Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons To Be Learned from the United States-Japan Agreement

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AT THE CULMINATION of World War II in 1945, United States forces entered and defeated the Japanese front.[1] Since that time, American troops have maintained a broad and continuing military presence in Japan.[2] Initially, the United States justified its interference as a pursuit to "*rebuild* the internal structure of the defeated state."[3] However, as time progressed and Japan recovered from nuclear destruction and reconstructed its shattered economy, American troops remained.

I. Background

Advocates of the United States-Japan alliance aver that this partnership was the paramount outcome of that devastating war.[4] While visiting Japan's Cornerstone of Peace Park, President Bill Clinton stated that "[t]he strength of our alliance is one of the great stories of the 20th century."[5] Before the Japan-American Society,[6] the Assistant

* Class of 2003. The author would like to extend great thanks and appreciation to her friends and family, especially her parents Dr. Marlin E. and Ms. Sharon R. Gher, for their unending love, confidence, and support. She would also like to thank Elinor Leary Vallejo for her time and dedication to the editing and publication of this Comment, and Shelly A. Leachman for her contributions to the foundation of this Comment. This Comment is dedicated to all of the innocent men, women, and children who have unjustly lost their lives at the hands of others.

1. *See* Steven G. Hemmert, *Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction*, 17 B.U. INT'L L. J. 215, 235–36 (1999).

2. *See id.*

3. *Id.* at 234 (emphasis added).

4. *See* Edwin Chen, *Clinton, In Japan for G-8 Summit, Vows to Cut U.S. 'Footprint' on Okinawa*, L.A. TIMES, Jul. 21, 2000, at A1.

5. *Id.*

6. The Japan-American Society is a nonprofit, nonpartisan, educational, and cultural organization of individuals and institutions with an interest in Japan and United States-Japan relations. It serves as a forum for promoting understanding between Americans and

Secretary of State for East Asian and Pacific Affairs stated that the "security relationship that particularly in light of its origins, is unprecedented in history . . . the partnership between our two countries, the two biggest economies in the free world, benefits not only ourselves but the world as a whole."[7]

The rhetoric surrounding the United States-Japan alliance is positive and promising, but testimony and criminal statistics reflecting the behavior of United States servicemen stationed in Japan may paint a different picture. For example, in 1955, a six-year-old child was raped and murdered by a United States Sergeant.[8] In 1974, a "sleeping woman was beaten to death with a cement block by a U.S. serviceman intending to commit robbery."[9] On September 4, 1995, three military men rented a car, abducted a twelve-year-old schoolgirl and raped her.[10] In 1996, "[f]ormer U.S. Pacific Fleet commander Richard Macke was forced to apply for early retirement . . . after . . . [he was quoted saying] that [the] three United States servicemen who . . . rape[d] a 12-year-old girl in Okinawa, should have hired a prostitute instead."[11] On January 16, 2000, Lance Corporal Oswald McDonald was arrested for trying to sexually assault a Japanese woman at a disco.[12] In 2002, Lance Corporal Kurt Billie was charged with arson for allegedly starting two fires in an area outside Chatan.[13] And, as if to add insult to injury, Lieutenant General Earl Hailston, commander of the United States forces in Okinawa, made derogatory remarks

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Japanese citizens through its cultural, public affairs, and educational programs. The Society's programs reach out to a diverse audience, providing a forum where business, government, and community leaders and the general public are able to meet and discuss issues of concern to both countries in an atmosphere of friendship. *See* Japan-American Society of Washington, DC, *at* http://www.us-japan.org/about.html (Sept. 28, 2002) (last visited Sept. 28, 2002).

7. Paul Wolfowitz, Assistant Secretary of State for East Asian & Pacific Affairs, Address before the Japan-American Society (Sept. 18, 1985), *in* U.S. Dept. of State, American Foreign Policy Current Documents 734 (1986).

8. *See* Adam B. Norman, *The Rape Controversy: Is a Revision of the Status of Forces Agreement with Japan Necessary?*, 6 IND. INT'L & COMP. L. REV. 717, 722 (1996).

9. *Id.*

10. *See* e-mail from Koji Sunagawa, Representative, A Citizens' Group Yearning For A Peaceful Okinawa, to William Jefferson Clinton, President of the United States, *at* http://www.walrus.com/~dawei/articles/to.president.1995.11.14-e.html (Nov. 18, 1995) (last visited Oct. 31, 2002).

11. *Okinawa Town Demands U.S. Withdrawal, at* http://www.cnn.com/ 2001/WORLD/asiapcf/east/02/15/okinawa.anger/ (Feb. 16, 2001) (last visited Jan. 11, 2001) [hereinafter *Okinawa Town*].

12. *See U.S. Marine in Okinawa Kept in Detention for Attempted Rape*, AGENCE FRANCE-PRESSE, Jan. 16, 2000, *available at* 2000 WL 2713657.

13. *See Okinawa Town, supra* note 11.

about local government officials such as calling the governor and other local leaders "nuts" and "a bunch of wimps."[14] Lieutenant General Hailston's remarks may be indicative of the United States' military's attitude toward the local government.[15]

Such events not only erode the United States-Japan alliance, but help to underscore the primary source of conflict between the two nations: criminal jurisdiction. Japanese critics allege that the United States delays the transfer of custody of United States servicepeople to Japanese authorities prior to indictment, thus impeding investigation and favoring the accused United States citizen.[16] They also assert that this policy fails to deter the abhorrent behavior of American servicemen and women.[17]

On February 16, 2001, a local assembly on Okinawa, the site of America's largest military base in Japan, demanded the "withdrawal of all U.S. Marines on the island and the resignation of their commander."[18] As the global community becomes more aware of Japanese dissatisfaction, the more likely it is that United States diplomatic endeavors will be thwarted and its international reputation tarnished.

The United States has a long history of "sending . . . [troops] abroad to further [its] national security and foreign policy objectives[, which] has profound implications under United States and international law and raises . . . issue[s] of . . . status, rights, privileges, and immunities."[19] This Comment focuses on an instrument essential to America's military placement scheme: the Status of Forces Agreement ("SOFA").

A SOFA is an agreement entered into between nations that delineates the "legal rights and responsibilities of military forces stationed on foreign soil."[20] At first glance, a SOFA appears to be a minor technicality among the myriad tasks required to establish an overseas base, but in actuality it has a much larger role: It establishes the foundation for diplomatic reciprocity and a "smooth working relationship"[21] be-

14. *Id.*

15. *See id.*

16. *See* Norman, *supra* note 8, at 724.

17. *See id.* at 718 (stating that Japanese citizens claim the present United States-Japan Status of Forces Agreement allows United States servicepeople to commit crimes and avoid prosecution).

18. *Okinawa Town, supra* note 11.

19. Colonel Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 137, 137 (1994).

20. Hemmert, *supra* note 1, at 217.

21. Erickson, *supra* note 19, at 140.

tween the sending and receiving nations.[22] In order to maintain political legitimacy and positive foreign relations, it is imperative that the United States considers the profound implications of its military policy-making. The United States must fashion SOFAs that reach beyond its own national interests and equitably address the needs and concerns of the *receiving* nation. By taking this approach, the United States will do much to garner future international support.

Part I of this Comment describes the evolution of international jurisdiction and tracks the development of modern SOFAs. Part II addresses the history of the United States-Japan partnership, the countries' existing SOFA, and the effects of that SOFA on United States-Japan relations. Part III exposes the failure of the current United States-Japan SOFA to create smooth-working relations between the two nations, and describes the steps Japan and the United States have recently taken in attempting to address the issue of criminal jurisdiction. Part IV presents a solution to this foreign policy failure. It advocates that United States foreign policy shift to a more egalitarian approach by considering the *receiving* nation's history and culture, negotiating for equal bargaining power between the nations, continuously amending SOFAs to comport with current conditions, modifying current jurisdictional provisions that are unjust and actually enforcing those provisions, and incorporating principles of morality into its international negotiations.

A. Development of Status of Forces Agreements and International Jurisdiction

The first articulation of international jurisdiction was in *Schooner Exchange v. M'Fadden*.[23] That seminal case held that a host nation's sovereignty is absolute; it has jurisdiction over *any* offense committed by foreigners within its territorial limits, unless expressly or impliedly waived.[24] Justice John Marshall's succinct and forthright decision, however, is misleading. His opinion failed to account for the nuances of international jurisdiction that existed even at the time of the 1812 decision.

22. *See id.*

23. 11 U.S. Cranch 116 (1812).

24. *See id.* at 143.

1. Evolution of General Rule of Jurisdiction During International Passage

Justice Marshall qualified his holding by endorsing the concept of the Law of the Flag, an implied waiver of all jurisdiction by the receiving country over the sending country's troops, which deemed the grant of free passage through another's territory.[25] Thus, a foreign general traveling through another country's territory was permitted to discipline his troops and inflict punishments that the government of *his* army required.[26] This concept relied on the assumption that discipline was an essential military tool, and unless the sending nation had the ability to punish its own offenders, the Commander would lose control and his "forces would cease to be an army and would become a mob."[27]

2. Jurisdiction During Occupation

Justice Marshall's jurisdictional ruling was also qualified in times of war.[28] It has been settled international practice that "[w]hile on duty in occupied enemy countries, or while in combat, . . . a serviceman who commits a crime against the laws of the country in which he is serving is not subject to the criminal jurisdiction of the courts of that nation."[29] Nonetheless, once the occupied country has regained its sovereignty, this presumed jurisdictional waiver expires and Justice Marshall's general rule of absolute jurisdiction applies, unless otherwise stipulated in an international agreement.[30]

3. The Brussels Pact

Recognizing such intricacies of international jurisdiction, Justice Marshall advocated for the creation of international agreements that would clearly outline jurisdictional practices between sovereigns.[31] The Brussels Pact ("Pact") was one of the first of such accords.[32]

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25. *See id.* at 144.

26. *See id.*

27. Major Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 171 (1994) (quoting Archibald King, *Jurisdiction Over Friendly Armed Forces*, 36 AM. J. INT'L L. 539 (1942)).

28. *See* Donald T. Kramer, Annotation, *Criminal Jurisdiction of Courts of Foreign Nations Over American Armed Forces Stationed Abroad*, 17 A.L.R. FED. 725, 743 (2001).

29. *Id.*

30. *See id.*

31. *See Schooner Exch.*, 11 U.S. Cranch 116 (1812).

32. *See* Norman, *supra* note 8, at 732.

Signed in 1948, five European nations that were concerned about the growing threat of the Soviet Union pledged in the Pact to form an alliance against the communist regime.[33] This Pact was the predecessor to the first international SOFA undertaken by the North Atlantic Treaty Organization ("NATO"),[34] and laid the foundation for one of the most essential elements of a SOFA: criminal jurisdiction. The Pact declared that "[m]embers of a foreign force who commit an offense in the 'receiving State' against the laws in force in that State can be prosecuted in the courts of that 'receiving state.'"[35]

The language of the Brussels Pact mirrored Justice Marshall's decision in *Schooner Exchange*[36] by promulgating host nation jurisdiction. However, this trend began to shift by the end of World War II. At that time, the victorious Allied forces acquired immense influence and it became customary for conquering states to enter a defeated nation and station troops on a long-term basis in order to "restore" the country.[37] Due to the inordinate bargaining power that the Allied nations, and the United States in particular, possessed, and reasoning that *receiving* state law would impede the *sending* state's army,[38] the superpowers were able to insist upon absolute immunity from prosecution for their overseas troops.[39] Because the "weaker" nations needed assistance and believed they needed superpower protection, this unequal condition was regularly accepted. Basically, "[t]he more a nation need[ed] the presence of foreign troops, the more likely [it was] to grant more jurisdiction to the sending state."[40]

B. NATO: Setting the General Framework for SOFAs

The complete waiver of jurisdiction that the United States and others negotiated following World War II was short-lived. The NATO SOFA became the first multilateral treaty under which the *sending* state relinquished a portion of its criminal jurisdiction in an international agreement.[41] The NATO SOFA was created in response to the

33. *See id.*
34. *See id.*
35. *Id.*
36. *See Schooner Exch.*, 11 U.S. Cranch 116.
37. *See* Hemmert, *supra* note 1, at 235.
38. *See id.* at 219.
39. *See* Norman, *supra* note 8, at 732. "When both states are not politically or economically equal, the more powerful state will obtain a broader right of jurisdiction, even in peacetime." Maj. Manuel E. F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, 1994 ARMY LAW. 3, 8 (1994)).
40. *Id.*
41. *See* Hemmert, *supra* note 1, at 220.

Warsaw Pact and the Cold War, when NATO began to "permanently station troops in other NATO states."[42] The treaty was designed to avoid jurisdictional problems and resolve any ancillary issues regarding the signatory countries' rights and obligations that the countries envisioned would arise from continuous foreign troop presence.[43] When jurisdiction was addressed during the 1953 hearings regarding the NATO SOFA, the United States State Department declared that implied immunity from criminal jurisdiction no longer existed under international law.[44] Moreover, in *Holmes v. Laird*,[45] the United States Court of Appeals for the District of Columbia extinguished the notion that a visiting state's troops were immune from the host state's laws.[46]

1. NATO Jurisdictional Provisions

Since its creation, the NATO SOFA has become the model jurisdictional formula.[47] Specifically, the NATO SOFA defines two types of criminal jurisdiction: exclusive and concurrent.[48] Generally, a *sending* or *receiving* nation will possess exclusive jurisdiction over an offender who breaks a law unique to that country.[49] Conversely, both nations share concurrent jurisdiction if the offender breaks a law applicable to both countries.[50] Generally, jurisdictional disputes arise where there is concurrent jurisdiction. In an attempt to eliminate these disputes, SOFA drafters further categorized concurrent jurisdiction into primary and secondary concurrent jurisdiction.[51] This distinction essentially determines which nation can prosecute first.[52] Under the NATO SOFA and other SOFAs modeled after it, the *receiving* state is generally allocated primary concurrent jurisdiction.[53]

This grant appears to confer the *receiving* nation with wide authority to exercise jurisdiction over crimes committed within its borders;

42. *Id.* at 219.
43. *See* Erickson, *supra* note 19, at 140.
44. *See id.* at 139.
45. 459 F.2d 1211 (D.C. Cir. 1972).
46. *See id.* at 1217.
47. *See* Brigadier General C. Claude, *Status of Forces Agreements: An International and Domestic Obligation to Return Military Personnel from the United States to Foreign Countries for Criminal Prosecution and Confinement*, 26 A.F. L. REV. 21, 21–22 (1987).
48. *See* Kramer, *supra* note 28, at 731.
49. *See id.* Because most jurisdictional disputes occur when an issue arises under concurrent jurisdiction, this Comment will not thoroughly address exclusive international jurisdiction.
50. *See id.*
51. *See id.*
52. *See* Lepper, *supra* note 27, at 174.
53. *See id.*

however, the rule is almost entirely subsumed by three broad exceptions. First, the *inter se* exception gives the *sending* state "primary jurisdiction over members of its force or civilian component who commit offenses solely against its security or property, or against the person or property of another member of its force or civilian component or dependent."[54] Second, the official duty exception provides that the "sending state has primary jurisdiction over offenses arising out of the performance of official military duties," which are commonly defined as "official acts."[55] Within this exception conflicts may arise between countries regarding the exact definition of an "official act."[56] Third, the waiver exception permits a country to "waive its primary jurisdiction if it considers the other state's prosecution motives to be more important."[57] This exception, which adds flexibility to the SOFA formula, is premised on the idea that mechanical application of the SOFA formula cannot adequately account for each party's interests.[58]

The United States, however, does not generally waive its primary jurisdiction in these situations because it is already agitated by its forced jurisdictional relinquishment in other situations.[59] Instead, the United States often attempts to extend jurisdiction by "construing the circumstances of a crime so that the offense lies within the U.S. military's primary concurrent jurisdiction."[60] In fact, despite SOFA provisions which mandate nations "with secondary concurrent jurisdiction [to] request [jurisdictional] waivers only in cases of particular importance,"[61] the United States "automatically request[s] a waiver for U.S. personnel implicated in criminal activity."[62] Underlying this practice is Army Regulation 27-50, which calls for the United States to maximize jurisdiction to the extent permitted by the applicable SOFA agreement.[63]

54. *Id.*

55. *Id.* at 175.

56. *See id.*

57. *Id.* at 176.

58. *See id.*

59. *See id.*

60. Cathleen Caron, *Whose Security Is It? Military Violence Against Women During Peacetime*, 6 HUM. RTS. BRIEF. 13, 14 (1999).

61. *Id.* at 13.

62. *Id.* The United States Department of Defense report, *Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals Over United States Personnel*, December 1996–30 November 1997, states that host countries granted 86.1 percent of United States military requests for waiver of primary foreign jurisdiction in 1997.

63. *See generally* ARMY REGULATION 27-50, *available at* http://neds.nebt.daps.mil/Directives/5820_4g.pdf (last visited Sept. 10, 2002). This regulation applies to all active and reserve components of the Army, Navy, Air Force, and Marine Corps. *See id.* at i.

2. Custody Issues

Custody of the accused is a subsidiary point of contention that frequently arises in jurisdictional disputes. The NATO SOFA and others modeled after it generally seek to protect American servicepeople who are charged with crimes that occurred in a foreign country by securing custody.[64] Specifically, the "United States may take and retain physical custody of an accused serviceman until final resolution of the criminal case by the host nation."[65] Had this provision not been stipulated in the NATO SOFA, international law would call for the contrary, and grant the *receiving* nation the right to take immediate custody and prosecute under its laws.[66] Thus, by negotiating contrary to customary law, the host nation's prosecutorial rights are further abrogated under the NATO SOFA.

3. SOFAs Drafted As Treaties or Executive Agreements

Another controversial issue arising within a SOFA negotiation is whether it is drafted as a treaty or as an executive agreement. The NATO SOFA was drafted as a treaty. Though many SOFAs mirror this agreement substantively, most of them are drafted as executive agreements rather than as treaties. But many countries are dissatisfied with executive agreements because they believe the United States bestows greater authority upon treaties in comparison to executive agreements.[67] Specifically, other countries prefer treaties because they have an "aura of greater solemnity than executive agreements."[68]

Some argue that treaties do warrant greater authority because the United States Constitution specifically confers the right to enter into treaties to the President,[69] and because a treaty is considered the supreme law of the land.[70] Congress also prefers treaties because they require two-thirds approval of the Senate, which gives Congress substantial power over the agreements.[71] Further, executive agreements

64. *See id.* at 1.

65. Teagarden, *supra* note 47, at 23.

66. *See id.* at 24.

67. *See* Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT'L L. J. 45, 58 (1995) [hereinafter *Agenda for Progress*].

68. *Id.*

69. *See* U.S. CONST. art. II, § 2, cl. 2.

70. *See* Teagarden, *supra* note 47, at 27.

71. *See* U.S. CONST. art. II, § 2, cl. 2.

are not expressly approved of in the Constitution and are self-executing, thus they do not require congressional approval.[72]

However, others argue that by and large, foreign assumptions regarding executive agreements are without merit. In *Dames & Moore v. Regan*,[73] the Supreme Court held that executive agreements, initiated by the President without congressional approval, are valid exercises of executive power under the Constitution.[74] Congress is frustrated by this trend, because it has less influence over executive agreements.[75] In addition, foreign nations often try to negotiate their SOFAs as treaties.[76]

Regardless of the fact that international law construes treaties and executive agreements as equally binding,[77] and despite *Regan*'s explicit holding, foreign nations and the United States Congress continue to prefer treaties, and award them greater weight.[78] Notwithstanding foreign and congressional preferences, since World War II the United States has drastically declined its treaty practice and more often enters into a SOFA as an executive agreement.[79]

C. The Current Situation

The structure and requirements of the NATO SOFA currently remain the world standard for SOFAs.[80] Nevertheless, there is one distinct feature about the NATO SOFA: it is a reciprocal agreement.[81] This essentially means that the SOFA's jurisdictional conventions are applied equally regardless of the party's status as a *sending* or *receiving* state. Currently, few non-NATO nations are parties to reciprocal SOFAs with the United States.[82] Instead, they are parties to nonreciprocal SOFAs that unilaterally apply the jurisdictional rules to disputes arising from the United States' presence on the foreign nation's soil.[83] For example, if a non-NATO nation had troops stationed in the United States, it would be bound by a different set of jurisdictional

72. *See Agenda For Progress, supra* note 67, at 48.
73. 453 U.S. 654 (1981).
74. *See id.* at 686.
75. *See Agenda for Progress, supra* note 67, at 68.
76. *See id.* at 70.
77. *See id.* at 58.
78. *See id.*
79. *See id.* at 47.
80. *See* Erickson, *supra* note 19, at 141.
81. *See* Hemmert, *supra* note 1, at 226.
82. *See id.*
83. *See* Norman, *supra* note 8, at 733.

rules and it would be prohibited from exercising jurisdiction over its own troops while within United States territory.[84]

Historically, the United States has justified this imbalance of power by claiming that:

> Foreign nations needed the presence of American troops in their countries much more than the United States needed the presence of foreign military personnel in America . . . [, and t]he United States . . . have often carried a disproportionately high cost of maintaining the defense against the Communists and other threats in foreign nations.[85]

The United States also maintains that other countries do not need SOFA protection because American Constitutional due process protections adequately safeguard them.[86] One may note that these assertions rely on the biased premise that the United States has a more just legal system than other countries.

II. Japanese Status of Forces Agreement

The United States-Japan SOFA is one example of the comprehensive nonreciprocal agreements into which the United States typically enters.[87] An executive agreement that came into force on June 23, 1960, this SOFA supports the "Treaty of Mutual Cooperation and Security Between the United States and Japan."[88]

A. Historical Development Leading to the United States-Japan Partnership

The relationship between Japan and the United States dates back to 1853, when Commodore Matthew C. Perry and his crew entered the Edo (Tokyo) harbor and "opened" Japan.[89] Perry arrived with a note from President Millard Fillmore urging Japan to end its "centuries of virtual isolation and . . . [begin] . . . commercial, diplomatic, and . . . other kinds of associations with Americans, other Asians, and the peoples and nations of the world."[90]

84. *See id.*
85. *Id.*
86. *See id.* at 734.
87. *See id.* at 733.
88. Major William K. Lietzau, *Using the Status of Forces Agreement to Incarcerate United States Service Members on Behalf of Japan*, 1996 ARMY LAW. 3, 4 (1996).
89. *See* GERALD L. HOUSEMAN, AMERICA AND THE PACIFIC RIM: COMING TO TERMS WITH NEW REALITIES 65 (1995). Japan was "opened" one year later, in 1854, when Perry returned with more ships and heavy guns. *See id.*
90. *Id.*; *see also* Norman, *supra* note 8, at 718–19.

"Japan did not necessarily give voluntary assent to this 'opening up,'"[91] but nevertheless signed a treaty of peace and friendship with the United States the following year.[92] Unfortunately, soon after the signing of that treaty, political turmoil erupted in Japan and the Tokugawa bakufu regime was overthrown by the Meiji government.[93] This new military administration, desiring to achieve world power status, undertook an expansionist policy.[94] Japan's pursuit of supremacy eventually precipitated United States participation in World War II, and it was not until the Allies' victory over Japanese forces on September 2, 1945, that Japan was halted and forced to surrender.[95] The Allied powers, with the United States in command, began a period of occupation immediately following Japan's defeat.[96] They had two main objectives: demilitarization and democratization.[97] As a result of the Allies' objectives, Japan revised its Constitution to emphasize pacifism,[98] and refocused its energies toward economic and civilian sectors.[99] Despite the fact that Article IX of the amended Japanese Constitution prohibits the "development of military forces beyond the level of [its] internal security needs,"[100] Japan was still able to secure international protection by making use of American troops and their continuing presence.[101]

B. Provisions of the United States-Japan SOFA

As time passed, relations between Japan and the United States improved, and in 1960 the two countries signed the Treaty of Mutual Cooperation and Security.[102] "Although termed 'mutual,' [this treaty] did not require Japan to defend American territory; rather, it provided that American troops were to be based in Japan until Japan could 'assume responsibility for its own defense.'"[103] Specifically, the

91. HOUSEMAN, *supra* note 89, at 65.
92. *See* Norman, *supra* note 8, at 719.
93. *See id.*
94. *See id.*
95. *See id.* at 720.
96. *See id.*
97. *See id.*
98. *See id.*
99. *See* HOUSEMAN, *supra* note 89, at 79.
100. *Id.*
101. *See generally id.* The reshift in focus allowed Japan to concentrate on its economy and fulfillment of civilian needs.
102. Treaty of Mutual Cooperation and Security, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652.
103. FREDERICK H. HARTMANN & ROBERT L. WENDZEL, AMERICA'S FOREIGN POLICY IN A CHANGING WORLD 418 (1994).

treaty codified both nations' legal rights and the responsibilities of military forces that became the countries' current SOFA.[104]

Article XVII of this treaty provides the groundwork for criminal jurisdiction between the two countries.[105] The agreement provides that Japanese and United States military authorities "shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents. . .and in handing them over to the authority which is to exercise jurisdiction."[106] It also provides that Japanese authorities shall promptly notify United States military authorities of any arrest of one of its servicepeople.[107] Further, Japanese and United States military authorities "shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence,"[108] and the authorities "shall notify each other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction."[109]

Though the provisions of the United States-Japan SOFA appear to establish an equitable balance of power, a closer analysis reveals an inequity favoring the United States. The largest point of contention involves the criminal jurisdiction provision (Section 5(c)) of the current SOFA. That provision reads: "[t]he custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he [or she] is in the hands of the United States, remains with the United States until he [or she] is charged by Japan."[110] Critics believe this provision enables United States military authorities to delay and thwart Japanese investigative and prosecutorial efforts.[111]

Further, critics argue that United States efforts to frustrate prosecution and usurp jurisdiction have actually resulted in an increase in the number and severity of crimes committed by American troops in Japan.[112] In essence, when the United States attains jurisdiction over a case, the Uniform Code of Military Justice serves as the working judi-

104. *See* Gwyn Kirk & Carolyn Francis, *Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia*, 15 BERKELEY WOMEN'S L.J. 229, 250 (2000).

105. *See id.* at 27.

106. *Id.* at 29–30.

107. *See id.* at 30.

108. *Id.*

109. *Id.* at 30–31.

110. *Id.* at 30.

111. *See* Atsushi, *Reactions to Rape in Okinawa*, UIUC (Nov. 4, 1995), *available at* http://deil.lang.uiuc.edu/exchange1/contributions/news/rape3.html. (last visited Sept. 29, 2002).

112. *See* Caron, *supra* note 60, at 13–15.

cial authority. Defendants found guilty by this legal body generally only receive non-judicial punishments or court martials.[113] Critics of the current military scheme assert that nonjudicial punishments and court martials are unpredictable, citing three main reasons that they fail to guarantee disciplinary outcomes:

> First, the status of U.S. military proceedings and the records of accused servicemen are not readily available, making transparency an additional hurdle that victims must overcome to raise a successful claim . . . . Second, the commanding officer . . . has complete discretion when deciding to pursue either a non-judicial punishment or a court-martial when a serviceman under his command is accused of a crime . . . . Third, U.S. servicemen facing a court-martial for certain crimes committed, including crimes of sexual violence, can request a discharge from the military in lieu of facing the stigma of a conviction. If U.S. military authorities accept the request, the serviceman walks free.[114]

It is not uncommon for court martial convictions in foreign countries to result in more lenient sentences than criminal trials in the United States.[115] As a result, "some activists believe that military violence against women is seriously under-reported due to victims' shame, fear, or belief that perpetrators will not be apprehended or punished."[116] The harsh reality is that United States SOFAs and current United States military practice protects Unites States troops at the expense of the local people.[117]

Another controversial debate has arisen over the non-reciprocal status of the United States-Japan SOFA. A nonreciprocal SOFA is a

113. *See id.* at 15.

114. *Id.* at 15–16.

115. *See id.* at 16.

116. Kirk & Francis, *supra* note 104, at 247. Military presence in host countries presents a myriad of negative social effects such as "military prostitution, the abuse of local women, and the dire situation of mixed-race children fathered by U.S. military men." *Id.* at 229. Since the United States occupation of various countries in Asia beginning in 1898, it is estimated that United States servicemen have fathered 30,000 to 50,000 Amerasian children. *See id.* at 259. *See also* Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53 (2001). The United States Supreme Court in *Nguyen* recently compounded the negative effect of abandoning children abroad, by holding that federal immigration statute section 1409(a), which creates unequal barriers to attaining United States citizenship for children born to unmarried citizen-fathers and non-citizen mothers, does not violate equal protection. The court explicitly stated its concern for "young people, men for the most part, who are on duty with the Armed Forces in foreign countries." *Id.* at 65. *Nguyen*, in essence, failed to create a disincentive for reckless military behavior abroad, by exempting military men from having to establish paternity for their foreign-born child. This is one more example where United States military men are not held accountable for their actions (*i.e.*, fathering and abandoning Asian children), and the local people, children in particular, are harmed as a result.

117. *See* Kirk & Francis, *supra* note 104, at 256.

unilateral agreement that binds the two nations *only* while on the host nation's territory.[118] At this time, NATO is the only reciprocal SOFA to which the United States is a party.[119] Many nations argue that by insisting on non-reciprocal SOFAs, the United States is not "playing fair" and that the United States perceives its government as superior to that of other nations.[120]

Specifically, there is a general perception that because NATO is the United States' only reciprocal SOFA, the United States is biased towards Europeans and prejudiced against nonwhites.[121] Critics contend that "the rhetoric of 'alliance' and 'friendship' . . . hides the fact that citizens of East Asian countries are not protected by SOFAs to the same degree as the Western European countries of the NATO alliance."[122] Overall, East Asian countries operate with lesser bargaining power because they "see their national security as intertwined with that of the United States, partly because they continue to depend on the United States militarily, politically or economically."[123] The actual inequities in the East Asian SOFAs are revealed by comparing the lengths of Western countries' SOFAs to their East Asian counterparts.[124] For example, the German SOFA contains eighty-three negotiated articles, while the Japanese SOFA only contains twenty-eight.[125]

The criminal jurisdiction provision and the nonreciprocal nature of the United States-Japan SOFA have been highly criticized by some Japanese people. Critics are appalled by the criminal offenses that accompany American occupation and continue at alarming levels to this date.[126] For instance, since the reversion of Okinawa to Japan in 1972, "4,716 serious crimes involving U.S. personnel, their dependents or civilian employees" have been committed and "[a]ttorneys in Okinawa estimate that U.S. military personnel commit about 1,000 crimes and misdemeanors annually in Okinawa."[127] "A local human rights group, Okinawan Women Act Against Military Violence, cite Okinawan police records that report U.S. military personnel raped 200 Okinawan

118. *See* Norman, *supra* note 8, at 733.
119. *See id.*
120. *See id.* at 734.
121. *See id.*
122. Kirk & Francis, *supra* note 104, at 251.
123. *Id.*
124. *Id.*
125. *See id.* at 252.
126. *See* Norman, *supra* note 8, at 723.
127. Joseph Gerson, *I Refuse, in* 52 BULL. OF THE ATOM. SCI. 4, 26 (1996), *available at* http://www.thebulletin.org/issues/1006/ja96/ja96toc.html (last visited Sept. 29, 2002).

women between 1972 and 1997."[128] At this point, critics believe the current SOFA enables these offenses because it is fundamentally unfair, biased, and accords American criminal offenders special treatment.[129]

C. Current United States-Japanese Relations

The unjustified and heinous crimes that continue to occur on Japanese soil have threatened the United States-Japan partnership. The Japanese government has repeatedly requested that its current SOFA be amended, claiming that criminals are neither being brought to justice nor deterred.[130] As a result, the country continues to fall victim to the abuses of American servicemen. Because "Japan is the single most important player in the Asian balance of power,"[131] it is essential that the United States mend and nurture this relationship in order to maintain positive working relations with that region of the world.

III. Problem

The primary goal of a SOFA is to establish and foster smooth working relations between member countries.[132] However, the current United States-Japan SOFA has failed to accomplish this objective. Specifically, the agreement's criminal jurisdiction provisions, which guard United States servicemen during pre-indictment proceedings and impede investigation, have enraged the Japanese public.[133] After a twelve-year-old school girl was raped by three American servicemen in 1995, 85,000 Okinawan citizens staged the largest protest in history against a United States military base.[134] The Okinawan government took out a large ad in the New York Times begging Americans to help them "reduce and realign U.S. bases located on their island."[135] A citizens' group personally emailed then-President Clinton, expressing their pain and requesting apologies and SOFA revisions.[136] In a 1996

128. Caron, *supra* note 60, at 17. Japanese Human Rights Group "Okinawan Women Act Against Military Violence" notes that this statistic is likely inaccurate due to the documented trend of underreporting. *See id.*

129. *See* Atsushi, *supra* note 111.

130. *See* Norman, *supra* note 8, at 717–18.

131. HARTMANN & WENDZEL, *supra* note 100, at 415.

132. *See* Erickson, *supra* note 19, at 140.

133. *See* Norman, *supra* note 8, at 717–18.

134. *See id.* at 723.

135. *Id.*

136. *See* Sunagawa, *supra* note 10.

local referendum, ninety percent of Okinawan voters called for the immediate reduction of United States bases and further SOFA revisions.[137]

The problem is that "it has been a long-standing United States policy to seek broad relief from local jurisdiction through the mechanism of a SOFA."[138] The United States-Japan SOFA is a prime example of this approach. The United States has an obligation to protect the rights of its servicemen abroad; however, the United States must take other considerations into account when conducting foreign policy and entering into SOFAs.

A. The Need to Adapt SOFA Agreements to the Changing World

One major flaw in America's inflexible negotiation process regarding SOFAs is its failure to adapt existing agreements to current situations. The international system is characteristically restless; the dynamic of shifting powers among nations is complex and continually calls for adjustment. For an international agreement to withstand societal and cultural shifts, it must be consistently updated to comply with the emerging needs and concerns of each party to the agreement. Without the ability to change, an agreement is essentially stripped of its means of preservation. At present, the United States gives little credence to the idea of fluid, ever-changing foreign policy. Unfortunately, failure to modify current international agreements to mirror global shifts may decrease their effectiveness.

B. Offending the Host Nation's Sovereign Dignity

The United States-Japan SOFA, as it is currently drafted, and American military presence in Japan, is an affront to many Japanese citizens. United States forces stationed in Japan have been analogized to a "vestige of colonialism," and are a constant reminder of Japan's painful past.[139] This problem is especially acute in Okinawa, which remained under United States administration until 1972, though most of Japan returned to civilian self-rule a few years after World War II.[140] Today, seventy-five percent of land occupied by the United States' is

137. *See* Toni M. Bugni, *The Continued Invasion: Assessing the United States Military Presence on Okinawa Through 1996,* 21 SUFFOLK TRANSNAT'L L. REV. 85, 92 (1997).

138. Erickson, *supra* note 19, at 140.

139. Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future,* 137 MIL. L. REV. 67, 68 (1992).

140. *See* Chen, *supra* note 4, at A11.

on Okinawa, where 26,000 American troops are stationed.[141] The existence of bases in Japan implies that it is "unable to carry out the critical duty of a 'sovereign' and 'independent' nation to provide for its own national defense."[142]

To some, the jurisdictional regulations of the United States-Japan SOFA are an insult to Japan's citizenry.[143] Many are angered that violent crimes continue at alarming rates and claim that current provisions do not bring American military offenders to justice.[144] Each crime that occurs and each protest that is ignored communicates America's general lack of concern for these matters, and for Japan's populace as a whole.

C. Constitutional Law Implications

The United States citizens that are sympathetic to the Japanese plight refuse to support the push for alterations of America's current SOFA negotiation scheme because they feel it enables the United States to better safeguard military servicepeople's constitutional rights. Specifically, they believe the Japanese criminal justice system denies American citizens their constitutionally mandated right to due process under the law.

1. Differences Between the Japanese and American Criminal Justice Systems

The United States is fearful of subjecting its citizens to the Japanese criminal justice system because Japan utilizes a "crime-control" model, as opposed to the American "due process" model.[145] The main goal of the Japanese system is to repress criminal conduct,[146] whereas the United States focuses on protecting the individual liberty of the accused.

Japan grants legal authorities wide discretion to investigate and to "persuade" the accused to comply with their efforts.[147] They employ these procedures because they regard confessions as the "best evi-

141. *See id.*

142. Porrata-Doria, Jr., *supra* note 136, at 88.

143. *See generally* Norman, *supra* note 8 (noting the context in which the SOFA was created, the jurisdictional provisions as written, the distrust of the Japanese criminal justice system, and the nonreciprocal nature of the agreement communicates United States' bias and unfairness).

144. *See* Atsushi, *supra* note 111; *see also* Norman, *supra* note 8 at 724.

145. *See* Norman, *supra* note 8, at 730.

146. *See id.*

147. *See id.* at 726.

dence of the truth."[148] Additionally, Japan does not provide legal counsel during the investigation process and views the primary role of penalties as rehabilitation rather than punishment.[149]

The United States, however, employs a heightened burden of proof in the criminal context, requiring proof of guilt beyond a reasonable doubt to ensure due process under the law.[150] Rules regarding the burdens of persuasion in America were "developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."[151] The creation of the Bill of Rights exemplifies an underlying distrust of government in the United States.[152] Accordingly, to protect the accused from faulty conviction, the founders created certain fundamental rights such as the right to due process under the law, to confront one's opponent, to compulsory process, to freedom from unreasonable search and seizure, and to freedom from cruel and unusual punishment.[153]

Despite distinct variations between the Japanese and American criminal justice systems, the Japanese system can hardly be deemed inferior. In fact, Japan has one of the lowest crime rates in the world.[154] Further, only five percent of those convicted are actually sentenced to prison and the average sentence is less than two years.[155] Though the United States protects defendants' rights at the outset of criminal proceedings, a conviction may result in a loss of freedom that can last a lifetime.

2. United States Constitutional Rights Are Not Absolute

The American criminal justice system achieves laudable objectives; however, our constitutional laws are *not* absolute and do not necessarily warrant international application. The Supreme Court in *Holmes v. Laird* held:

> [American] citizenship does not give . . . immunity to commit crime in other countries, nor entitle him [or her] to demand, of right, a trial in any other mode than that allowed to its own people

148. *Id.*
149. *See id.*
150. *See In re* Winship v. United States, 397 U.S. 358, 362 (1970).
151. *Id.*
152. *See generally* John Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181 (1987) (noting that the Constitution contains a myriad of complex and ambivalent messages, thus requiring various portions of the text to conflict with the others in order to compensate for the inconsistencies).
153. *See* U.S. CONST. amends. IV, V, VI, and VIII.
154. *See* Norman, *supra* note 8, at 729.
155. *See id.*

> by the country whose laws he has violated and from whose justice he has fled.[156]

The mere fact that a foreign court does not have the same procedural safeguards as our system should not permit the United States to interfere with another nation's criminal processes.[157] Further, as one commentator noted, the trial of a serviceperson in "courts of nations having different systems of jurisprudence . . . has been held *not* to violate any of . . . [his or her] rights under the United States Constitution."[158]

Concerns regarding trial fairness are valid; however, SOFA agreements patterned after NATO are specifically drafted to guarantee that basic due process requirements are met.[159] For example, Article XVII, section 9, of the United States-Japan SOFA states,

> Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:
> to a prompt and speedy trial;
> to be informed, in advance of trial, of the specific charge or charges made against him;
> to be confronted with the witnesses against him;
> to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;
> to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;
> if he considers it necessary, to have the services of a competent interpreter; and
> to communicate with a representative of the Government of the United States and to have such a representative present at his trial.[160]

These safeguards substantially mitigate the potential unfairness of an American serviceperson being tried in a Japanese court. Americans traveling and working overseas are accorded some but not *all* of the safeguards of the American system.[161] In actuality, "[r]ecognition of the host nation's right to exercise criminal jurisdiction is consistent with the laws of the United States, both domestic and international."[162]

156. 459 F.2d 1211, 1218 (D.C. Cir. 1972).
157. *See* Teagarden, *supra* note 47, at 28.
158. Kramer, *supra* note 28, at 7 (emphasis added).
159. *See id.*
160. Treaty of Mutual Cooperation and Security, *supra* note 102, at 1666.
161. *See* Teagarden, *supra* note 47, at 28.
162. *Id.* at 33.

When unlawful offenses occur in an international context, the rights of the individual should not be the sole factor in the criminal justice equation. Foreign policy requires that the situation be analyzed on a broader scale. *Wilson v. Girard*[163] laid out a balancing test typically employed by United States courts in these situations. This test involves weighing the national interest justifying the stationing of troops abroad against the possibility of any deprivation of constitutionally protected rights at the hands of foreign local law.[164] Generally, national interests will trump individual rights.

In sum, constitutional implications raised by waiving United States criminal jurisdiction under SOFA agreements are strong. Nevertheless, drafters of these agreements have taken these concerns into account and have adequately preserved minimum due process protections within the agreement. Therefore, these concerns should not serve as a roadblock to other much needed modifications to the United States' SOFA negotiation process.

D. Steps Taken by the United States to Improve the Situation in Japan

At present, the United States has taken only three steps to improve relations with Japan. The first was to jointly create a Special Action Committee on Okinawa ("SACO"), to reduce the excessive burden of United States' military bases on Okinawa.[165] Specifically, SACO was established to develop recommendations "on ways to consolidate, realign and reduce [United States] facilities and areas, and adjust operational procedures of [United States] forces in Okinawa."[166] The second step was to agree to give "*sympathetic consideration* to requests [for early custody of the accused] concerning rape and murder cases."[167] The final step was for the United States to investi-

163. 354 U.S. 524 (1957).

164. *See generally* Wilson v. Girard, 354 U.S. 524 (1957) (where an American solider, while guarding a machine gun and clothing, fatally wounded a Japanese woman who was gathering expended machine gun cartridges). Although the security treaty between the United States and Japan grants the United States primary jurisdiction over members of the military in relation to offenses arising out of any act done in the performance of an official duty, the treaty also provides that the United States' authorities shall give sympathetic consideration to a Japanese request for waiver of jurisdiction. *See id.* at 547.

165. *See* Bugni, *supra* note 137, at 107.

166. *Id.* (quoting SPECIAL ACTION COMMITTEE ON OKINAWA, INTERIM REPORT (Apr. 15, 1996), *at* http://www.okinawa.ttc.co.jp/chijicomment-e.html (last visited Sept. 29, 2002).

167. Norman, *supra* note 8, at 724 (emphasis added).

gate the feasibility of establishing floating bases in the Pacific Ocean.[168]

These steps have merely been band-aids on the suffering relationship between Japan and the United States relationship. This Comment asserts that the United States-Japan SOFA, as originally drafted, is unfair. If the United States desires to build and maintain longstanding, positive international relations, it needs to revise and update the Japanese agreement and take a different approach when drafting SOFAs with other nations.

E. Avoiding Criminal Jurisdiction on a Larger Scale: The International Criminal Court

Current events further demonstrate deteriorating foreign relations as a result of the United States' absolute refusal to surrender to another nation or entity's jurisdiction. Recently, the United States refused to ratify the Rome Treaty that would create the world's first International Criminal Court ("ICC"). The ICC is a transnational forum to prosecute individuals, not governments, for the commission of crimes that "shock the conscience of humankind,"[169] such as "genocide, war crimes, [and] crimes against humanity."[170]

Despite the fact that the ICC "will not supercede national legal systems . . . [but] will intercede only when national courts are unable to investigate or prosecute serious crimes[,]"[171] the United States considers the ICC "fundamentally flawed because it puts American servicemen and women at . . . risk of being tried (by) an entity that is beyond America's reach, beyond America's laws, and could subject Americans—civilian and military—to arbitrary standards of justice."[172] Presently, seventy-five nations have ratified the Rome Treaty,[173] and

168. *See* Bugni, *supra* note 137, at 106.

169. John L. Washburn, *Exempting the United States from Equal Justice Under Law*, Carnegie Council on Ethics & International Affairs, *at* http://www.carnegiecouncil.org/test/lib _pov_washburn.html (July 2, 2002) (last visited Sept. 29, 2002).

170. *Bush Digs in Against War Crimes Court* (July 2, 2002), *at* http://www.msnbc.com/news/774480.asp (last visited July 2, 2002) (establishing that crimes against humanity include murder or torture, rape, and sexual slavery).

171. *Id.*

172. *Id.* White House spokesman, Ari Fleischer, stated that "[t]his is a very important matter of principle about protecting Americans who uniquely serve around the globe in peace-keeping efforts. . . . The world should make no mistake the United States will stand strong and stand on principle to do what is right to protect our citizens." *Id.*

173. *See* Anthony Deutsch, *International War Crimes Court Opens for Business*, THE SACRAMENTO BEE, July 1, 2002, *at* http://www.sacbee.com/24hour/world/story/452408p-36227x35c.html (last visited July 2, 2002).

the United States is "the only democratic country in open opposition" to the ICC.[174] Alas, "[w]hen the United States voted in Rome against the treaty . . . , it broke ranks with its closest allies."[175] Other countries protest the United States' "tendency to behave like a rogue superpower, responsible to no one but . . . [itself, and many had] hoped that [the] September 11th [terrorist attacks] would [have] chang[ed] the United States and prompt[ed] it to re-engage with the international community."[176] Thus, similar to the friction caused by inequitable SOFAs, "the most corrosive effect of the U.S. vote against the . . . Treaty . . . [appears to be] the damage done to the moral dimension of U.S. international leadership."[177]

IV. Solution

The United States should heed lessons to be learned from the fading United States-Japan partnership. Since World War II, Asia has been a region of major interest to the United States.[178] The United States has invested much time and energy by fighting two wars on the continent and expending more than 100,000 lives in those endeavors.[179] Japan is currently the most powerful nation in that region. As expected, the United States government maintains a keen interest in Japan, and it is to its advantage to foster and maintain positive relations with this Asian powerhouse.

Due to the inordinate amount of economic and political power that the United States currently possesses, it has been "unavoidably thrust into a position of global leadership."[180] It is essential that the United States set an example and undertake a more egalitarian approach when it creates SOFAs in the future. Specifically, the United States must take on an international morality. This involves realizing and addressing the "extra-legal obligations . . . [that are] incumbent

174. Washburn, *supra* note 169.

175. *The Case for U.S. Support*, Lawyers Committee for Human Rights, *at* http://www.open.igc.org/khr/feature/50th/USPOS.htm (July 2, 2002) (last visited Sept. 29, 2002).

176. Ramesh Thakur, *Diplomacy's Odd Couple, The U.S. and the U.N.; Peacekeeping*, INT'L HERALD TRIBUNE, July 26, 2002, at Opinion Section, 11.

177. *Id.*

178. *See* HARTMANN & WENDZEL, *supra* note 103, at 413.

179. *See id.*

180. DAVID LITTLE, AMERICAN FOREIGN POLICY & MORAL RHETORIC THE EXAMPLE OF VIETNAM 86 (1969).

upon [a] . . . state in respect . . . to its international dealings."[181] Drafting a SOFA does not merely create a legally binding document, but rather fosters a partnership, embracing another culture and sharing human values.

A. Addressing the Historical Context of the Host Country

The first step in undertaking an international morality is to develop a cultural sensitivity toward the host country by analyzing its historical roots. For example, "war and conflict have been almost constant phenomena in Asia."[182] If the United States is to shape a SOFA to accommodate the Asian culture, it must take into account that "nearly all of Asia fell under foreign . . .domination in the . . .pre-twentieth century imperialist expansion . . .[,] [t]he colonization-decolonization process left a permanent mark [, and] . . . Asians are bound to be at least somewhat suspicious of the intentions of foreigners. . . ."[183]

Analyzing the situation at hand, both Japan and the United States would have benefited had the United States studied the history of the sites of its bases prior to entering the agreement. For example, Okinawa, where most Japan-based American troops are stationed, has an exceptionally precarious past. This region of Japan is unique because it has always been somewhat separate from mainland Japan. Annexed to Japan in the 1870s, at the close of World War II it was the site of one of the war's last major battles,[184] which lasted three months and claimed 234,183 Okinawan lives.[185] Approximately one-third of the Okinawan population was lost in that battle.[186] At that point, the United States took control over the land until 1972, when it reverted back to Japan.[187]

Understanding the Okinawan experience would help the United States to understand why some Japanese citizens are so resentful of their military presence, especially in light of the continuing crimes perpetrated by United States servicepeople stationed in Okinawa. Both Japanese and specifically the Okinawans deserve to have their

181. Geoffrey Stern, *Morality and International Order, in* THE BASES OF INTERNATIONAL ORDER ESSAYS IN HONOUR OF C.A.W. MANNING 134 (Alan James ed., Oxford Univ. Press 1973).

182. HARTMANN & WENDZEL, *supra* note 103, at 414.

183. *Id.* at 415.

184. *See* Norman, *supra* note 8, at 723.

185. *See* Chen, *supra* note 4, at A1.

186. *See id.*

187. *See* Norman, *supra* note 8, at 723.

cultural experiences factored into the United States-Japan SOFA. Each SOFA should be specially tailored to encompass the specific circumstances at hand and to be sensitive to the concerns of those directly affected by the agreement.

B. Equal Bargaining Power

The second step in undertaking an international morality is to ensure equal bargaining power within the SOFA, between the parties to the agreement. Traditionally, bargaining power has been determined by each country's relative degree of sovereignty, measured according to the country's general economic, political, and military strength. However, the notion of sovereignty is changing in the modern era.[188] Nations now possess varying degrees of military and economic power and thus are no longer measured solely according to their own strength, but also by the strength of their associations with other countries.

Today's view is that a nation can remain sovereign and "voluntarily band together for common defense."[189] This new vision communicates equality among nations. One country may have a smaller economy or army, but that country still holds a valuable asset—the strength that it provides another country by acting as its ally. Unfortunately, because the United States possesses such immense power on every level, it tends to operate with an arrogance that undermines its judgment in international relations.[190] This poses problems when countries such as Japan gain increasing power and demand to be treated more justly.[191] In order to establish and sustain positive working relations by means of a SOFA, the United States needs to make the SOFA equally beneficial, giving each country an active voice in its making and maintenance. This is especially important when the United States establishes a military base, becoming a guest on another country's land.

C. Updating SOFAs to Reflect the Current Situation

The third step in undertaking an international morality includes continually modifying SOFAs to conform to changing circumstances and to address the shifting needs of the parties to the agreement. Decades prior, the primary mission of the United States when entering

188. *See* Porrata-Doria, *supra* note 139, at 89–90.
189. *Id.* at 90.
190. *See* Little, *supra* note 180, at 9–10.
191. *See* HARTMANN & WENDZEL, *supra* note 103, at 418.

SOFAs was to contain communism.[192] However, following the demise of the communist threat, United States bases remained intact. Inevitably the purpose of these bases changed and it has become imperative that the agreements be modified to reflect these transformations.[193]

Generally, "[w]ith receding external threats, the host nation perceives less necessity for the stationing of foreign forces in its territory and for the granting of special privileges to those forces."[194] Internal factors such as political opinion and internal pressure will have greater weight in these situations.[195] The United States should recognize these changing attitudes and modify both the agreement and its presence in the host nation to reflect current circumstances.

These modifications are extremely important for SOFAs initially premised on war-time occupation that later lead to a continuing defensive operation. As opposed to United States SOFAs instituted for peace-keeping where consent is initially obtained from the host nation, SOFAs created following conquest are established *without* the host nation's consent. As in Japan, the United States often establishes bases in conquered countries under the guise of "reconstruction." In these situations, once the country has been "rebuilt" and security threats have diminished, theoretically the United States should have to then obtain consent to have any further presence in that host nation. The United States is likely reluctant to do this because it may anticipate that the host nation would call for SOFA revision and demand increased bargaining power in the agreement.

D. Enforce Current Provisions and Amend Inequitable Jurisdiction Provisions

The fourth step in undertaking an international morality requires enforcing current SOFA provisions, and modifying imbalanced and unfair jurisdictional provisions. For example, Article VII of the current United States-Japan SOFA calls for the parties to assist each other in the arrest, transfer of custody, and facilitation of communication and investigation of the accused.[196] Statistics and continuous Japanese complaints indicate that the United States is not living up to this term

192. *See* Hemmert, *supra* note 1, at 216.

193. *See id.* at 235.

194. John E. Parkerson, Jr., *The Peacetime Use of Foreign Military Installations Under Modern International Law*, 141 MIL. L. REV. 232, 235 (1993).

195. *See id.*

196. *See* Treaty of Mutual Cooperation and Security, *supra* note 102, at 11 U.S.T. at 1666.

of the agreement. Unfortunately, all too often "the law tends to be what we say . . . [and] not what we do."[197] The United States needs to make a "conscious commitment to the actual living out of peace-oriented values" to which it claims to ascribe.[198]

Not only does the United States need to abide by current provisions of the United States-Japan SOFA, it must also revise the sections that are inherently biased and unfair. Specifically, the United States should rework section 5(c), the custody provision of Article VII, which currently allows the United States to retain custody of the accused service person until he or she is formally charged by Japanese authorities.[199] When a crime has been committed on Japanese soil, at the very least, Japanese law enforcement should have access to the accused to investigate the matter at hand. The United States should be willing to work in conjunction with Japanese law enforcement to bring about expedient and just resolution to crimes committed by United States servicepersons.

On October 25, 1995, President Clinton declared that the United States would *agree* to give "*sympathetic consideration* to requests [for early custody of the accused] concerning rape and murder cases,"[200] however *sympathetic consideration* is not enough. The terms of the agreement should be changed to ensure United States compliance with the agreement's provisions and further, that criminals are brought to justice. "[T]he interests of the parties to the . . . [SOFA], as well as the national policies underlying the agreement, can only be served if the obligation undertaken in the agreement to surrender a serviceman to the host nation is recognized. . . .[Acting] contrarily[,] cast[s] in doubt the entire. . . arrangement [of which the SOFA is only a part]."[201]

The United States should also alter the nonreciprocal status of the current United States-Japan SOFA to reciprocal, similar to the NATO SOFA. This change would merely grant Japanese authorities the same rights to exercise jurisdiction on American soil if they were to station troops in the United States.[202] There seems to be no rational justification for why European nations under the NATO SOFA

197. Burns H. Heston, *The Role of Law in Promoting Peace & Violence: A Matter of Definition, Social Values, and Individual Responsibility, in* TOWARD WORLD ORDER & HUMAN DIGNITY 114, 122 (W. Michael Reisman & Burns H. Hestor eds., The Free Press 1976).

198. *Id.* at 26.

199. *See* Treaty of Mutual Cooperation and Security, *supra* note 102, at 11 U.S.T. 1665.

200. Norman, *supra* note 8, at 724 (emphasis added).

201. Teagarden, *supra* note 47, at 33.

202. *See* Hemmert, *supra* note 1, at 226.

are the only nations in the world bestowed this right, when Asian and other countries are not.[203]

Lastly, when the United States rightfully attains jurisdiction over one of its service persons, it should properly punish the wrongdoer. The Uniform Military Code of Justice, serving as the current working judicial authority, often only proscribes nonjudicial punishments or court martials.[204] These types of "punishments" can be seen as a slap on the wrist that fails to deter the problem, and instead exacerbates it. The United States should modify the Uniform Military Code of Justice to at least mirror its domestic criminal justice system, where the punishment increases according to the severity of the crime.[205] In line with the theory underlying the proposed ICC—that unless the world community is held accountable for the crimes it commits, those crimes will continue to occur—United States servicepersons must also be held accountable for the wrongs they commit, in order to halt the cycle of violence.[206]

E. Morality

The fifth step in undertaking an international morality is to actually incorporate *morality* into our international negotiations. Because of the United States' position of global leadership, its "standards of conduct must, inevitably, have a great influence in setting *the moral tone* of international relations. . . ."[207] "Without doubt, influence in the world depends on might and wealth. But it also depends on moral stature and the power of principles."[208] In order to live up to and maintain its dominant position, the United States must look at personal and national interests from the point of view of the welfare of *all* humans.[209] This involves embracing a wider system of values that tran-

203. *See* Norman, *supra* note 8, at 733.

204. *See* Caron, *supra* note 60, at 13–15.

205. *See* Caron, *supra* note 60, at 16 (noting that it is not uncommon for United States service persons court-martialed in foreign countries to receive lesser sentences that those that would have been imposed in United States' civilian courts).

206. *See generally* LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE CASE FOR U.S. SUPPORT (Sept. 24, 2002), *available at* http://www.open.igc.org/khr/feature/50th/USPOS.htm (last visited Sept. 29, 2002). ("By helping to deter atrocities, the court will reduce the chances that American troops will have to be deployed in response to future [international crises]").

207. LITTLE, *supra* note 180, at 86 (citing ROBERT F. OSGOOD, IDEALS AND SELF INTEREST IN AMERICA'S FOREIGN POLICY 444, 450 (1953)).

208. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 206.

209. *See* LITTLE, *supra* note 180, at 24.

scends its national interests.[210] Whether it be putting aside "unfounded fears of phantom prosecutions"[211] and signing on to the International Criminal Court, or on a more wide-spread level, weakening its jurisdictional stronghold when drafting SOFAs, the United States must demonstrate a willingness to answer to others, rather than only to the American public.

Obviously this is a lofty and optimistic proposal that may be extremely difficult to carry out. It is hard to imagine the United States yielding some of its immense power because there is a "natural unwillingness of people to abandon power . . . as a result of proposed changes, even when it is argued that these changes will confer benefits on members of the international system generally at a later stage."[212] But most foreign policy decisions do *not* require forfeiting national interests entirely. Rather, they tend to involve more subtle questions regarding the protection of treaty rights and the preservation of outlying bases.[213] If the United States can make these decisions equitably and with respect for the concerns of the host nation, it can set the groundwork for more diplomatic foreign policy.

Conclusion

The Japanese-United States partnership is deteriorating. The roots of this failure can be directly linked to crimes committed by United States servicepeople in Japan. Realizing their unequal status under the current Japanese-United States SOFA, some Japanese citizens are demanding an immediate revision of that agreement. Until now, the United States has mostly ignored these pleas and as a result, a mutually beneficial international partnership is in jeopardy.

In this global era, a nation's strength is not only defined by its economic and military power, but also by the partnerships it maintains. One way the United States can improve its foreign policy is to learn from the Japanese experience and alter its approach to negotiating SOFAs with other foreign countries. The United States needs to humble itself and take a more egalitarian approach when entering into these agreements. If the United States can realize that more than

210. *See id.* at 19.

211. Press Release, William F. Schulz, *The "Unsigning" of the International Criminal Court Treaty* (May 6, 2002), *at* http://www.amnestyusa.org/news/2002/usa05062002.html (last visited July 2, 2002).

212. F. S. Northedge, *Order and Change in International Society, in* THE BASES OF INTERNATIONAL ORDER 7 (Alan James ed., Oxford Univ. Press 1973).

213. *See* LITTLE, *supra* note 180, at 22.

its own power and prestige is at stake when engaging in international agreements, then it will be able to establish more positive and far-reaching relations in the global marketplace.

Particularly, the United States must be willing to loosen its jurisdictional grip, allow itself to be held accountable to others, and adopt an international morality. This entails fashioning SOFAs that take into account the host country's history and cultural background, that allot equal bargaining power, that can adapt to the current social order, that are fair as drafted and actually enforced, and lastly, that encompass *morality* in general. Overall, this requires the United States to value and respect all human needs, not only the needs of *its* citizens. If the United States can learn from its mistakes and undertake these difficult objectives, it will strengthen its international presence and foster more honorable foreign relations.