

The US-Japan Status of Forces Agreement and Okinawan Anger. A DEBATE

C. Douglas Lummis

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special criminal law appended to SOFA which denies the Japanese authorities to take possession of US military property without US military permission.

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The Japanese authorities are awaiting a response to their request to examine the flight recorder. The fact

This article, and the subsequent exchange with Major Nathan C. Hurst, originated in a symposium on the US global military posture that appeared in Mother Jones. As the article was being posted, we learned that on the night of October 24 another US plane, this time a small Cessna 172 had crashed in Okinawa after clipping high-voltage wires, and burst into flames. The four US airmen on board were reportedly members of a private flying club at Kadena Air Base, "the hub of US airpower in the Pacific". Kadena is home to 18,000 US airmen and 4,000 Japanese employees. US authorities stated that the plane was government owned. Local firefighters put out the blaze and escorted the four to a nearby hospital. As in the story that follows, the crash perfectly illustrates the conflict over jurisdiction under the Status of Forces Agreement as US authorities denied Japanese officials attempts to investigate the plane in order to determine the cause of the accident. The Okinawa Times showed a huge crane loading the plane's wreckage onto a US military truck. US authorities stated that there is a

that the crash occurred near Nago, where opponents have been fighting US plans to build a new Marine Air Station, is certain to strengthen calls to halt plans for construction. Fuji TV's video

(<http://fnn.fujitv.co.jp/en/news/headlines/articles/CO00142951.html>) of the crashed plane shows local firefighters putting out the blaze and interviews boys who were playing baseball in a nearby field.. For a

discussion

(<http://www.japanupdate.com/forum/showthread.php?t=8734>) of the incident and commentary on Okinawan anti-base sentiment among US service personnel and others, see the Okinawa Japan Forum.

In her article "How to Stay in Iraq for 1,000 Years," Frida Berrigan takes up the issue of status of forces agreements (SOFAs), those treaties that determine the standing of US troops based on operating in foreign countries. She mentions that the special privileges granted under the US-Japan

SOFA have been a particular source of resentment in Okinawa, where GIs who had committed crimes against Okinawans were repeatedly spirited away by US military police and disappeared, apparently transferred back to the US, leaving it unclear whether they were ever charged in a military court. Find the full Japanese and English texts of the 1960 SOFA agreement ratified by the Japanese and US governments here (<http://apjif.org/data/fulltext.pdf>).

The Okinawa experience brings into focus the humiliation of this extraterritoriality, but a recent incident here raises another question: When push comes to shove, to what extent is the US military willing to abide by even its own agreements?



Futenma base in the middle of Ginowan City

In August 2004, on Friday the 13th, a helicopter from the US Marine Air Station at Futenma smashed into the side of a building inside Okinawa International University, fell to the ground, exploded, and burned.



Toxic smoke blazes from the wreckage

Miraculously, no one other than the crew was injured. But what happened afterward was just as extraordinary.



CH-53 in flames

Immediately, scores of Marines came pouring over the fence (the base and the university are back-to-back), and occupied the university. They set up a cordon of yellow tape around the accident site, and kicked out not only reporters and cameramen, but also the Okinawan firemen who had come to put out the blaze, the local police who had come to investigate the cause of the accident, and even the mayor of the town.



Ginowan City firefighters on the scene

That evening a friend drove me through some backstreets, avoiding roadblocks, and we managed to get into the university, as far as the yellow tape blockade. Standing behind the tape was a line of Marine MPs, pistols on their belts. Behind them, Marines were dismantling the wrecked helicopter and loading it into trucks (from a police standpoint, destroying the evidence).



Marines inspect wreckage at the site of the crash

This behavior naturally drew a lot of protest, but most Okinawans came to the same conclusion: It

proved once again that the SOFA needed to be revised. Wondering about this, I found a copy of the agreement and searched for the clause that permits the US military to occupy turf outside its bases.

There is no such clause.

Moreover, concerning the right of MPs to operate outside their bases, the SOFA is clear. If American GIs are making, or involved in, some kind of trouble off base, then US military police may, after notifying Japanese police of their intentions, go to where the trouble is and use their police powers against those GIs. But the MPs have no police powers over Japanese citizens outside the bases.

So what were those pistols, then? Under the existing SOFA, they had no legal basis for threatening people outside the base with violence. When a military unit, carrying weapons, takes control of a piece of foreign territory without the permission of that territory's government, the proper term, I believe, is a military incursion. The occupation of Okinawa International University was small-scale and short-lived but in the context of international law, that's what it was.



Marines occupy Okinawa International University campus

The incident is telling as to how the US military understands its status in foreign countries. That is, it will obey the status of forces agreements when it's no big inconvenience, but in the case of a crisis, it will operate at will.

Should the US forces in Okinawa ever get involved in a war with a nearby enemy, we can be sure that the military will treat the entire archipelago, and not just certain designated areas, as its base. Of course, this could be a special characteristic of Okinawa, which the US military, and especially the Marine Corps, still partly views as its own turf, the spoils of an earlier war. Maybe in some other countries the military will be more respectful, even in crisis, of local sovereignty. But I wouldn't be too sure.

Response [1] by Major Nathan C. Hurst

Mr. Lummis makes some points here that I would like to address.

First and foremost, I agree that we have often

poorly handled the legal proceedings against Marines and Soldiers on Okinawa that have committed crimes. Those Article 15 investigations (like a grand jury) and general courts-martial should have taken place on Okinawa and been very open and public to give Okinawans a view of how the wheels of military justice work. Let me assure you, they work well. The military does not want criminals in its ranks. It is bad for the good order and discipline of the force.

In fact, the SOFA provision excluding US troops from prosecution in Japan for crimes punishable in the USA (either under federal law or the Uniform Code of Military Justice, UCMJ for short), is not only common (found in Germany, Belgium, and any other nation where we have a SOFA), but is a common practice when there is a dispute of jurisdiction over troops based in the United States.

Bottom line: The process is thorough and there are many safeguards against commanders influencing the process. While the US military has not done a good job making this process transparent to the Okinawans and Japanese, Americans can rest assured that guilty troops get convicted and serve sentences.

As for the helicopter crash, that is a different story and no SOFA is going to cover it. I agree that the Marines could have done a better job

being more open and working with the local authorities. However, there are bigger factors at play here which prevented the Japanese government from lodging a formal protest and of which Mr. Lummis is most likely ignorant.

Military equipment, along with diplomatic equipment, is considered under international law as an "instrument of the sovereign." That means that it has, for lack of a better term, diplomatic immunity and falls solely under the authority of the owning government. This is why US forces protect US aircraft while on the ground in foreign lands and why US Marine Guards and Diplomatic Security officers can use deadly force to protect US Diplomatic Missions and their personnel abroad. Sending an armed Marine security detachment to guard the crash site was the US government protecting its interests. I can assure you that within minutes of the crash, the Deputy Chief of Mission at the US Embassy in Tokyo was notified of the situation and was already talking to the Japanese Government about it.

Instruments of the sovereign can contain very sensitive information and technology. Given Okinawa's proximity to China there was a pressing national security need to secure the crash site to prevent US military technology from disappearing from the crash site, quite possibly into Chinese intelligence service hands. So, while the method was less than pleasant, the need was

urgent.

Let me make this clear, though: I feel that American troops abroad need to be MUCH more culturally sensitive than they are. It is somewhat easier for troops stationed abroad in European nations, where there is much more cultural commonality. However, being stationed in the Far East in the midst of a ancient and proud culture very different from ours makes it much easier to offend one's hosts.

Bottom line: It was meet and right of the US forces to secure the crash site, excluding all non-military from the site. It was not arrogance or a military incursion. It was a matter of national security. However, they should have done a better job of working with the local authorities.

I am a US Army Officer and the views I expressed here are my own. They do not reflect official policy or position of the US Army.

Lummis responds [1]

I want to thank Maj. Nathan C. Hurt for his thoughtful and informative response to my article. In it he makes two main points. 1) Don't worry, the military is by no means lax in punishing lawbreakers in its midst, though it is not always good at making this process transparent to people in the countries hosting its bases. 2) Military equipment is considered an

"instrument of the sovereign" under international law, so the Marines from Futenma Airbase were legally justified in using (threat of) deadly force to keep people away from their helicopter.

As to the first, I do know that the military is tough on lawbreakers in certain cases - much tougher sometimes than most civilian authorities. But this does nothing to assuage the doubts that military justice may be a whole lot more lenient when the victim is a foreigner - say, an Okinawan woman. The "double standard" is hardly a novel idea in US justice.

Concerning the concept "instrument of the sovereign", Maj. Hurt is quite correct in his guess that this is something I did not know about. I am not alone in this: the Okinawan people do not know about it, Mayor Iha Yoichi of Ginowan City (where the crash occurred) doesn't know about it (he has a different interpretation) and apparently the then US Consul General didn't know about it - or if he did, I am not aware that he mentioned it. (Maybe that's why he got replaced.)

Maj. Hurt says that the views expressed in it are his own. Does that mean that the concept of "instrument of the Sovereign" is his own opinion or interpretation, or is it really an accepted principle in international law? If the latter, is this customary law, or is it established in an international treaty? If there is such a treaty, what is its name? Does it guarantee the right to

use deadly force to protect military equipment in foreign countries to all states, or only to some? If a Mexican warplane crashed across the border in Texas, would the Mexican army have the legal right to surround it with armed troops and kick out the Texas police and fire department?

Incidentally, it is a little hard to imagine Chinese spies infiltrating the Ginowan City police and fire department. The explanation believed by most Okinawans is more plausible: that the helicopter in question contained parts made of depleted uranium and the Marines wanted to conceal that fact.

Major Hurt responds [2]

Thank you, Mr. Lummis, for your thought-provoking response to my post.

I have done a little research and have learned that in most cases, American service members are generally tried on the post/base nearest site of the crime. Generally, this facilitates access to evidence, witnesses, and makes giving testimony easier. It does seem counter-intuitive to move the troops to another post or base in the lead-up to the trial, unless there is no way to keep them in pre-trial confinement at their present duty station. However, that is just a guess. There might be a few isolated cases where unscrupulous commanders sent service members back stateside to avoid local prosecution.

However, military lawyers will generally stop this if they catch wind of it.

In fact, though, it is pretty hard to quickly “spirit” a service member back to the states, as ending an overseas tour prior to the prescribed tour length (generally 12, 24, or 36 months) requires some waivers with good reasons. At any step along the way, a commander, assignments officer/NCO, or someone else in the process can bring the move to a screeching halt. Additionally, there are issues like shipment of household goods and clearing the base to consider. Getting this done takes a considerable amount of time, which allows the situation to develop on the host nation side.

I would also like to correct a misstatement I made earlier. The military equivalent of a grand jury investigation is an Article 31 investigation. An Article 15 proceeding is how the military administers non-judicial punishment.

I have also done some more research into the crash. I invite Mr. Lummis and anyone else interested to read the account of it on the US Embassy Tokyo website (<http://tokyo.usembassy.gov/e/p/tp-20040827-61.html>). This background briefing provided a somewhat different picture of the incident than the one Mr. Lummis presented.

This version is, in all probability, closest to the

truth for two reasons: First, the Marines who scaled the fence were credited with pulling the three crew members from the wreck before it caught fire, thereby saving their lives. (It also credits them with helping to evacuate- not occupy- the building the helicopter struck.) Second, Marines would not have weapons or ammunition unless they were either on a rifle range, on a military operation in a war zone, or serving on duty as a military policeman (or in some other base security function where they would be authorized to carry a weapon and ammo). During normal duty days, the weapons are locked in the arms rooms and the ammunition is secured in the ammunition storage point. There are formal procedures required to get either from these storage areas and both are tightly controlled when they are issued. These Marines were most likely doing their normal daily duties, were unarmed, saw the helicopter go down, and did what any Marine would do for another Marine in danger: they went to help as quickly as they could. The armed forces to secure the crash site most likely arrived later.

I cannot comment on the Mayor of Ginowan City or the US Consul General's ignorance of responsibilities/actions/etc. However, I can tell you that the account provided by the embassy states that the Japanese Ministry of Foreign Affairs was notified within 42 minutes of the crash. Having a little background in embassy

work, I speculate that the notification probably went up Marine Corps chain of command reporting channels and then to the Defense Attaché Office in Tokyo, which, in turn, took it to the Deputy Chief of Mission. The DCM probably directed someone to notify Washington and then went to talk to the Japanese government. Notice that the US Consul General was not in that chain of reporting. The Consulate, while a satellite of the embassy, does not have any military staff and does not perform the strategic engagement that the Embassy does.

I have been slightly corrected in the concept of the “instrument of the sovereign.” The concept is more accurately termed “law of the flag.” It is a long-standing part of customary international law and its origins are primarily naval and precede the long-term basing of US Soldiers overseas, but may have some application on land as well.

The hypothetical situation of a Mexican aircraft crashing in the US, as Mr. Lummis framed it, would not fall under this case. It would be considered an incursion, whether it was intentional or not. Aircraft must have a clearance to enter the airspace of another country. For civilian aircraft, this is generally governed by treaties, bilateral agreements, and civilian agencies. For military aircraft, the Defense Attaché Office obtains a diplomatic flight clearance for the aircraft to enter the foreign

country's airspace. So, unless the aircraft had a fight clearance, it would be considered an incursion and the US Government would have a right to secure and search the site. Were the aircraft to have a diplomatic flight clearance, under law of the flag, the Mexican government would retain jurisdiction. There might be a need for the US government to secure the site, as well as put out the fire, until the Mexicans could get there, but, since the aircraft was afforded a diplomatic clearance, it would remain Mexican jurisdiction. Most likely, the security of the site would be a joint US-Mexican operation, with us assisting the Mexicans while they do what they need to do at the crash site. This would be similar to how the US Embassy Tokyo website described the security of the Okinawa crash site. This is my understanding of law of the flag based on my own limited experience working in a US Embassy. Please keep in mind that I am not a lawyer and this is just how I understand it works.

On Chinese spies: perhaps not so much the police and fire departments, but it is possible that some police are paid informants. I am just thinking in possibilities here. Intelligence services look for biases, frustrations, and other attributes to exploit in people. A police officer who wants the Americans gone would be a potential target for an intelligence service. A more plausible espionage threat would be the Chinese students attending Okinawa International University (OIU website lists Chinese among nationalities of

international students). Whether they are active intelligence collective agents or not, chances are they are at the very least being debriefed by Chinese intelligence when they get back to China. Besides, what better cover for a Chinese intelligence agent who wants to spy on US military activities close to China than to be a student next door to a Marine Corps Air Station?

I find Mr. Lummis' depleted uranium comments highly implausible. The helicopter that crashed was a CH-53. "CH" means "Cargo Helicopter." It is a utility transport. It is not an attack helicopter. It is only lightly armed for self defense. Aircraft need to be as light as possible and still meet the demands of the missions for which they were designed. For this reason, helicopters are built mainly out of aluminum and titanium alloys because they are light, flexible, and strong. Depleted uranium is heavy, dense, and hard. [T]here is no depleted uranium in a CH-53's airframe.

Thank you for listening to my point of view. I hope I answered most, if not all, of your questions. I find the dialog here to be interesting and civil. I appreciate that. Again, please remember that while I am an Army Officer, I am merely expressing my personal opinion. I do not speak for the Army.

Lummis responds [2]

I want to thank Major Hurt once again for his thoughtful and detailed response, and for his help in thickening the plot, as it were.

Major Hurt's note contains an important correction. The right of the US Marines to occupy a university outside their base, set up an armed cordon around the accident site, keep out police and fire inspectors, and dismantle and haul away their wrecked helicopter isn't derived from the right inherent in an "instrument of sovereignty" after all. I was glad to hear that, as I had never heard of such a thing. Now he tells us that it is an extension of the right of diplomatic immunity held by embassies, consulates and other diplomatic missions. Of course, we all know that embassies and consulates are guarded by military units from their home countries. Major Hurt wants to persuade us that this diplomatic immunity applies to military equipment wrecked in foreign countries – so long as the equipment is not there illegally. This is an interpretation that stretches the customary meaning of diplomatic immunity pretty thin. I'm beginning to understand why Major Hurt is careful to say that these are his personal opinions and not those of his employer, the US Army. I will return to this point.

Major Hurt says that we should look at the record of the press conference that was held at the US Embassy, Tokyo two weeks after the accident to get more accurate information. I have

done so, and he is right, it is quite interesting.

For example, the anonymous military spokesperson said that on the day of the crash, the Futenma Airbase air traffic control tower received a distress call from the helicopter at 2:17 PM, that the helicopter crashed at 2:18 PM, and that at 2:19 PM the control tower received a call from another aircraft reporting seeing the helicopter crash and catch fire. Then the spokesperson said that the Marines on the base "scaled two fences to get to the crash site, and pulled the three crew members away from the wreckage before the aircraft burst into flames."

As it happens, I teach at that university, and so last week I climbed up to the top of the building where my class is and took another look at Futenma Airbase outside the back window. Seen from the university, the airstrip runs left and right, the barracks and administration buildings are on the far side; on the near side are hangers, warehouses, machine shops, etc. Between that work area and the fence there's a thickly wooded area some 20 or 30 yards wide, then there's the high cyclone fence topped with barbed wire. Between the fence and the campus there's a narrow residential strip. After you enter the campus, there's maybe another 200 yards, going through or around buildings, to get to the crash site.

No Olympic runner is going to get through that

obstacle course in the time the Embassy spokesperson allowed him.

The Okinawan conspiracy theorists, few but vociferous, believe that the helicopter crash was staged to show the Okinawan people how dangerous Futenma base is, and frighten them into giving up their opposition to the replacement base now being planned in Northern Okinawa. They would have it that there was a detachment of Marines poised in the woods just behind the fence, waiting for the helicopter to crash. And they use the Embassy spokesperson's timeline to support that speculation. I don't believe the conspiracy theory.

What I do believe is that the spokesperson's impossibly contradictory claims only show that he or she didn't care much about facts, and was willing to say whatever was convenient.

There's another example. Reporters at the press conference asked the spokesperson why the other CH-53D helicopters, which had been grounded after the accident, were again allowed to fly so soon after. The spokesperson answered that the helicopters were allowed to fly only after the cause of the accident had been found, and it was determined that the trouble was "solely unique" to that one helicopter. It seems that a pin was missing from the tail apparatus, which made it impossible to steer. The reporters pressed the point. Was this some mechanic's error, or what? And how is it that the helicopter, which was on

its way back from a training flight, got that far without the pin, and then suddenly went out of control? The answer: "[U]ntil that investigation is complete, I think it's premature to speculate what happened." "...I would defer to the investigators to come up with the reason, the cause, and the timeline for that missing piece."

So they didn't know yet what happened, which means that they couldn't possibly have known that the trouble was "solely unique" to that one helicopter, and therefore that it was irresponsible for them to end their grounding before that was known.

But more important in the context of this discussion, the spokesperson did not agree with Major Hurt on diplomatic immunity. The spokesperson says that shortly after the accident Okinawa Police met with Marine Corps officials "to request access to the site to conduct a criminal investigation into the cause of the accident." Now, listen close here. The spokesperson continues: "In response, the Marine officials informed the OPP [Okinawan Prefectural Police] that the Marines would remain in charge of the site, in accordance with a long-standing agreement between the U.S government and the government of Japan, under SOFA" Got that? The Okinawan police "request", the Marines "inform". This means that the Marines have already taken exclusive control of the area, and consider themselves the supreme authority as to who can

enter and for what reason.

And the legal basis for that authority? It's SOFA after all. But as I wrote in my original piece, and as I believe Major Hurt agrees, it can't be SOFA. The SOFA agreement contains no clause allowing such action.

Of course, no one is criticizing the Marines for piling over the fence, pulling their buddies out of the helicopter, pouring water on the fire, or even waving people away from the danger area. In a case like that, to Hell with the law, that's what you do. What is at issue is the cordoning off of the area by armed MPs, putting hands over the lenses of TV cameras (that captured this on film) and keeping out the local police and fire departments—and the town mayor.

Major Hurt makes a thoughtful case as to why it is "unlikely" that the Marines there would have had guns. But, I'm sorry, I was there, and saw the guns. They were on the belts of MPs, who were in effect exercising police power over Japanese nationals outside the base—including, exercising police power over the Japanese police. This is a right that SOFA specifically does not give to the US military:

Article XVII, 16. Outside these facilities and areas [the bases], such military police shall be employed only subject to arrangements with the authorities of Japan and in liaison with those

authorities and in so far as such employment is necessary to maintain discipline and order among the members of the United States armed forces.

Off the bases, the MPs can exercise police power over troublemaking GIs, and that's it.

I can accept that the Marines might have had the primary right/responsibility to dismantle the helicopter and clean up the mess. But why the guns? A wrecking company might have primary responsibility for wrecking a building, but that doesn't give them the right to keep out building, fire, and other safety inspectors, using guns. It was the job of the Okinawan police department to investigate the cause of the accident and make sure there was not criminal negligence involved. It was the job of the Ginowan City Fire Department to investigate the cause of the fire. These two perfectly natural investigations were prevented with the use of armed force. By what right? The US Embassy in Tokyo says SOFA. But SOFA contains no such provision. Major Hurt says, the diplomatic immunity guaranteed under customary law. But I find this dubious. The Embassy spokesperson didn't offer this as a reason, and anyway, a military helicopter is not a diplomat.

The other question is, Why? Major Hurt wants us to believe that it was to keep out the Chinese spies who, he fears, have infiltrated the Ginowan

police and fire departments (waiting all those years for a helicopter to crash, and praying that, when it does, it will be on a day they are on duty, and that it is their unit that will be sent?). I doubt it.

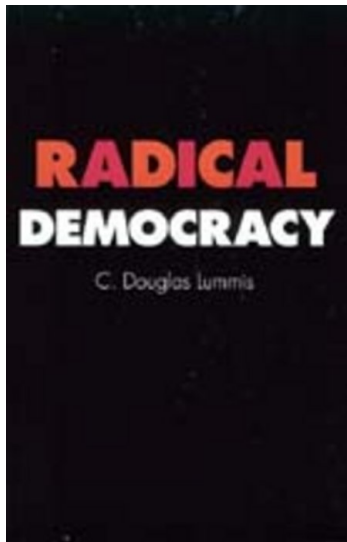
In my article I mentioned that many Okinawans believe it was because the helicopters contained depleted uranium. Major Hurt makes a thoughtful case as to why that would be "unlikely." Actually, given that helicopters often use superheavy depleted uranium as ballast, and that a training flight like this one where the helicopter is carrying just the crew would be just the occasion when such ballast would be needed, it doesn't seem unlikely at all.

But forget about unlikely. And forget about depleted uranium; I was wrong to suggest it. It was strontium 90. On September 2, 2004 the US Embassy, Tokyo, admitted that the CH-53D has in its propeller blades a safety device that contains strontium 90. I think we can assume that this is what the Marines didn't want the local police and fire department to discover, and also why after they got the helicopter carried away they dug up the dirt under the crash site and carried that away too.

Douglas Lummis

C. Douglas Lummis, a former US Marine stationed

on Okinawa, is the author of *Radical Democracy: Friday the 13th in Okinawa* and the subsequent *Change with Major Nathan C. Hurst*. The full text, *and the entire symposium on the global reach of the* <http://www.amazon.com/Radical-Democracy-C-Douglas-Lummi> *and is a Japan Focus contributions by Chalmers Johnson and Frida Berrigan, are available at a Mother Jones website* <http://www.motherjones.com/news/feature/2008/09/mission-creep.html>. This article was posted at Japan Focus on October 26, 2008.



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