BENGOSHI 弁護士

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CO's Corner

The Bengoshi was created as a means to educate and inform fleet leaders, collateral duty legal officers, and others in the Indo-Asia Pacific AOR who might have an interest in the complex legal issues that uniquely impact those who serve here. From my perspective as Commanding Officer, it is also a vehicle to show-case the talent of our exceptional group of legal service providers.

In this edition, we draw particular attention to our experienced, talented group of Japanese legal advisors. Each day, our Japanese legal advisors from Misawa, Okinawa, Sasebo, Atsugi, and Yokosuka bring their experience, aptitude and relationships to bear to the great benefit of our Sailors and their families. You will not find a more knowledgeable, courteous and courageous group of professionals anywhere in the world and they are here to serve you and our important U.S.-Japan alliance.

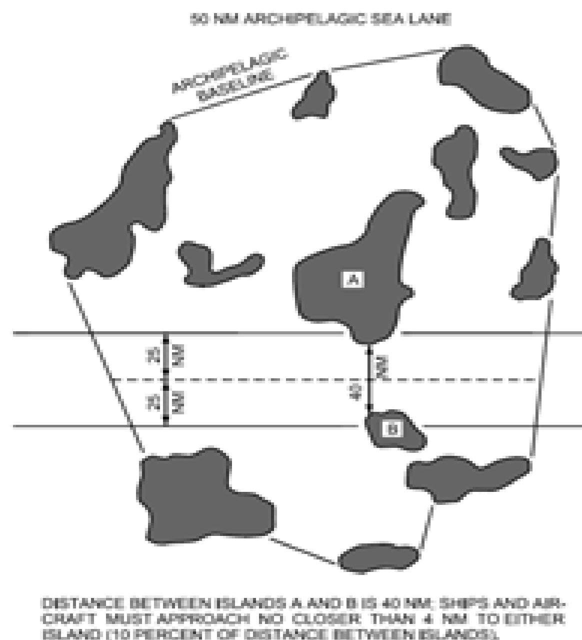
CAPT Dom Flatt, JAGC, USN
Commanding Officer, RLSO Japan

Indonesia, the Philippines, and Papua New Guinea: A Tale of Three Archipelagos

LCDR Jessica Pyle, JAGC, USN, and LT Sarah Padway, JAGC, USN

SEVENTH Fleet's area of responsibility (AOR) covers an enormous amount of the Earth's surface. SEVENTH Fleet executes military operations within 48 million square miles of the Pacific and Indian Oceans, spanning East-to-West from the International Date Line to the India/Pakistan border, and North-to-South from the Kuril Islands to Antarctica. There are many challenges in navigating this area of responsibility. One of the most interesting arises when operating near archipelagic states in the region.

Archipelagic states are formed by groups of islands, interconnecting waters, and other natural features forming an intrinsic geographical, economic, and political entity. States meeting the requirements of an archipelagic state under United Nations Convention on the Law of the Sea (UNCLOS) may draw archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that such baselines include the main islands and an area in which the ratio of the area of the water to the area of the land is between 1 to 1 and 9 to 1.



DISTANCE BETWEEN ISLANDS A AND B IS 40 NM; SHIPS AND AIRCRAFT MUST APPROACH NO CLOSER THAN 4 NM TO EITHER ISLAND (10 PERCENT OF DISTANCE BETWEEN ISLANDS).

Archipelagic waters, the water enclosed by these lines, are considered the country's territory, and ships, including military vessels, transit in a mode known as archipelagic sea lane passage (ASLP). ASLP permits ships to execute transit in the "normal mode." UNCLOS defines "normal mode" as navigation and overflight solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. Where ships would be passing through what is considered territorial waters using innocent passage and staying out of internal waters, they enjoy "normal mode" transit within archipelagic sea lanes (ASL) of that state. For a warship, normal mode often includes flying helicopters in support of the security of the vessel.

An advantage of being an archipelagic state is the right to designate the location of ASLs, which are specified paths suitable for continuous and expeditious passage of foreign ships. Ships and aircraft can deviate up to 25 nautical miles on either side of a designated ASL, so long as they do not come within 10 percent of the distance between the nearest points on islands bordering the ASL. If an island is in the middle of the ASL, aircraft can fly directly over that island. When an ASL is designated properly, ships passing through are required to use the ASL. If the country does not properly designate ASLs, ships may pass through routes normally used for international navigation. Ships in the Seventh Fleet AOR frequently encounter archipelagic states. To get to the ports of the southern hemisphere directly from the South China Sea, for example, a ship will need to pass through at least one state with archipelagic claims.

Indonesia

Given Singapore's location at the end of the Malay Peninsula, a ship leaving that port will pass through the Indonesian archipelago. Fig. 1. Indonesia is a properly drawn archipelagic state with some designated ASLs. A ship leaving Singapore could easily take ASL I, depicted in Figure 2, and transit to a place like Perth with navigable water available throughout the transit.

Indonesia, the Philippines, and Papua New Guinea: A Tale of Three Archipelagos

LCDR Jessica Pyle, JAGC, USN, and LT Sarah Padway, JAGC, USN

Fig. 1. Indonesian Archipelago

However, all of Indonesia's ASLs are North-to-South routes. If a vessel traveled from Singapore to the east coast of Australia to a port near Sydney, it may prefer to transit to the north of Indonesia and pass through archipelagic waters in order to save transit time. Given the lack of East-to-West routes, the Indonesia ASL designation is considered partial, meaning that the archipelagic state does not designate sea lanes or air routes.

Fig. 2 Indonesian Archipelagic Sea Lanes

When a designation is considered partial, ships retain the right to execute ASLP through all routes normally used for international navigation. In order to use the East-to-West route, a vessel must demonstrate that it is normally used for international navigation and follow all other ASLP restrictions.

Philippines

If a ship takes the northerly route around Indonesia, then transiting within the Philippines is the most efficient means of reaching Sydney. The Philippines draws archipelagic baselines that may not be in conformity with international law, and has not clarified whether they consider the waters within their baselines internal (due to a historic bays claim) or archipelagic. Unlike Indonesia, the Philippines have not designated any ASLs which means ships may take routes normally used for international navigation. Given the myriad legal issues raised by the Philippine claim briefly described above, but not addressed in this article, vessels transiting its waters should be cautious and consult their JAG or ISIC JAG about their transit route to ensure the vessel remains in compliance with U.S. policy.

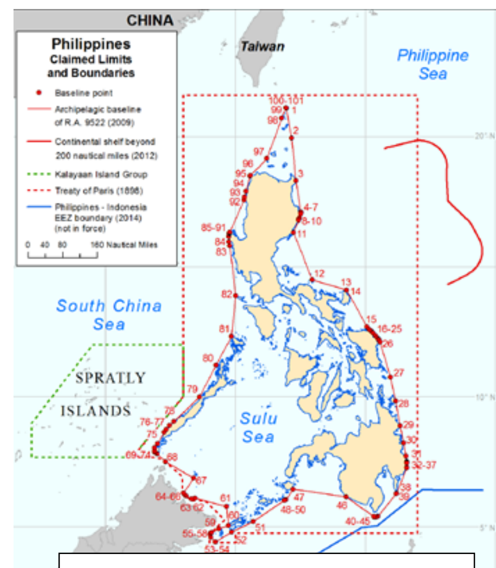


Fig. 3.Philippine Archipelago

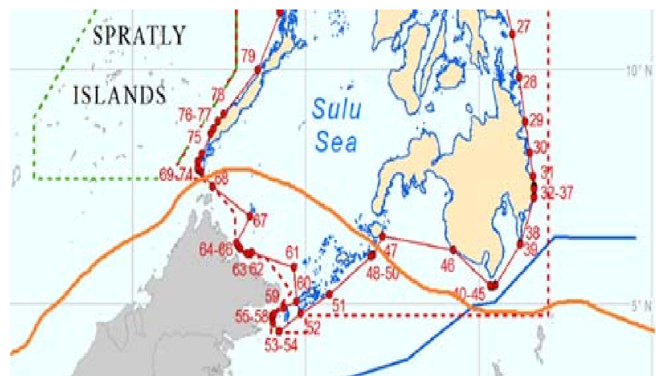


Fig. 4 -Potential Route

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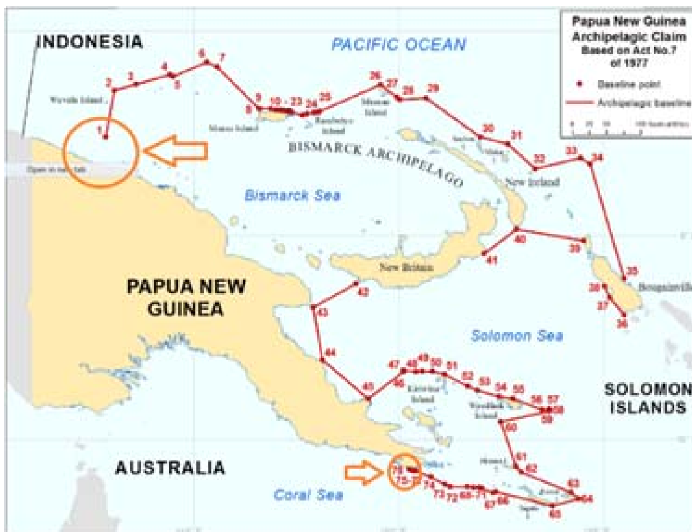
Papua New Guinea

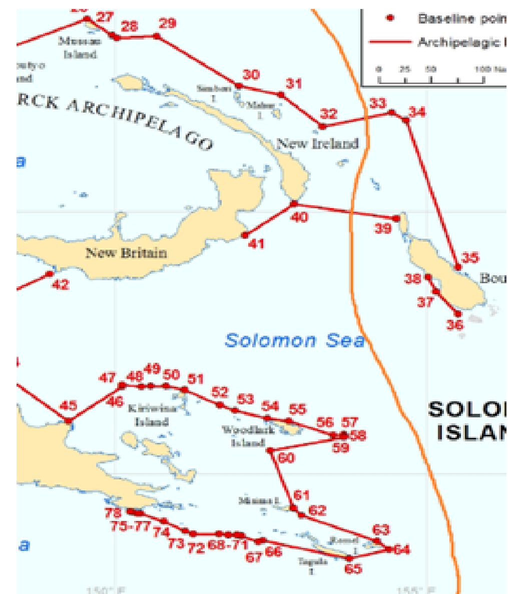
Papua New Guinea is another state with incomplete baseline claims. Fig. 5. The position of the United States, as detailed by the State Department, is that the baselines Papua New Guinea draws do not form a single, enclosed system of land and water. The starting and ending points of the archipelagic baseline system do not connect to the island of Papua New Guinea, as you can see below.

Fig. 5 -New Guinea Archipelago



Because of this, the archipelago is considered incomplete. Additionally, Papua New Guinea does not designate any ASLs, meaning ships can take any route normally used for transit through Papua New Guinea, but should still abide by the rules of ASLP.

Fig 6- Potential Route



Summary

ASLP is a simple regime with complicated variables based upon baseline claims, designated ASLs, and country-specific legislation. Ships transiting almost anywhere in the Seventh Fleet AOR will encounter at least one archipelagic state, and frequently multiple states with archipelagic claims. This article provides a basic introduction to archipelagic sea lanes, however, a trained Judge Advocate is versed in all of these matters and can provide the most current claims and U.S. Government policy, and can help navigate these troubled waters.

LCDR Pyle is the Force Judge Advocate for Commander, Task Force 70. She has previously been assigned as an operational law attorney on the staff of Multi-National Corps—Iraq and the COMUSNAVSO/C4F staff. She holds a Juris Doctor from Wake Forest and Master of Law in International Law from Columbia University.

LT Padway is an attorney at Region Legal Service Office Japan. She holds a Bachelors Degree in history and journalism from Wisconsin-Madison, and a Juris Doctor from University of Richmond. LT Padway recently served as Staff Judge Advocate to the USS STERETT/ USS DEWEY Surface Action Group deployment to the C7F AOR.

Our Unsure Future in Diego Garcia

LN2 Ronald Forster, USN

The United Kingdom (U.K.) granted independence to the island of Mauritius in 1965. In doing so, Mauritius agreed to sell the U.K. the Chagos Islands, which the U.K. re-named the British Indian Ocean Territory (BIOT). The key island in this small chain is known as Diego Garcia. The island was uninhabited until approximately 1780. Early inhabitants were marooned lepers, slave and contract laborers brought to tend to a coconut plantation established by the French as well as the plantation's overseers. The territory was transferred to the U.K. in the Treaty of Paris in 1814.

Economist.com

In 1966, the U.K. permitted the United States (U.S.) to establish a naval communication station with capacity for air and naval support on Diego Garcia. The U.S. and U.K. subsequently executed an agreement that allowed the U.S. to conduct military defense operations for 50 years on the island. The agreement was eventually extended for another 20 years, and is set to expire in 2036. The island operates as a joint U.S.-U.K. base with the U.K. retaining full and continual access.

The inhabitants of Diego Garcia, known as Chagossians, were required to relocate to make way for the new base. In 1971, the U.K. passed an ordinance on the island barring the natives from living there and relocated them, in many cases involuntarily, to Mauritius, England, or one of the U.K.'s other numerous territories.

Over decades of use since, the island has been crucial to operations in the Persian Gulf War, Operation Enduring Freedom, and Operation Iraqi Freedom. The island has been used as a stopover while transporting suspected terrorists out of the Middle East. Given its geographic position (pictured), Diego Garcia plays a vital role in U.S. security operations in Africa, Southern Asia, and the Middle East.

In the late 1990's, on behalf of the Chagossian Islanders forced off the island, Mauritius filed a lawsuit against the U.K. government, claiming the early inhabitants of Diego Garcia had been illegally removed from the island. In 2000, a British court ruled that the 1971 ordinance ban was unlawful and the government should look into relocation efforts. The British government appealed the decision and until 2008 every level of the court agreed with the original ruling. In 2008, at the final level of appeal in the House of Lords, a panel of 5 Lords overturned the court's decision, although they expressed their regret to the Chagossian people for the loss of their land. "Diego Garcia." The Editors of Encyclopedia Britannica, February 14, 2017.

Later, on April 1, 2010, the British government established the world's largest "no-take" marine protected area (MPA) around the Chagos Archipelago. "No-Take" marine reserves are areas of the sea in which there is no fishing allowed and only limited human access. The Chagossians asserted that the MPA effective-

Our Unsure Future in Diego Garcia

LN2 Ronald Forster, USN

ly barred them from ever returning to the island as the MPA would prevent them from using fishing as their main livelihood. Mauritius subsequently filed a legal challenge with the Permanent Court of Arbitration at the Hague. In 2015, the Court held that the establishment of the MPA violated the United Nations Convention on the Law of Sea as Mauritius had a right to fish in the waters surrounding the Chagos Archipelago. "U.S. Naval Base Is Under Threat…And It's Britain's Fault." The National Interest, Peter Harris, March 24, 2015. This decision is binding on the U.K. given its position as a signatory to the United Nations Convention on the Law of Sea. The perimeters of the MPA are now under negotiation.

Since 2015, Mauritius has also initiated a territorial dispute before the United Nations (UN). Mauritius says the islands that make up the Chagos Archipelago are part of its rightful territory. It asserts that the U.K. broke international law (UN resolution 1514) when it separated off the islands before granting Mauritius its independence. "UN Ruling Raises Hope of Return for Exiled Chagos Islanders." Owen Bowcott and Sam Jones, March 19, 2015. The British Foreign Office indicated it intends to cede control over the Chagos Archipelago when no longer needed for military purposes. Mauritius publically stated that it has no intention of disrupting U.S. military operations on Diego Garcia. Shortly after the Brexit referendum, the UN voted to refer Mauritius's claim to the International Court of Justice (ICJ), where it currently awaits a final decision. As part of the UN's decision to refer the controversy to the ICJ, the organization claimed that due to the agreement to return the islands to Mauritius the British government cannot make unilateral decisions regarding the islands. However, any decision reached by the ICJ will not be binding.

This pending decision brings into question the continuation of the lease for U.S. Naval Base Diego Garcia. If the ICJ sides with Mauritius, the International community could pressure the U.K. to cede control of the island to Mauritius prior to December 2036. The U.S. could be left to negotiate a new lease with Mauritius or possibly cancel the lease and leave the island. Should the lease be cancelled, the U.S. does not have many options with which to replace it. With a developing relationship and growing strategic ally in India, the option for a new base there might be a possibility.

However, there are no talks or decisions made in that direction to date. The U.S. State Department released an official statement regarding Diego Garcia explaining that, "The Agreement between the United States and United Kingdom on Diego Garcia remains in force until December 30, 2036, unless it is terminated by either party. The United States has no intention of terminating the Agreement, and we have no indication that the U.K. will pursue termination." "Islanders Pushed Out For U.S. Base Hope For End To 40-Year Exile", Ari Shapiro, April 16, 2015.

LN2(SW) Ronald Forster is assigned to RLSO Japan. He holds an Associate's in Science degree in Paralegal Studies from Roger Williams University. He anticipates attending law school in Fall 2019. His previous duty stations include USS LAKE CHAMPLAIN (CG –57) and Naval Justice School in Newport, RI.

Participation in Talisman Saber 2017

LT Andrew Giddings, JAGC, USN

Talisman Saber (TS) is a biennial military exercise between the U.S. and Australia that demonstrates both countries' abilities to work bilaterally and multilaterally. The seventh TS took place between June - July 2017 and involved more than 33,000 U.S. and Australian personnel, 21 ships including the U.S. Navy aircraft carrier USS RONALD REAGAN (CVN 76) (pictured on next page) and the USS BONHOMME RICHARD Expeditionary Strike Group, and more than 200 joint aircraft. In addition to the close coordination between the U.S. and Australia, representatives from 24 other nations had the opportunity to observe or participate in portions of the exercise. The exercise was conducted from multiple locations in the U.S. and Australia to include Field Training Areas. Field exercises included airborne operations, amphibious assaults (field training pictured), as well as sea and air combat.

As noted in prior editions of the *Bengoshi*, any high-end warfighting scenario raises a wide range of legal, policy, and other considerations. LCDR Brian Haagensen, "NORTHWESTPAC: Advancing Our Bilateral Partnership," *The Bengoshi* (VII, Issue 1), available at: http://www.jag.navy.mil/legal_services/documents/Bengoshi_VolII_IssueI.pdf. As noted by Chief of Joint Operations, Vice Admiral David Johnston, U.S. Navy, this year's exercise was the most complex, challenging, and fulfilling TS to date. "Talisman Saber 2017 Concludes", *Naval Today*, available at: https://navaltoday.com/2017/07/27/talisman-saber-2017-concludes/. Part of this complexity involved the transition from a 3-star Army commander to a 4-star Navy commander as the nature of the conflict changed. Attorneys and paralegals were instrumental in working through all of these considerations to provide practical and effective solutions consistent with the law.

Part of the role of Judge Advocates was to advise on the military-specific aspects of important issues shared among many stakeholders. Legal issues ranged from Rules of Engagement (ROE)/Rules for the Use of Force (RUF) to specific questions on the law of armed conflict over the domains of sea, land, air, and cyber logistics and sustainment issues, humanitarian assistance, post-conflict issues, and many others. Some of these issues were thoroughly worked through in advance during the months and years of planning and coordination, others by their nature came up as part of the evolving battlefield and were addressed real-time. This is one key reason Judge Advocates are involved at the tactical, operational, and strategic levels and why there are watch rotations and coverage plans to make sure that no matter the time or the circumstances there is the ability to provide on-the-spot legal advice to the commander(s).

At the heart of the TS exercise is the opportunity to coordinate components from almost all service branches. In addition, throughout the lead up and execution of the exercise, lawyers from the Australian Army, Royal Australian Navy, and Royal Australian Air Force contributed to the overall effort and provided spot-on advice concerning to complex legal issues involved. And as part of the "whole of government" effort – modeling a conflict's impact across military and non-

Participation in Talisman Saber 2017

LT Andrew Giddings, JAGC, USN

military domains – lawyers from both the Australian Department of Foreign Affairs and Trade and the U.S. Department of State were directly involved in the exercise. Legal teams also worked with members of multiple governments and civil society to include the Australian Agency for International Development, the World Food Program, the United Nations Office for the Coordination of Humanitarian Assistance, the U.S. Department of Justice, the Federal Bureau of investigation, the U.S. Agency for International Development, the Red Cross, and others.

TS17 was a team effort that allowed all of those involved to develop and build lasting relationships and demonstrated the ability of the Judge Advocate community to collaborate on legal issues of strategic importance in a realistic and challenging scenario. This exercise prepared all the parties involved, including the Judge Advocates, for any future exercises or real-world situations.

LT Giddings is the Staff Judge Advocate assigned the RLSO Japan Branch Office Atsugi. He holds a law degree from Harvard and Master of Arts in Law and Diplomacy from the Fletcher School. Prior to joining the Navy he was Counsel with the International Monetary Fund. He was a pre-exercise planner, watch stander and legal advisor during TS17.

Japanese Bengoshi and American Lawyers

Mr. Junichi Fukuda

Note from the author: I am Mr. Junichi Fukuda, a Japanese-attorney-at-law. I am fortunate and honored to be given an opportunity to write an article for The *Bengoshi.* I have met many of the readers because I am one of the teachers of the Law Faculty of the Chuo University and the Chuo Law School who take the students to the Yokosuka U.S. Navy base to attend the annual mock trial kindly presented by the Japanese Community Legal Association for legal education, which we always greatly appreciate.

Translation note: The Japanese word "Bengoshi" means "attorney-at-law" and is never used to mean "judge (Hanji)" or "prosecutor (Kenji)."

American lawyers may occasionally be discombobulated by the differences in the legal culture of Japan, but the same thing can be said of the Japanese attorneys who are bewildered by the U.S. legal culture. Personally, I am an Intellectual Property lawyer, but I also handle criminal cases, civil litigation, and family affairs cases the same as other Japanese attorneys-at-law. The majority of the Japanese Bengoshi (attorneys-at-law) are not particularly specialized in one area legal service, which can be surprising to many American attorneys. I would like to present some of my experiences with the legal cultures and judicial systems of both countries.

System of Legal Profession

In Japan, the path of legal professionals (judges, prosecutors, and attorneys-at-law) is decided for them when they graduate from the Legal Training and Research Institute and pass the final qualifying examination. This differs from the American system which allows any qualified attorney to perform any of the three jobs after completing the necessary training and experience. Accordingly, for better or worse, most Japanese judges and public prosecutors have no experience consulting personal clients on personal legal problems.

Legal Education/ Law School System

The Japanese Law School system started in 2004 and is modeled after the system of the United States. What has happened in the 13 years since the start of the system in Japan? The statistics tell the story. When the Law School system began in 2004, a total of 49,991 people applied for the bar exam. In 2017, only 6,716 people applied, a mere 13.4% of the original number of applicants. We have seen a tremendous decrease in the number of people who seek to become lawyers. Naturally, many law schools have closed.

Criminal Trials

In 2009, Japan began implementing the "Lay Judge" system, which is an application of the premise behind the jury system in the United States. In the Lay Judge system, three professional judges sit on a case with six lay judges. Anecdotally, it appears that the professional judges' opinions are dominant and strongly influence the lay judges' opinion on both guilt and sentencing. It is rumored that approximately 60% of those who are selected as candidates for lay judges attempt to avoid being appointed as a lay judge for a criminal trial. Another significant difference between Japanese and American criminal jurisprudence is that defense counsel in Japan cannot be present when a suspect is interrogated by the police or prosecutors.

Civil Litigation

Judges are much more involved in Japanese civil litigation than in the United States. In Japan, there are no "depositions." Additionally, there is a chasm between what is said as "oral proceedings in the civil procedure" and what is actually seen in the court (i.e., most of their assertions, admission and denial, arguments

Japanese Bengoshi and American Lawyers

Mr. Junichi Fukuda

and debates are done by ceremonially exchanging documents between the public trial sessions). In a civil trial, counsellors are required to exchange and submit to judges the statements of witnesses before they testify. The statements are not scripts of examinations, but counsellors and judges can ask questions based on them. Under this rule, most of the facts which witnesses will mention are known among court players beforehand, so new facts are rarely found at examinations. Court players tend to be primarily interested in the credibility of the contents of the statements. American lawyers are often surprised to see very few "objections" during the examination of the witnesses and it seems that Japanese civil court judges do not expect to discover new facts in this setting. This does not mean that they are shy in conversation or uninterested in examining the witnesses.

Family Law

I often see Americans seeking divorce in Japan become bewildered by the system of Conciliation Board at the Japanese Family Court. It will help to realize that this process is not a civil trial. Generally, most of the decisions by the Board on child custody arrangements go against the father, and Boards often approve only one meeting a month with the child.

While I have explained some of the differences, there is still much more to say. I recommend you attend the Japanese courts to see and feel the Japanese legal culture. As I continue to learn about the American system, I hope to convey the experience, expertise, and the way of thinking of the American lawyers to Japanese law students. Continued friendship between American and Japanese citizens is the best way for both sides to learn. I ask each of you to make the effort to befriend someone new so that both of us can promote our friendship in the legal fields of Japan and the United States.

Fukuda-sensei teaching at Chuo law School, Chuo University

Revising Sex Related Offenses in the Japanese Penal Code

Mr. Koichi Sekizawa and Mr. Akira Nonobe

The first revision made to the criminal provisions concerning sex related offenses in the Japanese Penal Code since its enactment in 1887 was officially implemented on 13 July 2017. Even at the time of the proclamation of the new constitution in 1946, no significant revisions were made to these provisions, unlike most other provisions and laws at the time. Unfortunately, under the old provisions of the Penal Code in Japan, many victims of sexual offenses were treated unfairly because of their weak legal standing. The investigative process and criminal trials did not provide sufficient protection for the victims of these offenses. Additionally, the sensationalized media coverage was often unfair and biased against victims. Japan has also been severely criticized because the punishment for sexual offenses has often been extremely light compared to those of the international community. For example, in the past, the crime of robbery was treated far more seriously system than rape in the Japanese criminal justice. The recent revisions attempt to rectify this approach by raising the statutory minimum punishment for rape from 3 years confinement to 5 years, among other important changes.

Perhaps the most remarkable revision to the Penal Code is the expansion of the definition of "rape" to include penetration of the anus or the mouth. The name of the crime also changed from "rape" to "forcible sexual intercourse, etc." Before this change, the only crime punishable under the Japanese Penal Code was forcible insertion of a penis into a vagina. For male victims, only the lesser offense of obscenity by force could be charged. This oversight was one of the major shortcomings in Japanese laws concerning sex offenses that international human rights groups and activists rallied against. Whether intended or not, the revision may indicate a shift in the government's willingness to face the new standard of diversified gender identity which Japanese society has started to widely accept. Regardless of social impacts, by expanding the definition of "rape," the statute now affords more protection to male and child victims.

Child victims received further protection through creation of a new criminal provision: the crime of sexual intercourse by a custodial person. In the past, all sexual offenses against a minor (except a female minor under age of 13) required an element of assault or threat against the minor to be actionable. This new provision eliminates this required element if a custodial relationship exists between the minor and the offender. The legal interpretation of what constitutes a "custodial person" by the investigative and judicial authorities is the key to this new provision. Although the element of assault or threat has gone away, the provision stipulates "taking advantage of influence of being a custodial person" is an element of the crime. A "custodial person," pursuant to this provision, is generally meant to be a family member, relative, or lodger. As an example, a Japanese prosecutor stated that a man who lived together with his girlfriend would be considered a "custodial person" if he committed a sexual offense against the daughter or the son of the girlfriend. This new provision is an important step in protecting minor-aged victims of sexual offenses. Before

Revising Sex Related Offenses in the Japanese Penal Code

Mr. Koichi Sekizawa and Mr. Akira Nonobe

this change, crimes were rarely discovered or reported because offenders would take advantage of their trusted positions to abuse the minor, vice threatening harm or physically assaulting the minor. This made substantiation and prosecution of criminal offenses impossible. Now, indictment is possible without that required element of assault or threat when a custodial relationship exists.

The final significant change in the revisions is the abolishment of the statutory requirement for filing an official complaint by the victim. This provision sparked controversy within Japanese society, especially the Japanese media, over the potential ramifications. Some anticipate a significant increase in the number of indictments without consideration of victims' wishes. However, the lack of an official complaint and consideration of a victim's input regarding the criminal justice process are two distinct matters. In fact, the Ministry of Justice sent out an official directive to all District Public Prosecutors Offices across the nation demanding that sufficient care be paid to the protection of victims' privacy and consideration to victims' feelings and desires. Along with this official directive was a delivery by both houses of the Diet encouraging public prosecutors and judges to enroll in a training program focused on victim psychology. However, a great deal is unknown regarding how the authorities have effectuated these insights into their practice. Two Japanese public prosecutors gave useful, though unofficial, comments concerning the abolishment of the statutory requirement of filing an official complaint by the victim. First, there is a thought that the number of police investigations and issuances of AV40 notifications will be increased. Second, they believe that the criteria by which the prosecution determines whether to indict the suspect or not will remain unchanged. Finally, they will continue to strive to ensure that the victims' feelings will be chiefly respected throughout the process.

A U.S. Legal Advisor's goal is to maximize jurisdiction for the U.S. Forces, but this goal can still be accomplished while taking into account the wishes of victims of sex offenses. Additionally, should a Japanese victim express a desire for a SOFA status offender to be penalized within the U.S. military justice system rather than in the Japanese criminal system, that preference will be considered by the Japanese prosecution.

Mr. Akira Nonobe has worked as a Master Labor Contractor at RLSO Japan's Branch Office Okinawa since 1997. A native of Mie prefecture, mainland Japan, Nonobe-san moved to Okinawa in his twenties where he met he met his wife. The couple has a nineteen year old son and a thirteen year old daughter.

Mr. Koichi Sekizawa has worked as a Japanese legal advisor to the U.S. Navy in Yokosuka for 37 years. Sekizawa-san's specialty is Japanese criminal jurisprudence and the Status of Forces Agreement between the United States and Japan.

UNDERSTANDING THE TERRORISM PREPARATION CRIME ACT, A.K.A. THE ANTI-CONSPIRACY ACT

Mr. Kei Sato, Japanese Legal Assistant

On 15 June 2017, Japan enacted a law that fundamentally shifts the way terrorism is prosecuted, as well as the way counterterrorism operations are conducted. Rather than simply punishing a completed crime, the new law allows for prosecution of actions done in furtherance of a crime. This may sound normal to American readers, but it is a dramatic departure from the basic principles of Japanese criminal laws and systems.

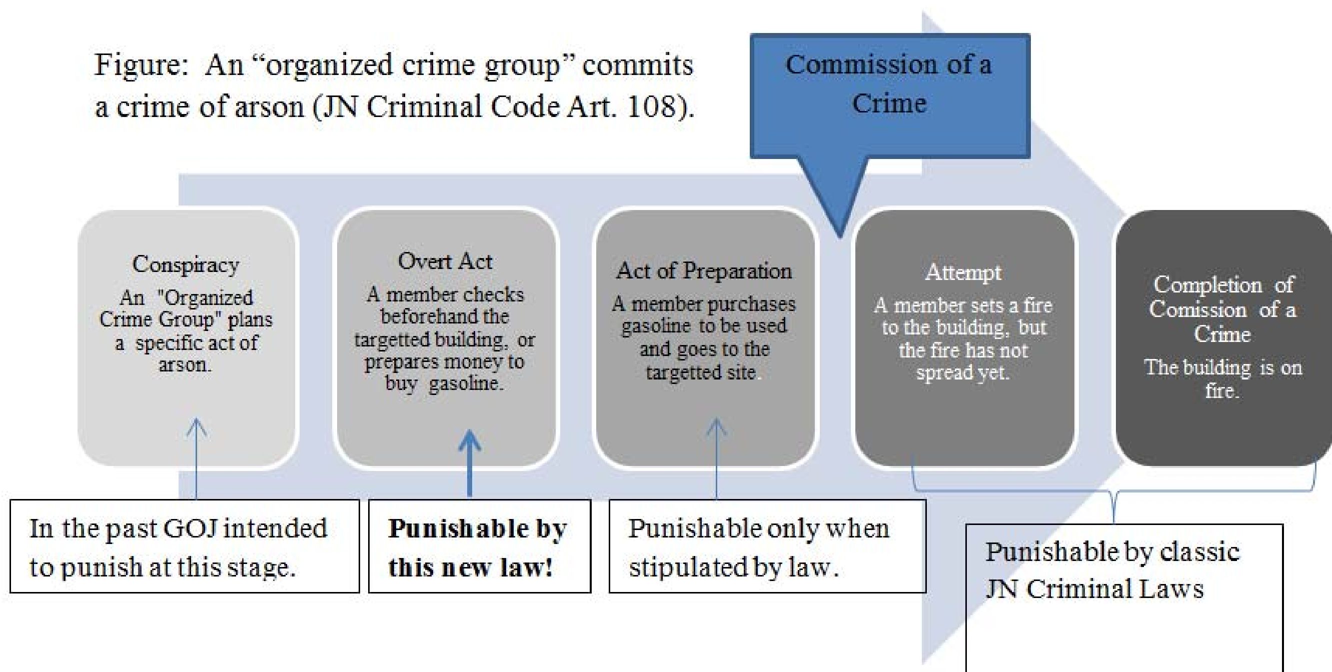
Background:

The Upper House of the Diet, the equivalent to the U.S. Senate, passed and enacted a bill called the "Revised Act on Punishment of Organized Crimes and Control of Crime Proceeds" to make preparation for terrorism, or similar acts, a crime under Japanese law. Advocates of the new rule refer to it as the "terrorism and so on preparation crime act" while opponents call the law the "anti-conspiracy act." For convenience's sake, this article will use "Anti-Terrorism Act."

The Government of Japan (GOJ) explained that the new rule is "necessary for Japan to be a party to the CTO treaty, or United Nations Convention against Transnational Organized Crime." *http://www.moj.go.jp/houan1/houan_houan23.html*. Prime Minister Abe supported the rule, claiming on January 23, 2017 that it was "indispensable to host the Tokyo Olympics in 2020." *http://www.shugiin.go.jp/internet/itdb_kaigiroku.nsf/html/kaigiroku/000119320170123002.htm.* Some members of the opposition parties, including lawyers and civic groups, opposed to the new rule arguing that the rule oppresses the constitutional "freedom of thought and conscience" and threatens to criminalize free activities of Japanese citizens. *https://ryukyushimpo.jp/news/entry-513201.html.*

What it means:

What makes the Anti-Terrorism Act special is that the law now punishes an "overt act" committed by a member of an "organized crime group." This shift is not in line with the current principles of criminal proce-



Understanding the Terrorism Preparation Crime Act, a.k.a. the Anti-Conspiracy Act

Mr. Kei Sato, Japanese Legal Assistant

dures in Japan. Traditionally, there were five steps for anyone to commit act of terrorism: (1) conspiracy, (2) overt act, (3) act of preparation, (4) attempt, and (5) completion of the crime. (See figure on previous page). Simply put, modern Japanese criminal systems are designed to punish any deeds of people after the action done to commit a crime. These are called "attempt" (e.g. setting abuilding on fire but the fire does not spread) and "completion." As an exception, the GOJ can penalize an act of preparation of a felony if specifically stipulated by law. *JN Criminal Code 44.*

The Anti-Terrorism Act is a marked change to these traditional principles. According to the new law, an overt act done by a member of an "organized crime group" is punishable if it is done to carry out a serious criminal act "that can be punishable by death penalty, penal servitude with labor with an indefinite term, or imprisonment with or without labor longer than 4 years." The Ministry of Justice stated, as examples of the serious crimes, "murder, armed robbery and forcible confinement." One of the most controversial aspects of this law is that the overt act itself, such as withdrawing money at an ATM to buy a can of gasoline to set fire to a building, may not look like a crime from an objective point of view.

Comparison to American Law:

In American law, different states use different approaches to prosecuting conspiracy. Most do not require an "organized crime group," only an agreement between two or more people to commit a crime. Many states also require that someone in the agreement commit an overt act in furtherance of the conspiracy. The details of what qualifies as an "overt act in furtherance of the conspiracy" varies by state, but are similar to the Japanese "overt act" and "act of preparation" steps. Like the new Japanese rule, the overt act does not itself have to be a crime (withdrawing money, buying gasoline).

Concerns:

Some opposition party's lawyers and journalists have been voicing their concern about the new rule. They point out that the definition of the "organized crime group" is not clear. Attorney Yukio Yamashita of the Japan Federation of Bar Associations explained that law enforcement agencies decide what the groups are, which could lead to an abuse of power through monitoring and shadowing of citizens by the police.

SOFA Members and Anti-terrorism, etc., Act:

It is not likely that a SOFA member will get arrested for violation of this act. However, US bases can be involved in cases where this act becomes an issue. The Ryukyu Shimpo newspaper carried an article saying this act might be used to oppress anti-base campaigns by citizens. Here is the scenario the author suggested: a group of Japanese citizens plans to obstruct construction of a new base somewhere in Japan. They decide to put concrete blocks on the road leading to the construction site, which may be construed as a crime of forcible obstruction of business (Criminal Code Art. 234). GOJ considers it punishable by the new law and starts investigating members of the group as soon as one of them posts on SNS their plan to gather at the construction site. People not friendly to the US presence in Japan may view the act as a way for GOJ to oppress their campaign violating their freedom of expression and speech.

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Marriage in Japan — Misconception and Actuality

Ms. Kazumi Takahara, Japanese Legal Advisor

Servicemembers often come to the Legal Assistance Office seeking advice in getting married in Japan. They visit us either to seek information regarding the process or assistance in obtaining command approval. They often come misinformed. This article is intended to dispel the five most common misconceptions about getting married in Japan.

Misconception 1: A servicemember marrying a U.S. citizen must attend the marriage seminar.

Correct Information: While anyone getting married is encouraged to attend the seminar, COMNAVFORJAPANINST 1752.1S, commonly described as the "CNFJ marriage instruction," does not require servicemembers marrying a U.S. citizen to attend the seminar or obtain command approval. This only applies to servicemembers marrying a foreign national.

Misconception 2: A servicemember's foreign national fiancé needs to attend the marriage seminar.

Correct Information: While prospective spouses are encouraged to attend, the CNFJ marriage instruction does not require fiancés to attend the seminar. Only a servicemember marrying a foreign national is required to attend the seminar for command approval.

Misconception 3: Command approval is not required for marrying a foreign national in the U.S.

Correct Information: The CNFJ marriage instruction requires all servicemembers stationed in Japan to obtain command approval when marrying a Japanese national or resident, regardless of the location of the marriage, unless the fiancé is already a legal resident of the U.S. If a servicemember did not obtain the command approval, he or she may be required to obtain the approval after the fact to satisfy the requirements for command sponsorship of his or her spouse.

Misconception 4: A servicemember must follow the COMNAVMARIANA instruction when his or her Filipino fiancé is overstaying in Japan or is in Japan under a visitor visa.

Correct Information: The CNFJ marriage instruction applies to a marriage to a foreign national living in Japan regardless of the fiancé's residency status in Japan. The COMNAVMARIANA instruction applies only to marriages being performed in their jurisdiction.

Misconception 5: The Ship's legal office or legal officer can notarize an affidavit of competency to marry.

Correct Information: The CNFJ instruction directs servicemembers to the RLSO Legal Assistance Office to obtain an affidavit of competency to marry. Yokosuka City Hall only accepts affidavits notarized by the RLSO Legal Assistance Office when an applicant is U.S. military or civilian personnel.

CNFJ is currently working to revise the marriage instruction. Please note that some of the above information will be outdated once the new instruction is issued.

Command representatives who have additional questions about the marriage instruction are encouraged to contact their SJA or RLSO Command Services Department. Service members who need assistance should be referred to the RLSO Legal Assistance Office.

Ms. Kazumi Takahara works in the Legal Assistance Department of RLSO Japan. She holds a bachelor of law degree from Chuo University and a Master's of law degree from the University of Hawaii. Takahara-san recently passed the California State Bar Examination.

RESULTS OF TRIAL

May 2017:
At a General Court-Martial in Yokosuka, Japan, an O-3, USN was tried for attempted sexual assault of a child, attempted sexual abuse of a child, and solicitation of child pornography. On 25 May 2017, the panel of members returned a verdict of not guilty.

June 2017:
At a Special Court-Martial in Yokosuka, Japan, an E-5, USN was tried for numerous offenses. On 22 June 2017, the panel of members returned a verdict of guilty to abusive sexual contact. The panel of members sentenced him to reduction in rank to paygrade E-3, to be fined $500, and to confinement for 45 days.

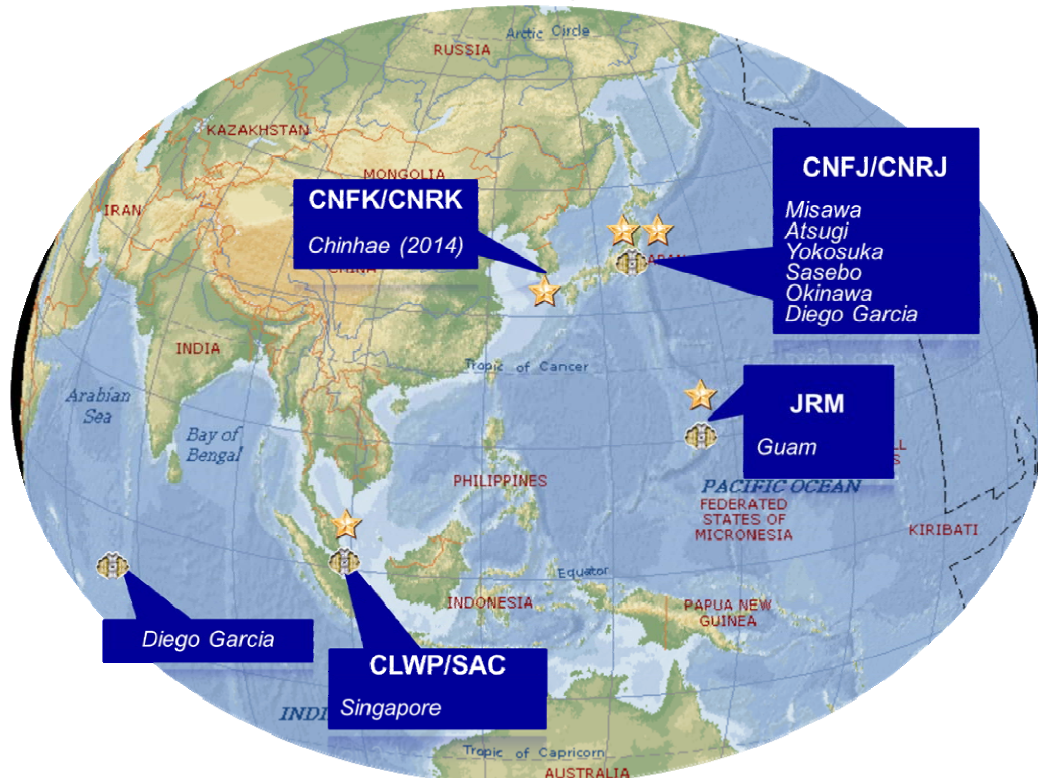
August 2017:
At a General Court-Martial in Yokosuka, Japan, an E-7 USN, pled guilty pursuant to a pretrial agreement to sexual abuse of a child. On 22 August 2017, the military judge sentenced him to be discharged with a Bad Conduct Discharge and 3 years confinement.

September 2017:
At a General Court-Martial in Yokosuka, Japan, an E-5 USN, pled guilty pursuant to a pretrial agreement to wrongful possession and viewing of child pornography. On 1 September 2017, the military judge sentenced him to be discharged with a Bad Conduct Discharge, reduction in rank to paygrade E-12, and 2 years confinement.

At a Special Court-Martial in Yokosuka, Japan, an E-5, USN, pled guilty pursuant to a pretrial agreement to assault consummated by a battery. On 19 September 2017, the military judge sentenced him to reduction in rank to paygrade E-12 and 120 days confinement.

CONTACT INFORMATION

Your Nearest Legal Advisors



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Sasebo Legal Assistance: 315-252-2119

Misawa: 315-226-4022

Diego Garcia: 315-370-2922

Okinawa: 315-632-3974

Guam Legal Assistance: 315-333-2061

Joint Region Marianas: 315-349-4134

Singapore: 315-421-2305

CNFK: 315-763-8010

C7F: 315-241-9104

CTF70: 315-243-7113

CTF72: 315-264-2860

CTF76: 315-622-1620

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