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## COMFORT WOMEN IN JAPAN AND KOREA

GRACE LAI<sup>1</sup>

### ABSTRACT

One of the greatest human rights abuses against women occurred during World War II when the Japanese Imperial Army a system of military brothels staffed by young women who were coerced, tricked, or abducted to work in “Comfort Stations.” These young women were euphemistically called “Comfort Women” because they were to provide “comfort” – that is, sexual pleasure to the Japanese soldiers. This paper will examine the genesis of the Comfort Women system, explore why the wrong has never been addressed, assess the legal grounds for holding Japan accountable in international law, and critique the legal mechanisms that have been used to obtain redress for former Comfort Women.

### I. INTRODUCTION

I first became aware of the Comfort Women<sup>1</sup> issue when I lived in Taipei in 1998. That year was the tenth anniversary of the Taipei Women’s Rescue Foundation (TWRWF), a private organization assisting women who are victims of violence and working to authenticate the claims of Taiwanese women who were once Comfort Women. The Comfort Women, now elderly women, had been forced into sexual slavery by the Japanese Imperial Army during World War II. Between 1932 and 1945, the Japanese military sent 2,000 to 3,000 Taiwanese

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<sup>1</sup> The term “Comfort Women” is used in this paper solely in its historical context. The unfortunate choice of such a euphemistic term to describe the atrocity suggests the extent to which the international community as a whole, and the Government of Japan in particular, have sought to erase and minimise the nature of the violations to the women.

women to military brothels in Southeast Asia and Okinawa.<sup>2</sup> Despite this fact, the Japanese government continues to refuse moral and legal responsibility for the atrocities committed against former Comfort Women. Little effort has been made to redress the harm suffered by these women. Japan has refused to prosecute surviving war criminals, to provide official compensation, or to officially acknowledge its legal accountability.<sup>3</sup>

To mark the anniversary, the TWRP organized a rally to gain support from the public in order to compel the Taiwanese Ministry of Foreign Affairs to demand an official apology and compensation from the Japanese government on behalf of the victims. I distinctly remember the faces of these former Comfort Women who were protesting at the rally. I particularly noticed the sadness in their eyes and the hollow expressions on their faces – expressions of those upon whom some wrong had been committed. This wrong has been left unaddressed and unresolved for more than fifty years. Redress is urgent because these women, all septuagenarians or octogenarians, may not live long enough to see a resolution to their demand for justice. Many have already died without any justice served.

This paper will examine the genesis of the Comfort Women system and explore why the wrong has never been addressed. The legal grounds for holding Japan accountable in international law, and critique of the legal mechanisms that have been used to obtain redress for former Comfort Women shall also be examined.

## II. THE ORIGIN OF COMFORT WOMEN

### 1. Reasons for the Institutionalization of Forced Prostitution

The impetus for the establishment of the Comfort Women system began in 1931 when Japan invaded Manchuria and subsequently marched into China. During the Japanese advancement, Chiang Kai-

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<sup>2</sup> Taipei Times, “Comfort women attend Toyo hearing,” (1999) online: Taiwan Headlines <[http://th.gio.gov.tw/whow.cfm?news\\_id=729](http://th.gio.gov.tw/whow.cfm?news_id=729)> (date accessed: 11 November 2001).

<sup>3</sup> Gay J. McDougall, U.N. Econ. & Soc. Council, *Contemporary forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/2000/21 at para. 72, [hereinafter *McDougall Report*].

Shek's capital city of Nanking was captured. In what came to be known as the "Rape of Nanking," Japanese soldiers ransacked the city and slaughtered as many as 200,000 Chinese.<sup>4</sup> The Rape of Nanking has both a figurative and a literal dimension; the Japanese pillaged the city of Nanking and raped hundreds of Chinese women. The actions of the Japanese in Nanking unleashed such international disapprobation and outrage<sup>5</sup> that, ever conscious of its image, the Japanese military and government sought to find a way to avoid acts that would tarnish their reputation. The solution? By placing brothels in the battlefield, Japanese soldiers would have easy access to sexual outlets and so would be less likely to rape the local women. The Japanese government compelled women to serve in these military brothels, more commonly known as 'Comfort Stations.'

## 2. The Legal Foundation of the Comfort Women System

The Comfort Women system was legalized through the authority of the Japanese Emperor. As the Emperor and as the supreme commander-in-chief of the Japanese army, navy, and airforce, Emperor Hirohito held the legal basis for absolute power over the sovereignty of Japan. It was in the capacity of his Royal Office that the Emperor exercised these powers when he enacted *Imperial Ordinance No. 51952*. This ordinance established the legal foundation for the recruitment of Comfort Women and detailed how the women would be recruited and how they would be "employed." Article 6 declared that "governors, mayors and school presidents could order recruitment of comfort women whenever needed,"<sup>6</sup> thus enlisting the civilian population and public policy-makers in the creation of brothels.

It was under the auspices of the *Imperial Ordinance* that the Japanese Military used force, deceit, and coercion to "recruit" Comfort Women. Testimony from former Comfort Women describes how they had received promises of jobs as cooks, nannies, nurses, and cleaners.<sup>7</sup>

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<sup>4</sup> Michael A. Barnhart, *Japan and the World Since 1868* (Great Britain: Edward Arnold, 1995) at 114.

<sup>5</sup> *Ibid.*

<sup>6</sup> Yvonne Park Hsu, "Comfort Women from Korea: Japan's World War II Sex Slaves and the Legitimacy of their Claims for Reparations," (1993) 2 Pac. Rim. L. & Pol'y J. 97 at 105 [hereinafter "Comfort Women from Korea"].

Others said that the Japanese forcibly took them from their homes or kidnapped them from the streets. While the women were procured by means of illegal acts, such actions were nonetheless legally authorised through *Imperial Ordinance*.

### 3. Japanese Justifications for the Comfort Women System

The Japanese government justified the institutionalisation of Comfort Stations as a means to redress three concerns. First, as mentioned above, the Japanese government wanted to prevent their soldiers from raping women in occupied areas as such rapes were damaging to Japan's international reputation. Rapes undermined "the official pretext of the war [which] was that Japan was saving other Asian nations from colonization by Western countries."<sup>8</sup> Secondly, there was a need to counter any espionage activity that might have been implemented by having women from the native populations exchange sexual favours for secret Japanese information.<sup>9</sup> Finally, there was a need to prevent venereal disease. Prior to this period, Japanese prostitutes had been sent to the frontlines; however, because many of these women were seasoned sex workers, they had already contracted sexually transmitted diseases. Consequently, the Japanese Military and Government found a ready solution in women from its colonies.

Japanese colonial expansionist policy was rooted in racial superiority. Japan had historically felt culturally inadequate when compared to the two ancient Asian civilizations of India and China, the sources of Buddhism and classical learning. According to George Hicks, "Japan quickly developed a profound contempt for other Asians" when its military prowess in colonized Korea catapulted it into competition with its Western rivals.<sup>10</sup> Historian Louise Young observed, "as Japanese imperialism entered a new phase in the 1930s, the imperial discourse on

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<sup>7</sup> *Ibid.* at 100.

<sup>8</sup> Watanabe Kazuko, "Militarism, Colonialism, and the Trafficking of Women," (1997) 26:4 Bulletin of Concerned Asian Scholars 3 at 7 [hereinafter "Militarism, Colonialism"].

<sup>9</sup> David Alan Boling, "Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?" (1995) 32 Colum. J. Transnat'l L. 533 at 542 [hereinafter "Mass Rape"].

<sup>10</sup> George Hicks, *The Comfort Women* (New York: W.W. Norton & Company, Inc., 1994) at 37 [hereinafter *The Comfort Women*].

self and other became more overtly chauvinistic, expressing race hates and race fears vociferously.”<sup>11</sup>

The mere fact that the majority of Comfort Women came from the colonies and not from Japan further revealed the prevailing attitudes of racial superiority and chauvinism. “Ordinary” Japanese women were precluded from becoming military prostitutes as they were to be “bearing good Japanese children who would grow up to be loyal subjects of the emperor.”<sup>12</sup> The war was being fought for the sake of family and the country and “men were to protect women and children while glorifying the nation and the Emperor.”<sup>13</sup> Thus, a Japanese soldier having sexual intercourse with another female national undercut the noble purposes of the war. While some Japanese women were recruited, their numbers were limited. The Japanese Home Ministry concluded that sending Japanese women who were not prostitutes abroad to be Comfort Women would have serious implications for its citizens. The Ministry considered how a soldier’s trust in the state and the army would be destroyed should their sisters, wives, or female acquaintances be stationed overseas to serve as Comfort Women.<sup>14</sup> As a consequence, the Japanese colonies of Korea and Taiwan became a ready source of women for the Comfort Stations. In addition to colonial women, Comfort Women were included Chinese, Filipino, Indonesian, Malaysian and Dutch women. Overall, historians estimated that approximately 200,000 women were forced to serve the Japanese military and, of these, about 80 percent were of Korean descent.<sup>15</sup>

#### 4. The Colony of Korea: A Case Study of the Comfort Women

Korea was one of the colonies from which the Japanese forced many women into prostitution. In 1910, Korea and Japan signed a *Treaty of*

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<sup>11</sup> Louise Young, *Japan’s Total Empire: Manchuria and the Culture of Wartime Imperialism* (Berkeley: University of California Press, 1998) at 95. For a very interesting discussion of Japan’s Ethnology during World War II, see Kevin M. Doak, “Building National Identity through Ethnicity: Ethnology in Wartime Japan and After” (2001) 21 *J. of Japanese Stud.*

<sup>12</sup> John Lie, “The State as Pimp: Prostitution and the Patriarchal State in Japan in the 1940s” (1997) 38 *Soc. Q.* 251 at 254.

<sup>13</sup> *Ibid.*

<sup>14</sup> Yoshimi Yoshiaki, *Sexual Slavery in the Japanese Military During World War II*, (New York: Columbia University Press, 2000) at 155.

<sup>15</sup> “Mass Rape,” *supra* note 9 at 541

*Annexation* and, under its terms, the Korean Emperor ceded all sovereign power over Korea to the Japanese Emperor.<sup>16</sup> The Japanese colonial policy imposed severe control on all aspects of Korean life. The Japanese began to carry out “The Policy of Oneness of Koreans and Japanese,” which compelled Koreans to become citizens of Imperial Japan and to accept Japanese Imperial ideology.<sup>17</sup> The 1938 Japanese *National Mobilization Law* authorised the compulsory transfer of Korean people to Japan.<sup>18</sup> Over one million Korean nationals were forcibly transferred to Japan under this law.<sup>19</sup> In this half-assimilated colony, Japan conscripted Korean men into its armed forces and heavy industries, and Korean women were taken abroad to satisfy the sexual desires of its soldiers.

Subscribing to the Confucian principle of female chastity, most young Korean women had never engaged in sexual intercourse and, as a result, they were unlikely to suffer from sexually transmitted diseases. The Japanese believed that, as colonial subjects, Koreans shared with them a responsibility to serve the Emperor.<sup>20</sup>

Racial hierarchy based on the prevailing Japanese attitudes resulted in a racial stratification of the Comfort Women system. While Koreans were regarded as Japanese nationals, the system never really treated them on par with Japanese sex workers. These Japanese women were career prostitutes and as such, they fared better as Comfort Women. Where Japanese Comfort Women tended to be kept on more secure base areas, because the Koreans were not considered to be of the same status “there was less concern about forcing these women to go to the battle-front where they might be killed.”<sup>21</sup> The Japanese women serviced higher-ranking officers in rooms while, in contrast, their Korean coun-

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<sup>16</sup> Ustina Dolgopol, “Women’s Voices, Women’s Pain,” *Hum. Rts. Q.* 17 (1995) 127 at 129 [hereinafter “Women’s Voices”].

<sup>17</sup> Yasunori Fukuoka, “Koreans in Japan: Past and Present” (1996) 31 *Sitama U. Rev.* 1 at 2 [hereinafter “Koreans in Japan”]. Koreans were required to change their food, clothing and housing style to that of the Japanese, to follow Japanese holidays and to learn Japanese marital arts. Policies which later followed required Koreans to change their names to Japanese thus, creating a new national identity for the colonized Koreans.

<sup>18</sup> “Comfort Women from Korea,” *supra* note 6 at 98.

<sup>19</sup> *Ibid.*

<sup>20</sup> Laura Hein, “Savage Irony: The Imaginative Power of the ‘Military Comfort Women’ in the 1990s” (1999) 11 *Gender & Hist.* 336 at 339 [hereinafter “Savage Irony”].

<sup>21</sup> “Mass Rape,” *supra* note 9 at 543.

terparts serviced lower ranking soldiers in cubicles of three feet by five feet. Korean women were made to service an average of thirty to forty soldiers per day, “with soldiers waiting in line outside her small room.”<sup>22</sup> Moreover, the fees for the services of a Comfort Woman were based on race: “one yen for a Chinese woman, one and half for a Korean woman and two yen for a Japanese woman.”<sup>23</sup> In order of preference, the Japanese soldiers preferred Japanese Comfort Women, followed by Korean, then Chinese and lastly, Southeast Asian, “who tended to be darker-skinned.”<sup>24</sup> The racial hierarchy on which the Comfort Women system was grounded was both the foundation and framework for genocidal actions against the Korean people.

## 5. Comfort Women: Genocide of the Korean People

Scholars and practitioners of international law often regard genocide as one of the most heinous of crimes. The Comfort Women system was a flagrant violation of human rights. The system was analogous to genocide of the Korean people for it uprooted the reproductive capability of young women and it attempted to destroy Korean identity. Article II of the *Convention for the Prevention and Punishment of the Crime of Genocide* defines genocide as:

[A]ny of the following acts committed with intent to destroy in whole or in part; a national ethnical, racial or religious group, such as:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>25</sup>

The prevailing Japanese attitude of racial superiority provided grounds on which policies for Korea’s assimilation was based. By suppressing Korean traditions and ways of life, with strategies such as

<sup>22</sup> “Militarism, Colonialism,” *supra* note 8 at 9.

<sup>23</sup> “Mass Rape,” *supra* note 9 at 543.

<sup>24</sup> *The Comfort Women*, *supra* note 10 at 48.

<sup>25</sup> *Convention for the Prevention and Punishment of the Crime of Genocide*, (1951), 78 U.N.T.S. 277; 1949 Can. T.S. No. 27.

the imposition of Japanese names, the Japanese began their destruction of the Korean people. In 1937, for example, Japanese authorities established policies for intermarriage between Koreans and Japanese.<sup>26</sup> These policies aimed to ethnically eliminating Koreans since such marriages would never produce ethnically pure Korean children. Thus, assimilationist policies such as these broadly fit within the definition of genocide as the aim of these policies was to destroy the national and ethnic identities of the Korean people.

Clearly, the Comfort Women scheme was a policy with genocidal features. Specifically, the system caused the prevention of births and serious bodily and mental harm to the women. Serving as Comfort Women meant that these women suffered disease, physical injuries, psychological trauma, and social discrimination. In the Confucian society of Korea, where a high value is placed on chastity, the loss of virginity meant greatly reduced prospects for marriage and children for former Comfort Women. Many of these women led lives of solitude as a direct result. Furthermore, many former Comfort Women were rendered sterile by the sexually transmitted diseases that affected their reproductive organs and urinary tracts. Operations were forced on them to eliminate menstruation (thus keeping them always available for service) and by the injections of salvarsan or terramycin to abort unwanted pregnancies and as a prophylactic.<sup>27</sup> These procedures have had lasting physical and psychological consequences for the women. United Nations Special Rapporteur, Radhika Coomaraswamy observed, “in addition to the apparent physical scars the women have on their bodies, mental pain has tortured them throughout their lives and was of much greater significance. Many former Comfort Women suffer from lack of sleep, nightmares, high blood pressure and nervousness.”<sup>28</sup>

Korean Comfort Women were recorded on military supply sheets as “female ammunition” and their bodies were often referred to a “sanitary public toilets.”<sup>29</sup> These “sanitary public toilets” were neither reproduc-

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<sup>26</sup> “Koreans in Japan,” *supra* note 17 at 3.

<sup>27</sup> *The Comfort Women*, *supra* note 10 at 94 and 165.

<sup>28</sup> Radhika Coomaraswamy, U.N. ESC, Commission on Human Rights, *Report on the to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, E/CN.4/1996/53/Add.1 (1996) at para. 60 [hereinafter *Coomaraswamy Report*].

<sup>29</sup> *Ibid.*

tive organs nor women deserving of respect; they were merely a site at which Japanese soldiers could dispose of their sexual needs and tensions. The fact that the women were treated so inhumanly shows the disregard the Japanese had for Koreans. The degrading attitudes, the forced assimilation, and the callous behaviour towards the Korean population, and especially to the Comfort Women, shows a systematic genocidal intent on the part of the Japanese.

When the Japanese retreated, the Comfort Women were abandoned and left to fend for themselves in unfamiliar surroundings in foreign lands. Historians estimate that only 30 percent of Comfort Women survived their terrible ordeal.<sup>30</sup> After the war, little redress was given for the crimes committed against the Comfort Women and the international community did not acknowledge their suffering or the crimes that had been committed against them.

### III. IGNORED BY THE INTERNATIONAL COMMUNITY

#### 1. Racism Tainting the Administration of Law

A hierarchy of races stratified the post-war world. This racial hierarchy was not unlike the system that the Japanese had adopted to justify the Comfort Women system. The international community did not address the Comfort Women issue after the war simply because of their racist views of Asians. Most of the Comfort Women were Asians, and from the Western World's perspective, Asians were lowly peoples and thus, there was no need to address the wrongs done to them for they did not matter.

When the Japanese officially surrendered to the Allied forces on September 2, 1945, the Allies agreed to setting up the Far Eastern Commission to prosecute Japanese war criminals. Modelled after the *Nuremberg Charter*, the *Tokyo Charter* created the International Military Tribunal for the Far East, which called for the "just and prompt trial and punishment of the major war criminals in the Far East."<sup>31</sup> However,

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<sup>30</sup> "Mass Rape," *supra* note 9 at 542. So as to "destroy the evidence," many Comfort Women were murdered when the Japanese retreated.

<sup>31</sup> Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, New Jersey: Princeton University Press, 1971) at 21[hereinafter *Victor's Justice*]. This book sharply

this system was rife with racism and only brought ‘a just and prompt trial and punishment of the major war criminals’ who had harmed the Allied nations and not the Asian nations who had endured the brunt of the atrocities of the war. Many notorious cases of massacre, rape, and pillaging by the Japanese military against Asian civilians were never brought to trial.

The offences over which the International Military Tribunal of the Far East held jurisdiction included crimes against peace, conventional war crimes, and crimes against humanity. Despite this, however, the Tribunal tried only individuals whose charges included crimes against peace.<sup>32</sup> While there were fifty-five specific counts of indictments against twenty-eight Japanese major war criminals, few of these indictments included crimes against the Asian nations and none of these indictments included sexual violence. By ignoring Asian civilians, the Allies’ inaction in prosecuting the Japanese for the atrocities done to other Asians illustrates how racism and neo-colonial domination inhibited justice. According to legal scholar, Ustinia Dolgopol, the Allied Powers “made the decision to prosecute Japan only for those acts that affected their own nationals.”<sup>33</sup> Japan was held accountable for the several thousand Western prisoners of war forced to work on the Burma-Thai railroad, yet no mention was made of the vastly larger number of Korean, Chinese, Taiwanese, and Southeast Asian forced labourers.<sup>34</sup>

The racial hierarchies were particularly evident in providing redress, or more precisely not providing redress, for former Comfort Women. For example, the Batavia Military Tribunal, held in 1948, was the only trial that tried and punished the Japanese for coercing women into prostitution.<sup>35</sup> In this trial, Japanese military officials were sentenced to imprisonment for committing crimes against humanity, namely, “coercion to prostitution, abduction of girls and women for forced prostitution, rape, and bad treatment of prisoners.”<sup>36</sup> Tellingly, the women who

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attacked the International Military Tribunal for the Far East’s legitimacy, use of international law, use of process, and interpretation of historical facts.

<sup>32</sup> *Ibid.*

<sup>33</sup> “Women’s Voices,” *supra* note 16 at 149.

<sup>34</sup> “Savage Irony,” *supra* note 20 at 352.

<sup>35</sup> George Hicks, *The Comfort Women: Sex Slaves of the Japanese Imperial Forces* (Malaysia: Souvenir Press, 1995) at 31 [hereinafter *Sex Slaves of the Japanese*].

<sup>36</sup> Ustinia Dolgopol and Snehel Paranjape, *Comfort Women: Report of a Mission* (Geneva: International Commission of Jurists, 1994) at 135 [hereinafter *Report of a Mission*].

had suffered this crime against humanity were thirty-five Dutch women forced into prostitution in the Dutch East Indies (now Indonesia). Although this trial rendered a positive verdict for the thirty-five former Comfort Women, it ignored the even larger number of Indonesian women who had been similarly coerced into sexual slavery by the Japanese. The Batavia Trials committed a great disservice, as it did not even mention the thousands of Korean, Chinese, Taiwanese, Filipino, Indonesian and Malaysian survivors – all non-Europeans – who had suffered the same fate as those thirty-five Dutch women. The implication is clearly that, “under the assumption of Western humanism, which was the philosophical basis of the Batavia Trials, Asians did not belong to the category of humanity and were all the more excluded.”<sup>37</sup> Indeed, the Allied Powers should accept some responsibility for the failure to address the crimes perpetrated by the Japanese against women of the Asia Pacific region. Their inaction then has created an environment in which the plight of the Comfort Woman was shrouded with silence for so many years.

## **2. Erased from the World’s Consciousness**

In the subsequent five decades following the World War II, few references were made to the Comfort Women. From the point of view of the Allied countries, justice had been served at the Tokyo Trials for the atrocities committed against their own nationals. In addition, the war had caused significant destruction and devastation in the war-torn areas and attention was focussed on rebuilding, rather than on censuring, Japan. The United States became so preoccupied with rebuilding and strengthening Japan against the Communist threats of the USSR and China the fact that many outstanding issues resulting from the War remained unresolved was never brought up. When the international community focused on global rebuilding, the erasure of the Comfort Women from the world’s consciousness and conscience resulted.

## **3. Comfort Women’s Silence**

The lack of world attention focused on the issue of Comfort Women can partly be attributed to the fact that former Comfort Women chose to

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<sup>37</sup> Chin Kim and Stanley S. Kim, “Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves,” (1998) 16 *UCLA Pac. Basin L. J.* 263 at 268 [hereinafter “Delayed Justice”].

remain silent to prevent further humiliation and rejection from society. Confucianism is very influential in Asian society and much emphasis is placed on women's chastity. Consequently, there is considerable stigma and shame attached to having been raped. Moreover, many women did not want to endure reliving the sexual terror. Therefore, former Comfort Women were not inclined to expose themselves and reveal the trauma they endured.

#### 4. The Japanese Denial

A contributing factor to the erasure of the Comfort Women issue is Japan's response to the matter itself. While the Japanese government was able to create and justify the Comfort Women system as a legally valid policy stemming from the Emperor, the government was aware that their actions could be deemed criminal for they ordered the destruction of key documents pertaining to Comfort Women. Towards the end of the war, when the Japanese realized that they would inevitably have to surrender, the Minister of War issued an order to every Army headquarters ordering the destruction of all documents and other evidence that suggested ill-treatment of prisoners of war and civilians internees. Telegrams were sent to headquarters in Korea, China, Hong Kong, Mukden, Borneo, Thailand, Malaya, and Java which stated: "documents which would be unfavourable for us in the hands of the enemy are to be treated in the same way as secret documents and destroyed when finished with."<sup>38</sup> Thus, all the detailed documents relating to the procuring and shipping of Comfort Women were destroyed and there remains very little documentary proof of the existence of the Comfort Women system, except for the women themselves.

Even when the Comfort Women issue first came to light, the Japanese position was to deny the existence of Comfort Women. In the early 1990s, former Comfort Women started to come forward to tell their story. On December 6, 1991, three Korean women who identified themselves as "Military Comfort Women" filed a lawsuit against the Japanese government for having violated their human rights.<sup>39</sup> When the first lawsuit was filed, the Japanese government denied the military's

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<sup>38</sup> Leon Friedman, ed., *The Law of War: A Document History*, (New York: Random House, 1972) at 1122-23 [hereinafter *The Law of War*].

<sup>39</sup> "Militarism, Colonialism," *supra* 8 note 10.

involvement. Former Justice Minister Seisuki Okuno claimed that “comfort women were commercial prostitutes. There was no forced recruitment.”<sup>40</sup> Some members of the Japanese Legislature (the Diet) denied Japan’s aggression and glorified its past when they insisted that “Japan did something good during colonial rule. We raised Korean’s standard of living on par with that of Japanese.”<sup>41</sup>

This denial of any wrong committed has been rife at all levels of the Japanese government and has been most prevalent in the Japanese Education Ministry, the body that scrutinises the country’s history textbooks. Japanese high-school textbooks referred briefly to a war between Japan and the United States, but did inform students that Japan had invaded neighbouring countries. Certainly no reference was made to the issue of Comfort Women.<sup>42</sup> Throughout the subsequent five decades, no mention was ever made of Comfort Women by any official source. It is little wonder why Japanese officials such as Seisuki Okuno would deny the existence of Comfort Women; his generation had not even been taught of the Japan’s role during the War, let alone the criminal acts committed against the Comfort Women.

In 1992, history professor Yoshimi Yoshiaki, researching in the Library of the National Institute for Defense Studies, came across original wartime documents relating to Comfort Women.<sup>43</sup> Discovery of documents like a set of rules governing the use of Comfort Stations implicated the Japanese military in establishing and running Comfort Stations. Such documents clearly show the Japanese military institutionalising Comfort Stations. The subsequent discovery of other incriminating documents and an official probe into the issue led the Japanese government to finally acknowledge the extent of its involvement.

On August 4, 1993, Chief Cabinet Secretary Yohei Kona officially admitted that Japanese forces had been, either directly or indirectly, involved in establishing and managing Comfort Stations and that these

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<sup>40</sup> Rumiko Nishino, “The Comfort Women Issue and Responses of the Japanese government,” in Indai Lourdes Sajor ed., *Common Grounds: Violence Against Women in War and Armed Conflict Situations* (Manila: Asian Centre for Women’s Human Rights) at 216 [hereinafter “Responses of the Japanese government”].

<sup>41</sup> *Ibid.* at 215.

<sup>42</sup> Charles Smith, “The Textbook Truth,” *Far Eastern Economic Review* (August 25, 1994) 26.

<sup>43</sup> *Sex Slaves of the Japanese*, *supra* note 35 at 164.

women were recruited against their will through force or coercion. In a weak public apology, Kono noted:

The scars of war still run deep . . . The problem of the so-called wartime "Comfort Women" is one such scar which, with the involvement of the Japanese military forces of the time seriously stained the honor and dignity of many women. This is entirely inexcusable. I offer my profound apology to all those who, as wartime "Comfort Women," suffered emotional and physical wounds that can never be closed.<sup>44</sup>

Despite admitting its involvement, Japan has offered nothing but an apology. The Japanese government continues to deny its liability for the blatant violation of human rights of the Comfort Women and continues to evade the issue reparations in the form of state compensation to the victims. In an attempt to evade legal responsibility, the Japanese government, in June of 1995, set up a private fund in which the government provided 300 million yen for a campaign to solicit donations.<sup>45</sup> Rather than casting the matter as one of the state acknowledging its liability and providing some measure of compensation, the government maintained that the Asian Women's Fund is a "project of atonement by the Japanese people as a whole."<sup>46</sup> Most of the victims have rejected the payments from the fund because it is compensation and not charity that they are seeking. Supporters of the Comfort Women argue that "it's inhumane to stick money in front of those poor victims while the government refuses to offer compensation."<sup>47</sup>

#### IV. HOLDING THE JAPANESE ACCOUNTABLE

It is always seen as problematic to hold people responsible for retroactive wrongs; that is, to hold people to blame for actions done before sanctions were imposed on actions of that kind. As I shall show, the treatment that the Japanese inflicted upon the Comfort Women

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<sup>44</sup> Etsuro Totsuka, "Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery," (1999) 8 Pac. L. & Pol'y J. 47 at 52 [hereinafter "Commentary on a Victory"].

<sup>45</sup> Sachinko Sakamaki, "Not Bought Off," *Far Eastern Economic Review* (25 July 1996) 26 [hereinafter "Not Bought Off"].

<sup>46</sup> "Responses of the Japanese government," *supra* note 40 at 218.

<sup>47</sup> "Not Bought Off," *supra* note 45.

violated international law, both treaties and customary law, as it existed at that time.

### 1. Violation of Customary International Law

Japan failed to comply with several instruments of international customary law of which it was a signatory. Japan was in direct violation of the 1907 *Hague Conventions*, which codified the laws and customs of war and served as a “rule of conduct for the belligerents in their mutual relations with the inhabitants.”<sup>48</sup> When Japan institutionalized forced prostitution of women, it contravened Article 46 of the *Hague Conventions*, which states:

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.<sup>49</sup>

In societies where a woman’s chastity was highly valued, coerced service as a sex slave would have no doubt brought shame to the woman and her family. Japan failed to comply with this Article as it neither respected family honour and rights nor did it respect the lives of the women when it subjected Comfort Women to the humiliation of being systematically raped each day. Thus, the phrase “family honour and rights” should be read to encompass the right of women to be protected from rape and forced prostitution. In support of this position, legal scholars, Karen Parker and Jennifer Chew further contend that, “because every major religion condemns rape, the reference to ‘religious convictions’ supports an interpretation of the *Hague Conventions* as prohibiting rape, torture, and forced prostitution during war.”<sup>50</sup>

Moreover, as the *Hague Convention* was not intended to provide an exhaustive enumeration of prohibited acts, the preamble included a very broad clause to cover cases either insufficiently addressed or absent from the text:

Until a more complete code of the laws of war has been issued... in cases not included in the Regulations...the inhabitants and the belligerents remain under the protection and the rule of the principles

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<sup>48</sup> *The Law of War*, *supra* note 38 at 309.

<sup>49</sup> *Ibid.*

<sup>50</sup> Karen Parker and Jennifer Chew, “Compensation for Japan’s World War II War-Rape Victims,” (1994) 17 *Hastings Int’l & Comp. L. Rev.* 497 at 515 [hereinafter “Compensation”].

of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.<sup>51</sup>

Therefore, acts that are not specifically addressed by the *Convention* can, nevertheless, be prohibited by this clause. However, according to Article 2 of the *Convention*, its regulations are only applicable to the parties of the Convention:

The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.<sup>52</sup>

Since not all the belligerents were parties to the 1907 *Hague Conventions*, agreement would seem to be inoperative. However, the International Military Tribunal for the Far East stated in its judgement that the *Convention* was “good evidence of the customary law of nations to be considered by the tribunal, along with all other available evidence, in determining the customary law to be applied in any given situation.”<sup>53</sup> Therefore, the *Hague Convention of 1907* can be invoked as a basis for Japan’s liability.

The atrocities perpetrated against the Comfort Women were not addressed at the Military Tribunals of the Far East. In fact, no person appearing before the Military Tribunals of the Far East was ever tried for crimes against humanity. Therefore, claims against persons who abducted and raped Comfort Women ought to be prosecuted by Japan as crimes against humanity. The concept of crimes against humanity was put into practice in the *Charter of the Nuremberg International Military Tribunal* and the *Charter for the Military Tribunal for the Far East* reaffirmed the principles recognized in the *Nuremberg Charter* and defined crimes against humanity pursuant to Article 5(c):

Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and ac-

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<sup>51</sup> *The Law of War*, *supra* note 38 at 309.

<sup>52</sup> *Ibid.* at 310.

<sup>53</sup> *Victor’s Justice*, *supra* note 31 at 50.

complices participating in the formulation of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.<sup>54</sup>

The Japanese government authorised its military to institute a system in which women were systematically abducted and raped. The women who became Comfort Women were civilians who were enslaved, deported and subject to inhumane acts. Many died during their ordeal. Clearly, these actions meet the definition of crimes against humanity.

As discussed above, the Comfort Women scheme was genocidal at its very core. Although the crime of ‘genocide’ was not codified in a single international instrument, until the *Convention on the Prevention and Punishment of the Crime of Genocide of 1948*, the status that genocide has now attained is that of a *jus cogens* norm. That is, it is a peremptory norm “from which...no derogation may be made except by another norm of equal weight.”<sup>55</sup> The term ‘genocide’ received its first formal, legal recognition in the context of the Nuremberg trials and Tokyo trials.<sup>56</sup> Although the *Nuremberg* and the *Tokyo Charters* did not expressly use the term, the definitions “crimes against humanity” provided in Article 6(c) of the *Nuremberg Charter* and 5(c) in the *Tokyo Charter* cover many of the acts that constitute genocide. In particular, the International Court of Justice recognized the status of genocide under customary international law when, in the *Reservations to the Conventions on the Prevention and Punishment of the Crime of Genocide*, it remarked that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”<sup>57</sup> Furthermore, the International Court of Justice recognized that obligations concerning genocide are an *erga omnes* obligation on all states:

In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide,

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<sup>54</sup> *The Law of War*, *supra* note 38 at 897.

<sup>55</sup> Rebecca Wallace, *International Law*, 2nd ed. (London: Sweet & Maxwell: 1992) at 32.

<sup>56</sup> Jason Abrams and Steven Ratner, *Accountability for Human Rights Atrocities in International Law* (Oxford: Clarendon Press, 1997) at 25.

<sup>57</sup> *Reservations to the Conventions on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* [1951] I.C.J. Rep. at 23.

as also from the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination.<sup>58</sup>

In addition to genocide, the International Court of Justice also singled out as an example of obligations *erga omnes*. Therefore, Japan had an obligation to protect citizens in the occupied states from violations like genocide and slavery.

## 2. Breaches of International Treaties

One of the treaties that Japan both signed on to and violated was the *International Agreement for the Suppression of the "White Slave Traffic."* This Agreement "criminalized the procuring women or girls abroad for immoral purposes."<sup>59</sup> Japan violated this prohibition on the trafficking of women when it forced foreign nationals into prostitution. Japan's actions were contrary to the *Suppression Agreement* which sought to secure to "women of full age who have suffered abuse or compulsion, as also to women and girls under age, effective protection against the criminal traffic known as the 'White Slave Traffic.'"<sup>60</sup>

After having ratified the *Suppression Agreement*, in 1925, Japan ratified the *International Convention for the Suppression of the Traffic in Women and Children of 1921-1922*,<sup>61</sup> which confirmed and extended the provisions of the *Suppression Agreement*. The *Suppression Convention* obliged parties to prosecute persons engaged in crimes prohibited by the *Convention*. The ratification of such an agreement exemplified Japan's further commitment to ending the trafficking of women and children. However, not only did Japan fail to comply with this *Convention*, it further exacerbated the trafficking. Japan would likely rely on Article 14 of the *Suppression Convention*, which allows signatories to pronounce that the provisions do not apply to the people of its colonies:

Any Member or State signing the present Convention may declare that the signature does not include any or all of its colonies overseas possessions, protectorates, or territories under its sovereignty or au-

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<sup>58</sup> *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 at 32.

<sup>59</sup> *International Convention for the Suppression of the White Slave Traffic*, March 18, 1908, 1 L.N.T.S. 86.

<sup>60</sup> *Ibid.* at 84.

<sup>61</sup> *International Convention for the Suppression of the Traffic in Women and Children*, Mar. 31, 1922, 9 L.N.T.S. 417.

thority, and may subsequently adhere separately on behalf of any such colony, overseas possessions, protectorate or territory so excluded in its declaration.<sup>62</sup>

Japan did indeed exercise this prerogative towards Korea, Taiwan, and the leased territory of Kwantung when it excluded them from the *Convention*.<sup>63</sup> This article appears to create colonial “safe havens” for the sex slave trade. However, this safe haven should not immunize Japan from liability for its sexual enslavement of women from areas that were not colonies or territories at the time, such as the Philippines. One commentator has suggested that since the provision only applies to acts occurring within the colonies’ geographical boundaries, claims of Korean and Taiwanese Comfort Women, who were forced to serve in Comfort Stations outside of their homelands, would not be exempt from protection from the *Convention*.<sup>64</sup> Thus, interpretations that the *Convention* did not apply to women dispatched from Korea or Taiwan are untenable.

Notwithstanding this declaration, legal scholar Yvonne Park Hsu has asserted that by signing the *Convention*, “Japan implicitly acknowledged that the acts committed against the comfort women were violations of fundamental human rights, and the declaration that its signature excluded its territories did not disaffirm this acknowledgment.”<sup>65</sup> In support of Hsu’s position, the International Commission of Jurists maintained that Article 14 was inserted because of concerns about practices which had continued as local customs such as the payment of dowry and “bride price” in many territories controlled by the then colonial powers.<sup>66</sup> Thus, Japan would be liable under the *Suppression Convention*.

Japan also failed to comply with the 1930 *Convention Concerning Forced or Compulsory Labour*, which it had ratified in 1932. According to Article 2 of this *Convention*, forced or compulsory labour is defined as “all work or service which is exacted from any person under the menace of a penalty and for which the person has not offered himself voluntarily.”<sup>67</sup> Undoubtedly, Japan’s exercise of force, deceit, and coer-

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<sup>62</sup> *Ibid.* at 427.

<sup>63</sup> *Ibid.* at 430.

<sup>64</sup> “Mass Rape,” *supra* note 9 at 574.

<sup>65</sup> “Comfort Women from Korea” *supra* note 6 at 108.

<sup>66</sup> *Report of a Mission*, *supra* note 36 at 158.

<sup>67</sup> M. Hudson, ed. *International Legislation 1929-1931* (Washington: Carnegie Endowment for International Peace, 1936) at 611.

cion in the “recruitment” of Comfort Women would most certainly fall under the rubric of “forced labour” as defined by the *Convention*.

### 3. The Japanese Position: The Right to Compensation Has Been Extinguished

The Japanese government maintains that it bears no legal responsibility to pay direct compensation for its actions because post-war settlement treaties extinguished rights to compensation. With respect to claims of nationals from the Republic of Korea (South Korea), the Japanese government relies on Article 2, section 1 of the *Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea*, signed in 1965 which states: “The Contracting Parties confirm that [the] problem concerning property, rights, and interests of the two Contracting Parties and their nationals ... is settled completely and finally.”<sup>68</sup> The main purpose of the *Japan-Korea Settlement* was to promote economic relations between the two countries as Japan promised grants and loans in the agreement to Korea.<sup>69</sup> Unlike the post-war agreements with the Allied Powers that contained specific provisions addressing claims of individuals,<sup>70</sup> the *Japan-Korea Agreement* did not contain any provisions for individual claimants. This omission lends support to the argument that the Agreement was intended to be limited to property and economic issues. Therefore, Japan cannot simply rely on the *Japan-Korea Agreement* to nullify claims asserted by Korean Comfort Women.

With respect to other nationals, Japan similarly asserted that all claims against it had been settled in the 1951 *Treaty of Peace between Japan and the Allied Powers*, known as the *San Francisco Treaty*. Article 14(b) states:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by

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<sup>68</sup> *Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea*, Japan and Korea, June 22, 1965, 583 U.N.T.S. 258 [hereinafter *Japan-Korea Settlement*].

<sup>69</sup> “*Comfort Women from Korea*,” *supra* note 6 at 102.

<sup>70</sup> *Ibid.* at 103.

Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.<sup>71</sup>

United Nations Special Rapporteur, Gay McDougall contended that the fact that by drawing a distinction between the claims for “reparations” and “other claims,” the waiver did not apply to compensation of the Allied Powers’ nationals. Since “the only reparations contemplated in the waiver are those of the Allied nations themselves.”<sup>72</sup> Hence, the waiver would not bar claims by former Comfort Women since such claims would not fall within the claims contemplated by the treaty. For states such as China, North Korea, and Taiwan, Japan’s assertion that treaties have extinguished rights to compensation is unpersuasive for none of these countries were signatories to any settlement treaty with Japan.<sup>73</sup> Moreover, Japan would be unable to rely on the treaties signed with the Korea or the Allied Powers to avoid liability for the right to seek a remedy because the Permanent Court of International Justice has already declared that the right to redress is “a principle of international law, and even a general conception of law,” and can be understood as a *jus cogens* norm.<sup>74</sup> Because the right to seek redress is itself a *jus cogens* norm that cannot be derogated, Article 64 of the *Vienna Convention* declares that a treaty is void if “it conflicts with a peremptory norm or general international law” is applicable.<sup>75</sup> Such treaties that the Japanese rely on conflict with this article and, thus, should be rendered void.

The Japanese government claimed that any criminal or civil cases with respect to the “Comfort Stations” would now be time-barred.<sup>76</sup> Notwithstanding the fact that Japan did not ratify the 1968 *Convention for the Non-Applicability of a Statute of Limitations for War Crimes and Crimes Against Humanity*, this convention has already gained the status of customary international law.<sup>77</sup> Since genocide and slavery are considered *jus cogens* violations, a statute of limitations will not be applicable to these matters.

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<sup>71</sup> *Treaty of Peace between Japan and the Allied Powers*, September 8, 1951, 3 U.S.T. 3169, 136 [hereinafter *San Francisco Treaty*].

<sup>72</sup> *McDougall Report supra* note 3 at para. 60.

<sup>73</sup> *Ibid.* at para. 61.

<sup>74</sup> *Chorzow Factory (Indemnity) Case*, (1928), P.C.I.J., Ser. A., No. 17 at 29 [hereinafter *Chorzow Factory*].

<sup>75</sup> *Vienna Convention On the Law of Treaties*, May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969).

<sup>76</sup> *McDougall Report supra* note 3 at para. 6

<sup>77</sup> “Mass Rape,” *supra* note 9 at 354.

#### 4. Comfort Women's Right to Compensation

The Japanese government has argued that it is not bound by international law to compensate former Comfort Women because “former comfort women as individuals are not subjects of international law and thus cannot assert individual claims for compensation.”<sup>78</sup> This position is contradicted by several sources of both pre and post-World War II international laws that provide individuals with the means to make claims against states for international law violations. For example, Article 3 of the *Hague Convention of 1907* states:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.<sup>79</sup>

Moreover, the *Treaty of Versailles* from the Paris Peace Conference of 1919 established mixed arbitration tribunals where individuals could bring claims for damages against Germany.<sup>80</sup> Postwar human rights instruments also set out a right to redress. Article 8 of the *Universal Declaration of Human Rights*, for example, states that, “everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted by him by the constitution or by law.”<sup>81</sup> The *International Covenant of Civil and Political Rights* provides, in Article 2(3), that persons claiming an effective remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State.<sup>82</sup> Given the strength of an individual's right to redress through international law, the Japanese position cannot be maintained.

In the *Chorzow Factory (Indemnity) Case*, the Permanent Court of International Justice held that, “any breach of an engagement involves an obligation to make reparations” and that such reparations must, “as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if

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<sup>78</sup> *Ibid.* at 533.

<sup>79</sup> *The Law of War*, *supra* note 38 at 310.

<sup>80</sup> *Ibid.* at 842.

<sup>81</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 12 at 71, UN Doc. A/810 (1948) 71.

<sup>82</sup> *International Covenant of Civil and Political Rights*, (1966) 999 U.N.T.S. 171.

that act had not been committed.”<sup>83</sup> For obvious reasons, the Comfort Women cannot be restored to the position they were in prior to the illegal acts so they ought, at the very least, be compensated for the harms they suffered as sex slaves.

Japan’s post-war reparation payments have been wholly inadequate, especially when compared to the payments made by Germany. Japan paid 364,348,000,000 yen (US\$ 1012 million) in war reparations to Burma, the Philippines, Indonesia, and Vietnam.<sup>84</sup> A further US\$ 300 million was paid to the Republic of Korea.<sup>85</sup> In contrast, Germany has paid in reparations and payments to victims DM 102 billion (US\$ 66 billion).<sup>86</sup> In contrast to Japan, Germany’s reparation policies emphasized compensation to individual victims, whereas, Japan’s focussed on corporate compensation thus depriving individuals who had been directly harmed of compensation.<sup>87</sup>

In her report on the *Issue of Military Sexual Slavery in Wartime*, Special Rapporteur, Radhika Coomaraswamy, offered several recommendations to compensate surviving Comfort Women. Among her recommendations, Coomaraswamy suggested the Japanese government should:

- (a) acknowledge that the system of comfort stations set up by the Japanese Imperial Army was a violation of its obligations under international law and to accept legal responsibility for that violation;
- (b) pay compensation to individual victims
- (c) make a full disclosure of documents and materials in its possession with regard to comfort stations and other related activities;
- (d) make a public apology in writing to individual women
- (e) identify and punish, as far as possible, perpetrators involved in the recruitment and institutionalization of comfort stations.<sup>88</sup>

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<sup>83</sup> *Chorzow Factory*, *supra* note 79 at 29 and 47.

<sup>84</sup> *Report of a Mission*, *supra* note 36 at 139.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at 138.

<sup>87</sup> Won Soon Park, “Japanese Reparations Policies and the “Comfort Women” Question (1997) 5 Positions 107 at 113 [hereinafter “Japanese Reparations Policies”].

<sup>88</sup> *Coomaraswamy Report supra* note 28 at para. 137.

Compensation will never undo the harms that have been done to these women nor will it restore their dignity and reputation. However, acknowledgement of the wrong and acceptance of the responsibility that compensation symbolises together with sincere and apologies will provide the former Comfort Women with a sense of satisfaction that the wrong has been addressed.

## V. ATTEMPTS TO REDRESS

### 1. Domestic Japanese Courts

The first lawsuit seeking recognition and compensation for Japan's violation of human rights with regard to Comfort Women was launched in 1991. Since that time, seven other suits have been filed in Japanese courts by groups of Comfort Women of various nationalities. Five former Taiwanese Comfort Women filed the most recent lawsuit on July 14, 1999.<sup>89</sup> As of today, two of the cases have been heard. On April 17, 1998, the Shimonoseki Branch of the Yamaguchi District Court in Japan ordered the Japanese government to pay 300,000 yen (US\$ 2,270.00) to the initial three South Korean Comfort Women who filed their case in 1991.<sup>90</sup> The judgment recognized that the Diet had a constitutional duty to enact a law requiring compensation for the Comfort Women when it admitted in 1993 that it was involved in establishing Comfort Stations.<sup>91</sup> However, the Court denied the plaintiffs an official apology from the government. This victory was short-lived as the Japanese government immediately filed an appeal to the Hiroshima High Court. The appeal is currently pending. Despite the fact that the higher court will most probably overturn the Shimonoseki District Court's ruling, this case was significant in that it was the first time a Japanese court found in favour of foreign plaintiffs in a postwar compensation case and the fact that it recognized the Japanese government's legal obligations to Comfort Women.<sup>92</sup>

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<sup>89</sup> Linda Chang, "Wartime 'comfort women' sue Japan over atrocities," *The Free China Journal* (15 July 1999) 4.

<sup>90</sup> "Delayed Justice," *supra* note 37 at 263.

<sup>91</sup> "Commentary on a Victory," *supra* note 44 at 54.

<sup>92</sup> *Ibid.* at 57-61.

The second case, in which forty-six Filipino women demanded compensation for their sexual slavery under the Japanese military, was a complete reversal of the Shimonoseki District Court's decision five months prior. The Tokyo District Court dismissed the plaintiff's argument that Tokyo owes them compensation under the *Laws and Customs of War on Land Convention of 1907*. The judge said that the *Hague Convention* defines compensation obligations "between states, and does not provide for individual victims the right to seek compensation from the state."<sup>93</sup> The success of the first case was greatly diminished as the dismissal of the second reinforces the prevailing attitude of the Japanese courts – that the government should not be held liable.

The decade of litigation in Japanese domestic courts has proven to be extremely slow and unsuccessful. Former Comfort Women will need to assess other mechanisms to receive compensation.

## 2. A Second Attempt: the Tokyo Trial

In an effort to highlight the ongoing denial of compensation to former Comfort Women, non-governmental organizations held a Women's International War Crime Tribunal, which handed down a ruling that found the late Japanese Emperor Hirohito guilty of crimes against humanity.<sup>94</sup> As discussed above, the Tokyo Trial immediately after the war did not administer justice. The United States had issued a directive to the International Military Tribunal for the Far East that read, "You will take no action against the Emperor as a war criminal pending receipt of a special directive concerning his treatment."<sup>95</sup> The Emperor was thus able to evade liability in the first Tokyo Trials. However, in this mock trial, Emperor Hirohito was ultimately found guilty as the supreme commander of the army and navy for he had both "the responsibility and power to ensure that his subordinates obeyed international law and stopped engaging in sexual violence."<sup>96</sup> Although this second Tokyo Trial did not have any legal powers, it did clarify the responsibilities of wartime Japanese leaders.

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<sup>93</sup> "Court denies compensation for 46 wartime sex slaves," *Mainichi Daily News* (10 November 1998), Online: NEXIS (News, Wires).

<sup>94</sup> *Tokyo Mock War Trial Finds Late Japanese Emperor Guilty*, [2000] WL 30805629 online: WL [hereinafter *Tokyo Mock War Trial*].

<sup>95</sup> "Japanese Reparations Policies," *supra* note 87 at 117.

<sup>96</sup> *Tokyo Mock War Trial*, *supra* note 94.

### 3. Suing Japan in United States Court: Alien Torts Claim Act

Various national courts may be available to hear criminal proceedings with respect to the issue of Comfort Women. Hugh Kindred has identified the Universal Principle as a way for states “to exercise jurisdiction over all crimes, committed by anyone, wherever they may occur.”<sup>97</sup> This principle is utilized for serious crimes where the international nature of the offence justifies its universal repression.<sup>98</sup> While international law can avail itself of this universal principle to prosecute perpetrators of universally condemned crimes, some nations have enabling legislation expediting the prosecution process, such as the *Alien Torts Claim Act* in the United States. In *Filartiga v. Pena-Irala*, the Second Circuit held that since “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties,”<sup>99</sup> s.1350 of the *Alien Torts Claim Act* provides federal jurisdiction. This section provides “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>100</sup>

On September 18, 2000, fifteen former Comfort Women filed a class action lawsuit against Japan in the United States District Court for the District of Columbia under the *Alien Torts Claim Act*. This suit follows on the heels of successful suits brought in the United States by victims of human rights abuses where a jury in New York ordered Bosnian Serb leader Radovan Karadzic to pay \$745 million to a group of women who accused him of killings and other atrocities.<sup>101</sup>

Such lawsuits may appear to be innovative ways to pursue justice but Margaret Perl has identified several obstacles to obtaining redress for human rights violations. Among the hurdles is the problem of foreign sovereign immunity, where “under the *Foreign Sovereign Immunities Act*, a foreign state is generally immune from suit in U.S. courts

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<sup>97</sup> Hugh Kindred, *International Law Chiefly as Interpreted and Applied in Canada*, 6th ed. (Canada: Emond Montgomery Publications Limited, 2000) at 519 [hereinafter *International Law*].

<sup>98</sup> *Ibid.*

<sup>99</sup> *Filartiga v. Pena-Irala* 630 F2d 876 (2d Cir. 1980) at 878.

<sup>100</sup> *Alien Tort Statute*, 28 U.S.C. § 1350 [hereinafter *Alien Torts*].

<sup>101</sup> Bill Miller, “Mugabe Sued in N.Y. Over Rights Abuses” *Washington Post* (September 09, 2000).

with certain, narrowly construed exceptions.”<sup>102</sup> These exceptions are found in Section 1605(a) of the *Foreign Sovereign Immunities Act*:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

- (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
- (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;<sup>103</sup>

Another obstruction to the *Alien Torts Claim Act* that Perl notes is the doctrine of *forum non conveniens*, where a claim will be dismissed “if the defendant proves that an alternative forum exists that can provide a remedy to the plaintiffs...”<sup>104</sup>

The obstacles enunciated above were the exact grounds that led U.S. District Judge Henry Kennedy Jr. to dismiss the class action suit of *Hwang Geum Joo, et al v. Japan* on October 4, 2001. Kennedy J. held that Japan was protected by the *Foreign Sovereign Immunities Act* and that the District Court was not the appropriate forum for this case.

In the hearing on Japan’s motion to dismiss the complaint based on its sovereign immunity, the counsel for the plaintiffs, Michael Hausfeld contended that Japan was not protected by foreign sovereign immunity based on the two enumerated exceptions in §1605 of the *Foreign Sovereign Immunities Act* of waiver and commercial activity. In asserting that Japan had explicitly waived its sovereign immunity in the *Potsdam Declaration* that it signed after World War II, Hausfeld relied on the paragraph of the declarations that stated:

<sup>102</sup> Margaret G. Perl, “Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations” (2000) 88 Geo. L. J. 773 at 790 [hereinafter “Not Just Another Mass Tort”].

<sup>103</sup> *Alien Torts*, *supra* note 100 at §1605(a).

<sup>104</sup> “Not Just Another Mass Tort,” *supra* note 102 at 792.

We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people.<sup>105</sup>

However, Kennedy J. held that Japan's agreement to the terms set out in the *Potsdam Declaration* did not constitute an explicit waiver under § 1605(a)(1) because "the law requires that an explicit waiver must be unambiguous and intentional."<sup>106</sup> Kennedy J. relied on *Argentine Republic v. Amerada Hess Shipping Corp.*, where the Supreme Court stated that it did not "see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver to suit in United States courts or even the availability of a cause of action in the United States."<sup>107</sup>

Hausfeld asserted that Japan implicitly waived immunity when it violated *jus cogens* norms of the law of nations and because of the eminent status *jus cogens* has achieved under international law, any violation of it will limit the sovereign immunity of states to the extent that they adhere to the rules of the international community.<sup>108</sup> Kennedy J. quickly rejected this assertion, citing *Princz v. Germany*, where the D.C. Circuit held that "*jus cogens* violations did not constitute an implied waiver under § 1605(a)(1)."<sup>109</sup>

The plaintiffs maintained that the case fell within *Foreign Sovereign Immunities Act* exception provided in the third clause of § 1605(a)(2). They argued that the action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."<sup>110</sup> The plaintiffs submitted that the "Comfort Stations" were "state-supervised brothels" and thus, constituted commercial activities that occurred outside the United States. To satisfy the second portion,

<sup>105</sup> *Hwang Geum Joo et al. v. Japan*, [2001] WL 1246419 at 5 (D.D.C.) online: WL [hereinafter *Hwang v. Japan*].

<sup>106</sup> *Ibid.*

<sup>107</sup> *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 442-43.

<sup>108</sup> *Hwang Geum Joo, et. al v. Japan*, Transcript of Motions Hearing Docket No. CA 00-2233 at 35 [hereinafter *Motions Hearing*].

<sup>109</sup> *Hwang v. Japan*, *supra* note 105 at 6.

<sup>110</sup> *Foreign Sovereign Immunities Act*, 28 U.S.C. §1605(a)(2).

the plaintiffs argued that “Comfort Stations” were established inside Guam and the Philippines. Because these were United States territories at the time, there was a direct effect on the United States.<sup>111</sup>

Furthermore, after World War II, the Japanese territories occupied by the United States military became part of the United States, thus the burden of repatriating the Comfort Women fell to the United States, creating a direct effect.<sup>112</sup> Kennedy J. did not even need to consider the jurisdictional nexus test because in concluded that:

The described conduct is unquestionably barbaric, but certainly not commercial in nature. Japan’s use of its war-time military to impose “a premeditated master plan” of sexual slavery upon the women of occupied Asian countries may be characterized properly as a war crime or a crime against humanity. This conduct, however, was not in connection with a commercial activity.<sup>113</sup>

Accordingly, the Court ruled that none of the exceptions to the *Foreign Sovereign Immunity Act* were applicable in this case and thus, Japan’s motion to dismiss the case was granted. Kennedy J. further grounded his decision in the doctrine of forum *non conveniens*, stating:

There is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions nearly a half century later. Just as the agreements and treaties made with Japan after World War II were negotiated at the government-to-government level, so too should the current claims of the “comfort women” be addressed directly between governments.<sup>114</sup>

Following Justice Kennedy’s ruling, Hausfeld immediately appealed the dismissal. It is important to note that present at the motions hearing was the United States, represented by the U.S. Department of Justice, which was not a party to motion but filed a statement of interest. While the United States maintain that their interests were seeing to “the proper construction of the *Foreign Sovereign Immunities Act*,” and ensuring that the case “properly belongs in the diplomatic arena and not in the a U.S. courtroom.”<sup>115</sup> Despite the benign characterisation of its interest, the motives of the United States could be seriously questioned.

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<sup>111</sup> *Motions Hearing*, *supra* note 108 at 25.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Hwang v. Japan*, *supra* note 105 at 8.

<sup>114</sup> *Ibid.* at 10.

<sup>115</sup> *Ibid.* at 13-14.

The United States does not want jeopardise its lucrative trade relationship with Japan and it may well be that, as at the end of World War II, the harms done to the Comfort Women are being swept under the rug of national interests.

#### 4. Other Channels

Given that the *Alien Torts Claim Act* falls short in addressing abuses that are committed by a foreign government, the likelihood of a successful appeal appear dismal. Are there any other avenues the Comfort Women should pursue? To date, the avenues for redress have been brought to the national courts of Japan and the United States. But because Japan was in breach of several international instruments, the Comfort Women case should be brought to the International Court of Justice under the doctrine of state responsibility.

The law of state responsibility concerns “what happens when things go wrong and states behave in a manner that is inconsistent with their international obligations.”<sup>116</sup> Under this doctrine, international law places an affirmative duty on states to investigate and prosecute grave violations of human rights. In the *Velasquez Rodriguez Case*, the Inter-American Court of Human Rights held that states have an obligation not only to “respect” but also to “ensure” rights, found in article 1(1) of the *American Convention of Human Rights*. The Court outlined the obligation as the duty to:

organize the government apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.<sup>117</sup>

As specified in the *Velasquez Case*, it is a duty of the State that has violated an international obligation to make reparations. Japan may well be held liable for its failure to investigate the Comfort Women issue, for its failure to prosecute those responsible, and for its failure to provide

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<sup>116</sup> *International Law*, *supra* note 97 at 601.

<sup>117</sup> *Velasquez Rodriguez Case* (1988), Inter-Am. Ct. H.R. (Ser. C.), No. 4; 9 Hum. Rts. L.J. 212 at para. 166.

compensation. Slavery and genocide have attained status in international law and thus, all states have an obligation *erga omnes* in their protection. By violating both these international norms, Japan has a duty to provide compensation.

The standard to which Japan should be held accountable is that which was enunciated in the *Neer Case* (United States v. Mexico), where the General Claims Commission held that the sufficiency of government action should be put to the test of international standards:

To hold (first) that the propriety of government acts should put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.<sup>118</sup>

The Japanese military took steps to ensure that an investigation could not take place by destroying the incriminating documents. Moreover, the Japanese government failed to investigate the human rights violations in the case of the Comfort Women. These actions constitute bad faith on the part of the Japanese government that falls below international standards.

As a signatory to the International Court of Justice, Japan has accepted the compulsory jurisdiction of the Court. States whose nationals have been violated by the Comfort Women system have a responsibility to bring Japan before the International Court of Justice based on its breaches of international law. However, the possibility of these states doing so is slim given that Japan is major trading partner to states like Korea and Taiwan. The leaders of these countries may not be willing to jeopardize their trade relationships.

Countries like Canada, with a culture of protecting human rights, could bring forward a case to the International Court of Justice on behalf of former Comfort Women under the *erga omnes* obligations. The ability to do this was affirmed in *Barcelona Traction Light and Power Co.*<sup>119</sup> Again, it is doubtful whether any states would want to jeopardise

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<sup>118</sup> *Neer Claim (United States v. Mexico)*, General Claims Commission (1926), 4 R.I.A.A. 60, at 61-62.

<sup>119</sup> *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, [1970] I.C.J. Rep. 3.

trade relations with Japan; economics seem to trump conscience again.

Finally, there has been much excitement in international law circles surrounding the International Criminal Court. At the time of writing, the Court had received 46 of the 60 ratifications needed for it to come into force. The Court will have jurisdiction over the crime of genocide, crimes against humanity, and war crimes. Despite looking like a promising avenue for former Comfort Women, Article 11 of the 1998 *Rome Statute of the International Criminal Court* states “the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”<sup>120</sup> Thus, this Court will not offer any assistance to the Comfort Women.

## VI. CONCLUSION

This paper examined the complex ramifications spawned by a wrong left unaddressed for many years. Comfort Women have a moral and legal right to be compensated for the crimes that were committed against them over fifty years ago. Japan clearly breached both international customary law and treaty law and thus, should be held accountable for the violations. To date, actions for redress in national courts in Japan and the United States have met with little success. National governments of former Comfort Women should bring a case against Japan before the International Court of Justice. While this might be the best mechanism to compel the Japanese government to acknowledge their role in the Comfort Women system and to pay compensation, the national governments have not shown the will to proceed.

At a broader level, the international community has a responsibility to bring a case before the International Court of Justice on behalf of the former Comfort Women. This is so because the international community of nations is partly to blame for Japan’s refusal to pay. Because the Allied powers and the national governments did not properly address this issue during post war negotiations, the human rights violations to Comfort Women remain unresolved and, moreover, the treaties have

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<sup>120</sup> *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF. 183/9 (July 17, 1998).

provided the Japanese government with a defence that the claims of the women are barred. The international community has the responsibility to pressure Japan to provide an equitable compensation package to the remaining Comfort Women. If European and North American nations apply international pressure, Japan may well reconsider its stance on this issue. Japan is such an important trading partner and so the imposition of such strict trade sanctions is highly improbable. Nevertheless, if countries acted in concert to exert diplomatic pressure on the Japanese government, progress could be made to resolve this issue for former Comfort Women.

The Comfort Women issue is not merely a concern of the past that ought to be forgotten when the last victim of the system has died. Rather, it is one that needs to be resolved in a way that acknowledges the harm done and seriously examines the nature of that harm. This examination must also address the way the issue of Comfort Women has been ignored for over half a century. Failure by the international community to consider the Comfort Women system as a systematic crime by the state against women, and its failure to punish the perpetrators can be interpreted as implicitly sanctioning such practices. The international community's inability and unwillingness to set a precedent of prosecuting such violence and degradation has led to reoccurrences of systematic rapes in the Former Yugoslavia and Rwanda. The international community has only recently begun to wake up to the fact that rape and other crimes against women are used for political ends and, thus, can properly be characterised as acts of aggression against a state and as genocide. Crimes against women in wartime must be taken seriously. This is an opportunity to make clear that the world will neither forget nor tolerate such crimes.