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Whose Security Is It? Military Violence Against Women During Peacetime

by Cathleen Caron*

When one thinks about military violence, crimes committed against civilians during armed conflict—war crimes—come quickly to mind. In the last decade, human rights groups have campaigned to expand the concept of war crimes to encompass additional offenses that particularly affect women. Recognition of rape as a violation of international law took an important step when the International Criminal Tribunal for Rwanda (ICTR) defined rape as a crime against humanity in its landmark conviction of Jean-Paul Akayesu on September 2, 1998. In *The Prosecutor v. Akayesu*, the ICTR determined that rape qualifies as a crime against humanity when it is committed for discriminatory purposes against civilians during a systematic attack. Peripheral violence against women during warfare—violence caused by war that occurs far from the frontlines—has also received more attention in recent years. For example, during World War II, the Japanese Imperial Army forced Korean women to serve as sexual slaves to Japanese soldiers. After years of intense lobbying efforts by women's organizations, the Japanese government issued a formal apology in 1998 to these "comfort women."

There remains, however, another dimension of military violence that has yet to receive significant global attention: the violence against women generated by the long-term presence of military personnel in foreign nations during times of peace. The United States currently has approximately 1,400,000 active duty military personnel on military bases in 16 countries throughout the globe. Many U.S. military personnel have been charged with acts of sexual violence toward local women. Despite the legal developments of *Akayesu* for crimes that occur during times of war, similar human rights violations, when committed by U.S. military personnel during times of peace, are often exempt from an effective judicial process. Japan will be used as a case study to demonstrate how jurisdictional determinations affect the judicial process for crimes against women committed by U.S. military personnel stationed abroad.

U.S. Military Presence in Times of Peace

The United States establishes bases overseas through bilateral treaties negotiated between the United States and the host countries. The terms included in these Security of Forces Agreements (SOFAs) largely depend on the negotiating power of the parties involved. Not surprising is the East-Asia/U.S. Women's Network Against United States Militarism's finding that "[host] countries with more power can get better agreements."

Typically, SOFAs cover issues such as land lease arrangements, labor contracts, customs and duties, and jurisdiction issues. Criminal jurisdiction over acts committed by U.S. military personnel on foreign soil is divided into three categories: exclusive foreign jurisdiction, exclusive U.S. military jurisdiction, and concurrent jurisdiction. These categories determine whether a host country will try U.S. servicemen accused of criminal offenses in its own courts or whether the U.S. military judicial system will handle the cases.

Exclusive (foreign or U.S. military) jurisdiction exists when an act committed by U.S. military personnel offends solely the laws of one State Party to the SOFA. In other words, when only one state, either the host country or the United States, has a law criminalizing the behavior in question, that party has exclusive jurisdiction to try and punish the accused.

If an offense violates both U.S. laws and host country laws, concurrent jurisdiction exists. Each SOFA designates categories of crimes as either primary foreign concurrent or primary U.S. military concurrent jurisdiction. If a state (either the United States or foreign host country) has primary concurrent jurisdiction, it has the first right to exercise authority over the accused. Once jurisdiction is exerted, the other state has no legal recourse over the military offender's criminal offenses, regardless of the ultimate disciplinary outcome under the other party's system. An examination of SOFA arrangements indicates that most have double jeopardy provisions that formally preclude the state without primary jurisdiction from trying the offender a second time for the same crime.

If the state with primary concurrent jurisdiction chooses not to exert its right, the other state may then exercise jurisdiction. For example, Article XVII of the United States-Japan SOFA

establishes that the United States has primary concurrent jurisdiction over offenses committed solely against U.S. property or security, between members of the U.S. armed forces, and for acts committed while in the course of official duty. Japan has primary concurrent jurisdiction over "any other offense." The state, however, with primary concurrent jurisdiction "shall give sympathetic consideration" to a request by the

other state to waive its first right, thereby acceding to a transfer of the case in circumstances of "particular importance."

SOFA Jurisdiction in Practice

When U.S. servicemen commit crimes of sexual violence abroad, serious questions need to be raised concerning the SOFA procedures that designate judicial forums, the adequacy of human rights protections, and the sovereign rights of the host nation. According to a recent U.S. Department of Defense report, entitled, "Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals Over United States Personnel 1 December 1996-30 November 1997" (CJFT), U.S. military personnel committed 3,196 concurrent jurisdiction offenses that fell within primary foreign jurisdiction and 187 offenses within exclusive foreign jurisdiction. According to these statistics, one would assume that foreign courts processed the majority of crimes committed by U.S. military servicemen. This scenario, however, is not the case.

SOFAs mandate that the state with secondary concurrent jurisdiction request waivers only in cases of particular importance. The U.S. policy, however, is to automatically request a waiver for U.S. personnel implicated in any criminal activity. In accordance with Army Regulation 27-50, military authorities should make efforts "that will maximize United States jurisdiction to the extent permitted by applicable

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agreements." Indeed, the U.S. military seems to be quite successful in acquiring the transfer of cases back to its authority. The CJFT notes that host countries granted 86.1% of U.S. military requests for waiver of primary foreign jurisdiction in 1997. The frequency and success of the requests for waiver of primary foreign jurisdiction ensure that large numbers of U.S. personnel remain under U.S. jurisdiction for crimes committed abroad.

In addition to requesting waivers, U.S. military authorities may secure jurisdiction over accused servicemen by construing the circumstances of a crime so that the offense lies within the U.S. military's primary concurrent jurisdiction. The manner by which an act is determined to be committed in the course of official duties (one of the categories for U.S. military primary concurrent jurisdiction) reveals how the U.S. military has the possibility of manipulating the facts of a case to support its jurisdictional claims. To illustrate, the United States-Japan SOFA vests full authority in the suspect's commanding officer to issue a certificate determining if an alleged act occurred while a serviceman was performing official duties. Although a host country may rebut the classification presumption, seldom does such a challenge of the U.S. military occur.

If the host country and U.S. military both claim that a crime falls within their respective primary concurrent jurisdictions, the conflict is settled through state negotiations. There is no third party authority to which complaints may be brought. If the issue is not resolved between the U.S. military authorities and host nation prosecutors, the issue moves from a legal to a political realm, with foreign affairs officials making the final jurisdiction determination. Usually jurisdictional conflicts result in the U.S. gaining military jurisdiction.

Although SOFAs clearly dictate that a state has exclusive jurisdiction if an act violates the laws of only one state party, the United States nonetheless retains jurisdiction in a large number of these cases. Although no SOFA mandates this procedure, the U.S. military often requests a jurisdictional waiver from the host nation when a U.S. serviceman is accused of a foreign law violations. Although the U.S. military can not criminally prosecute its own servicemen for violating a foreign law, it can initiate collateral criminal proceedings or take administrative measures internally. Typically, when the U.S. military offers these alternative actions, host nations are amenable to waiving exclusive jurisdiction because it relieves them of the costs and responsibilities associated with crimes committed by foreigners. Although SOFA arrangements establish the host nation's authority to assert jurisdiction over many instances of criminal conduct by U.S. servicemen, the political and practical reality of these crimes often ensures that the U.S. military has control over its own. U.S. jurisdiction for crimes committed by servicemen abroad is pervasive; therefore, it is essential that this juridical process is effective.

U.S. Military Prosecution of Crimes Against Women

There are many reports documenting violence by U.S. military personnel against women in a host country during

times of peace, which often are resolved within the internal U.S. military adjudicatory process. A successful U.S. military prosecution for crimes of sexual violence, however, is difficult for a victimized woman from a host country to obtain. Foreign women with claims against U.S. military personnel not only are excluded from any participation in determining the adjudicatory forum, but then are limited to recourse within an unfamiliar U.S. military court system.

According to the Uniform Code of Military Justice (UCMJ), which regulates behavior in the U.S. military, personnel guilty of crimes receive either non-judicial punishments or courts-martial. Non-judicial punishments are typically verbal admonishments, demotions in rank, or forfeitures in pay. Courts-martial are military courts divided into general, special, and summary courts-martial, each with a different function and authority to mete out punishments. These military processes often anger women seeking redress in the halls of military justice because the results of non-judicial punishments and courts-martial are often unpredictable and do not guarantee disciplinary outcomes for three primary reasons.

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. Transparency refers to the clarity and accessibility of the procedures and outcomes of the system. The lack of transparency in U.S. military proceedings undermines victims' confidence in the system.

Second, the commanding officer, according to the UCMJ, 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. Although one would assume that the severity of the allegations would determine whether a non-judicial punishment or a court-martial is appropriate, the UCMJ does not mandate this

result. In fact, the UCMJ does not prescribe where categories of offenses fall within the military justice structure. To the contrary, the UCMJ is arranged by the type of disciplinary action that may be ordered. Only if the commanding officer considers more than 30 days incarceration to be the appropriate punishment for the alleged crime will the case be referred to a court-martial. The amount of discretionary authority left to the accused's commanding officer, therefore, highlights a judicial system where it is possible that servicemen guilty of serious crimes, such as rape, will receive non-judicial punishments.

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. As noted, once the U.S. military asserts its jurisdiction, a host country is often precluded from initiating its own criminal charges under the terms of the SOFA. As a consequence of these factors, women from host countries are regularly deprived of an open and fair adjudication process for crimes committed by U.S. servicemen.

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Okinawa: An Example of Military Injustice

Perhaps no place illustrates the seriousness and volatile nature of the issues at stake as well as the island of Okinawa, Japan. In 1995, former U.S. defense secretary William Perry commented, "The U.S. [military]-Japan relation is an absolute key to the security and stability in Asia, and nobody benefits more than Japan." But many Okinawan women have a different opinion about whose security interests are at stake, as regional military security has resulted in local insecurity for Okinawa women.

A History of Sexual Violence in Okinawa by U.S. Servicemen. Although formal U.S. occupation ended in 1952, Okinawa remained under U.S. military authority until 1972, when the island reverted to Japanese rule. The United States and Japan signed a SOFA in 1960 to establish, among other things, the jurisdictional boundaries applying to U.S. military personnel on the island. This relationship between the U.S. military and the local populace of Okinawa is marred with hundreds of allegations of sexual crimes. Okinawan police reports from 1945 to 1950, for example, reveal 278 reported rapes by U.S. servicemen, including the rape of a nine month old girl in 1949. Similarly, in 1953, local records indicate that a U.S. serviceman kidnapped, raped, and murdered a six year old Okinawa girl.

With the reversion of Okinawa to Japan in 1972, local authorities gained more authority to address problems caused by the U.S. military, but acts of sexual violence persisted nonetheless. A local human rights group, Okinawan Women Act Against Military Violence, cite Okinawan police records that report U.S. military personnel raped 200 Okinawan women between 1972 and 1997. This number, however, is likely to be artificially low not only because of the difficulty and uncertainty of criminal justice processes, but also because of the historical under-reporting of sex crimes.

The Current Perspective on Sexual Violence in Okinawa by U.S. Servicemen. Today approximately 47,000 U.S. active duty personnel in 42 military installations are stationed in Okinawa. The brutal rape of a 12 year old girl in September 1995 by U.S. military servicemen Rod Harp, Kendrick Ledet, and Marcus Gill, however, marked a major turning point for Okinawans. According to well-publicized accounts, the girl was returning home after buying a notebook for school in a neighborhood store when the three U.S. servicemen abducted her, beat her, bound her with duct tape, and took her to a nearby field where they gang raped her. Then commander of U.S. forces in the Pacific, Admiral Richard Macke, incensed many Japanese citizens even further when he suggested that the servicemen were "stupid" because they could have bought a prostitute for less money than they spent on renting the car used in the abduction. The event quickly embarrassed the United States, causing President Clinton and then U.S. ambassador Walter Mondale to issue formal apologies to the Japanese government.

An apology, however, did not appease many Okinawans, including the 85,000 residents who gathered to express anger over the rape and demand changes in the conditions of the U.S. military presence. Okinawan women took center stage to tell the world that the girl's rape was not an anomaly, but rather a particularly brutal example of a frequent occurrence. Okinawan women used this incident to illustrate how the U.S. military presence threatens their personal

security and is synonymous with their victimization—they had had enough. "Security treaties for whom?" scoffed Yayori Matsui, Director of the Asia-Japan Women's Resource Center, in a later discussion on the effects of U.S. military presence in Asia. Ms. Matsui, an active supporter of the Okinawan women's efforts, questions "[w]hose security it is if women and children are raped and harassed by military men"

A U.S. newspaper, *The Dayton Daily News*, conducted an eight month special investigation, which included numerous Freedom of Information Act requests and federal lawsuits against the Navy and Army, to bring the workings of the military justice system into the public light. The newspaper revealed that from 1988 to 1995, nearly a third of the 169 reported courts-martial in Japan for sexual assault were actually special courts-martial, where the maximum sentence is six months confinement. Many of the final convictions in special courts-martial for charges as serious as rape are substantially lower than those typically handed down in U.S. civilian courts. For example, one sailor accused of attempted rape in 1991 was convicted in the U.S. military courts of indecent assault, fined \$150, and discharged for bad conduct. Another marine received six months confinement when a military court found him guilty of rape. *The Dayton Daily News* exposé also revealed that in 1988, a marine received a simple reprimand, a form of non-judicial punishment, for having "poor judgment" in the attempted rape of a 17 year old Okinawan girl. In contrast, a first time rape conviction in some U.S. civilian courts mandates five years incarceration.

Conclusion

The battles in Okinawa highlight the ongoing problems generated by the long term presence of foreign troops regulated under SOFA terms. When U.S. servicemen commit crimes against foreign women, few assurances exist that justice will be rendered. The international community supports the establishment of criminal courts, such as the ICTR, to protect civilians from military violence during times of armed conflict. The only safeguards currently available to civilians for military crimes committed during times of peace, however, are those that their country manages to negotiate with the incoming military power.

According to Article 26 of the International Covenant on Civil and Political Rights, a state must guarantee its citizens equal protection under the law. A country hosting U.S. military personnel can not provide its citizens with such basic protections. The inequity of bargaining power when developing a SOFA with the United States, compounded by the successful assertions of U.S. military jurisdiction and the discretionary U.S. military adjudication process, renders many host nations defenseless within their own borders. As the case of Okinawa illustrates, the current system provides for the continuous presence of U.S. military troops during times of peace, a circumstance that can significantly infringe upon the host nation's sovereignty and directly impact the rights of its women citizens. A broader legal definition of military violence needs to be adopted by the international community to ensure that civilians are guaranteed their security not only during war, but in times of peace as well. ☐

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