Times*, May 1, 2010; see also the activities of a grassroots organization called Beigunhanzai Higaisha Kyusai Senta [The Support Center for the Victims of American Military Crimes], http://reliefcenter.blog101.fc2.com/ (providing information on military related crimes, including activities of grassroots organizations and civic activists in Japan).

these external exigencies force the Japanese prosecution to issue a non-indictment decision, the U.S. military swiftly considers this as the Japanese government's official forfeiture of its right to prosecute the case in its own criminal justice system. Under these circumstances, any subsequent PRC review carries no legally binding authority in the future prosecution of that particular crime.

Lastly, some criminal offenses involving U.S. military servicemen simply cannot be pursued further due to their furtive nature; inter-governmental agreements have effectively excluded a class of offense and incident from prosecution, preventing the PRC from exercising its civic oversight, particularly in areas like Okinawa. At least one such governmental agreement revealed that a certain class of criminal offenses had already been excluded from prosecution in Japan since the 1950s.[91]

III. Suggested Modifications of SOFA Legal Provisions in the Adjudication of Military Crimes in Japan

SOFA Modifications for the Possible Adjudication of On-Duty Accidents/Crimes
Modifications to the U.S.-Japanese SOFA have been extremely difficult, as it requires extensive bilateral negotiations and the willingness on both sides to alter the agreement. Oftentimes, the request to review and modify the SOFA provision comes from the side of host countries. The U.S. government has signed a SOFA with more than a hundred countries in the world, each of which was devised to take into the consideration unique socio-political circumstances, special requirements, and strategic missions of U.S. armed forces of the host countries and their strategic importance to the U.S. geopolitical agenda.[92]

Nonetheless, an analysis of the SOFA provisions helps to identify two key elements that have historically impeded host countries' ability to pursue the prosecution of crimes committed by American soldiers, civilian military employees, and their families. The host countries' incapacity to extend proper jurisdiction over foreign soldiers and their dependents

91. "Priority Given to Military Operations Over Any Sense of Justice," *Japan Press Weekly*, April 7, 2010, http://www.japan-press.co.jp/modules/feature_articles/index.php?id=170.

92. Condoleezza Rice and Robert Gates, "What We Need in Iraq," *Washington Post*, Feb. 13, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/02/12/AR2008021202001.html.

has led to the loss of sovereignty and geopolitical autonomy. The recourse to the following key elements may thus extend host nations' rights for proper adjudication of crimes committed by American military personnel: (1) official duty certificates and jurisdictional waivers and (2) special custody provisions applied to U.S. service members in host countries. The following section examines each of these special provisions and addresses possible political and legal strategies in relation to them.

The Certificate of Official Duty and the SOFA's Jurisdictional Waivers. Standard within every bilateral SOFA is the allocation of the right to criminal jurisdiction between the U.S. and the government of the respective host country—a feature commonly known as concurrent jurisdiction. When a soldier commits a crime, which violates the law of both countries, concurrent criminal jurisdiction provisions establish a system of priorities delineating which country holds the primary right to prosecute. As mentioned earlier, the current U.S.-Japan SOFA gives the U.S. primary criminal jurisdiction over inter se crimes and acts or omission done during the performance of official duty. In all other cases, Japan can exercise its jurisdiction. The U.S. has adhered to the position that only the U.S. government as a sending state may make the determination of whether or not a criminal offense arises out of performance of official duty.[93] Thus, under the U.S.-Japan SOFA, the U.S. military is given priority to determine what constitutes official duty by issuing a so-called "certificate of official duty."[94] Specifically, the provision states that

> [I]mmediately after receipt of information concerning an offense committed by a member of the U.S. armed forces subject to the concurrent jurisdiction of the U.S. and Japan, the unit commander... will make a determination as to the official duty status of the accused. If the unit commander determines the alleged offense arose out of an act, or omis-

93. Major Mark R. Ruppert, U.S.AF, "Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say 'No,'" *Air Force Law Review* 40 (1996): 28.

94. Criminal and Disciplinary Jurisdiction Under the Status of Forces Agreement, Art 13(2)(1), http://www.af.mil/shared/media/epubs/5AFI51-102.pdf (explaining the way in which the U.S. Air Force must respond to the Japanese authority in case AF service members violate the law in Japan).

sion of an act, in the performance of official duty, he will complete and forward the certificate as to official duty."[95]

It also states that the official duty certificate "will be delivered to the chief prosecutor of the district... within ten calendar days after the official written notification of the offense was received."[96] Thus the release of the official duty certificate by the U.S. authority confirms whether or not the American service member was on official duty at the time of the incident.

A recently released internal document on the minutes to the U.S.-Japan SOFA sheds new light and detail on the authenticity of this certification process. Specifically, it states that "[w]here a member of the U.S. military personnel is charged with an offense, a certificate issued by his commanding officer stating that the alleged offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved."[97] In other words, the document assumes from the outset that any acts committed by the accused took place while the individual was on-duty—without justification—and thereby relegating the burden of proof on the part of the plaintiff and prosecution to reveal evidence that claims the contrary. Based on this bilateral agreement, the Japanese government faithfully followed this protocol in the certification of official duties involving American military personnel.[98]

Furthermore, the U.S.-Japan joint committee's 1953 secret "agreed official minutes" regarding Article 17 of the SOFA also indicates that if the Japanese government fails to advise the U.S. forces within a set period of time—regardless of whether it will in fact exercise its jurisdiction over the military crimes—the U.S. can exercise such right. The periodic condition imposed on the Japanese government was very short: (1) five days (revised to ten days in 1960) for crimes "punishable under Japanese law by confinement for 6 months or less," including trespassing, assault, and driving under the influence; and (2) twenty days for alleged offenses "punishable under Japanese law by confinement for more than 6 months."[99] Such an arrangement was made by the insistence of American military officials that any delay in determining the proper steps regarding a service member would interfere with military affairs. At the same time, this arrangement was also created in order to impose the forced implementation of the 1953 secret agreement that propels the Japanese side to renounce its rights to exercise jurisdiction over certain classes of crimes committed by U.S. servicemen.[100]

95. Ibid.

96. Ibid.

97. "Japanese Government's Submission to U.S. Revealed in Dealing with U.S. Soldiers' Crimes," *Japan Press Weekly*, May 19, 2008, http://www.japan-press.co.jp/2008/2574/usforces_3.html.

98. Ibid.

In order to maximize the projection of the U.S. jurisdiction in SOFAs, the U.S. government has also been reluctant to define what truly constitutes as an offense arising in the performance of official duty for the purposes of favorably constructing any act or omission to have occurred under the performance of official duty.[101] In cases where the U.S. holds the right to exercise its jurisdiction, the Japanese government still has the right to request a waiver of the U.S. jurisdiction over on-duty accidents or crimes. Nonetheless, the U.S. military has consistently refused such requests. According to Managing Director Hiroshi Oohashi of the Criminal Justice Division in the Ministry of Justice, who testified in response to Communist Party Member Seiken Akamine's question, "Japan has never requested a waiver of the U.S. jurisdiction over on-duty incidents."[102] In actuality, the U.S. has only given in to Japanese demands in a very limited number of cases as described below.

One major obstacle for the Japanese government has been the presence of the dominant legal culture of the U.S. military and its rigid procedures for examining and assessing the merits for granting such requests. The standard protocol is to first "promptly notify the base SJA

99. "Priority Given to Military Operations." *Japan Press Weekly*.

100. Ibid.

101. There is an exception in the Korea SOFA, in which Agreed minutes to Art XXII, specifying that the term official duty "is meant to apply only to acts which are required to be done as functions of those duties which the individuals are performing." See Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in Republic of Korea with Agreed Minutes, Agreed Understandings, Exchange of Letters and Other Implementing Agreements, Jul. 9, 1966, 17 U.S.T 1677, UNTS 163, Art XXII.

102. "Zainichi Beigun: Jiken, Jiko 20mankencho [American Military in Japan: More Than 200,000 Crimes and Accidents]," *Shinbun Akahata*, July 2, 2005, http://www.jcp.or.jp/akahata/aik4/2005-07-02/2005070201_02_1.html.

[staff judge advocates] [which] ... in turn will notify the accused's unit commander. The commander will forward his recommendations for approval or disapproval of the requested waiver ... within 5 calendar days after receipt of such notification."[103] The instruction further requires that "trial by courts-marshal ... will not be initiated until authorization has been received from HQ 5 AF/JAI [Headquarter of the Fifth Air Force International Law Division in Yokota Air Base in Japan]."[104]

In the past, there have only been a few cases in which the U.S. military waived its jurisdiction to Japan.[105] Conversely, the U.S. military seemed to consider Japan's waiver of jurisdiction as a matter of course and inserted a provision to the SOFA in order to expedite such a process, stating that "signatories should give sympathetic consideration to requests for waivers", encouraging the Japanese authorities to give up the right of jurisdiction. The U.S. further inserted the following phrase for the same end, claiming that it itself claims the right of jurisdiction "in all cases except those they [Japan] consider of particular importance."

The substantive evidence of successful U.S. pressure on the Japanese authority was shown in the report, "United States Overseas Military Bases," complied in December by Frank C. Nash who served as the Special Assistant to the President for National Security in 1957. Nash was commissioned to do an in-depth study of U.S. bases overseas in the light of Cold War developments. His report stated that "during the three and a half years ending in May 31, 1957, out of 38,315 cases which might have been tried in foreign courts, only 11,320 servicemen have been actually tried in

103. Ibid., Art 18.

104. Ibid. The Fifth Air Forces (5 AF) is the United States Air Force Pacific Air Forces (PACAF) which headquarters is located at Yokota Air Base in the City of Fussa, Tokyo Japan. The largest combat wing of the PACAF is located in Kadena Air Base in Okinawa, Japan.

105. The U.S. first granted waivers to Japan in 1957. See Wilson v. Girard, 354 U.S. 524, 529 (1957) (granting Japan's request for waiver). In this case, the U.S. forces voluntarily relinquished the right to jurisdiction to allow Japan to try Girard. In return, the Japanese government secretly promised to give a light sentence to Girard. In the aftermath of a twelve-year old Okinawan girl being raped by three American soldiers in Okinawa, the U.S. government also decided to offer a "sympathetic consideration (*koiteki koryo*)," to Japanese requests to waive the U.S. jurisdiction and hand over military personnel prior to an indictment." See Fukurai, "People's Panel" (examining several heinous crimes committed by American soldiers whose custody has been handed down to the Japanese authority after 1996) (cited in n. 58).

such courts."[106] Regarding the U.S. forces in Japan, Nash reported, "Japan agrees that it will renounce its primary jurisdiction unless the case holds materially great significance to Japan."[107]

The army statistics recently unearthed by Shoji Niihara indicate that the Japanese government has waived its jurisdiction in ninety-six percent of all cases between 1954 and 1958.[108] This high waiver rate was an anomaly in comparison to other SOFA nations like Great Britain that have waived only nineteen percent of its cases during the same period.[109] This pattern of waiving jurisdiction rights continues to remain extremely high in Japan; the Japan Peace Committee reported that eighty-three percent of accidents or crimes for which Japan held the primary jurisdiction were exempted from prosecution from 2001 and 2008.[110]

Prosecutorial Review Commissions and the Forced Prosecution of Military Suspects. U.S. military protocol, the SOFA, and secret Japanese-U.S. bilateral agreements have all hindered Japanese prosecutors' ability to criminally prosecute and try military personnel in Japan. Japanese prosecutors have in most cases chosen not to issue an indictment against criminal offenses committed by U.S. soldiers. Hence, the PRC becomes an important tool to rectify this particular failure on the part of the state itself. Civic complaints filed by victims of military crimes, their families or proxies, or PRC's own investigative initiative can lead to the critical assessment of this particular shortcoming. The PRC as a vehicle for determining whether the indictment of American soldiers is imminent in the given case can reverse the original non-indictment decision by the Japanese prosecutors.

Since the implementation of the PRC Act in 2009, at least two victims of alleged military crimes have filed a complaint with the local PRC. These cases involved: (1) vehicular manslaughter of sixty-six-year-old Yoshio Onda on a civilian road by Jamie M. Wallace, a civilian employee

106. "DoD Presses Japan to Waive Jurisdiction," *Japan Press Weekly*, April 6, 2010, http://www.japan-press.co.jp/modules/feature_articles/index.php?id=169.

107. "Japanese Government's Submission to U.S. Revealed in Dealing with U.S. Soldiers' Crimes," *Japan Press Weekly*, May 19, 2008, http://www.japan-press.co.jp/2008/2574/usforces_3.html.

108. "DoD," *Japan Press Weekly*.

109. Ibid.

110. Ibid.

of the American military base in Iwakuni, Yamaguchi Prefecture in the early morning of September 7, 2010;[111] and (2) the Koki Yogi case on January 12, 2011 in Okinawa as already mentioned.

In the first case, the deceased was a key member of the grassroots organization called "Atagoyama o Mamoru Kai [The Protection Group of Mount Atago or PGMA]." The PGMA has been protesting the construction of 1,060 new housing units on Mount Atago and inside the existing U.S. Marine Iwakuni Base. The construction of new residential units for additional American military personnel and their families was needed to accommodate the planned transfer of fifty-nine carrier-borne aircraft currently stationed at the U.S. Navy Atsugi Base in Kanagawa Prefecture to the Iwakuni Base in Yamaguchi Prefecture. Of the fifty-nine aircraft, forty-eight are FA18 Super Hornets, the most advanced, state-of-the-art combat aircraft in the U.S. military.[112]

The PGMA insisted that the increased presence of military personnel and their dependents likely leads to the greater instances of military-related accidents and crimes in the nearby residential communities. Despite these protests, the Japanese government in 2010 decided to expedite $817 million for the housing construction for a planned expansion of Marine Corps Air Station Iwakuni.[113]

In September 2010, the PGMA submitted a petition to Iwakuni City, demanding that Wallace be punished under Japanese law, along with a revision to the SOFA, granting Japan the primary right to exercise jurisdiction over crimes and accidents committed by U.S. military personnel and civilian employees in the base.[114] Nonetheless, on October 7, the Japanese prosecutor's office decided not to indict Wallace.[115]

111. "U.S. Base Employee Must be Tried in Japanese Court: Iwakuni Residents," *Japan Press Weekly*, September 15, 2010, http://www.japan-press.co.jp/2010/2687/U.S.F1.html.

112. "No to U.S. Military Beef-Up in Post-Disaster Mess," *Japan Press Weekly*, May 17–18, 2011, http://www.japan-press.co.jp/modules/news/index.php?id=1854.

113. "Japanese Cost for Iwakuni Housing Expansion Estimated at $817 Million," *Stars & Stripes*, September 20, 2010, http://www.stripes.com/news/japanese-cost-for-iwakuni-housing-expansion-estimated-at-817-million-1.118836.

114. "Iwakuni Residents Demand U.S. Base Employee be Tried in Japanese Court," *Japan Press Weekly*, September 15, 2010, http://www.japan-press.co.jp/modules/news/index.php?id=1304.

115. Tsutomu Niigaki, "Yamaguchi-ken Iwakuni Deno Doshu Jijitsu [The Same Incident in Iwakuni, Yamaguchi], Nichibei Chiikyotei Kaisei o Jitsugensuru NGO [NGO for the Revision of the U.S.-Japan SOFA]," June 13, 2011, http://kaiteingo.ti-da.net/e3594968.html.

Yoshio Onda was no ordinary Japanese citizen. His life had been deeply affected by the war, including Japan's colonial war in the 1940s, an atomic bomb, and the presence of American military bases near his home throughout his life. His father was killed in the Philippines during WWII, and when he was one-year-old, one of his sisters and his cousins were also killed by the nuclear blast in Hiroshima. His mother had to take care of her entire family by working at a nearby U.S. military base. While supporting her family, his mother died when she was only fifty-one years of age.[116]

After the auto accident, his remaining family members filed the complaint to the local PRC on October 29, 2010.[117] On March 11, 2011, the civic panel deliberated on the case and determined that the non-indictment was a proper decision, stating that "the soldier's accident took place while on-duty. As indicated in the U.S.-Japan SOFA, the duty status properly gives the U.S. government the primary right to exercise jurisdiction over the accident [thereby, the non-indictment by the Japanese prosecutors was a proper decision]."[118] The U.S. military then announced that Wallace would be punished for causing the deadly accident by having her driving privileges suspended for four months.[119]

The conditions surrounding the death of Yoshio Onda in Iwakuni are nearly identical to those of Koki Yogi's death in Okinawa. Both cases involved an auto accident that resulted in the death of a Japanese civilian; both drivers were civilian employees of military bases, not U.S. Armed Forces service-members. The U.S. military determined that the accidents occurred in the performance of official duty, and the Japanese prosecutors decided not to indict the American drivers because of their perceived lack of the primary right to exercise jurisdiction over the accidents.

The PRC's investigation into these nearly identical conditions and subsequent deliberations, however, produced different outcomes. The Iwakuni PRC agreed with the Japanese prosecutors' original decision

116. "Beigun Hazai: Beigungunzokujiko Fukiso Izoku Kenshin Moshitate-e [Military Crimes: Victim's Family Filed Complaint to the PRC]," D-Navi, April 10, 2011, http://d-navi.org/node/1960.

117. Ibid.

118. Ibid.

119. Niigaki, "Yamaguchi-ken."

that the non-indictment against the American driver was a proper ruling, while the Naha PRC reversed the Japanese prosecutors' original decision, recommending that the American military employee be indicted for the death of a Japanese citizen.

The indictment decision of the Naha PRC was based on their critical investigations of legal rulings on crimes and accidents caused by military personnel in the U.S. and host countries that signed the SOFA with the U.S. government. Japan's civic panel was able to unearth court decisions differentiated on the basis of status distinctions between American armed forces service members and civilian personnel of the U.S. military. The Naha PRC specifically cited the ruling of the U.S. Supreme Court in *McElroy v. Guagliardo* in 1960, which determined that during peacetime, the Uniform Code of Military Justice (UCML) could not be applied to civilian employees of U.S. Armed Forces overseas in non-capital offenses, recognizing that different jurisdictional applications exist between U.S. Armed Forces service-members and civilian components of armed forces personnel.[120] The Supreme Court in *Grisham v. Hagan* in 1960 further ruled that the different jurisdictional principle be applied to civilian employees in capital cases as well.[121]

The U.S.-Japan Security Treaty in 1953 stipulated that there was no clear discernible distinction between members of the armed forces and civilian components of the armed forces in the American military exercise of jurisdiction in Japan. The U.S.-Japan SOFA also incorporated a similar understanding with respect to rights of exercising Japanese jurisdiction over the members of the armed forces and their civilian components. The U.S. Supreme Court in 1960 first recognized this bifurcated system of U.S. military rule and regulation in criminal matters on the basis of employment status in the U.S. military, eliminating the peacetime court-marshal jurisdiction over dependents of military personnel and civilian employees in foreign countries. The Naha PRC further cited the recent Korean Supreme Court's decision that also recognized a similar bifurcated system of jurisdiction. The PRC decision is to likely influence subsequent dispensation of justice involving serious crimes and deadly accidents caused by civilian employees of armed forces in Okinawa and other regions in Japan. The PRC's citation of these court cases also served to expose the

120. *McElroy v. United States ex rel.* Guagliardo, 361 U.S. 281 (1960).
121. *Grisham v. Hagan*, 361 U.S. 278 (1960).

limitation of U.S. military juridical rule over its civilian components, such as family members, civilians under its employed and civilian contractors who provide services pursuant to a specific contractual agreement with the military.[122] Both nation-wide and Okinawa community surveys conducted in 2010 indicated that the great majority of Japanese citizens support the idea that crimes or accidents committed by military personnel, regardless of their official status, should be adjudicated by representative civic panels selected from the local communities.[123]

In addition to playing an important conscionable role in exposing the U.S. military's jurisdictional limitations, the Naha PRC also serves as a conduit for channeling local concerns and sentiments of ordinary citizens living in Okinawa into the deliberation process, as it challenged non-indictment decisions made by the government. In the Yogi case, the PRC was able to investigate and examine all relevant military crimes and their judicial reviews, not only in Japan, but also in the U.S., Korea, and NATO countries in Europe. Their examinations shed a new critical light on the varying interpretive dispositions of crimes and accidents caused by civilian components of the U.S. military. Subsequently, both the Japanese and U.S. government have agreed to establish the bifurcated system for the prosecution of crimes and accidents on the basis of the employment status of American military personnel in Japan.

Lay Adjudication of Military Crimes in Host Countries. Prosecuting foreign military personnel for crimes committed in Japan has several advantages for the Japanese citizenry. First, the entire process ensures victims' families that justice was achieved in their local jurisdiction by members of the local community, not behind the closed doors of a foreign military tribunal. The local prosecution also facilitates the processes of gathering evidence and identifying witnesses to testify in court. In Japan, for example, new victim participation programs introduced in 2008 allow victims of heinous crimes and their family members to directly partici-

122. See generally Susan S. Gibson, "Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem," *Military Law Review* 148 (1995): 114.
123. Hiroshi Fukurai, "Lay Prosecution of U.S. Military Crimes in Okinawa," presented at the Sho Sato International Conference on Japanese Legal Reforms, the University of California, Berkeley, March 11–13, 2011, conference paper.

pate in court proceedings.[124] While some critics argue that active participation of victims and their families as witnesses or advocates for the prosecution may create an undesirable imbalance of power in the courtroom, their participation may act as a preventive and deterrent force against future crimes committed by foreign soldiers and their dependents in local communities.[125]

Second, Japan's PRC is uniquely situated to help rectify the Japanese government's inability to prosecute accused military personnel. In the U.S. and other common law countries, the prosecutorial role played by the civic panel such as the institution of a grand jury in the U.S. may principally determine the indictment of the accused. Since evidential and investigative materials usually come from the side of prosecution, the grand jury has often been criticized as a mere rubber-stamp institution for local prosecutors to maintain the governmental authority by indicting anyone that the government cares to bring before it. Japan's PRC, however, operates on a different prosecutorial principle; it reviews and challenges the government's final decision to prosecute. Similarly to what the Naha PRC achieved in Okinawa, the commission's decision squarely challenged the Japanese governmental decision, reversed the original non-indictment case, and recommended the forced prosecution of a military employee. Japan's PRC also establishes an important public space for local residents to inject their sentiments and equitable sense of justice into the deliberation process, thereby overriding the conservative approach taken by the Japanese government in the adjudication of military crimes. Furthermore, the PRC may help remove the adjudicative role of the U.S. military by putting it directly in the hands of local residents who have long been victimized by protracted foreign military presence.

Lastly, the PRC is presented with a unique opportunity to preside over other criminal matters involving other foreign nationals. Recently the Naha PRC decided to indict forty-two-year-old Chinese fisherman Zhan Qixiong whose trawler hit Japan Coast Guard ships in September of 2010.[126] The powerful collision took place near the disputed East China Sea Islands, called Senkaku in Japan and Diaoyu in China, escalating

124. Masami Ito, "Victim Participation in Trials Risky, Experts Say," *Japan Times*, March 30, 2007, http://search.japantimes.co.jp/cgi-bin/nn20070330a3.html.

125. Ibid.

126. "Call for Indictment of Chinese Skipper Illegal: Spokesperson (Call for Indictment)," Jiji Press Ticker Service, April 19, 2011.

Sino-Japanese tensions. Zhan was arrested on charges of obstructing the duties of the Japanese Coast Guard, but the Japanese government soon released him, fearing further deterioration of bilaterals relation with the Chinese government. In October, a group of five Japanese citizens, including a journalist, filed a criminal complaint against Zhan with the prosecutors' office in Naha.[127]

When the Naha prosecutors' office decided not to indict him on January 24, 2011,[128] the same group filed another complaint with the Naha PRC to review the prosecutors' non-indictment decision.[129] The civic review panel then voted on April 18 to seek the indictment of the captain who returned to China last September.[130] In response to the PRC's recommendation, the Naha prosecutors' office once again investigated the matter and decided again not to indict the Chinese fisherman on June 28.[131] On July 21, the Naha PRC decided for the second time that Zhan face charges for obstructing justice, violating fishing rights, and causing criminal damages to Japanese ships.[132]

IV. Conclusions

The death of Koki Yogi became an important symbol that highlighted the politics of the U.S.-Japan SOFA and its inequitable prosecutorial process. Yogi's best friend, Shoji Arakaki, summarizes Japanese sentiments toward the document perfectly: "[N]ever did I dream that there were such rules like the SOFA that make light of our human rights. Our grandparents and parents have suffered from the burden of heavy military presence and unfair treatment. How much longer do we need to suffer?"[133]

Foreign governments and alien soldiers have dominated the history of Okinawa. There have been few means by which the indigenous peo-

127. "Probe Sought on Decision Not to Indict Chinese Skipper," Jiji Press Ticker Service, January 24, 2011.

128. Ibid.

129. "Call for Indictment," Jiji Press Ticker Service.

130. Ibid.

131. "Japanese Prosecutors Again Drop Charges Against China Skipper," Jiji Press Ticker Service, June 28, 2011.

132. "Chugokujin Sencho "Kisosubeki" Naha Kensatsushinsakai ga Giketsu [Indictment is Proper for Chinese Captain, According to the Naha PRC]," *Ryukyu Shinpo*, July 21, 2011.

133. Sumida, "Okinawans Protest" (cited in n. 23).

ple could assert their sovereignty or political independence, as both the Japanese and U.S. governments thoroughly control the political and economic sectors of the island. The introduction of twin systems of both the *Saiban-in Seido* and the PRC in Okinawa, nonetheless, began to change the mindset of the colonized subjects in the island. The lay adjudication of American and Japanese military personnel in 2010 and 2011 helped express indigenous voices and create a possible path for indigenous independence and de-colonization of people in the island. There will be more American and Japanese military defendants subject to these judicial processes, as lay adjudication begins to play a prominent 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 or not the quasi-jury trial and PRC continue to create an important public space in which to articulate effective decolonial voices and an equitable future of the island is something to be examined in coming years.

Environmental and Worker Safety Law in Japan: Recent Changes, the Impact of Reform Laws and Movements, and the Prospects for the Future

Eri Osaka[1]

I. Introduction

In Japan, asbestos disasters are seen not only as occupational accidents but also as environmental pollution caused by a failure of regulation. Compared with other developed countries, asbestos regulations in Japan have been too slow. Even after the establishment of an administrative compensation scheme for asbestos-related diseases, a substantial number of asbestos victims have chosen to go to court. These lawsuits are of a public interest nature. With help from experienced lawyers through environmental litigation in the past, plaintiffs are pursuing the State's liability for promoting the use of asbestos and not preventing asbestos-related injuries as well as demanding the expansion of the administrative compensation scheme.

This article consists of three parts. In the first part, I will briefly overview the development of environmental and worker safety laws in Japan. In the second part, I will examine the ongoing asbestos disaster, possibly the biggest negative legacy of industrial pollution in Japan and will look into the regulations, legislation, and litigation dealing with asbestos. In the final part, I will make some observations about the possible reasons for belated asbestos regulations and the future of asbestos disasters.

1. Associate Professor of Law, Toyo University Faculty of Law (Japan). The research work for this article was supported by Grant-in-Aid for Young Scientists (B) (19730077) of the Japan Society for the Promotion of Science. The author would like to thank Professors Harry N. Scheiber and Tom Ginsburg for their help in publishing this article.