

***Kayano v. Hokkaidō Expropriation Committee* Revisited: Recognition
of Ryūkyūans as a Cultural Minority Under the International
Covenant on Civil and Political Rights, an Alternative Paradigm for
Okinawan Demilitarization**

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I. INTRODUCTION

Despite the recent economic downturn,¹ Japan remains one of the world's most prosperous democracies. Japan's citizens benefit from a high standard of living² and a modern legal system³ that provides liberal political and social rights.⁴ Japan's post-war transformation—from a country defeated and devastated by war into an economic superpower—has been characterized as nothing short of miraculous.⁵ This economic miracle was in large part possible because of the American military umbrella, which enabled Japan to direct its financial resources toward economic growth rather than military development.⁶

Behind this success story, however, is a minority that has borne the majority of the burden associated with hosting a foreign military

¹ *GDP falls as recession deepens: 1.2% third-quarter contraction dampens good economic news*, JAPAN TIMES ONLINE, Mar. 9, 2002, at <http://www.japantimes.com> (“The economy has been mired in a series of abortive turnarounds for a decade, as structural problems continue to act as a drag on the economy.”). *Id.*

² See THE WORLD ALMANAC AND BOOK OF FACTS 2002 106 (William A. McGeeveran Jr. et al. eds., 2002) (citing statistics showing that Japan, in 1999, had the third highest gross domestic product and the tenth highest per capita gross domestic product in the world).

³ JOHN O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 18 (1991):

Japan experienced the institutional transformation of its legal order into a modern, predominately German-derivative, civil law system as well as the adaptation and ultimate containment of Western legal institutions during the first half of this century in the midst of rapid industrialization, worldwide depression, war, and defeat. The process continued in post-war Japan

Id.

⁴ LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES 11-12 (John O. Haley ed., 1988) (explaining how individual rights in Japan have been protected under the postwar constitution).

⁵ See generally CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY 1925-1975 (1983) (discussing Japan's postwar economic growth); see also S. MOHINDRA, THE JAPANESE ECONOMIC MIRACLE (1987); AARON FORSBURG, AMERICA AND THE JAPANESE MIRACLE: THE COLD WAR CONTEXT OF JAPAN'S POSTWAR ECONOMIC REVIVAL, 1950-1960 (2000).

⁶ See PETER J. KATZENSTEIN & NOBUO OKAWARA, JAPAN'S NATIONAL SECURITY: STRUCTURES, NORMS AND POLICY RESPONSES IN A CHANGING WORLD 103-04 (1993) (explaining how the United States has indirectly provided for Japan's economic security through its military guarantee in a system known as “comprehensive security”). The Japanese themselves accept that their country's economic success following the war was possible because of low defense expenditures. During the immediate post-war era, Japan's military budget comprised a mere 2% of the gross national product and less than 10% of the national budget. Robert E. Ward, *Legacy of the Occupation*, in THE UNITED STATES AND JAPAN 29, 44 (Herbert Passin ed., 1966).

presence,⁷ while sharing unequally in the country's prosperity.⁸ Okinawa, Japan's poorest⁹ and one of its smallest¹⁰ prefectures, has been a dumping ground for American bases since the end of World War II.¹¹ Consequently, noise pollution, environmental contamination, military accidents, and crimes committed by U.S. servicemen, are a part of everyday life in Okinawa.¹² The U.S. military presence has transformed a peaceful island society into a floating fortress.¹³ More significant, the Ryūkyūans—the indigenous inhabitants of Okinawa¹⁴—are a cultural and ethnic minority who have historically been oppressed and discriminated

⁷ A public poll taken in mainland Japan revealed that most Japanese agree that Okinawa has had to support an “unequal burden” of the U.S. bases located in Japan. TALKUDER MANIRUZZAMAN, JAPAN'S SECURITY POLICY FOR THE 21ST CENTURY 27 (2000).

⁸ CHALMERS JOHNSON, BLOWBACK 40 (2000).

⁹ *Id.*

¹⁰ *See id.* at 36 (“The island of Okinawa measures 454 square miles, almost exactly the size of Los Angeles and smaller than the island of Kauai in the Hawaiian chain . . . Okinawa occupies only 0.6% of Japan's total land area.”).

¹¹ JOHNSON, *supra* note 8, at 40 (“The Japanese government has so far been successful in making Okinawa, the most remote prefecture, serve as the ‘garbage dump’ of the Security Treaty.” (quoting Okinawan women's coalition activist, Etsuko Miyagi Utsumi)).

¹² *See generally* JAPAN FEDERATION OF BAR ASSOCIATIONS, REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS 9-17 (2000) (discussing the impact of the U.S. military bases on Okinawan's local population); *see also* JOHNSON, *supra* note 8 at 40-54.

¹³ *See* JON HALLIDAY & GAVAN MCCORMACK, JAPANESE IMPERIALISM TODAY: ‘CO-PROSPERITY IN GREATER EAST ASIA’ 197 (1973).

Forty-four percent of the arable land (14.8 per cent of the land surface) has been converted into bases; one sixth of the entire work force is employed by the military. The base complex, occupied by some 45,000 U.S. troops, has been to the U.S.A. ‘the Keystone of the Pacific’: source of bombing raids against Indochina; location of major depots for nuclear, gas and chemical and bacteriological weapons supply, and of guerilla warfare schools in realistic Asian conditions; convenient surveillance and spying post against China and North Korea, and important staging post for dry-run exercises in counter-revolutionary warfare in Korea or elsewhere in Asia.

Id. (footnote omitted).

¹⁴ Prior to its annexation by Japan in 1879, the group of islands, which are today known as Okinawa Prefecture, was previously an independent kingdom called the Ryūkyū Kingdom. *See infra* Part III.B.1. Thus, the name “Okinawa” is the name the Japanese gave to the islands and not the original inhabitants' name for the islands. Julia Yonetani, *Ambiguous Traces and the Politics of Sameness: Placing Okinawa in Meiji Japan*, 20 JAPANESE STUDIES 16, 20 (2000).

against by Japan.¹⁵ Thus, based on historical precedence, Japan's acquiescence in allowing the United States to retain Okinawa following World War II and the continued disproportionate allocation of the bases there, even following the islands' reversion to Japan in 1972,¹⁶ cannot be viewed without extreme skepticism.

The people of Okinawa have resorted to mass protests as well as lawsuits to force the Japanese government to address their grievances and bring about the demilitarization of the islands.¹⁷ But so far, neither public demonstrations nor lawsuits¹⁸ have proven successful.¹⁹ A recent case out of the Sapporo District Court, however, may provide a new avenue for advancing the Okinawans' rights through the court system. In *Kayano et al. v. Hokkaidō Expropriation Committee* ("Nibutani Dam Decision"), for the first time a Japanese court recognized the right of a member of an

¹⁵ See discussion *infra* Parts III.C.

¹⁶ JOHNSON, *supra* note 8, at 36 (explaining that although Okinawa occupies 0.6 % of Japan's total land area, approximately 75 % of U.S. military facilities stationed in the country are concentrated there).

¹⁷ *Id.* at 52.

¹⁸ To date, two provisions of the Japanese Constitution have been evoked to challenge the bases in Okinawa on separate occasions. In 1995, Masahide Ota, then governor of Okinawa, defended his refusal to extend the forced lease of private property, where U.S. bases were located, by invoking Article 29, which states that "the right to own or to hold property is inviolable." Aurelia George Mulgan, *Managing the US Bases in Okinawa: A Test for Japanese Democracy*, 20 JAPANESE STUDIES 159, 163 (2000) (citing Nihonkoku Kenpō (1946) [KENPŌ] [Constitution] art. 29 (Japan)). Even before the case was settled, the land leases were forcibly renewed by the prime minister's executive authority and through a legislative amendment to the Special Measures Law for Land Used by the American Forces. Ota eventually lost the case on appeal at the Supreme Court of Japan. *Id.* at 162. In 1997, Okinawans along with residents of other prefectures challenged the Japanese government's subsidy of U.S. bases, based on Article 9, maintaining legal standing as tax payers. JOHNSON, *supra* note 8, at 56. Article 9 of the Japanese Constitution is commonly referred to as the "no-war clause." MIKISO HANE, MODERN JAPAN: A HISTORICAL SURVEY 415 (2d ed. 1992). It states:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

. . . .

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

KENPŌ, art. 9.

¹⁹ JOHNSON, *supra* note 8, at 52.

ethnic minority's right to enjoy his or her culture based on Article 13²⁰ of the Japanese Constitution and the International Covenant on Civil and Political Rights ("ICCPR").²¹

In the Nibutani Dam Decision, the court held a public dam project illegal because the government failed to adequately consider the project's impact on Ainu cultural interests.²² The court based its decision on three crucial findings. First, the court recognized the Ainu culture as a distinct minority culture that deserved special protection.²³ The court went further by stating that minorities such as the Ainu should be provided enhanced protection because of their indigenous nature.²⁴ Second, the court recognized a public policy interest in protecting Ainu culture.²⁵ According to the court, this public policy concern arose because Ainu culture had been severely weakened over time as a result of subordination to the majority *Wajin*²⁶ culture.²⁷ Finally, the court identified Ainu cultural interests that were endangered by the government's actions in the dam construction project.²⁸

²⁰ Article 13 of the Japanese Constitution states that, "all of the people shall be respected as individuals," and guarantees each individual the right to "life, liberty, and the pursuit of happiness." KENPŌ, art. 13.

²¹ *Kayano v. Hokkaidō Expropriation Committee*, 1598 HANREI JIHŌ 33, 938 HANREI TIMES 75 (Sapporo Dist. Ct., Mar. 27, 1997) (Japan), reprinted in 38 I.L.M. 394 (Mark A. Levin trans., 1999), available at <http://www.hawaii.edu/law/faculty/publications/nibutani.pdf> (last visited May. 31, 2002) (complete annotated translation) [hereinafter Nibutani Dam Decision] (only the pdf cite will be used for all subsequent references).

²² *Id.* at 3. Webster's dictionary defines an Ainu as: "a member of an indigenous people of the Japanese archipelago, the Kuril Islands, and part of Sakhalin Island." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 25 (10th ed., 1994). See Mark A. Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL. 419, 420-45 (2001), for a further discussion of the Ainu and their history.

²³ Nibutani Dam Decision, *supra* note 21, at 17-18.

²⁴ *Id.* at 28-29.

²⁵ *Id.* at 32-34.

²⁶ "*Wajin*" is a term Levin uses in his article when referring to the majority ethnic population of Japan. Levin, *supra* note 22, at 321 n.8 ("In discussions concerning the Ainu people in Japan, *Wajin* is a standard Japanese language term that refers to the majority ethnic Japanese people as distinguished from the Ainu, albeit absent any suitable English translation for the term. Following this usage, this Article avoids the term "Japanese" (i.e., *Nihonjin*) to reference the majority ethnic Japanese population because the term more commonly indicates Japanese nationality."). This term will be employed in the same manner for purposes of this paper.

²⁷ Nibutani Dam Decision, *supra* note 21, at 28-34.

²⁸ *Id.* at 32-40.

This paper demonstrates that the Ryūkyūans, like the Ainu, are a historically oppressed indigenous cultural minority in Japan entitled to protection under domestic and international law. Section II summarizes the Nibutani Dam Decision and discusses the case's holding. Section III applies the decision's analysis to the facts relating to the Ryūkyūan people and the history of Okinawa. In particular, it shows that Ryūkyūans qualify as both a cultural and indigenous minority under the ICCPR and the Nibutani Dam Court's definitions and that the historical relationship between the *Wajin* and the Ryūkyūans gives rise to a public policy interest in protecting Ryūkyūan cultural rights. Section IV discusses the "Okinawa Problem" and explains the post-war relationship between the United States, Japan, and Okinawa and how deliberate policy decisions have resulted in the disproportionate concentration of military bases in Okinawa. The paper will conclude by addressing the Nibutani Dam Decision's implications for the rights of Ryūkyūans and the possible changes the decision may initiate in Okinawa.

II. THE NIBUTANI DAM DECISION

A. Case Summary

The Nibutani Dam Decision was a condemnation case brought by Japanese citizens of Ainu ancestry against the government of Japan and Hokkaidō's prefectural government.²⁹ The controversy began in February 1989 when the Hokkaidō Expropriation Committee issued expropriation orders for building a dam as part of a regional industrial development project in an area known as Nibutani.³⁰ The same year, Shigeru Kayano and Tadashi Kaizawa (private land owners whose lands were confiscated) initiated an administrative appeal to the Ministry of Construction, challenging the committee's rulings.³¹ Four years later, the ministry rejected the appeal and the two filed a complaint with the Sapporo District Court on October 26, 1993.³² On March 27, 1997,³³ the court held that the committee's failure to abide by administrative procedures rendered the expropriations illegal.³⁴ The court found that the committee did not meet

²⁹ *Id.* at 5-6. Hokkaidō is the northernmost island of Japan's four main islands. Although the initial lawsuit was against the Hokkaido Expropriation Committee, the Government of Japan was later added as a "participating party." *Id.* at 8.

³⁰ *Id.* at 5.

³¹ *Id.* at 7.

³² Levin, *supra* note 22, at 454-55.

³³ Nibutani Dam Decision, *supra* note 21, at 1.

³⁴ *Id.* at 38-39. As a result of its findings, the court held that the Ministry of Construction abused its administrative discretion under Expropriation Law Article 20(3), rendering the Project Authorization illegal. *Id.* at 39. The Confiscatory Administrative

its obligation under the Land Expropriation Law, which requires an administrative entity to weigh a public project's beneficial effects against any detriment to public or private interests when authorizing a public works project.³⁵ According to the court, the government fell short of the law's requirement when it failed to consider the project's impact on the plaintiffs' cultural rights, protected by the Japanese Constitution, as well as international law.

B. *The Court's Rationale*

The Nibutani Dam Decision's analytical framework is based on the balancing test contained in the Land Expropriation Law, Article 20(3).³⁶ In its decision, the court explained that this balancing analysis should be comprehensive and include the following considerations:

the background of the Project Plan enactment process, the details of the Project Plan that are raised in the Project Authorization, the public benefit that should occur from carrying out the Project Plan, the losing interests and accompanying costs that may arise out of the execution of the project, and the considerations that were made in response to the various losses arising from the instant project.³⁷

While the plaintiffs argued that the dam had ceased to be necessary at the time of the project's authorization, as there was no need for industrial-use water,³⁸ the court found that the main purpose of the Nibutani dam was flood control, for which there remained an existing need.³⁹ The decision then went on to discuss the dam's adverse effects on Ainu culture, a discussion that was premised on the court's recognition that the Ainu are a

Rulings issued by the Hokkaido Expropriation Committee, which was premised on the authorization, was also, consequently, ruled illegal. *Id.* at 40.

³⁵ *Id.* at 10.

³⁶ *Id.* at 25-26. The court focused on the legality of the Ministry of Construction's project authorization rather than the expropriation committee's confiscatory ruling itself. *Id.*

³⁷ *Id.* at 10.

³⁸ *Id.* at 11-12.

³⁹ *Id.* at 12. The court relied on the Construction Implementation Plan drafted in 1978, as well as subsequent plans to demonstrate that the dam's main intended purpose was flood control. *Id.* Aside from flood control, the court also found that the dam corrects the functioning of the river flow, generates electric power, and supplies the area with irrigation, municipal, and industrial water supplies. *Id.* at 14-17.

minority group protected by ICCPR Article 27,⁴⁰ and that the majority of the people who lived in the vicinity of the dam⁴¹ belonged to this group.

The court's discussion of Ainu culture began by emphasizing the Ainu's respect for nature and their philosophy of co-existence with the *kamui*, or gods.⁴² The court explained that the mountains, rivers, and other natural landmarks provide the Ainu with structure in their daily lives, as well as an identity based on their surroundings: “[T]he nearby mountains and rivers having mythical traditions is not merely a historical legacy, but something for which present-day efforts to sustain its ethnic culture are extremely important.”⁴³ Moreover, the court explained that Nibutani has long been a preferred settlement for the Ainu due to its natural surroundings,⁴⁴ resulting in a rich legacy for the Ainu in this area of Hokkaidō.⁴⁵ The decision then proceeded to enumerate specific cultural assets, which would be lost or severely affected by the project.⁴⁶

The next segment of the decision discussed the nexus between a minority's cultural rights and the ICCPR.⁴⁷ According to the court, since the Japanese government is a signatory to the ICCPR, the Ainu should be protected under Article 27, which reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to

⁴⁰ *Id.* at 17-18.

⁴¹ The court accepted the fact that of approximately 500 people who resided in the Nibutani vengeance area, 80% were Ainu as of April 1993 and 70% were Ainu as of December 14, 1995, as evidence. *Id.* at 18.

⁴² *Id.* at 18-19.

⁴³ *Id.*

⁴⁴ *Id.* at 19.

⁴⁵ *Id.* The court found that because of Nibutani's historical significance the members of the Ainu community who have dedicated themselves to the preservation of the Ainu people's "traditional, spiritual, and technological culture," are particularly numerous in the region. *Id.*

⁴⁶ In particular, the court referred to the *Chipusanke*, a ceremony for launching new boats in to the river, a tradition revived by plaintiff Kayano and others in 1972. *Id.* at 20. The court stated that this ceremony has not only kept Ainu traditions alive, but has fostered "togetherness" with non-Ainus who also regularly participate in the ceremony. *Id.* The court also identified *Chash'i*, Ainu archeological remains and prayer sites known as *Chinomishir* or "the place where we worship." *Id.* at 21-22. Although the *Chinomishir* sites had been kept relatively secret to avoid desecration by the Japanese, the court admitted that there was enough evidence to acknowledge their existence. *Id.* at 20-21.

⁴⁷ *Id.* at 26.

profess and practise their own religion, or to use their own language.⁴⁸

The court interpreted this provision to mean that countries who are signatories to the ICCPR⁴⁹ have a duty to “exercise due care” when formulating policy, so as not to infringe on a minority’s right to enjoy its culture.⁵⁰ The court conceded, however, that these considerations are subject to “the limits for the public welfare”⁵¹ as prescribed by Articles 12 and 13 of the constitution, but warned that “any limits on the guarantee of rights must be kept to the narrowest degree necessary.”⁵²

In addition, the court cited to Article 13 of the Japanese Constitution, which it interpreted in a similar manner to ICCPR Article 27.⁵³ The court stated that the language of Article 13 “demands the highest regard for the individual in his or her relationship with the state”⁵⁴ and recognizes the “particular worth of all citizens.”⁵⁵ According to the court, the particular worth of a citizen includes his or her unique character, defined by such things as gender, ability, age, and wealth.⁵⁶ The court further explained how this provision applies to the cultural interests of ethnic minorities:

The minority’s distinct ethnic culture is an essential commodity to sustain its ethnicity without being assimilated into the majority. And thus, it must be said that for the individuals who belong to an ethnic group, the right to enjoy their distinct ethnic culture is a right that is needed for their self-survival as a person. We believe the

⁴⁸ *Id.* at 27 (quoting ICCPR art. 27, S. TREATY DOC. NO. 95-2, 999 U.N.T.S. at 179). To demonstrate that the Ainu people are covered under ICCPR Article. 27, the court referred to the Japanese government’s third report to the U.N. Human Rights Committee, in which Japan formerly recognized the Ainu as a minority possessing their own religion and language, who have preserved the uniqueness of their own culture. *Id.* (citing *Third Periodic Report of Japan to the Human Rights Comm.*, at 49, U.N. Doc. CCPR/C/70/Add.1 (1992)).

⁴⁹ The court cited to Article 98(2) of the Japanese Constitution when discussing Japan’s obligations under the ICCPR, *Id.* at 27, which reads: “The treaties concluded by Japan and established laws of nations shall be faithfully observed.” KENPŌ, art. 98(2).

⁵⁰ *Id.* at 27.

⁵¹ *Id.*

⁵² *Id.* at 27 (citing KENPŌ, art. 12-13).

⁵³ *Id.* at 27-28.

⁵⁴ *Id.* at 27.

⁵⁵ *Id.* at 28.

⁵⁶ *Id.*

guarantee of that right fulfills the basic tenets of democracy by meaningfully respecting the individual while striving for the majority's compensation of and respect for the circumstances faced by the socially weak.⁵⁷

Following from this, the court found that Article 13 guarantees Kayano and Kaizawa, the "right to enjoy the distinct ethnic culture of the Ainu people, which is the minority to which the plaintiffs belong."⁵⁸

In addition to the rights guaranteed by the aforementioned provisions, the court elaborated that the Ainu were entitled to enhanced protection by virtue of their indigenous origin.⁵⁹ The court stated that when comparing a minority group which lived in an area prior to being ruled by a majority and a minority group which came to live in an area already inhabited by a majority, the former should be entitled to greater protection.⁶⁰ The court explained that it reached this conclusion based on "a growing international movement towards seeing indigenous peoples' culture, lifestyle, traditional, ceremonies, customary practices, etc., as deserving respect"⁶¹ For the purpose of this analysis, the court provided its own definition for identifying an indigenous people:

a social group who live and have lived in a region which historically existed outside of a state's rule and was brought within that state's rule as a minority group with a culture and identity which differed from the majority of the parent ruling state, and who have retained a unique culture and identity that originate and continue from the past, such that even while subject to the rule of the above-mentioned majority, that group has not since lost the unique culture and identity which derives and continues from the past.⁶²

This was followed by a discussion on the Ainu's indigenousness characteristics.⁶³

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 28-29.

⁶¹ *Id.* at 29.

⁶² *Id.*

⁶³ *Id.* Based on historical evidence, the court found the Ainu are an indigenous minority. *Id.* at 32. The historical evidence the court relied on includes: the Ainu's first contact, through commerce, with the *Wajin* in the twelfth century; the Matsumae clans' settlement of Hokkaido in the fifteenth century; and the incorporation of the Matsumae fiefdom into the Tokugawa government a hundred years later. *Id.* The court recounted

Finally, the court highlighted public policy considerations pertaining to the social and economic devastation the *Wajin* majority has inflicted on the Ainu, which was taken into account when conducting the relevant analysis.⁶⁴ The court found that as a result of the *Wajin* government's policy, the Ainu have lost "their ethnic culture, lifestyle, traditional customs, and the like."⁶⁵ Due to the potential consequences of the dam project involving human rights considerations, the court explained that a government official conducting the balancing inquiry is under an obligation to provide "generous consideration" for the Ainu's cultural interests.⁶⁶

Ultimately, the court held that the government had failed to satisfy its burden—to show that the Ministry of Construction adequately considered the Nibutani Dam's impact on Ainu culture during the project authorization process.⁶⁷ The court criticized the local authorities' determination of its construction location based on "merely ground form, structure, and economic factors."⁶⁸ The court pointed out that the comparative balancing test should have been based on a preliminary environmental assessment and that the government had a duty to investigate whether such an assessment was sufficiently conducted.⁶⁹ While acknowledging that officials took potential risks to buried assets into consideration, pursuant to the Cultural Assets Protection Law, the court declared, "there was not a scintilla of particular consideration for the Ainu *per se*."⁷⁰ Moreover, the court stated that the failure to mention Ainu culture in the Construction Implementation Plan, the Fundamental Plan, or the Project Plan, was further evidence that "Ainu culture had not been

how the Ainu culture has survived despite the influence of the Matsumae clan and the Tokugawa government's assimilation policy. *Id.* at 32. The court commented that, while most Ainu live amidst the *Wajin* majority in modern times, their culture has, to this day, been preserved and revived through the efforts of members in the Ainu community. *Id.*

⁶⁴ *Id.* at 32.

⁶⁵ *Id.* The court referred to *Wajin* laws prohibiting the Ainu from cutting down trees and fishing as well as criminal penalties against the Ainu for wearing traditional dress and ornaments and engaging in Ainu funeral practices, as examples of such loss. *Id.* at 32-33.

⁶⁶ *Id.* at 35. Moreover, according to the court, the preservation of Ainu culture is not only important to the Ainu people, but to *Wajin* society as well, which benefits from having the opportunity to be exposed to a different culture. *Id.* at 36. The court also emphasized the importance of preserving the Ainu culture found in Nibutani for future generations. *Id.*

⁶⁷ *Id.* at 37.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

separately considered whatsoever.”⁷¹ Notwithstanding this legal conclusion, the court refused to overturn the expropriation orders based on public policy concerns.⁷²

The Nibutani Dam Decision’s most obvious significance is that a Japanese court recognized a minority group’s constitutional right to enjoy its ethnic culture.⁷³ Perhaps more important, the court interpreted this right as a “concrete and enforceable”⁷⁴ right, rather than a mere guiding or aspirational principle.⁷⁵ Furthermore, the court held that a person belonging to an indigenous minority is entitled to enhanced protection of this right.⁷⁶ The court’s analytical framework, which went beyond the Japanese government’s action in the case, and addressed the historical relationship between the majority *Wajin* and the minority Ainu stands as another vital aspect of the case.⁷⁷ The court’s analysis not only recognized the existence of indigenous minorities in Japan, but also acknowledged

⁷¹ *Id.* at 38. The court dismissed the government’s argument that the preliminary investigations were conducted with the protection of Ainu culture in mind. *Id.* The court likewise dismissed the assertion that the existence of the *Chinomishir* could not be confirmed, and, therefore, could not be considered. *Id.*

⁷² *Id.* at 40-41. Despite the illegality of the government’s action, the court refused to reverse the project authorization or the confiscatory administrative rulings, using its discretion under the Administrative Litigation Law Article 31. *Id.* at 40. The court cited several main reasons for exercising its discretion in allowing the dam to stand. *Id.* The court’s first reason was the great financial waste that would occur if the dam were never used. *Id.* The second reason was that an unfilled dam would obstruct the proper flow of the river and increase the danger of flooding. *Id.* Thirdly, the court stated that the state would have to incur additional costs to construct alternative embankments if the Nibutani Dam could not be used. *Id.* The court explained that removal of the dam would not be feasible because of the enormous costs associated with such an undertaking. *Id.* The court, furthermore, pointed out that much of the damage already caused by the construction of the dam could no longer be reversed. Thus, it declared that reversing the administrative rulings would result in “extraordinary harm to the public interest.”

⁷³ Levin, *supra* note 22, at 487 (citing Teruki Tsunemoto, *Hōkoku: Senjūminzoku to saiban—Nibutani damu no hanketsu no kōsatsu* [Report: Indigenous Peoples and the Court-Examination of the Nibutani Dam Decision], 9 HUM. RTS. INT’L (J. JS. ASSOC. OF HUM. RTS. L.) 51, 53 (1998)). The case was also historically significant in that it was only the second time in Japan’s legal history that a court held a government public works project to be illegal. *Id.* at 423.

⁷⁴ Tsunemoto, *in* HUM. RTS. INT’L, *supra* note 73, at 53.

⁷⁵ *Id.* at 53 n.23 (citing 924 HANREI JIHŌ 34 (Osaka High Ct., Feb. 26, 1979)). Since the adoption of the constitution, scholars and jurists have debated whether Article 13 creates “concrete and enforceable” rights. Levin, *supra* note 22, at 481. The Japanese Supreme Court appears to have resolved this issue when it recognized enforceable Article 13 privacy rights in a case addressing the legality of police surveillance. *Id.* at 481 (citing *Hasegawa v. Japan*, 13 Keishū 12 at 1625 (Sup. Ct., G.B., Dec. 24, 1969)). However, an alternative view is still supported by a minority of courts and scholars. *Id.* at 481.

⁷⁶ Nibutani Dam Decision, *supra* note 21, at 29.

⁷⁷ Levin, *supra* note 22, at 509.

that the *Wajin* are responsible for the “deprivation of the Ainu people.”⁷⁸ In effect, the court offered a counternarrative challenging the notion of Japan as a mono-ethnic nation, defined by a single culture and heritage.⁷⁹ Levin describes the court’s ruling as “fl[ying] in the face of Japanese government pronouncements, the canon of public education pedagogy, and the widely held popular notion of self and state.”⁸⁰ In the long-term, the court’s interpretation of Article 13 as a provision offering protection to indigenous cultural minorities and the broad historical context in which it placed the issue, implicates the rights of other minority groups in Japan.

III. APPLICABILITY OF THE NIBUTANI DAM JURISPRUDENCE TO OKINAWA

The Nibutani Dam Decision recognized the right of an individual, belonging to an ethnic minority, to enjoy his or her culture.⁸¹ The ruling neither limited this right to the Ainu people nor to the specific facts of the Nibutani Dam decision. While the court based its analysis on the balancing test found in the Land Expropriation Law, the statute was merely a vehicle the court utilized to frame the plaintiffs’ substantive legal rights. Kayano and Kaizawa’s legal rights as members of a cultural minority, are based on two independent legal authorities: the Japanese Constitution and the ICCPR. It should follow then, that this legal principle can be applied to other minorities in other contexts, if the party claiming this right can demonstrate that he or she is a member of a cultural minority whose protection would further public policy. This section identifies the Ryūkyūans as a cultural minority that should also be protected under the aforementioned provisions. It also demonstrates that the Ryūkyūans are an indigenous minority, deserving enhanced consideration, pursuant to the Nibutani Dam decision’s definition of an indigenous minority. Finally, this section highlights the historical relationship between the *Wajin* and Ryūkyūans, and demonstrates that the public policy considerations for protecting the Ryūkyūans are likewise present in Okinawa.

The Nibutani Dam court relied on the Japanese government’s third report to the U.N. Human Rights Committee to show that the Ainu were a minority group officially recognized by the Japanese government for purposes of the ICCPR.⁸² The report mentions Koreans, Burakumin, and other minority groups, in addition to the Ainu, but fails to list the

⁷⁸ Nibutani Dam Decision, *supra* note 21, at 32. See also *infra* Part III.C.

⁷⁹ See Levin, *supra* note 21, at 498-513.

⁸⁰ *Id.* at 501.

⁸¹ *Id.* at 419-27

⁸² Nibutani Dam Decision, *supra* note 21, at 26-27.

Ryūkyūans.⁸³ It is a well-established principle, however, that a group need not be recognized as a minority under local law to be considered as such under international law.⁸⁴ In fact, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities (U.N. Sub-Commission) has formulated its own definition of minority in the ICCPR:

a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the state—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁸⁵

Furthermore, the U.N. Sub-Commission's report reiterates the principle that state recognition is unnecessary for a group to be considered a minority.⁸⁶ The report explains that if a minority can be objectively recognized, the state in which they live should afford them protection under ICCPR Article 27.⁸⁷

⁸³ See *Third Periodic Report of Japan to the Human Rights Comm.*, supra note 48, at 49. In fact, a document published by the Japanese government in 2000 explicitly denies that the Ryūkyūans are a minority:

We know that some people claim that the population in Okinawa is a different race from the Japanese race; however, we do not believe that this claim represents the will of the majority of the people in Okinawa. Also, as described in 1(2)(a), those who live in Okinawa Prefecture or natives of Okinawa are of the Japanese race, and they are not generally considered to be a group of people who share different biological or cultural characteristics from the Japanese race.

Comments of the Japanese Government on the Concluding Observations adopted by the Committee on the Elimination of Racial Discrimination on March 20, 2000, regarding initial and second periodic report of the Japanese government, The Ministry of Foreign Affairs, at <http://www.mofa.go.jp/policy/human/comment0110.html>.

⁸⁴ Louis B. Sohn, *Rights of Minorities*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 270, 277 (L. Henkin ed. 1981).

⁸⁵ Francesco Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, at 43, UN Sales E.78.XIV.1 (1979). Capotorti's definition has been described as having the "widest recognition in theory and practice." MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 487 (1993). Moreover, it is based on "case law of the Permanent Court of International Justice, on proposals from a large number of governments and on his proposed definition in the HRCComm." *Id.*

⁸⁶ See Louis B. Sohn, *Rights of Minorities*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, supra note 84, at 270, 282.

⁸⁷ *Id.*

The above definition can be divided into four objective criteria and one subjective criterion.⁸⁸ The first objective criterion requires that the group possess an ethnic, religious or linguistic characteristic that differs from those of the rest of the population.⁸⁹ The second objective criterion states that the minority must be numerically inferior to the majority population.⁹⁰ Third, the minority must be shown to be a “non-dominant” minority that needs to be protected.⁹¹ Fourth, the minority must be citizens of the nation-state in which they live. Finally, the group must satisfy the subjective criterion of having some form of cultural solidarity.⁹² As will be shown, Ryūkyūans meet each of these criteria and are a minority population as defined by the ICCPR.

A. *Ryūkyūans as a Cultural Minority*

1. *Ethnicity, Religion, and Language*

First, Ryūkyūans have a cultural heritage distinct from the rest of the Japanese population, manifested in their ethnicity, religion, and language. It is helpful to consult the ICCPR commentary in applying the U.N. Subcommittee’s definition. The commentary explains that ethnicity is not limited to describing “biological, physically recognizable or genetic features” but encompasses “cultural and historical elements.”⁹³ As for religious minorities, the commentary defines them as “those groups that profess and practice a religion that differs from that of the majority population.”⁹⁴ Furthermore, this religion need not possess any special characteristics and may even be atheistic. The commentary characterizes linguistic minorities as “those groups of the population that use a language, both among themselves and in public, that clearly differs from

⁸⁸ *Id.* at 278-79; NOWAK, *supra* note 85, at 488. Although both commentators identify one subjective criterion in Capotorti’s definition, Sohn categorizes the objective portion of the definition into four criteria, while Nowak categorizes them into two. Louis B. Sohn, *Rights of Minorities*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 84, at 270, 278-79. For the purposes of this paper, the definition will be separated into four objective elements, rather than two.

⁸⁹ Louis B. Sohn, *Rights of Minorities*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 84, at 270, 278 (citing to Capotorti, *supra* note 85, at 96).

⁹⁰ *Id.* at 279.

⁹¹ *Id.*

⁹² *Id.*

⁹³ NOWAK, *supra* note 85, at 491.

⁹⁴ *Id.*

that used by the majority as well as from the State language.”⁹⁵ Moreover, while the language does not have to be a written language, it can not be a language which only slightly deviates from the majority tongue.

a. *Ethnicity*

Despite the commentary’s guidance, ethnicity remains the most amorphous of the elements found in the first criterion. The commentary fails to explain how and to what degree a minority’s physical, historical, and cultural characteristics must differ from that of the majority population. It furthermore fails to specify how, if at all, these factors should be prioritized. Notwithstanding the availability of a precise framework, evidence shows that Ryūkyūans differ significantly from the *Wajin* in all three areas.

Koji Taira explains that the presently held view among most Japanese academics is that the Ryūkyūans and the Ainu are directly descended from the Jōmon people, who were “conquered, eliminated or assimilated” by people from Asia proper, from whom the modern Japanese descended.⁹⁶ The ancestors of the modern Japanese are referred to as Sinodonts or “New Mongoloid,” while the Jōmon people are described as Sundadonts or “Proto-Mongoloid.”⁹⁷ According to Taira, the Sundadonts evolved from the Asian population, which populated the Japanese and Ryūkyū islands during the Ice Age, while the Sinodonts evolved from groups who migrated into the Chinese interior during the same period.⁹⁸ Furthermore, Taira points out that the Sundadonts and Sinodonts were distinguishable by varying physical characteristics.⁹⁹ Modern-day Ryūkyūans are also distinguishable from their Japanese *Wajin* counterparts based on their physical characteristics. According to William Lebra, another noted Okinawa scholar, the two groups exhibit distinct physical differences: “[R]elative to the Japanese, Okinawans are characterized by shorter stature, broader shoulders, darker skin, greater nasal breadth, wider eye opening, and less prognathism.”¹⁰⁰

⁹⁵ *Id.*

⁹⁶ Koji Taira, *Troubled National Identity: The Ryukyuan/Okinawans*, in *JAPAN’S MINORITIES: THE ILLUSION OF HOMOGENEITY*, 140, 144 (Michael Weiner ed., 1997) [hereinafter Taira, *Troubled National Identity*].

⁹⁷ *Id.* at 145.

⁹⁸ *Id.*

⁹⁹ *Id.* (asserting that the Sundadonts and Sinodonts were distinguishable by varying tooth characteristics).

¹⁰⁰ WILLIAM P. LEBRA, *OKINAWAN RELIGION: BELIEF, RITUAL, AND SOCIAL STRUCTURE* 7 (1966). Studies have shown that 25-30 percent of Ryukyuan have heavy quantities of hair on their lower legs, compared to 1 percent among Japanese. *Id.* (citing

In addition to physical anthropological differences based on pre-historic evidence, 30,000 years of isolation gave rise to two distinct cultural groups:

The two groups of humans were physically and culturally—that is, ethnically—distinct. Comparison of prehistoric earthenwares found in Japan and Ryukyu suggests that culture may have been similar in Japan and Ryukyu, but that the earlier similarities subsequently broke down and differentiated. By the end of the Jōmon period (the beginning of the Yayoi period) in Japan, Ryukyuan culture and Jōmon culture had diverged considerably.¹⁰¹

Today, the relationship between Japanese and Ryūkyūan culture is described as a “cognate relationship,” meaning that although they share a similar set of beliefs and practices, they developed into two distinct cultural entities that were molded by different historical and intellectual experiences.¹⁰² The observable dissimilarity between the two cultures is summarized as follows:

The cultural relationship of Okinawa to Japan, though more intensively studied than its relationship to either China or Taiwan, has been confounded by the implicit assumption on the part of many Japanese scholars that Okinawan culture is essentially Japanese and represents an isolated provincial development. However, to any foreign observer reasonably familiar with Japan, Okinawa does not suggest a mere provincial entity but rather a distinct culture evincing varying degrees of affiliation with neighboring cultures. Haring makes the analogy that Okinawa differs more from Japan than Ireland from England or Quebec from Ontario. Not only the readily material differences—large tombs, massive stone walls surrounding house lots, red tile roofs, clothing and hair styles, and food—but basic differences in

Marshall T. Newman & Ransom Eng, *The Ryukyu People, a Cultural Appraisal*, 5 A.J.P.A. 391-399 (1947).

¹⁰¹ *Id.* at 145 (citations omitted); see also Kazumichi Katayama, *The Japanese as an Asia-Pacific Population*, in MULTICULTURAL JAPAN 19, 24 (Donald Denoon et al. eds, 1996) (“The Yayoi to early Kofun age was thus critical in the formation of the modern Japanese physique and in the ethnic differentiation of the Ainu, Honshu Japanese, and Okinawans.”).

¹⁰² Douglas G. Haring, *Chinese and Japanese Influences*, in RYUKYUAN CULTURE AND SOCIETY: A SURVEY 40 (Allan H. Smith ed., 1964).

personality and values soon impress the observer. A significant distinction may be cited in the higher status accorded women in Okinawan society, which may stem partially from the absence of militarism during the past five hundred years, although female domination of religion suggests a more deeply embedded trait.¹⁰³

The marked difference between the two cultures in more recent times is attributable to the fact that the Ryūkyū Islands and Japan were impacted at different times in history by Chinese culture.¹⁰⁴ The greatest Chinese influence on Japan came during the T'ang Dynasty (618-907 C.E.), characterized by Buddhism, while the infusion of Chinese culture in the Ryūkyūs came about several centuries later during the Ming Dynasty (1368-1622 C.E.), which was by then dominated by Confucian thought.¹⁰⁵ Furthermore, Japan's contact with China was filtered through Korea and came from northern China, while the Ryūkyūans were influenced by southern China.¹⁰⁶

b. Religion

In addition to ethnic differences, the Ryūkyū Islands have a religious tradition not found in the rest of Japan. The native religious system began as a religion focused on nature, whose practitioners worshipped sprits, which were believed to dwell in the natural surroundings.¹⁰⁷ The central figure in the Ryūkyūans' religious system has always been the female shaman who communicated the spirits' will to the people.¹⁰⁸ Although the roots of Ryūkyūan religion are similar to the Japanese Shintō tradition, characteristics found in the Ryūkyūan religion today have all but disappeared in Japanese religion.¹⁰⁹ Moreover, while Buddhism profoundly influenced Japanese religion, Ryūkyūan religion was primarily influenced by Taoism and relatively uninfluenced by

¹⁰³ LEBRA, *supra* note 100, at 13.

¹⁰⁴ Haring, *supra* note 102, at 40.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ LEBRA, *supra* note 100, at 21.

¹⁰⁸ See generally SUSAN SERED, *WOMEN OF THE SACRED GROVES: DIVINE PRIESTESS OF OKINAWA* (1999).

¹⁰⁹ Tokihiko Ofuji, *Nihon Minzokugaku ni okeru Okinawa Kenkyūshi* [*History of Okinawan Studies in Japanese Folk Studies*], in *OKINAWA NO SHAKAI TO SHYŪKYŌ* [OKINAWAN SOCIETY AND RELIGION] 5, 11 (Tokyo City University Southwest Islands Research Group ed., 1965)

Buddhism.¹¹⁰ Although Shintō is similar to the Ryūkyūan's religion, Shintō possesses different deities, and in fact Shintō was not introduced to Okinawa until the fifteenth century.¹¹¹

When the islands were unified under Shō Hashi, the first king of the Ryūkyū Kingdom, in the early fifteenth century, the islands' folk religion was reorganized and transformed into a state religion.¹¹² Under this system, village shamans were organized into a national hierarchy of priestesses and the king entrusted them with political control over the kingdom's various regions.¹¹³ The state religion disintegrated as a result of Japanese annexation in 1879 and the last official priestess died in 1909.¹¹⁴ Despite the abolition of their religion as an official state religion, Ryūkyūans continue to practice their traditional faith through household worship and ancestor veneration.¹¹⁵

c. Language

Like Okinawan culture and religion, *Ryūkyū-go*, or the Ryūkyūan language, developed separately from Japanese. Prior to the migration of Manchurian and Mongolian peoples from the continent in c. 2000 B.C.E, the Jōmon people spoke Southeast Asian dialects.¹¹⁶ Subsequent to this migration, these dialects fused with the continental population's Altaic languages.¹¹⁷ While the ancient forms of Japanese and Ryūkyūan possessed similarities, scholars agree that the two languages clearly split

¹¹⁰ *Id.* at 12.

¹¹¹ JAMES C. ROBINSON, *OKINAWA: A PEOPLE AND THEIR GODS* 82 (1969).

¹¹² LEBRA, *supra* note 100, at 107.

¹¹³ *Id.* at 107-08.

¹¹⁴ *Id.* at 120.

¹¹⁵ ROBINSON, *supra* note 112, at 91; *see also* LEBRA, *supra* note 100, at 207 (“It seems likely that, despite manifold changes, certain aspects of this religion will persist for some time to come but that there will be a shift in activity focus from the collectivity to the individual.”). According to a survey of 466 families conducted by the local government in 1965, 100 percent said that they practiced ancestor veneration while 68 percent acknowledged observing the traditional ceremony of worshipping the “deity who is in charge of the home site.” *Id.* at 91 (citing *Ryukyus Hold on 70 Ancient Superstitions*, LIFE ON OKINAWA, October 1956, at 30). Forty-nine percent of respondents also stated they worship the fire deity, while 43 percent said they visited traditional religious grottos to pray for the prosperity of their families. *Id.*

¹¹⁶ Koji Taira, *Ryukyuan Migration: Pre-historic to Modern*, Paper delivered at the Okinawa History and Culture Celebration, International Scholars Forum at the Honolulu Academy of Arts (June 18-23, 1990) (proceedings available in the University of Hawai'i Library system).

¹¹⁷ *Id.*

from one another prior to the tenth century, at the latest.¹¹⁸ Furthermore, scholars also agree that, though the two languages belong to the same linguistic family, they are cognate languages.¹¹⁹ The Shuri dialect of the Okinawan language was the official language of the Ryūkyū Kingdom and has a literary tradition dating back to the sixteenth century.¹²⁰ Practically speaking, the differences between the languages vary so greatly that any Japanese dialect and any Ryūkyūan dialect are “mutually unintelligible.”¹²¹

As shown above, the Ryūkyūan language clearly differs and does more than “deviate slightly” from Japanese. In this way, it conforms to the ICCPR commentary regarding linguistic minorities. However, although the native language is still spoken in the home and utilized in religious and folk ceremonies today, it is hardly used in other public settings.¹²² Thus, the issue is whether the limited public use of the

¹¹⁸ *Id.* (explaining that the language of the Ryūkyūs split from early Japanese by 600 B.C.E.); Yukio Uemura, *Ryukyuan and Japanese Dialects*, in RYUKYUAN CULTURE AND SOCIETY, *supra* note 103, at 35, 37 (stating that while his personal theory is that the languages split prior to the 8th century, according to the Swadesh formula and the modified Hattori formula, the date is estimated to be around the tenth century and between the third and sixth centuries, respectively).

¹¹⁹ Douglas G. Haring, Chinese and Japanese Influences, in RYUKYUAN CULTURE AND SOCIETY, *supra* note 102, at 39, 39 (stating that he accepts B.H. Chamberlain’s position that the two languages are cognate languages); LEBRA, *supra* note 100, at 120. LEBRA analogizes the relationship between Ryūkyūan and Japanese to French and Italian, *Id.*, while Haring equates them to Spanish and Italian, Douglas G. Haring, Chinese and Japanese Influences, in RYUKYUAN CULTURE AND SOCIETY, *supra* note 102, at 39, 40. Although, according to Haring, some Japanese linguists prefer to categorize Ryūkyūan as a Japanese dialect, he dismisses this notion as ethnocentric apologia, which was developed for the purpose of justifying the islands’ annexation. *Id.* at 29-40. See Yonetani, *supra* note 14, at 20, for a study of cultural and ethnic apologia used to legitimate Japanese control of Okinawa developed under the Meiji regime.

¹²⁰ Yukio Uemura, *Ryukyuan and Japanese Dialects*, in RYUKYUAN CULTURE AND SOCIETY, *supra* note 103, at 35, 35. The Ryūkyūan language itself contains various language groups or dialects. Uemura divides them into two (Amami-Okinawa and Sakishima (Miyako Yaeyama)) and possibly three (Yonaguni). *Id.* LEBRA, on the other hand, identifies four (Amami Oshima, Okinawa, Miyako, and Yaeyama). LEBRA, *supra* note 100, at 8.

¹²¹ Yukio Uemura, *Ryukyuan and Japanese Dialects*, in RYUKYUAN CULTURE AND SOCIETY, *supra* note 103, at 35, 35.

¹²² LEBRA, *supra* note 100, at 9. The following excerpt describing the state of the Okinawan language was published by William P. Lebra in 1966:

As a result of Japanese control, most Okinawans have become bilingual; but in spite of assiduous efforts by Japanese educators, use of the indigenous language remains widespread. Okinawan persists as the language of most homes and villages and is used almost exclusively in religion and the folk-theatre, while in government, education, the press, cinema, radio television, and in nearly all phases of public and professional life, Japanese has virtually displaced Okinawan.

Ryūkyūan language is sufficient for Ryūkyūans to qualify as a linguistic minority. It should be noted that, while Ainu language has all but disappeared,¹²³ the Nibutani court recognized the Ainu as possessing a unique culture worthy of protection under the ICCPR. It should also be taken into account that the loss of the Ryūkyūan and Ainu languages is attributable to the assimilation policy during the Meiji Period, which prohibited the use of these languages.¹²⁴ Notwithstanding the relative uncertainty as to whether the Ryūkyūans can be considered a linguistic minority, they clearly satisfy the Caportorti definition's first criterion as an ethnic and religious minority.

Generally, old people and children speak only Okinawan, and country people, especially women, appear to be more articulate in the native tongue. The limited education in Japanese of two generations has been insufficient to displace Okinawan, although a decided drift toward Japanese phonology is occurring in the speech, while an increasing number of Japanese words is appearing in the vocabulary. The new generation, the third since the establishment of universal education, is receiving considerably more exposure to Japanese than its parents, grandparents, and the use of Okinawan may be expected to decline rapidly in the next two decades.

Id.

¹²³ See Levin, *supra* note 22 at 440 n.77 (“Today, the Ainu language is dead, the culture is moribund and the Ainu people themselves are on the verge of a sort of extinction (quoting David Howell, *Ainu Ethnicity and the Boundaries of the Early Modern Japanese State*, 142 PAST AND PRESENT 91-92 (1994)).

¹²⁴ TESSA MORRIS-SUZUKI, RE-INVENTING JAPAN: TIME, SPACE, NATION 181 (1998):

The Meiji state did not go so far as to propose a uniform Japanese way of sneezing, but it did succeed in imposing order on many aspects of the existing regional diversity of Japanese culture, including the multiplicity of regional dialects which existed throughout the country. Efforts to enforce the use of “normal language” in Okinawa and among the Ainu were accompanied by heated debates about the relative merits of the Kyoto and Tokyo dialects or of various forms of artificial *lingua franca*, as the official form of “standard Japanese”—debates which were ultimately won by those who favored the Japanese of the Tokyo middle classes.

Id. (citation omitted). Furthermore, Levin argues that, in instances where indigenous peoples, such as the Ainu, the Mashpee, or Native Hawaiians “have lost the common use of their language in a negotiated struggle for existence” their claims for recognition and autonomy should not be affected by the fact of their linguistic assimilation. Levin, *supra* note 22, at 490 n.25.

2. Numerosity

The Capotorti report's second criterion is a numerical requirement, which requires the group at issue to be numerically inferior. The U.N. Sub-commission's report states that a minority group must comprise less than fifty percent of a State's population to be considered "numerically inferior."¹²⁵ While the number of people who identify themselves as *uchinānchu*, or native or indigenous Okinawan, is unverifiable, because this minority inhabits a region with a population of 1.3 million people,¹²⁶ they clearly account for substantially less than fifty percent of Japan's population of roughly 120 million people.¹²⁷ Thus, they fulfill the requirement of being numerically inferior to the majority *Wajin* within Japan's territory.

3. Non-Dominance

Likewise, Ryūkyūans meet the third criterion, which requires the minority group to occupy a "non-dominant position" within the nation-state to which they belong. The Capotorti report states that "non-dominant position" pertains to political, economic, as well as cultural or social status.¹²⁸ Politically, Ryūkyūans have always been in an inferior position vis à vis the majority Japanese. During the Japanese feudal period, the Ryūkyūs were invaded by the Satsuma clan of Kyūshū, forced to become the Tokugawa shogunate's tributary state,¹²⁹ and required to pay homage.¹³⁰ After the Meiji Restoration in 1868, the new Japanese government designated the Ryūkyū Kingdom a *han*, or fiefdom, and

¹²⁵ Louis B. Sohn, *Rights of Minorities*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 84, at 270, 280 (citing Capotorti, *supra* note 85, at 9). Although the government of Sweden proposed a lower limit of one hundred persons, for purposes of recognizing a minority group, the commission reached no consensus on the issue. *Id.*

¹²⁶ Taira, *Troubled National Identity*, *supra* note 96, at 140, 142. ("Okinawans constitute the largest minority group of this type, with a population of about 1.3 million in their home base (Amami Islands and Okinawa Prefecture)"). *Id.*

¹²⁷ THE WORLD ALMANAC AND BOOK OF FACTS 2002, *supra* note 2, at 106.

¹²⁸ NOWAK, *supra* note 85, at 488.

¹²⁹ Yonetani, *supra* note 14, at 18.

¹³⁰ Morris-Suzuki, *supra* note 124, at 19. The relationship of the Ainu and Ryūkyū people in the feudal era was defined by the "*ka-i*" system. Yonetani, *supra* note 14, at 18. This system was characterized by a "logic of difference" which supported the notion of a "miniature world order." *Id.* This order was comprised of by an "unequal hierarchy of center (*ka*) and barbaric periphery (*i*)," *Id.*, and represented Japanese domination over foreign peoples. *Id.* at 18.

Ryūkyūans as Japanese subjects.¹³¹ Once the Ryūkyū Islands became a Japanese prefecture in 1879, Okinawans became a disadvantaged minority group, subject to inferior status within the Japanese nation-state.¹³² The Ryūkyūan people's social standing during this period is described as follows: "In the Japanese eyes the Okinawans stood somewhere between the former outcasts, the Eta of pre-Restoration days, and full-fledged membership in the nation-family."¹³³ Moreover, Ryūkyūans were discriminated against based on racial as well as cultural differences, including the fact that pork was a staple in the Ryūkyūan diet.¹³⁴ Although not as pervasive, discriminatory attitudes toward Ryūkyūans still persist in Japan today.¹³⁵

The Ryūkyūans' inferior racial and cultural status established in the pre-war years has translated into political and economic subjugation in the post-war era. American demand and Japanese acquiescence, in allowing Okinawa to come under direct control of the United States following the war, for example, had a strong racial component.¹³⁶ And during the U.S. control of Okinawa, which lasted until 1972, a military government governed Okinawa while the Japanese enjoyed civilian rule.¹³⁷ Since reversion, Okinawans have been a political minority outnumbered by the mainland Japanese; Okinawa currently has two seats in the 152

¹³¹ Yonetani, *supra* note 14, at 18-19.

¹³² Taira, *Troubled National Identity*, *supra* note 96, at 140, 142-43.

¹³³ *Id.* at 143.

¹³⁴ *Id.* at 142 ("Historically, contempt for persons belonging to 'inferior' races or nations has co-existed with adulation for those from 'superior' races or nations. During the pre-war period Okinawans were regarded as members of an inferior race."). *Id.*

¹³⁵ *Id.* at 164 ("Instances of overt discrimination against Okinawans are fewer in post-reversion Japan than in pre-war Japan, although the problem has not totally disappeared."). *Id.*

¹³⁶ See *infra* Part IV.A. The U.S. attitude and treatment of Okinawans as an inferior and uncivilized race stemmed from the Japanese's prejudices against the Okinawans:

A wartime study prepared by Dr. John W. Masland Jr. for the U.S. Department of State between April and July 1943 had suggested several plans for the postwar disposition of Okinawa based on the racial affinity between the Japanese and Okinawans. On the other hand, another paper presented by the Navy in October 1944 pointed out that the Japanese did not consider the Okinawans as racially equal—and therefore the United States might use this attitude to justify its control of the islands in the eyes of the Japanese.

YUKIKO KOSHIRO, TRANS-PACIFIC RACISM AND THE U.S. OCCUPATION OF JAPAN 111 (1999).

¹³⁷ Taira, *Troubled National Identity*, *supra* note 96, at 140, 160.

member Upper House and three seats in the 300 member Lower House of the Japanese legislature.¹³⁸ As will be discussed later, Okinawan political disenfranchisement in the post-reversion era has been manifested in the unequal distribution of U.S. military bases.¹³⁹ Moreover, Okinawa remains the poorest Japanese prefecture and has only recently achieved 70 percent of the national level of wealth.¹⁴⁰

4. *Citizenship*

The fourth criterion, which states that a minority group must be citizens of the nation-state in which they live, is obviously met in the case of Ryūkyūans. Ryūkyūans first became Japanese citizens or “subjects” following the annexation of the Ryūkyū Kingdom in 1879, when the Meiji government proclaimed them as “Japanese.”¹⁴¹ Ryūkyūans lost Japanese citizenship when Okinawa was occupied by the United States but regained their citizenship following reversion.¹⁴² Moreover, as full citizens of Japan, the Ryūkyūans are entitled to protection under the Japanese Constitution of 1947.¹⁴³ This stands in contrast to the Okinawans’ situation during U.S. rule, when they were not entitled to protection under either the U.S. or Japanese constitution.¹⁴⁴

5. *Solidarity*

Finally, Ryūkyūans satisfy the subjective criterion of possessing “solidarity directed towards preserving their culture, traditions, religion, or language.”¹⁴⁵ Okinawan identity and solidarity is embodied in the concept

¹³⁸ Mulgan, *supra* note 18, at 171.

¹³⁹ See discussion *infra* Part IV.

¹⁴⁰ See JOHNSON, *supra* note 8.

¹⁴¹ Yonetani, *supra* note 14, at 20.

¹⁴² Taira, *Troubled National Identity*, *supra* note 96, at 140, 163 (“The people of Okinawa Prefecture are now part of the people with whom the ‘sovereign power’ of Japan resides.”) *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Government comments regarding this criterion vary. On one hand, some countries focused on the importance of a minority’s willingness to maintain its cultural characteristic as part of the requirement. Louis B. Sohn, *Rights of Minorities*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 84, at 270, 282 (citing Capotorti, *supra* note 85, at 8-9). On the other hand, Yugoslavia pointed out that a “declaration or desire” by the minority group to preserve their culture should not be emphasized because a minority group’s interest in their own culture is often hampered or discouraged by the ruling majority. *Id.* (citing Capotorti, *supra* note 85, at 8-9).

of *uchinānchu*, a term still widely used in Okinawa today. *Uchinānchu* refers to descendants of the original inhabitants of Okinawa and is correspondingly used with the term, *yamatanchu*, which identifies people from the main islands of Japan.¹⁴⁶ Convention and festivals celebrating *uchinānchu* heritage and identity are regularly held in Okinawa, as well in other parts of the world where *uchinānchu* have emigrated.¹⁴⁷ For groups of young activists who promote the revitalization of traditional artistic traditions, *uchinānchu* has become their primary identification.¹⁴⁸ In his writings, Masahide Ota, Okinawan scholar and former governor of Okinawa Prefecture, speaks about the persistence of Ryūkyūan identity and the resurgence of Ryūkyūan nationalism, which has strengthened since reversion.¹⁴⁹ Ryūkyūan scholars and leaders have also held symposia and studies to consider Ryūkyūan independence and even drafted a draft constitution for a Republic of the Ryūkyūs.¹⁵⁰

According to the U.N. Sub-Commission's definition, Ryūkyūans are a minority for purposes of the ICCPR. An examination of the characteristics and current situation of Ryūkyūan culture shows that despite their status as Japanese citizens, the Ryūkyūans are a sufficiently numerous group of people in a politically inferior position, who have a sense of solidarity in maintaining their distinct ethnic, cultural, linguistic, and religious identity. Based on this definition, the Ryūkyūans' qualification as a minority should entitle them, not only to protection under ICCPR Article 27, but also under Article 13 of the Japanese Constitution. The Nibutani Dam court, premised the application of Article 13 to the Ainu plaintiffs, on the fact that the Ainu qualified as a minority under the ICCPR. The court explained that Article 13 is applicable to ethnic minorities because, for people belonging to such groups, "the right to enjoy their distinct ethnic culture is a right that is needed for their self-survival as a person."¹⁵¹ The latter statement is obviously taken from Article 27, which states that ethnic, religious, or linguistic minorities have

¹⁴⁶ Koji Taira, *Troubled National Identity*, *supra* note 96, at 140, 166; Morris-Suzuki, *supra* note 124, at 181.

¹⁴⁷ Morris-Suzuki, *supra* note 124, at 167.

¹⁴⁸ *Id.* at 181.

¹⁴⁹ MASAhide OTA, *Aidentiti no Kaifuku no Takamari [The Heightening Recovery of Identity]*, in OKINAWA HAKAI: OKINAWA NO KOKORO NO HENYŌ [DESTRUCTION OF OKINAWA: OKINAWAN SPIRIT AND CHANGE] 123-131 (explaining that, following Okinawa's reversion to Japan, Okinawan identity has been strengthened by the realization that the Japanese are unwilling to accept Okinawans as equals).

¹⁵⁰ Taira, *Troubled National Identity*, *supra* note 96, at 140, 164. Taira tells us that, twenty years after reversion, independence from Japan is a "widely shared dream" among Okinawans. *Id.* at 159.

¹⁵¹ Nibutani Dam Decision, *supra* note 21, at 28.

the “right . . . to enjoy their own culture.”¹⁵² Moreover, the court qualified this latter statement by stating:

Furthermore, this conclusion is in accord with the movement of the United Nations and the rest of the society of nations, which has sought through the creation and reception of the above-mentioned ICCPR, and subsequently all the more, to ensure the essential equality of minorities and to enable co-existence with a majority within a single national entity.¹⁵³

In essence, the court explained that a minority’s cultural rights should be protected by the Japanese Constitution because it these rights are universally recognized by the international community. While the automatic applicability of Article 13 in this case may be debatable, the Ryūkyūans have a sound basis for asserting their cultural rights under the ICCPR.¹⁵⁴ The following section demonstrates that Ryūkyūans are not merely a cultural minority protected under the ICCPR and the Japanese Constitution, but are actually an indigenous minority entitled to enhanced protection.

B. *Ryūkyūans as an Indigenous Minority*

In addition to recognizing the plaintiffs’ rights under the constitution and ICCPR, the Sapporo District Court held that a minority is entitled to “enhanced consideration,” if found to be an indigenous minority.¹⁵⁵ The court defined an indigenous people as:

¹⁵² *Id.* at 27.

¹⁵³ *Id.* at 28.

¹⁵⁴ See Teruki Tsunemoto, *Constitutional Protection of Indigenous Minorities*, Paper delivered at the Fifth World Congress of the International Association of Constitutional Law’s Workshop on Constitutional Rights of Minorities (July 13, 1999), available at <http://www.eur.nl/frg/iacl/papers/tsunemoto.html> (last visited June 26, 2000) (posing the issue of why the Nibutani Dam decision bothered addressing the constitutional cultural rights of the Ainu plaintiffs when a sound basis for protecting their cultural rights was found in the ICCPR). Tsunemoto explains that a major reason the plaintiffs’ asserted a constitutional claim was due to the fact that an encroachment on treaty rights, unlike the violation of a constitutional right, is insufficient grounds for appeal to Japan’s Supreme Court. *Id.* Another reason Tsunemoto cites is the fact that Japanese courts do not allow international human rights guarantees to be in excess of constitutional guarantees, based on the legal hierarchy, which places the constitution above treaties. *Id.*

¹⁵⁵ Nibutani Dam Decision, *supra* note 21, at 29.

a social group who live and have lived in a region that historically existed outside of a state's rule and was brought within that state's rule as a minority group with a culture and identity which differed from the majority of the parent ruling state, and who have retained a unique culture and identity that originate and continue from the past, such that even while subject to the rule of the above-mentioned majority, that group has not since lost the unique culture and identity, which derives and continues from the past.¹⁵⁶

The court derived the idea that indigenous people deserve heightened protection from international trends and customs,¹⁵⁷ as well as from what the court seemed to perceive as inherent logic.¹⁵⁸

Ryūkyūans satisfy the Nibutani Dam decision's definition of "indigenous minority," just as they fit the U.N. Sub-commission's definition of a cultural minority. For simplification purposes, the court's definition will be analyzed as three separate criteria or elements: the first criterion being the requirement that the minority group inhabit an area previously outside the borders of the parent state; the second criterion having to do with majority and minority's cultural differences; and the third dealing with the retention of this distinct culture and identity.

1. *The Ryūkyū Kingdom*

As mentioned previously, Okinawa Prefecture was formerly an independent kingdom known as the Ryūkyū kingdom. An organized system of governance first emerged in the islands in the early fourteenth century and by 1310, the main island had three kingdoms: Hokuzan in the

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 29 ("This notion [that indigenous peoples' circumstances warrant greater consideration] clearly follows with a growing international movement towards seeing indigenous peoples' culture, lifestyle, traditional ceremonies, customary practices, etc., as deserving respect . . .").

¹⁵⁸ *Id.* at 28-29.

If one minority group lived in an area prior to being ruled over by a majority group and preserved its distinct ethnic culture even after being ruled over by the majority group, while another came to live in an area ruled over by a majority after consenting to the majority rule, it must be recognized that it is only natural that the distinct ethnic culture of the former group requires greater consideration.

Id.

north, Chūzan in the center, and Nanzan in the south.¹⁵⁹ Prior to the age of the Three Kingdoms, village chieftains, or *aji*, ruled various parts of the archipelago.¹⁶⁰ The Chūzan kingdom eventually defeated Hokuzan and Nanzan and the Ryūkyūan kingdom was established around 1429.¹⁶¹ Although the Yamato state (which eventually became the modern nation of Japan) existed between the fifth and eighth centuries, Japan failed to exercise political control over the islands until the seventeenth century.¹⁶² The Ryūkyūan Kingdom was a Chinese tributary state during much of its existence and, therefore, had a much closer relationship with China than it did with Japan.¹⁶³ Despite its status as a tributary state under the Chinese imperial system, the islands enjoyed a great deal of political autonomy and flourished as an independent trading state.¹⁶⁴

The Ryūkyū Kingdom lost its independence when the Satsuma armies invaded the islands in 1609.¹⁶⁵ Shō Nei (1564-1620), the Ryūkyūan monarch at the time, was taken prisoner by the Satsuma and was only permitted to return home after he agreed to sign a “pledge of feudal fealty” to Satsuma.¹⁶⁶ The years between 1609 and 1879, are known as the era of “Dual Subordination” because of the Ryūkyūans’ dual loyalties to both China and Japan. During this period, the Japanese overlords curtailed the Ryūkyūans’ trade and taxed them heavily.¹⁶⁷ Following the Meiji Restoration, the Satsuma *han* was abolished and the Meiji government stepped into its place to exert control over the Ryūkyūs.¹⁶⁸ Under the policy of *Ryūkyū shobun* (literally, the “disposition of the Ryūkyū Kingdom”), the Japanese government officially dissolved the kingdom and incorporated the islands into the Japanese nation-state¹⁶⁹ as “Okinawa Prefecture.”¹⁷⁰

¹⁵⁹ Richard Pearson, *The Place of Okinawa in Japanese Historical Identity*, in MULTICULTURAL JAPAN, *supra* note 101, at 95, 106-07

¹⁶⁰ Taira, *Troubled National Identity*, *supra* note 96, at 140, 151.

¹⁶¹ *Id.*

¹⁶² Richard Pearson, *The Place of Okinawa in Japanese Historical Identity*, in MULTICULTURAL JAPAN, *supra* note 101, at 95, 95.

¹⁶³ *Id.* at 108-112. The Ryūkyūans became a subordinate trading partner to China in 1372 and continued this relationship until the Japanese forced them to sever their ties in the 1880’s. Yonetani, *supra* note 14, at 20.

¹⁶⁴ Richard Pearson, *The Place of Okinawa in Japanese Historical Identity*, in MULTICULTURAL JAPAN, *supra* note 101, at 95, 108.

¹⁶⁵ *Id.* at 112.

¹⁶⁶ Taira, *Troubled National Identity*, *supra* note 96, at 140, 149.

¹⁶⁷ *Id.* at 151-52.

¹⁶⁸ *Id.* at 153-56.

¹⁶⁹ *Id.* at 153.

¹⁷⁰ *Id.* at 140.

2. *Distinct Culture*

The second part of the court's definition requires showing that the identity and culture of the minority group differ from the parenting state's majority culture. This is sufficiently analogous to the first criterion found in the U.N. Sub-commission's definition, which requires that a minority's group's ethnic, religious or linguistic characteristics differentiate them from the majority population. Thus, the second factor is satisfied by the analysis and discussion of the U.N. Sub-commission's definition conducted previously.¹⁷¹

3. *Retention of Cultural Identity*

The final element of the Nibutani court's definition requires that the minority group has "not since lost the unique culture and identity, which derives and continues from the past."¹⁷² The key issue to clarify is: to what extent must a group have retained its culture and identity to meet this threshold? In most instances, indigenous cultures have become partially lost or completely destroyed as a result of assimilation or policies directed at them by the majority culture. The court recognized this in the Nibutani Dam decision and set a low threshold for determining whether a group has sufficiently been able to retain its culture and identity:

[T]he Ainu people presently are living amidst the general society in our country with little difference, linguistically or culturally, from other citizens and the number of people speaking their unique language, is extremely limited. However, based upon a sense of ethnic belonging and ethnic pride arising both individually and through the action of organized groups seeking renewal and enhancement of the ethnic rights of the Ainu people, efforts are being made for the preservation and continuation of the Ainu language and traditional culture. These efforts include the collection, preservation, and opening of museums for Ainu artifacts, the popularization of the Ainu language, the compilation of Ainu dictionaries, the transcription of Ainu oral legends, lectures relating to Ainu culture, etc. Moreover, these efforts are bearing fruit.¹⁷³

¹⁷¹ See discussion *supra* Part III.A.1.

¹⁷² Nibutani Dam Decision, *supra* note 21, at 29.

¹⁷³ *Id.* at 32.

In the excerpt above, the court acknowledges that the Ainu now live amongst the general population and have adopted the cultural and language of the *Wajin*. Because Ainu culture is no longer pervasively practiced on a day-to-day basis by the Ainu people, the court focused instead on efforts to revive and restore Ainu culture and identity. Like the Ainu, the Ryūkyūan people have made significant efforts to preserve and revitalize their cultural heritage and identity.

This final element of the court's requirements is similar to the final criterion found in the U.N. Sub-commission's definition. The previous section's discussion demonstrated the concept of *ūchinānchu* and the existence of festivals and academic symposia that celebrate and promote this identity, as well the young activists' movement aimed at reviving traditional cultural practices.¹⁷⁴ This discussion will elaborate on the previous section by addressing specific factors the court identified in demonstrating the Ainu's efforts at cultural preservation.

One of the main factors the court identified is the collection and preservation of cultural artifacts and the establishment of museums displaying them. The main museum in Okinawa is the Okinawa Prefectural Museum. While this museum hosts an array of exhibits, ranging from arts and crafts to marine biology and anthropology, it is largely devoted to exhibits related to Ryūkyūan culture and history.¹⁷⁵ It also provides lectures on topics such as traditional folklore, art, and storytelling, as well as cooking and art classes with Ryūkyūan themes. Other museums devoted to Ryūkyūan culture include the Naha City Traditional Craft Center, the Ishikawa City History and Folklore Museum, the Naha Tsuboya Pottery Museum, the Nago Museum, the Moromi Folklore Hall, there are many others.¹⁷⁶ Aside from public museums, private museums have also been founded, such as the Yomitan Village History and Folklore Museum, founded by Chiyo Kiku.¹⁷⁷

Likewise, Ryūkyūan language and literary traditions have been retained and revived. The Okinawa Prefectural Library, has four major collections of Ryūkyūan literature and documentation.¹⁷⁸ Also, there are currently several dictionaries translating the Ryūkyūan language into

¹⁷⁴ See discussion *supra* Part III.A.5.

¹⁷⁵ See Okinawa Kenritsu Hakubutsukan [Okinawa Prefectural Museum], at <http://wl.nirai.ne.jp/oki-muse/index.html> (last visited April 4, 2002).

¹⁷⁶ See *Sightseeing in Okinawa*, Okinawa.com, at <http://www.okinawa.com/sightinfo.html> (last visited May 8, 2002).

¹⁷⁷ *Housewife sets store by traditional culture*, THE DAILY YOMIURI, Apr. 1, 2000, at 25.

¹⁷⁸ See Okinawa Kenritsu Toshokan [Okinawa Prefectural Library], at <http://www.library.pref.okinawa> (last visited May 8, 2002).

Japanese: *Omorogo Jisho: Okinwa no Kojisho Konkōkenshū*,¹⁷⁹ *Ryūka Kogo Jiten: Furyūka Bunpō Gaisetsu*,¹⁸⁰ *Okinawa Kōgo Daijiten*,¹⁸¹ and *Ryūkyūgo Jiten: Naha, Shuri wo Chūshin to suru Okinawa Kōkigo Junkyo*.¹⁸² Chiyo Kiku, in cooperation with Prof. Shunzō Takahashi have recently written another dictionary translating the Amami dialect.¹⁸³ Books and transcriptions on Ryūkyūan myths, folklore, and legends also abound.¹⁸⁴ There has even been a renewed interest in Okinawan culture by the Japanese. As Douglas Haring explains: “The prolonged American occupation has prompted the Japanese to re-evaluate Okinawa and Okianwans ‘Things Okinawan’ have been invested with glamour during the past two decades and Okinawan culture is the subject of dozens of books, speeches, and articles.”¹⁸⁵

While portions of the court’s definition of indigenous minority overlap with the U.N. Sub-commission’s definition of minority, the former definition includes a distinct element, that requires that the minority group to have existed outside the territory of the country they are now part of. The evidence clearly demonstrates the existence of the Ryūkyūan kingdom, which was completely free of Japanese control until the seventeenth century.¹⁸⁶ Although Ainu and Ryūkyūan history differ in that the Ainu people never had their own kingdom, the two peoples’ historical relationships with Japan have some striking similarities. The Tokugawa feudal system, through its fiefdoms, incorporated and subjugated both groups around the same time. While the Matsumae *han* established dominion over the Ainu following the Shakushain war of 1669,¹⁸⁷ the

¹⁷⁹ OMOROGO JISHO: OKINWA NO KOJISHO KONKŌKENSŪ (Shuzen Hokama ed., Kadokawa Shoten 1972).

¹⁸⁰ *Ryūka Kogo Jiten: Furyūka Bunpō Gaisetsu* (Chōshō Ahagon ed., Naha Shuppansha, 1983).

¹⁸¹ *Okinawa Kogo Daijiten* (Okinawa Kogo Daijiten Henshū Inkaï ed., Kadokawa Shoten 1995).

¹⁸² *Ryūkyūgo Jiten: Naha, Shuri wo Chūshin to suru Okinawa Kōkigo Junkyo* (Ichirō Handa ed., Tōkyō Daigaku Shorin 1999).

¹⁸³ *Housewife sets store by traditional culture*, *supra* note 177.

¹⁸⁴ See generally KIYOKO SEGAWA, OKINAWA NO KON’IN [OKINAWAN MARRIAGE] (1969); SAIZEN HOKAMA, URIZUN NO SHIMA [THE URIZUN ISLAND] (1971); KŌHAN SHINYASHIKI, RYŪKYŪ OTOGIBANASHI [RYŪKYŪAN NURSERY TALES] (1970); CHIZUE SESOKO, OKINAWA NO DŌWA [OKINAWAN CHILDRENS’ STORIES] (1969); NANTETSU IBA, OKINAWA NO MINWA [OKINAWAN FOLKTALES] (1958); NANTETSU ISE, OKINAWA FUDŌKI [OKINAWA FUDŌKI] (1959).

¹⁸⁵ Douglas G. Haring, Chinese and Japanese Influences, *in* RYUKYUAN CULTURE AND SOCIETY, *supra* note 102, at 39, 42.

¹⁸⁶ See discussion *supra* III.B.1.

¹⁸⁷ Levin, *supra* note 22, at 431.

Satsuma *han* successfully took control of the Ryūkyūan kingdom in 1609.¹⁸⁸ Similarly, following the Meiji Restoration, the Japanese government established Hokkaidō as a Japanese prefecture in 1869¹⁸⁹ and established Okinawa Prefecture ten years later.¹⁹⁰ Consequently, both the Ainu and Ryūkyūans became the subjects of Japan and members of the Japanese nation-state. Furthermore, as will be discussed in the next section, the Tokugawa and Meiji governments' policy toward the Ainu and the Ryūkyūans was extremely similar in nature. Thus, the Ryūkyūans, like the Ainu, are a minority group that originally lived outside the territorial realm of Japan but was subjugated through conquest. In conjunction with the existence of a distinct Ryūkyūan culture and identity, this makes them an indigenous minority under the Nibutani Dam court's definition.

C. *Public Policy Relating to the Protection of Ryūkyūan culture*

Towards the final part of its decision, the Hokkaido District Court considered the impact that Japanese governmental policies have historically had on Ainu culture:

After governance was assumed by our country over the indigenous Ainu people, they became a minority and consequently suffered enormous social and economic devastation wrought by the rule of the country's majority members. As a result, they lost their ethnic culture, lifestyle, traditional customs, and the like. That being the case, this historical background must be taken into consideration in the comparative balancing we conduct presently.¹⁹¹

The court cited the Meiji government's Colonization Commission and the subsequent restrictions the government placed on Ainu regarding the use of land and natural resources, dress, language, customs, and diet.¹⁹² In addition to the loss of culture, the court explained that the Ainu lost their self-sufficiency as a consequence of these restrictions.¹⁹³ Moreover, the

¹⁸⁸ Taira, *Troubled National Identity*, *supra* note 96, at 140, 151.

¹⁸⁹ Levin, *supra* note 22, at 431.

¹⁹⁰ Taira, *Troubled National Identity*, *supra* note 96, at 140, 151.

¹⁹¹ Nibutani Dam Decision, *supra* note 21, at 32.

¹⁹² Levin, *supra* note 22, at 435.

¹⁹³ Nibutani Dam Decision, *supra* note 21, at 32.

court pointed out that even if these policies were intended to elevate Ainu living standards, they would be unjustifiable, because of the long-held Japanese assumption that *Wajin* culture is superior to Ainu culture and the complete disregard for the latter.¹⁹⁴ These public policy concerns similarly hold true for the Ryūkyūans.

1. *Ryūkyūs Under Satsuma Rule*

Although both policies were oppressive, Japanese policies toward Ryūkyūans before and after the Meiji Restoration differed sharply. Under the control of the Satsuma *han*, the Japan's prevailing worldview was characterized by the notion of *kai-i*.¹⁹⁵ According to this philosophy, the *Wajin* Japanese placed themselves at the center and inner circle of a hierarchy, while subordinate "barbarians" were placed at the periphery.¹⁹⁶ Morris-Suzuki explains that this worldview was founded on a "logic of difference", and that as result, "[e]verything about the relationship . . . had to be structured in such a way as to magnify the exotic character of the peripheral societies."¹⁹⁷ As applied to Ryūkyūans, they were discouraged from wearing Japanese clothing, hairstyles, or weaponry and were spoken and written about as people belonging to a "different country."¹⁹⁸

Although this policy was known as "preserving old customs,"¹⁹⁹ the incorporation of the Ryūkyūs, a peaceful trading state, by Tokugawa Japan, a militaristic feudal state, significantly impacted the Ryūkyū political social structure.²⁰⁰ As a result of Satsuma rule, Ryūkyūan society was, in part, transformed into a Japanese-type agrarian feudal domain with a new rigid class structure that permanently divided gentry and peasantry by status inheritance.²⁰¹ On the other hand, trade, the Ryūkyūan economy's foundation at the time, was curtailed and restrictions and controls were placed on commerce with the Indies and Southeast Asia and foreigners were banned from entering the islands.²⁰² Further, the relatively open society of the Ryūkyūan kingdom, characterized by occupational choice and a high degree of status mobility, suffered a "reverse

¹⁹⁴ *Id.*

¹⁹⁵ Yonetani, *supra* note 14, at 18.

¹⁹⁶ *Id.*

¹⁹⁷ Morris-Suzuki, *supra* note 124, at 18.

¹⁹⁸ *Id.* at 19-20.

¹⁹⁹ *Id.* at 26.

²⁰⁰ Koji Taira, *Ryukyuan Migration: Pre-historic to Modern*, *supra* note 116.

²⁰¹ *Id.*

²⁰² JAPAN COMMUNIST PARTY, PROBLEMS OF U.S. MILITARY BASES IN OKINAWA 3 (2000).

revolution.”²⁰³ Japan deprived Ryūkyūans of their freedom of mobility and association, binding the peasantry to the land, banning migration, and forcing them to relocate.²⁰⁴

2. Okinawa Under the Meiji Government

Japan’s encounter with the West, however, dramatically transformed Meiji leaders’ worldviews.²⁰⁵ The Meiji government’s goal became to redefine Japan as a nation-state and to strengthen its military might in order to avoid colonization. Toward that end, the new government established a policy of national unification that involved the assimilation of peoples, such as the Ainu and Ryūkyūans, who had previously stood socially and politically outside the boundaries of Japan.²⁰⁶ Another motivation to elevate the status of the so-called barbarians was to establish stronger Japanese claims over the territories in which these people lived.²⁰⁷

The official Japanese stance on Ryūkyūan history and identity, as well as the Ryūkyūans’ relationship to themselves, shifted dramatically, and was buttressed by a new narrative that replaced the old concept of *ka-i*. This change in the Japanese attitude was reflected in a set of documents entitled “In Response to China’s Objections: the following reasons and evidence support Japan’s claims over the Ryūkyū Islands,” which was drafted in preparation of diplomatic negotiations with the China in 1880.²⁰⁸ In the documents, the Japanese describe the Ryūkyūans’ homogeneity with the Japanese in terms of history, geography, language, religion, race,

²⁰³ Taira, *Ryukyuan Migration: Pre-historic to Modern*, *supra* note 116.

²⁰⁴ *Id.*

²⁰⁵ Yonetani, *supra* note 14, at 18.

The hierarchical organization of relations became untenable in a world which revolved around modern notions of borders, sovereignty and defense. By the middle of the 19th century the international climate had drastically changed, and China was no longer Japan’s main concern in regards to Ryukyu. The Meiji government, established on the eve of the most intense period of colony-grabbing in history, pursued ‘on a domestic front the policies of civilization (*bunmeika*) and rich-nation-strong-army’, and on an international front the projects of revision of the equal treaties and demarcation (possession) of territory, seeking a direction to realize the “appearance of independence” while similarly advocating the “building of national prestige” (*kokui hatsuyo*) in those regions on the periphery.’

Id.

²⁰⁶ Morris-Suzuki, *supra* note 124, at 28-30.

²⁰⁷ Yonetani, *supra* note 14, at 17-20

²⁰⁸ *Id.* at 20.

and custom. The documents argued that: the Japanese and Ryūkyūan royal family shared a common lineage, that the Okinawan language was a Japanese dialect, and that the Okinawans worshipped Japanese Shinto gods.²⁰⁹ It even claimed that the Ryūkyūan custom of eating on the floor, rather than sitting on chairs like the Chinese, was proof of common ancestry between the two peoples.²¹⁰ To bolster this new narrative, the Meiji government supported Japanese academics whose studies of Okinawa would justify such claims, which led to the development of a Japanese apologia known as “Okinawan studies.”²¹¹

This new narrative was soon formulated into concrete policies that directly impacted the lives of Ryūkyūans.²¹² While Japan administered the Ryūkyū Kingdom indirectly through directives issued to the Ryūkyū government in the early Meiji years, the Japanese government soon adopted the policy of Ryūkyū shobun. This policy ultimately eliminated the Ryūkyūan monarchy and kingdom and attempted to forcibly integrate the Ryūkyūan people into the Japanese nation-state, and had irreversible effects. The system was primarily implemented through education²¹³ and

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Yonetani, *supra* note 14, at 22.

²¹² In 1875, Home Minister Okubo Toshimichi, outlined the following requirements pertaining to the administration of the Ryūkyūs:

1. The King of Ryūkyū should visit Tokyo to give thanks to the emperor for Japan’s effort to protect the interests of Ryūkyūans cast away on Formosa.
2. Shuri should abandon the use of Chinese reign-names and should substitute the Meiji era-name throughout the islands. Furthermore, Ryūkyū should adopt all Japanese national official festivals according to notification from Tokyo. This would mean island-wide celebration of the emperor’s birthday, observance of the traditionally accepted Accession Day of the first emperor, Jimmu, and adoption of the New Year celebration in conformity with Western practices.
3. Shuri should adopt the criminal law codes of Japan developed in the Justice Ministry at Tokyo, and should send three officials to Tokyo for instruction.
4. The administrative organization at Shuri must be revised, and to this end the Home Ministry would send down experts to develop a liaison with Tokyo.
5. Ten youths should be selected by Shuri for education at Tokyo in order they might come to understand the trend of the times in Japan.

KERR, *supra* note 133, at 368.

²¹³ Morris-Suzuki, *supra* note 124, at 27. A Japanese observer during this time stated:

The education level of this prefecture has become equal to that of other prefectures. There has been progress in the development of a sense of

military conscription, which subjected the young to intense pressure to become “Japanese.”²¹⁴ Anything indigenous to Okinawa was presented as “inferior and undesirable” and local traditions, including the local language and cultural practices, were considered the “expression of a lower life form.”²¹⁵ Taira describes the degradation of Okinawan identity between the years of 1879 and 1945 as “a defining characteristic of Okinawan-Japanese relations.”²¹⁶

Japan’s administration over the Ryūkyūs was as devastating economically as it was culturally. For centuries, the Ryūkyūs were an independent and self-sufficient trading nation that relied on international commerce for sustenance.²¹⁷ Under Meiji rule, Japanese shipping interests led by the Mitsubishi Company dominated the Ryūkyūs and local inhabitants were forced out of shipping almost entirely.²¹⁸ Carpetbagger merchants from Osaka and Kyūshū, who formed cartels designed to keep local merchants from competing with them, dominated the economy.²¹⁹ Economically, the Ryūkyūs were incorporated into the Japanese mercantilist system and served as a dumping ground for Japanese goods that did not have a market elsewhere,²²⁰ the Japanese merchants’ indifference to the needs of the local population even led to food shortages.²²¹

During Japan’s nation-building years, Japanese government policies targeting Ryūkyūans were synonymous with the Ainu experience during the same period. Japanese nationalists were contemptuous of the Ryūkyūan way of life and deliberately sought to destroy it by imposing their own culture in its place. Due to its political and military superiority, Japan

national citizenship and in exterior appearances such as the clothing of boys and girls. However, there are still some areas in which there is a sense of foreignness and underdevelopment compared with other prefectures . . . [S]ome school children and people who have completed general education speak the local dialect, and even when you speak normal language [*fūtsugo*], their intonation and pronunciation sounds odd.

Id.

²¹⁴ *Id.* at 28.

²¹⁵ TONY BARRELL ET AL., *OKINAWA DREAMS* OK 39 (1997).

²¹⁶ Taira, *Troubled National Identity*, *supra* note 96, at 140, 144.

²¹⁷ Richard Pearson, *The Place of Okinawa in Japanese Historical Identity*, in *MULTICULTURAL JAPAN*, *supra* note 101, at 95, 110-12 (discussing the establishment and significance of Okinawa’s trading system with China and other countries).

²¹⁸ KERR, *supra* note 133, at 403.

²¹⁹ *Id.* at 398-99.

²²⁰ *Id.* at 408.

²²¹ *Id.* at 406.

was, to a large degree, successful in its efforts. The Meiji government's assimilation policy and tight administrative control over Ryūkūan society had a destructive and long-lasting impact on Ryūkū culture and gave rise to the "creation and maintenance of dominant and subordinate power relations"²²² between the *Wajin* and Ryūkyūans. This is relevant to Japan-Okinawa relations in the modern context because it illustrates the origins of the current relationship between the two groups and explains why the law should afford minorities such as the Ainu and Ryūkyūans cultural protection, to which the *Wajin* are not equally entitled.²²³

IV. THE "OKINAWA PROBLEM"

This section provides a brief post-war history and discusses the various political events that have led to the militarization of Okinawa and the controversy accompanying these events—often referred to as the "Okinawa Problem." It begins by examining the U.S. occupation of Japan and demonstrates how Japanese leaders negotiated a peace settlement with the United States and eventually regained independence following World War II. It then discusses the process by which Japan secured the return of Okinawa from the United States following American military rule over the islands, which continued for two decades after the end of the U.S. occupation of Japan proper. This section also describes the state of affairs in Okinawa in the post-Cold War era, an era in which the purpose and necessity of the U.S. bases in Japan have been called into question. Finally, this section concludes by examining the historical parallels that exist between Japan and Okinawa's relationship in the modern and colonial eras and identify the source of the "Okinawa Problem" as seen through the lens of the Nibutani Dam Decision.

A. *Post-war Okinawa and the U.S. Occupation*

United States military forces were initially stationed in Japan as an occupational force following World War II, and subsequently as a "friendly" military presence based on formal security arrangements established between the United States and Japan.²²⁴ Compared to the rest of Japan, Okinawa's experience with the U.S. military has been unique. From the outset, the United States placed Okinawa direct under military

²²² Levin, *supra* note 22, at 509.

²²³ *Id.* at 510-11.

²²⁴ See REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS, *supra* note 12, at 23-26.

control and governed the islands separately from the main islands of Japan.²²⁵ This disparate treatment was further reinforced when the Allied Powers granted Japan its independence following a decade-long occupation, but kept Okinawa under American trusteeship for an additional twenty years. Even following the islands' reversion to Japan in 1972, the majority of U.S. bases remained in Okinawa. The political status of Okinawa and the heavy proliferation of U.S. bases have been extremely controversial topics in the post-war era—this situation is collectively referred to as the “Okinawan problem.”²²⁶ Most recently, Okinawa has received renewed attention due to end of the Cold War, which eroded the primacy of the U.S.-Japanese alliance, and also due to the national public outcry surrounding the rape of a young Okinawan girl by two U.S. Marines.

Okinawa's inhabitants first encountered American troops as an invading enemy force during the Battle of Okinawa.²²⁷ By the time the Americans landed in Okinawa in 1945, Japan had all but lost the war.²²⁸ Nevertheless, the emperor and his military leaders ordered fierce resistance against the Americans, in the hope of salvaging a relatively favorable surrender.²²⁹ In what was essentially a meaningless battle, tens of thousands of Japanese and American soldiers lost their lives, with the local civilian population sustaining the heaviest casualties.²³⁰ Days after the Battle of Okinawa, the United States dropped atomic bombs on Hiroshima and Nagasaki and the Japanese government surrendered

²²⁵ See JOHN W. DOWER, *JAPAN IN WAR AND PEACE* 171 (1993).

²²⁶ Masaaki Gabe, *Futenma Air Station: The Okinawa Problem in Japan-U.S. Relations*, 27 *JAPAN Echo* (2000), <http://www.japanecho.com/docs/html/270306.html>, (last visited Feb. 12, 2002).

What is the “Okinawa problem” as seen from the perspective of the Japanese government? Directly, this is a problem that arises when difficulties occur in the provision of the bases that Japan, under the Japan-U.S. Security Treaty, must make available for American armed forces. The core of Tokyo's policy for Okinawa consists of long-term and stable base guarantees.

Id.; see also generally AKIO WATANABE, *THE OKINAWA PROBLEM: A CHAPTER IN JAPAN-U.S. RELATIONS* (1970).

²²⁷ See KERR, *supra* note 133, at 468-72, for details and description of the Battle of Okinawa. The Battle of Okinawa lasted from April to June 1945. In just three months of fighting some 14,000 Americans and 234,000 Japanese nationals were killed. JOHNSON, *supra* note 8, at 38.

²²⁸ *Id.* at 466.

²²⁹ JOHNSON, *supra* note 8, at 38.

²³⁰ KERR, *supra* note 133, at 672. According to Kerr, civilian casualties amounted to one eighth of Okinawa's population at the time. *Id.* Consequently, Okinawan civilian casualties outnumbered military casualties from either side. HALLIDAY & MCCORMACK, *supra* note 13, at 195.

unconditionally to the Allied Powers by accepting the Potsdam Declaration.²³¹ By then, the U.S. military had confiscated large portions of privately-owned land in Okinawa for the construction of military facilities and had placed Okinawan civilians in barb-wired concentration camps. The Americans did not subject the mainland Japanese population to the same harsh treatment.²³²

While democratization was a major goal of the American occupation in Japan, Okinawa was denied this beneficial aspect of American paternalism.²³³ As Chalmers Johnson describes it, “[T]he American armed forces occupied defeated Japan, promising to bring to those emperor-ruled islands an American-style series of democratic reforms. Okinawa, however, was separated off from Japan and ruled by the military in a purely autocratic manner.”²³⁴ Okinawa’s unique status during the occupation is clearly reflected in the United States’ occupation policy. For example, Okinawans living in Japan proper were repatriated at the end of the war, a policy similar to the deportation of Chinese and Koreans during the same time.²³⁵ In January 1946, a Supreme Command of the Allied Forces (“SCAP”) directive created a dividing line between the main islands of Japan and the Okinawan islands at latitude thirty degrees north.²³⁶ Consequently, the United States assumed sole command of Okinawa while the rest of Japan was officially under the auspices of the Allied Powers.²³⁷ Furthermore, although the United States conducted its occupation policy in Japan proper through the Japanese government, the U.S. military administered Okinawa directly and strictly controlled all communication between Japan and the Okinawan islands.²³⁸ Thus, for all

²³¹ EDWIN O. REISCHAUER, JAPAN: THE STORY OF A NATION 216 (rev. ed. 1974). The atomic bombs were dropped on Hiroshima and Nagasaki in 1945, on August 6th and 9th, respectively. The Japanese government accepted the terms of the Potsdam Declaration on August 10th and the emperor himself announced the surrender to the Japanese people in a broadcast four days later. *Id.* at 216-17. The Battle of Okinawa was the main American rationale for using the atomic bomb rather than sending troops to invade Japan proper. JOHNSON, *supra* note 8, at 38.

²³² REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS, *supra* note 12, at 23-24. Many of the Okinawan prisoners were not released from these camps until October 1946. *Id.*

²³³ JOHNSON, *supra* note 8, at 38.

²³⁴ *Id.*

²³⁵ YUKIKO KOSHIRO, *supra* note 136, at 111 (1999).

²³⁶ WATANABE, *supra* note 226, at 20.

²³⁷ *Id.* at 20-21.

²³⁸ *Id.* at 21.

practical purposes Okinawa was treated as a foreign country in relation to Japan, much like Taiwan and Korea.²³⁹

The strategic importance Okinawa acquired during the occupation years ultimately benefited Japan, as the Japanese were able to secure an early end to the occupation, in exchange for allowing the United States to retain control of the islands.²⁴⁰ Japan regained its independence in 1951, when it signed a peace treaty with the Allies and a separate security treaty with the United States.²⁴¹ Contrary to general perception, the emperor and his advisors played a major role in shaping Japan's peace settlement with the Allies, particularly with respect to the fate of Okinawa.²⁴² Japan communicated its willingness to give up Okinawa to the Americans as early as 1947, meaning that Japan had a role in the decision to separate the Ryūkyūs from Japan even *during* the occupation.²⁴³ Moreover, during treaty negotiations, Japan's chief negotiator, Primer Minister Shigeru Yoshida, strongly insisted on the continued presence of the U.S. military in Japan despite American plans to demilitarize Japan and its initial reluctance to commit permanent troops.²⁴⁴

²³⁹ *Id.* Although strategic considerations had obviously influenced the American decision to separate Okinawa from the rest of Japan immediately following the war, evidence shows that an American racial hierarchy, which perceived Okinawans as inferior to the Japanese, was also responsible for U.S. policy towards Okinawa. KOSHIRO, *supra* note 136, at 112. A paper entitled the Civil Affairs Handbook, assembled in 1946, recommended that "uncivilized" Okinawans be placed under a strict colonial regime, unlike the rest of Japan, which was to be governed by a more "enlightened and democratic" military occupation. *Id.* See also REISCHAUER, *supra* note 231, at 323 (explaining that the reason Okinawa was ruled as an American trust after World War II, while no comparable situation existed in Europe during the same time, was due to American racist attitudes).

²⁴⁰ JOHNSON, *supra* note 8, at 38 ("In 1952, retention of Okinawa proved to be the price the American government extracted from Japan in return for the signing of an early peace treaty and of the Japanese-American Security Treaty, which signaled the end of the occupation of Japan's main island."); see also DOWER, *supra* note 225, at 170-171 (characterizing the Japanese as eager to use Okinawa as a bargaining chip for the end of the U.S. occupation of Japan).

²⁴¹ Ward, *supra* note 6, at 35. The Peace Treaty, otherwise known as the "Treaty of San Francisco," and the Security Treaty were signed on September 8, 1951 and went into effect on April 28, 1952, following ratification by the United States. *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ MEIRION & SUSIE HARRIES, SHEATHING THE SWORD: THE DEMILITARISATION OF JAPA235-238 (1987). When John Foster Dulles flew to Japan on January 25, 1951, Japan submitted a proposed security treaty which called for a "collective" defense agreement within the framework of the United Nations Charter, for the continued stationing of the United States in Japan and for joint action by the United States to provide for the defense of Japan. *Id.* Shigeru Yoshida's firm belief in maintaining U.S. forces in Japan is reflected in his personal memoirs, in which he states: "No country in the world today is in a position to defend itself unaided against aggression

According to the Peace Treaty, Okinawa was expected to become a United Nations trusteeship,²⁴⁵ but the United States abandoned this arrangement and retained complete control over the islands (Japan was technically given “residual sovereignty” over the islands under this arrangement).²⁴⁶ As a result, the U.S. Secretary of Defense administered the former Japanese prefecture through an army general appointed as “High Commissioner.”²⁴⁷ An excerpt describing Okinawa during these years vividly recounts the islands’ transformation into an American military colony:

Okinawa was first and last a military operation, and military considerations took precedent over local civilian desires, including the desire for reversions [sic] to Japan . . . [W]ith the Americans came all the paraphernalia of their bases. The highways were jampacked with military traffic and lined with billboards advertising American soft drinks and other products. Most American investment was in bottling works, insurance companies, and the wide variety of services that went with bases everywhere. Highway Number One from Naha up through the huge military areas at Sukiran and Kadena was one long garage for the repair of vehicles, military and otherwise . . . [I]t could be best described as one huge military installation, employing

. . . I continue to believe that allying ourselves with the United States remains the best means of providing for the defense both of the United States and of ourselves.” Shigeru Yoshida, *The Yoshida Memoirs: The Story of Japan in Crisis 195* (Kenichi Yoshida trans., Houghton Mifflin 1st American ed. 1962).

²⁴⁵ Lawrence Olson, *Political Relations, in THE UNITED STATES AND JAPAN 57, 72* (Herbert Passin ed., 1966). The provision of the Peace Treaty which determined the status of Okinawa was Article 3. This provision gave the United States sole legal jurisdiction over the islands and gave the Americans the discretion to place Okinawa under United Nations trusteeship, which it did not. *Id.* Furthermore, the U.S. forces are described as having “complete freedom of action” as a result of this arrangement and their mission is characterized as “maintain[ing] this freedom above all else.” *Id.* Among Okinawans, April 28th is known as the “Day of Disgrace” and commemorates the day when Article 3 took effect. REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS, *supra* note 12, at 25.

²⁴⁶ Ward, *supra* note 6, at 36.

²⁴⁷ Lawrence Olson, *Political Relations, in THE UNITED STATES AND JAPAN 57, 72*. The administrative system under the American High Commissioner is analogized to a “three-layer cake.” The High Commissioner was the top layer, and presided over a Civil Administration, otherwise referred to as USCAR, a mixture of military and civilian officials, overseen by a Civil Administrator. USCAR, in turn, supervised the Government of the Ryūkyū Islands (“GRI”), staffed by the local population. *Id.*

around 50,000 Okinawans as base workers, and housing unknown but large numbers of American soldiers, marines, airmen, and their dependents. Here lay vast airfields, storage depots, troop encampments, civilian housing areas surrounded by green lawns on which few people ever walked, flower beds tended by Okinawan gardeners, PXs, swimming pools, clubs; a home away from home separated from the plots of surrounding farms by high steel fences.²⁴⁸

Most of the land currently occupied by U.S. bases was also confiscated during this period.²⁴⁹ During the 1950's, the United States acquired at least 60,000 acres of the 542,000 acres that comprised the Okinawan islands,²⁵⁰ in many cases forcibly through military directives.²⁵¹

B. *Reversion to Japan*

With the onset of the the Vietnam War, the reversion of Okinawa surfaced as a major issue in Japanese politics in 1965,²⁵² although the Okinawans themselves had begun seeking an end to U.S. rule many years earlier.²⁵³ The Vietnam War brought the “Okinawa problem” to the

²⁴⁸ *Id.* at 73.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS, *supra* note 12, at 24-27. A series of military directives were issued to secure land for the construction of military facilities from local land owners. The first of these, Proclamation No. 20 (“Rights of Contract”) was issued in November of 1952. This proclamation automatically allowed the U.S. military to occupy any land it leased from a local landowner, for a period of twenty years, beginning in July 1950. *Id.* at 25. This was followed by Ordinance No. 109 (the U.S. Land Expropriation Ordinance), which made a “unilateral declaration of will” by the military, sufficient to acquire new land in Okinawa. *Id.* at 25-26. The following year, the U.S. military issued Proclamation No. 26, which further justified the retention of already occupied lands. *Id.* at 26. Finally, Ordinance No. 20 of 1959 requisitioned an additional 50,000 hectares until 1965. *Id.* at 27.

²⁵² Hong N. Kim, *The Satō Government and Okinawan Reversion*, in SHOWA JAPAN: POLITICAL, ECONOMIC, AND SOCIAL HISTORY, 1926-1989, 175-176 (Stephen S. Large ed., Vol. 3, 1988); *see also* REISCHAUER, *supra* note 231, at 323. The issue became increasingly controversial when the Bōnin Islands, which like Okinawa had been separated from the rest of Japan by the Security Treaty, were returned to Japan in 1968. *Id.* at 324.

²⁵³ REISCHAUER, *supra* note 231, at 323:

It is surprising that the separation of Japan's 47th prefecture from the rest of the country in 1945 and its rule by Americans as a great military base did not stir up a quicker reaction within Japan proper. But in the early postwar years the Japanese in the main islands were to

forefront of national politics because many Japanese feared that due to the strategic location of U.S. bases in Okinawa, Japan would become entangled in America's war in Southeast Asia.²⁵⁴ The terms of Okinawan reversion were negotiated unilaterally by the Satō administration, and forced through the Diet by the Liberal Democratic Party (LDP), which has occupied a majority of seats in the Japanese legislature for most of the post-war era.²⁵⁵ Furthermore, the local population of Okinawa—the people most affected by the reversion—were never consulted.²⁵⁶ Prime Minister Satō did, however, encounter determined opposition from the minority parties, as well as from the public, who felt that Satō was giving into the U.S. government's demands too easily.²⁵⁷

Although Prime Minister Satō ultimately succeeded in returning Okinawa to Japan, the final terms of the reversion were not what many Okinawans, and many Japanese, had hoped for.²⁵⁸ Following a series of negotiations with the United States, streams of domestic allegations and criticisms,²⁵⁹ and minor compromises between the LDP and fragmented

demoralized and too occupied with their own economic recovery to worry much about Okinawa.

Id.

²⁵⁴ Kim, *supra* note 252, at 176.

²⁵⁵ Interview by Serge Berthier with Keizo Obuchi, Prime Minister of Japan, Tokyo, Japan (Autumn 1999), Asian Affairs, at <http://www.asian-affairs.com/Japan/obuchi.html> (last visited Apr. 24, 2002).

²⁵⁶ Mulgan, *supra* note 18, at 160; Koji Taira, *Troubled National Identity: The Ryukyuan/Okinawans*, in JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY, *supra* note 96, at 140, 161 (“Logically and actually, Okinawans had no influence over the status of the Ryukyu Islands at the time of reversion, just as they had no role in the earlier process that produced the doctrine of residual sovereignty.”)

²⁵⁷ Kim, *supra* note 252, at 181-84.

²⁵⁸ *Id.* at 186-87. A poll taken by *Asahi Shimbun*, in conjunction with the *Okinawa Taimus*, in 1971 revealed that 57% of the Japanese and 51% of Okinawans were dissatisfied with the terms of Okinawan reversion. *Id.*

²⁵⁹ Initial criticism was directed against the Satō administration's “clean-slate” policy which would “seek an agreement on the timetable of Okinawan reversion first and settle the future status of the Okinawa bases at the time of the actual reversion.” *Id.* at 177-78. Another criticism was leveled by the opposition following Satō's 1969 meeting with Nixon, when the Prime Minister announced that the “prior consultation” clause of the Security Treaty (which obligates the United States to consult Japan on three specific issues: “major changes in the deployment into Japan of U.S. Forces, major changes in their equipment, and the use of Japanese bases by U.S. combat troops for the purpose of conducting military operations outside Japan,” WATANABE, *supra* note 226, at 72) would be interpreted “flexibly” with regards to Okinawa, after reversion. *Id.* at 179. Critics also accused Satō of paying “too high price for Okinawa reversion” by linking regional security (i.e. Korea and Taiwan) with that of Japan following the 1969 Nixon-Satō Joint Communique. *Id.* at 180. And perhaps the most important criticism was the fact that

opposition parties,²⁶⁰ Okinawa was officially returned to Japan on May 15, 1972.²⁶¹ Although the base reduction resulting from the reversion appeared numerically substantial, it only amounted to 5,000 square meters of land returned to Okinawan landowners, of which seventy-five percent had not been used for bases.²⁶² Furthermore, Japan stationed 6,800 of its Self-Defense Force (SDF) troops in Okinawa following the reversion, while no major U.S. units were withdrawn from the islands.²⁶³ In the end, Okinawan reversion was a showcase for adorning Sato's political legacy²⁶⁴ and an opportunity for the LDP's conservative wing to revive national pride by removing the Okinawan blemish from the country's collective memory.²⁶⁵ It was not the liberation from military colonialism that many Okinawans had been hoping for.²⁶⁶

Satō was unable to get a firm commitment for making Okinawa “nuclear-free” following reversion. *Id.* at 180. Satō himself, during the negotiations, is quoted as saying “[a]ll we can do is to trust the U.S.” HALLIDAY & MCCORMACK, *supra* note 13, at 202 (quoting Prime Minister Satō).

²⁶⁰ Kim, *supra* note 252, at 181-86.

²⁶¹ *Id.* at 186.

²⁶² HALLIDAY & MCCORMACK, *supra* note 13, at 199.

²⁶³ *Id.* at 199-200.

²⁶⁴ See Kim, *supra* note 252, at 186 (stating that the person who received the most gratification from Okinawan reversion was, not the Okinawan or Japanese people, but Prime Minister Satō, to whom the issue was the “crowning achievement” of his premiership).

²⁶⁵ See HALLIDAY & MCCORMACK, *supra* note 13, at 203. In 1969, Satō, referred to the Okinawa issue as a “mental block” and “symbol of defeat” for the Japanese people. Halliday and McCormack interpret Satō's reference as imperialistic melancholia, which they believe was used to “whet the nationalist appetite.” *Id.* A quote by Defense Minister, and future Prime Minister, Yasuhiro Nakasone, further illustrates the political motives behind the reversion effort and the ideological slant of the LDP leaders at the time:

The return of our Okinawan brothers and the unification of the nation must be cause for a spiritual maelstrom among the people. We may expect a newer nationalism to well up strongly, and a ground swell to emerge such as has not been known in the spiritual history of our people since the war

Id. (quoting former Defense Minister, Nakasone Yasuhiro).

²⁶⁶ See Mulgan, *supra* note 18, at 160 (explaining that for the purposes of the anti-base movement, the reversion was considered a failure).

C. Modern Day Okinawa and Base Proliferation

The Japanese government has done little to alleviate the problems associated with U.S. bases in post-reversion Okinawa.²⁶⁷ While the bases

²⁶⁷ *Id.* at 161. The U.S. bases in the last fifty years have been a major source of pollution in Okinawa and the term “base pollution” has even entered the local vocabulary. REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS, *supra* note 12, at 12. Environmental damage resulting from the bases include: soil erosion from artillery, damage to coral reefs by ships and amphibious landing practice, and jet fuel run-off which contaminates the soil and local water supply. JOHNSON, *supra* note 8, at 49. Other contaminants, such as PCBs, waste oil, detergents, mercury, and poison gasses have also been detected. REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS, *supra* note 12, at 12. In many instances, no efforts are made to clean up the contamination and the contamination renders the land unusable. JOHNSON, *supra* note 8, at 49. The most serious case of environmental pollution has been the 1,520 depleted uranium shells, which were fired into a Torishima Island between 1995 and 1996. *Id.* The U.S. government failed to notify the Japanese government about their existence, while the Japanese government failed to take action once they had knowledge of their existence. *Id.* at 48.

In addition to base pollution, local inhabitants are reminded of the bases’ presence by the incessant noise of military aircraft. Kadena and Futenma air bases are surrounded by dense residential area and as a result, the noise affects a population of 480,000, or approximately 35% of Okinawa’s population. REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS, *supra* note 12, at 13. At Futenma alone, there are 52,000 takeoffs and landings annually, or 142 per day. JOHNSON, *supra* note 8, at 47. There are currently no concrete limitations on when these flights can take off and land, meaning that residents of surrounding neighborhoods are not only exposed to the sounds during the day but at night time as well. REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS, *supra* note 12, at 14. A local government agency report has revealed that the health impact of the noise levels include: an increase in hearing impairments, high birth rates for lower weight infants, as well as abnormal behavior among children. *Id.*

Accidents caused by aircraft and military vehicles are also a frequent consequence of the military bases. For example, between May 1972 through December 1997, there were 130 accidents caused by U.S. military aircraft, resulting in 22 deaths, 19 injuries, and 24 people missing. *Id.* at 11. During the same time, fires caused by military training exercises numbered 154, and damaged a total of 17 square miles. *Id.* at 12. Traffic accidents caused by U.S. military personnel also average more than a thousand cases every year. JOHNSON, *supra* note 8, at 45. As in other crimes committed by the U.S. military, the local residents often have little or no recourse against negligent or reckless drivers. *Id.* at 44-47.

Furthermore, the most notorious legacy of the U.S. military presence has been crimes committed in by U.S. soldiers and their dependents. Figures show that, between 1972 and 1995, U.S. service personnel were implicated in 4,716 crimes, which averages out to almost one crime per day. *Id.* at 41. What is particularly disturbing is the disproportionate number of so-called “heinous” crimes committed by those associated with the U.S. military. Heinous crimes, which include: murder, robbery, rape, and arson, are said to be seven times more likely to be committed by U.S. military personnel and dependents, than by local residents, while violent crimes (crimes involving violence or

have been incrementally reduced in size since reversion, the number of U.S. bases in Okinawa has proportionally expanded in relation to the number of bases located in Japan proper.²⁶⁸ Even measures that help to minimize the bases' impact, implemented elsewhere in Japan, such as restricting flying hours²⁶⁹ and limiting military maneuvers, have not yet been implemented in Okinawa.²⁷⁰ Moreover, during the 1980's, the Japanese government adopted a policy of encouraging the presence of U.S. bases by voluntarily paying for the Pentagon's expenditures for stationing troops in the country.²⁷¹ The stark contrast between the vision many had of post-reversion Okinawa and the present reality is described by one commentator in the following way: "In the context of the Japan-U.S. security arrangements, reversion was supposed to lead to Okinawa's being treated more like the rest of Japan, but it can hardly be said that this has been the case in the twenty-plus years since the United States relinquished control."²⁷²

Serious dialogue addressing the status of the bases in Okinawa did not come about until the 1990's, initiated then by the occurrence of two very different but equally shocking events. The first of these events was the fall of the Soviet Union and the end of the Cold War.²⁷³ The second was an incident in which three male marines kidnapped and raped a twelve-year old Okinawan girl in 1995.²⁷⁴ While the former event placed the strategic importance of the U.S. bases in Okinawa in question at a theoretical level, the latter incident directly resulted in the formation of a

injury), are four times more likely to be committed by them. REPORT ON OKINAWA MILITARY BASE HUMAN RIGHTS PROBLEMS, *supra* note 12, at 10. Sex crimes committed by Americans against women in Okinawa have also been disproportionately high. An American newspaper reported that, since 1989, U.S. military bases conducted 169 court-martials for sexual assaults, which is 66% more cases than the U.S. military base with the next largest number of such court-martials. JOHNSON, *supra* note 8, at 41.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 173.

²⁷⁰ *Id.*

²⁷¹ JOHNSON, *supra* note 8, at 54. The funds Japan contributes toward the U.S. military is referred to as *omoiyari osan*, or "sympathy budget," by the Japanese while Washington euphemistically calls it "host nation support." Although the United States is responsible for all expenditures associated with its bases in Japan, according to the Status of Forces Agreement ("SOFA") between the United States and Japan, the LDP first decided to donate 6.2 billion yen (approximately 60 million dollars) for this purpose in 1978. By 1997, the *omoiyari yosan* had ballooned to 273.7 billion yen, or 2.36 billion dollars. *Id.*

²⁷² Takashi Inoguchi, *The New Security Setup and Japan's Options*, 23 JAPAN ECHO (1996).

²⁷³ See generally MANIRUZZAMAN, *supra* note 7, at 35-42.

²⁷⁴ *Id.*

Special Action Committee on Okinawa (SACO) in December 1995, which was designed to reduce and consolidate the U.S. bases in Okinawa.²⁷⁵ Okinawans were, however, again not allowed to participate or have a direct say in the process and in the results of the SACO's final report. The report released in December 1996 amounted to no more than what has been called "cosmetic burden reduction."²⁷⁶ The SACO concluded that the total number of U.S. military personnel would be maintained at 28,000 and that the majority of facilities returned to Okinawa would be relocated to alternative sites in Okinawa, rather than to other areas of Japan.²⁷⁷ A major issue that has come to symbolize the true nature of SACO for anti-base activists is the proposed construction of a new heliport facility off the coast of Nago,²⁷⁸ which is anticipated to have a devastating effect on marine wildlife in the area.²⁷⁹

Post-war history reveals that Japan has consistently used Okinawa as a valuable bargaining chip in its dealings with the United States. Over the past fifty years, Japan has wagered the Okinawan people's lives, lands, and future, in negotiating the terms of surrender, independence, and reversion. This strategy has succeeded in minimizing the number of U.S. bases in Japan and has kept its main islands free of nuclear weapons. The popular perception—the scenario that the Japanese government would most likely desire to perpetuate—is that Okinawa's condition has been the result of a vanquished country being forced to acquiesce to the demands of a victorious foreign power. On the contrary, Japan has not been merely a passive bystander, but a willing participant in the process of designing Okinawa's fate. While the Allies provided Japan with a level of self-determination in shaping its future, neither the United States nor Japan has ever consulted the Okinawan people or given them a voice as to what should become of them and their homeland. Little or nothing has been done so far to address or alleviate Okinawa's numerous problems that stem from the excess proliferation of U.S. bases. Even the recent steps that have been taken through the formation of SACO have not brought about a difference in the everyday living conditions of the island's inhabitants.

²⁷⁵ Shin'ichi Kitaoka, *Okinawa and the Security Treaty*, 23 Japan Echo (1996).

²⁷⁶ Mulgan, *supra* note 18, at 174.

²⁷⁷ *Id.*

²⁷⁸ The Japan Times Online, *RELOCATION OPPONENT JOINS RACE: Nago mayoral race to hinge on heliport*, January 28, 2002), at <http://www.japantimes.com> (last visited Mar. 20, 2002)

²⁷⁹ The Japan Times Online, *Wildlife group call for review of U.S. base*, September 30, 2000, at <http://www.japantimes.com> (last visited Mar. 20, 2002).

It has been over a century since Okinawa was a Japanese colony and the Japanese government no longer officially designates Okinawa's inhabitants as second-class citizens. Today, the people of Okinawa are citizens of the Japanese nation-state, legally entitled to the same protection and privileges as all other Japanese. In reality, however, the hierarchical power structure that has defined the relationship between the *Wajin* and the Ryūkūans is still firmly in place. Whether it was the feudal era policy to separate and distinguish Ryūkūans from the *Wajin*, or the Meiji government's attempts to eliminate all traces of Ryūkūan culture, Japan has always determined Okinawa's path. It is in this historical framework that people must view the current "Okinawa Problem." The fact that a disproportionate share of U.S. bases in Japan are located in Okinawa is due to the Japanese government's view of the Okinawan people as "different," and the current situation builds upon the historical treatment rooted in this perception. Notwithstanding the government's official position of impartiality and equality with regard to Okinawa, the base situation in Okinawa is nothing but partial and unequal. Thus, in order to remedy the current situation, the people of Okinawa must be legally recognized as different, for this is where the root of the problem lies. Moreover, the native inhabitants of Okinawa should be afforded special protection as an indigenous minority under the law precisely because the *Wajin* government has subjected them to disparate treatment due to their different ethnic and cultural differences. Thus, rather than examining the "Okinawa Problem" in a vacuum, the Nibutani Dam Decision's analysis provides an opportunity to reframe the issue in the historical context in which it belongs and for the first time creates the possibility for meaningful and honest discussion.

V. CONCLUSION

Kayano v. Hokkaidō Expropriation Committee, 1598 HANREI JIHŌ 33, 938 HANREI TIMES 75 (Sapporo Dist. Ct., Mar. 27, 1997) is a landmark case in which a Japanese court found that the law protects cultural minorities from potentially harmful government action. In its decision, the Nibutani Dam court recognized the vulnerability of minority cultures in general and the *Wajin*'s patterns of oppression and the extraction of privilege directed at the Ainu, in particular.²⁸⁰ As demonstrated in this paper, Ryūkyūans, like the Ainu, are a minority population possessing cultural and historical characteristics that unequivocally distinguish them from Japan's majority population. Prior to annexation by Japan, Okinawa had been home to the Ryūkūans for centuries and the land still holds a special significance for the preservation

²⁸⁰ Nibutani Dam Decision, *supra* note 21, at 32-39.

of their unique culture and identity. Furthermore, the public policy concerns that prompted the Nibutani Dam Court to recognize the need for protecting the Ainu culture are also present in Okinawa. The Tokugawa and Meiji governments subjected Okinawa's indigenous population to its mercantilist and assimilation policies and the present-day proliferation of U.S. military bases, under the post-war Japanese government, stands as a legacy of this colonial past.

The comment's goal has been to identify the Ryūkyūans as a people with potential legal standing to challenge the Japanese government's action in Okinawa based on their status as an indigenous people. Issues such as what segment of the Okinawa's population would be able to maintain standing as indigenous Ryūkyūans, the actual damage the bases have inflicted on Ryūkyūan culture, and what steps or action is necessary to redress the situation are beyond the scope of this effort. The practical implication of this comment is that Okinawan residents that have been unsuccessfully challenging the Japanese government for damages caused by the U.S. military bases now possess an alternative legal basis to advance their claims. Based on the Nibutani Dam Decision, if a court finds that the Japanese government's actions, in particular the construction of large-scale military facilities, in Okinawa have been conducted without considering the impact on the local indigenous culture, a court may hold such actions illegal. The hope is that the Nibutani Dam decision will force the Japanese government to reassess its policy regarding U.S. military bases in Okinawa and induce it to allocate the burden of hosting the bases more equally between Japan's prefectures, ultimately initiating meaningful and lasting change—improving the lives of the people of Okinawa.

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