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"Comfort Women" from Korea: Japan's World War II Sex Slaves and the Legitimacy of Their Claims for Reparations

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"COMFORT WOMEN" FROM KOREA: JAPAN'S WORLD WAR II SEX SLAVES AND THE LEGITIMACY OF THEIR CLAIMS FOR REPARATIONS

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Abstract: During World War II, Japan forced 100,000 to 200,000 women from all over Asia into prostitution to satisfy the sexual cravings of Japanese soldiers. These women thus forced into prostitution were euphemistically called "comfort women". In December 1991, three former Korean comfort women filed suit in the Tokyo District Court, seeking damages for their sufferings. From both legal and moral perspectives, Japan needs to make reparations for violations of these women's fundamental human rights. By meeting the obligations arising from its past abuses of human rights, Japan will take a significant step toward preventing its militant past from re-occurring, fostering protection of human rights in the future and building trust among its neighboring countries.

"He that would make his own liberty secure
must guard even his enemy from oppression;
for if he violates this duty he establishes
a precedent that will reach to himself."

– Thomas Paine

INTRODUCTION

Japan annexed Korea in 1910 and ruled it through a colonial government until 1945.[1] The colonial policy of Japan demanded complete subjugation and assimilation from Korea.[2] In 1938, Japan passed the National Mobilization Law,[3] which essentially placed all material and human

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[1] For historical background leading to the annexation, *see* Shigeru Oda, *The Normalization of Relations Between Japan and the Republic of Korea*, 61 AM. J. OF INT'L LAW 35, 35-40 (1967).

[2] Japan's policy, the so-called *Naisen Ittaika* ("oneness") forbade the Korean language to be taught in schools, banned all Korean language newspapers and made Japanese the national language of Korea. Int'l Commission Of Jurists, *Japan's Denationalisation of the Korean Minority*, THE REVIEW 28 (Dec. 1982); *see also Review of further developments in fields with which the sub-commission has been concerned*, written statement submitted by Liberation (a non-governmental organization in consultative status on the Roster), U.N. Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, 44th Sess., Agenda Item 4, para. 2, U.N. Doc. E/CN.4/Sub. 2/1992/NGO/26 (1992).

[3] Under the National Mobilization Law, the Diet (the principal law-making body of the Japanese government) established the National Manpower Mobilization Plan of 1939 and the National Conscription

resources of Korea under the control of the Japanese government and authorized the compulsory transfer of Korean people to Japan.[4] During its occupation of Korea, Japan forcibly transferred more than one million Korean nationals to Japan.[5] Korean men were conscripted into the Japanese armed forces and heavy industries, and Korean women were taken abroad to satisfy the sexual cravings of Japanese soldiers.[6] These women forced into prostitution were euphemistically called *ianfu* in Japanese or "comfort women".[7]

On December 6, 1991, three former Korean comfort women filed suit in the Tokyo District Court, seeking damages for their sufferings.[8] In April, 1992, six more Korean comfort women joined in the lawsuit,[9] and many more have since stepped forward to condemn Japan's conduct during World War II.[10]

This Comment analyzes the claims of the former Korean comfort women under relevant human rights law and evaluates whether the women have a legitimate legal basis to receive compensation from the Japanese government. Part I examines the accounts of the comfort women and Japan's position on their claims. Part II discusses the various sources of law that recognize the acts committed against the comfort women as violations of

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Order of 1942. Yuji Iwasawa, *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law*, 8 HUM. RIGHTS Q. 131, 133-134 (1986).

[4] *Japan's Denationalisation of the Korean Minority*, *supra* note 2, at 28-29; *see also* Investigation Team on the Truth about the Korean Forced Laborers in Japan, General Association of Korean Residents in Japan, *Drafting of Koreans as Forced Laborers and "Comfort Girls" during Japan's Colonial Rule of Korea*, 1-5 (July 25, 1992).

[5] Iwasawa, *supra* note 3, at 133-134.

[6] *Japan's Denationalisation of the Korean Minority*, *supra* note 2, at 29.

[7] Chieko Kuriki, *Cruel "Comfort": Koreans Sue for Damage for Wartime Disgrace*, CHICAGO TRIBUNE, Mar. 29, 1992, at 11, *available in* LEXIS, Nexis Library, News File.

[8] The comfort women are joint plaintiffs with 32 other Koreans who seek wartime damages from the Japanese government. (The other plaintiffs are former soldiers who served in the Imperial Army or their surviving family members.) *Koreans Seek Damages: Former Troops and "Comfort Women" Sue*, THE JAPAN TIMES, Dec. 7, 1991, at 2. Apart from the lawsuit, the government of Korea decided as of March 29, 1993 that it will provide financial assistance to Korean comfort women, rather than asking Japan for compensation. *Seoul to waive compensation claims for comfort women*, JAPAN ECONOMIC NEWSWIRE, March 29, 1993, *available in* LEXIS, Nexis Library, News File.

[9] *Court Begins Hearing "Comfort Women" Suit*, THE JAPAN TIMES, June 2, 1992, at 3.

[10] Former comfort women and human rights groups all over Asia seek justice and redress from Japan for its wartime atrocities. *See* Ramon Isberto, *Japan Faces Mounting Calls to Pay Up for War Crimes*, INTER PRESS SERVICE, March 19, 1993, *available in* LEXIS, Nexis Library, News File. *See also* Colin Nickerson, *Japan's Wartime "Comfort Women": an Issue That Won't Die*, THE BOSTON GLOBE, March 30, 1993, at 2, *available in* LEXIS, Nexis Library, News File. In April 1993, eighteen former comfort women from the Philippines filed a class action lawsuit with the Tokyo District Court. *Philippine "Comfort Women" Urge Justice*, JAPAN ECONOMIC NEWSWIRE, April 2, 1993, *available in* LEXIS, Nexis Library, News File.

fundamental human rights. Part III probes Japan's obligations for reparations from both legal and moral perspectives. Part IV explores appropriate means of redress. This Comment concludes that Japan has a duty to carefully examine its past and accept responsibility for the injuries inflicted upon the comfort women, thereby demonstrating its willingness to earnestly undertake the protection of human rights.

I. BACKGROUND

Historians estimate that Japanese troops forced 100,000 to 200,000 women into prostitution during Japan's occupational period.[11] Until recently, however, the Japanese government has denied any involvement in running the military brothels.[12] The revelation of governmental involvement came after a history professor, Yoshiaki Yoshimi at Chuo University in Tokyo, located documents in the Defense Agency's archives which directly linked the Japanese military with the brothels.[13] The documents indicated that the Imperial Army established "comfort houses" in China as early as 1932.[14]

A. Evidence of Comfort Women

Since the discovery of the Defense Agency's documents, former soldiers, doctors and agents of the Imperial Army have stepped forward to bear witness to the claims of the comfort women. Hiromichi Nagatomi said as a former special secret service agent for the military, he decided when and where to open military brothels and made the necessary arrangements.[15] Ichiro Ichikawa, a noncommissioned officer in the military police who oversaw two military brothels in Baicheng, northern China, said he received notices about the arrival of off-duty soldiers and then calculated how many

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11 The Imperial Army took women from all over occupied Asia, but most of them were from Korea. *"Comfort Women" Testify in Tokyo*, KOREA NEWSREVIEW, June 6, 1992, at 8.

12 *Japan Denies Solace to "Comfort Women,"* JAPAN ACCESS, ASAHI SHIMBUN, Jan. 20, 1992, at 3. In the session of the Diet in June 1990, the government stated that private agents voluntarily arranged prostitution for soldiers at the front. *Studies Begin Unveil the Truth of World War II Japanese Military's Comfort Women*, UNIVERSAL PRINCIPLE: HUMAN RIGHTS REPORT FROM JCLU, 7 (Spr. 1992).

13 *Japan Denies Solace to "Comfort Women," supra* note 12.

14 According to the "White Paper," an investigative report that the Korean government distributed on July 31, 1992, one of the first records of comfort women brothels dates back to 1932 after the Japanese invasion of Manchuria. *Japan to Set Compensation for Korean Comfort Girls*, THE KOREA TIMES, Aug. 1, 1992, at 1.

15 *Secret Service Monitored Brothels*, THE JAPAN TIMES, Aug. 6, 1992, at 3.

soldiers each of the comfort women would have to serve.[16] The fact that Japan used the comfort women for the benefit of the Imperial Army is undisputed.

B. Issue of Coercion

Although conceding that the government "recruited" the comfort women, Japan claims it has not found any proof that the government coerced or forced the women into prostitution.[17] The testimonies of both military personnel and the comfort women, however, specifically allege the use of force, deceit and coercion. Mitsuyoshi Nakayama, a military doctor, said soldiers forced many Korean women at gunpoint to serve Japan as prostitutes.[18] Seiji Yoshida, a "recruiter" of comfort women, confessed to kidnapping women from Korean villages and described how his men herded young mothers into trucks, separating them from "clinging, wailing Korean children."[19] Many of the women stated that they received promises of jobs as cooks, nurse's assistants and cleaners.[20] A 69 year–old former comfort woman, Hwang Kum–Soo,[21] said the Japanese made her believe that she would work at a military supply factory.[22] Others said the Japanese forcibly removed them from their homes or kidnapped them on the streets.[23] Kim Hak–Sun[24] described her ordeal as follows: "The Japanese just came along in a truck, beat us and then dragged us into the back . . . I was raped that first

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[16] *Ex-noncom Vows to Testify: Military Cop Kept Tabs on Brothels*, THE JAPAN TIMES, Aug. 8, 1992, at 3.

[17] *Japan Acknowledges Role in Recruiting Comfort Women*, THE KOREA TIMES, July 7, 1992, at 1. In an attempt to settle the issue under mounting pressure, Japan has indicated that it might soon acknowledge that women were forced into prostitution. *Japan government to hear testimony from Korean "comfort women,"* AGENCE FRANCE PRESSE, March 23, 1993, *available in* LEXIS, Nexis Library, News File; *see also* Amy B. Rosenfeld, *Japan pressured on "comfort women" issue*, THE DALLAS MORNING NEWS, March 17, 1993, at 37A, *available in* LEXIS, Nexis Library, News File.

[18] *Doctors Recall Steps to Curb VD at Brothels: Concern for Troops' Health Outweighed Suffering of "Comfort Women"*, THE JAPAN TIMES, Aug. 7, 1992, at 3.

[19] *Comfort Girl Recruiter Says Japan Should Pay for Korean Rail System as Compensation*, THE KOREA TIMES, Aug. 13, 1992; *see also* Yuri Kageyama, *Japanese sex-slave procurer repents*, THE SEATTLE TIMES, June 2, 1992. Yoshida also recalled that his soldiers surrounded villages and beat with sticks the families who resisted the capture of their daughters. Nickerson, *supra* note 10.

[20] Jin Sook Lee, *The Case of Korean "Comfort Women": Women Forced into Sexual Service for Japanese Soldiers During World War II Seek Justice*, KOREA REPORT 18 (Spr. 1992).

[21] This Comment refers to Korean names in the text with the last name first and first name last, as is the custom in Korea.

[22] *Ex-Comfort Woman For Japanese Army Gives Testimony in Geneva*, THE KOREA TIMES, Aug. 20, 1992.

[23] Jin Sook Lee, *supra* note 20.

[24] Kim is one of the plaintiffs in the lawsuit. She was taken to China at the age of 17.

day, and it never stopped for a single day for the next three months."[25] These testimonies demonstrate the significant evidence supporting the existence of coercion.

Further investigation, however, is unlikely to reveal documentary evidence of coercion. On August 14, 1945, when Japan realized that it would inevitably have to surrender, the Japanese Minister of War issued an order to every Army headquarters to immediately destroy all confidential documents.[26] "Confidential" documents included any information unfavorable to Japan, as well as other secret papers.[27] If any evidentiary documents detailing the use of coercion existed at the time, they would probably have been destroyed. Therefore, an absence of documentary proof should not necessarily lead to the assumption that no use of coercion existed.

C. Japan's Attitude Concerning Reparations

Regarding compensation for the comfort women, the Japanese government claims the San Francisco Peace Treaty[28] and subsequent agreements completely settled all war claims and absolved Japan of any legal obligations arising from the colonial period.[29] Japan contends the Settlement of Claims[30] prevents the government of Korea and its nationals from pursuing any wartime claims,[31] pointing to the following section of the agreement:

> The Contracting Parties confirm that problem [sic] concerning property, rights and interest of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace[32] with Japan signed at the city of San

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25 *Koreans Seek Damages: Former Troops and "Comfort Women" Sue, supra* note 8.

26 International Military Tribunal for the Far East, November, 1948, *in* THE LAW OF WAR: A DOCUMENTARY HISTORY, Vol. II, 1122-1123 (Leon Friedman ed., 1972).

27 *Id.*

28 Multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 (signed by United States, 47 other Allied Powers, and Japan).

29 *Japan Denies Solace to "Comfort Women," supra* note 12.

30 Agreement on the Settlement of Problem Concerning Property and Claims and on the Economic Co-operation Between Japan and the Republic of Korea, June 22, 1965, 5 I.L.M. 111 (1966) (Sung Yoon Cho trans.), *reprinted in* 10 JAPANESE ANN. OF INT'L L. 284 (1966) [hereinafter Settlement of Claims].

31 *Japan Denies Solace to "Comfort Women," supra* note 12.

32 Article IV, paragraph (a) of the Treaty of Peace provided that the disposition of property of Japan and of its nationals in Japan's former territories, and their claims and debts, against the United States and the residents of the territories shall be the "subject of special arrangements" between Japan and the United

> Francisco on September 8, 1951, is settled completely and finally.[33]

Supporters of the Korean comfort women, on the other hand, view the agreement as a settlement only between two contracting parties, Japan and Korea.[34] The preamble of the Settlement of Claims states:

> Japan and the Republic of Korea, [d]esiring to settle problem [sic] concerning property of the two countries and their nationals and problem [sic] concerning claims between the two countries and their nationals, and [d]esiring to promote the economic co–operation between them, [h]ave agreed as follows . . .[35]

Although the preambular text refers to the claims of nationals, the agreement contains no provisions for individual claimants.[36] Rather, Japan promised grants and loans[37] in the agreement to aid the economic development of Korea.[38] The two governments, as principals to the agreement, designed the agreement mainly to promote economic cooperation.

D. Meaning of the Treaty with Japan

Japan's post–World War II settlements as a whole provide useful insight for understanding the meaning of the agreement between Japan and Korea. The settlement agreements between Japan and its formerly occupied territories, such as Korea, differ strikingly from those between Japan and the Allied Powers. Notably, the Allied Powers procured fair and equitable

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States. Likewise, the section stated that the disposition of property in Japan that belonged to the United States and to the residents of the territories, and their claims and debts against Japan and Japanese nationals, shall be decided between Japan and the United States. Treaty of Peace with Japan. *See supra* note 28 and accompanying text.

[33] Settlement of Claims, *supra* note 30, art. 2, para. 1.

[34] *Japan Denies Solace to "Comfort Women," supra* note 12. *See also Legal Ground Cited for Japanese Compensation*, KOREA NEWSREVIEW, June 27, 1992, at 7.

[35] Preamble, Settlement of Claims, *supra* note 30.

[36] Settlement of Claims, *supra* note 30. Under the Settlement of Claims, Korea received $300 million in cash and $200 million in loans from Japan. *Id.*, art. I. The purpose of the funds was for economic restoration. No individual victims were compensated. *See also Legal Ground Cited for Japanese Compensation*, *supra* note 34.

[37] Grants and loans were to be supplied in the form of products of Japan and services of the Japanese people. Settlement of Claims, *supra* note 30, art I.

[38] *Id.*

settlements, while the colonized nations received less comprehensive settlements.[39]

1. *Assessment of Post–World War II Settlement Agreements Between Japan and the Allied Powers*

Japan specifically recognized its responsibility for personal injury claims in several post–World War II settlements.[40] The Greece–Japan Agreement, the Great Britain–Japan Agreement and the Canada–Japan Agreement provided compensation "for personal injury or death which arose before the existence of a state of war . . . for which the Government of Japan [is] responsible according to international law."[41] The Switzerland–Japan Agreement provided for the distribution of Japanese assets for personal injuries inflicted during the Second World War, which Japan conceded were "a liability of the Government of Japan."[42] Similarly, in the Sweden–Japan Agreement and the Denmark–Japan Agreement, Japan explicitly accepted responsibility and allowed compensation for sufferings inflicted upon Swedish and Danish persons.[43] Japan's recognition of its responsibility for personal injury claims was largely limited to agreements with the Allied Powers.

Japan conveyed an expression of apology in some of the settlements. The Netherlands–Japan Agreement, for example, states:

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[39] A self-evident explanation for this discrepancy is in Japan's incentive to appease the victors of the war on the one hand and the lack of the colonized nations' bargaining power on the other.

[40] RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, PART I: THE COMMENTARY 203 (1975).

[41] Agreement Between the Royal Government of Greece and the Government of Japan Regarding Settlement of Certain Greek Claims, Sept. 20, 1966, 609 U.N.T.S. 103, art. 1; Agreement Between the Government of Japan and the Government of the United Kingdom of Great Britain and Northern Ireland Regarding Settlement of Certain British Claims, Oct. 7, 1960, 384 U.N.T.S. 89, art. 1; Agreement Between the Government of Japan and the Government of Canada Regarding Settlement of Certain Canadian Claims, Sept. 5, 1961, 451 U.N.T.S. 47, art. 1, *reprinted in* RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, PART II: THE AGREEMENTS 334, 231, 249 (1975).

[42] Agreement Between the Swiss Confederation and Japan Concerning the Settlement of Certain Swiss Claims Against Japan, January 21, 1955, ROLF 357, art. 2, *reprinted in* LILLICH & WESTON, *supra* note 41, at 107.

[43] Agreement Between the Government of Sweden and the Government of Japan Regarding Settlement of Certain Swedish Claims, Sept. 20, 1957, 325 U.N.T.S. 29, art. 1; Agreement Between the Government of Japan and the Government of Denmark Regarding Settlement of Certain Danish Claims, May 25, 1959, 341 U.N.T.S. 157, art. 1, *reprinted in* LILLICH & WESTON, *supra* note 41, at 154, 198.

> For the purpose of expressing sympathy and regret for the sufferings inflicted . . . Japan shall voluntarily tender as a solatium the amount . . . equivalent to U.S. $10,000,000 to the Government of the Kingdom of The Netherlands on behalf of those Netherlands nationals.[44]

Japan thus expressly apologized for its wartime conduct to the people of the Netherlands and offered compensation. Japan's cognizance of personal injury claims and apologies for sufferings may indicate the bargaining status of the Allied Powers after the war.

2. *Comparison of Japan's Settlement Agreements With Its Formerly Occupied Territories*

Japan's agreements with its formerly occupied territories generally lack explicit apologies and provisions for personal injury compensation. In the Indonesia–Japan Agreement, Japan stated:

> Japan is prepared to pay reparations . . . to compensate the damage and suffering caused by Japan during the war. Nevertheless it is recognized that the resources of Japan are not sufficient, if it is to maintain a viable economy, to make complete reparation for all the damage and suffering for the Republic of Indonesia and other countries during the war and at the same time meet its other obligations.[45]

In the Malaysia–Japan Agreement, Japan referred to its wartime aggression as merely "unhappy events" and expressed its desire to promote economic co–operation through the Agreement.[46] The Singapore–Japan Agreement likewise attempted to resolve the settlement of questions regarding the "unhappy events".[47] These agreements manifest the lack of bargaining power

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[44] Agreement Between the Government of the Kingdom of the Netherlands and the Government of Japan Relating to Settlement of the Problem Concerning Certain Types of Private Claims of Netherlands Nationals, Mar. 13, 1956, 252 U.N.T.S. 3, art. 1, *reprinted in* LILLICH & WESTON, *supra* note 41, at 128, 129.

[45] Treaty of Peace Between Japan and the Republic of Indonesia, Jan. 20, 1958, 324 U.N.T.S. 227, art. 4, *reprinted in* LILLICH & WESTON, *supra* note 41, at 158.

[46] Agreement Between Japan and Malaysia, Sept. 21, 1967, 13 JAPANESE ANN. INT'L L. 209 (1969), *reprinted in* LILLICH & WESTON, *supra* note 41, at 349.

[47] Agreement Between Japan and the Republic of Singapore, Sept. 21, 1967, 13 JAPANESE ANN. INT'L L. 244 (1969), *reprinted in* LILLICH & WESTON, *supra* note 41, at 350.

on the part of the occupied territories and their inability to attain comprehensive settlements.

In the Settlement of Claims with Korea, as in its agreements with other formerly occupied territories, Japan did not express words of apology or offer personal injury compensation. Rather, Japan viewed the agreement with Korea as a settlement about the problem "concerning property and claims" and a promotion of economic cooperation.[48] Economic cooperation served as a consistent theme in Japan's settlement agreements with all of its occupied territories.

E. Human Rights Under the Meiji Constitution

During the period of occupation, while Japan treated the Korean people as subjects of Japan, the laws of Japan granted only a limited protection of human rights. The Meiji Constitution[49] simply defined fundamental human rights as those which the Japanese subjects could enjoy within the limits of law.[50] Furthermore, in times of war or in cases of a national emergency, the Emperor could exercise powers which contravened those rights.[51]

Emperor Hirohito exercised those powers when he enacted Imperial Ordinance No. 519[52] in 1944. The ordinance established legal grounds for the recruitment of comfort women.[53] It detailed who would recruit the women and how the women would be "employed".[54] In Article 6, it declared that governors, mayors and school presidents could order recruitment of comfort women whenever needed.[55] Article 4 stated that the women should be employed for a year with an exception for those who agreed to stay longer.[56] Despite its apparent authority, however, the ordinance arrived too late to truly legalize the "recruitment" of comfort women. Whereas the Emperor enacted the ordinance as of 1944, records of comfort women date

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48 The Preamble, Settlement of Claims, *supra* note 30.

49 Constitution of the Empire of Japan 1889, *reprinted in* GEORGE M. BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION, App. X (1957).

50 *Id.*, Chapter II: Rights and Duties of Subjects, art. 29.

51 *Id.*, Chapter II: Rights and Duties of Subjects, art. 31.

52 *Joshi teishinro rei* (Women's volunteer labor corp. ordinance), Imperial Ordinance No. 519, HŌREI ZENSHO, 517-519 (Aug. 23, 1944); *see also* selected translations of the ordinance in *Hirohito OK'd Sex Slaves*, KOREA NEWSREVIEW, Feb. 15, 1992, at 6.

53 *Hirohito OK'd Sex Slaves*, *supra* note 52.

54 *Id.*

55 *Id.*

56 *Id.*

back to 1932.[57] Thus, the comfort women were entitled to enjoy fundamental human rights as subjects of Japan under the Meiji Constitution.

F. International Principles Respecting Human Rights

Although the majority of modern human rights instruments developed in the aftermath of World War II, generalized principles of international law recognizing crimes against humanity existed even prior to World War II.[58] International humanitarian law and general norms of human rights specifically recognized that deportation and forced prostitution, among other inhumane acts, constituted criminal acts.[59] If nations had applied these rules in good faith, these norms would have furnished an effective safeguard for the civilian population.[60] The atrocities of World War II, however, made the extensive codification of human rights essential.[61] Therefore, human rights principles which banned the acts committed against the comfort women originated from specific legal norms existing prior to World War II and augmented after the War.

1. Pre–World War II Human Rights Principles

The Hague Conventions of 1907,[62] to which Japan was a signatory party, codified the laws and customs of war.[63] The goal of the Convention was "to serve . . . the interests of humanity and the ever progressive needs of

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[57] *Japan to Set Compensation for Korean Comfort Girls, supra* note 14.

[58] David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 FORDHAM INT'L L. J. 86, 87-88 (1989-1990).

[59] *See infra* notes 68-77 and accompanying text for discussion of treaties prohibiting trafficking of women. *See also infra* notes 62-67 and accompanying text for discussion of the Fourth Hague Convention which articulated general standards of conduct during war to protect the "interests of humanity."

[60] COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 3 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY OF IV GENEVA CONVENTION].

[61] *Id.*

[62] 2 Am. J. Int'l. L. Supplement 90-117 (1908); *see also* THE HAGUE CONVENTIONS OF 1899 AND 1907 100-27 (J.B. Scott ed., 1918).

[63] The Hague Conventions of 1899 represented the first successful effort of the international community to codify a comprehensive set of laws concerning land warfare. The Convention of 1907 is a slight revision of the 1899 Convention. The International Military Tribunal at Nuremberg (1946) expressly recognized the Hague Conventions of 1907 as declaratory of customary international law. DOCUMENTS ON THE LAWS OF WAR 43-44 (Adam Roberts and Richard Guelff eds., 1982) [hereinafter DOCUMENTS]; YOUGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 9-11 (1982).

civilization."[64] The so-called Martens Clause appearing in the Preamble of the Convention Respecting the Laws and Customs of War on Land (the Fourth Convention) dictates that fundamental human rights be safeguarded. The Clause reads:

> . . . the inhabitants and the belligerents [shall] remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."[65] The laws of humanity and the dictates of public conscience encompass the protection of the dignity of women.[66] In addition, Article 46 mandates that "family honour and rights" be respected.[67] All of these provisions support the requirement of respect for the rights of women.

According to the International Agreement for the Suppression of the "White Slave Traffic,"[68] Japan committed a criminal act against the comfort women. The Suppression Agreement made "procuring of women or girls for immoral purposes abroad" an international crime.[69] The Suppression Agreement 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'."[70] Japan violated this international prohibition against the trafficking of women when it forced women into prostitution.

Japan became a signatory party to the International Convention for the Suppression of the Traffic in Women and Children,[71] which confirmed and

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64 Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, [hereinafter Hague IV], *reprinted in* THE LAW OF WAR: A DOCUMENTARY HISTORY, Vol. I, 309 (Leon Friedman ed., 1972) [hereinafter THE LAW OF WAR].

65 *Id.* Arguably, "the inhabitants and the belligerents" protected under the Convention do not include colonized people, who are considered nationals of the Occupying Power. *See supra* note 1 and accompanying text. But *see infra* notes 109-118 and accompanying text on the issue of nationality under the State Responsibility doctrine.

66 *See* KHUSHALANI, *supra* note 63, at 10.

67 Hague IV, *supra* note 64, at 322.

68 International Agreement for the Suppression of the "White Slave Traffic," March 18, 1904, 1 L.N.T.S. 83 [hereinafter Suppression Agreement].

69 *Id.* at 86, Article 1.

70 *Id.* at 84, Preamble.

71 International Convention for the Suppression of the Traffic in Women and Children, March 31, 1922, 9 L.N.T.S. 415 [hereinafter Suppression Convention]; *see also Secret service monitored brothels*, *supra* note 15.

extended the provisions of the Suppression Agreement. The Suppression Convention aimed to prosecute persons who engaged in crimes prohibited by the Suppression Agreement.[72] Japan's signature to the Suppression Convention signified that Japan recognized the trafficking of women for the purpose of prostitution as a punishable international crime.

Article 14 of the Suppression Convention, however, mitigates the gravity of these provisions for colonizing nations. Article 14 allows a signatory party to the Suppression Convention to pronounce that the provisions do not apply to the people of its colonies.[73] Japan exercised this prerogative and declared that its signature did not include Korea, Taiwan and the leased territory of Kwantung.[74] Nevertheless, by signing the Suppression 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.

After the First World War, the preliminary peace conference in Versailles created the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties[75] to inquire into the responsibilities relating to the war.[76] The Commission, composed of fifteen members including Japan, prepared a list of punishable war crimes, which included: rape, "abduction of girls and women for the purpose of enforced prostitution," "deportation of civilians," "internment of civilians under inhuman conditions," and "forced labour of civilians in connection with the military operations of the enemy."[77] Japan committed all of these acts against the comfort women during World War II.

As a result of the disagreement among the Commission[78] about whether to include language creating liability,[79] the Treaty of Versailles did

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72 *See* Suppression Convention, *supra* note 71, articles 2, 3 and 4, at 423-425.

73 *Id.* at 427.

74 *Id.* at 430, Signature of Japan.

75 *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Versailles*, March, 1919, 14 Am. J. of Int'l L. 95 (1920) [hereinafter Commission], *reprinted in* THE LAW OF WAR, *supra* note 64, at 842-867.

76 Carnegie Endowment for International Peace, Pamphlet no. 32, Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission on the Responsibility for the Conference of Paris (1919) [hereinafter Report of Commission]. *See also* KHUSHALANI, *supra* note 63, at 11-12; Matas, *supra* note 58, at 87-92.

77 Report of Commission, *supra* note 76.

78 The Report of Commission included dissenting reports of the U.S. and Japanese members. Japan expressed reservations about whether a tribunal composed of belligerents can try an individual belonging to the opposite side. Japan also dissented with the suggestion to hold heads of States liable for not acting

not codify the crimes against humanity listed in the Report of the Commission.[80] But the United Nations War Crimes Commission[81] endorsed the list as a paradigm of crimes against humanity when it adopted the list of crimes contained in the Report of the Commission as a working list.[82] The Report of the Commission provides a sound benchmark for the customary principles of international human rights at the time.

2. *Post–World War II Codifications of Pre–existing Human Rights Principles*

The tragedies which occurred during World War II despite existing human rights principles necessitated further codifications of those principles.[83] The Charter of the Nuremberg Tribunal is an expression of pre–existing international law.[84] The Charter codified "crimes against humanity" as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war...."[85] The Charter attached liability to those violations.[86]

As codified in the Charter, the International Military Tribunal for the Far East judged those who committed crimes against humanity. A significant

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to prevent war crimes. *Reservations by the Japanese Delegation*, Report of Commission, *supra* note 76, at 79-80.

[79] Matas, *supra* note 58, at 90.

[80] *See* Treaty of Versailles, June 28, 1919, U.K.T.S. No. 4 (1919); *see also id.* at 90.

[81] Established, Oct. 20, 1943.

[82] KHUSHALANI, *supra* note 63, at 27-29.

[83] COMMENTARY OF IV GENEVA CONVENTION, *supra* note 60, at 3.

[84] International Military Tribunal at Nuremberg, Oct. 1, 1946, 41 AM. J. INT'L L. 172, 216 (Judgment and Sentences) (1947). The Allied governments established the International Military Tribunals at Nuremberg and Tokyo after the Second World War to punish those who violated the laws of war. *See* DOCUMENTS, *supra* note 63, at 153. Some scholars have questioned whether the Charter was a codification of pre-existing international law. Many felt that the cases tried by the Military Tribunals greatly expanded the reach of the laws of war. For instance, they objected to the fact that military leaders were held liable for failing to take positive steps to prevent their soldiers from committing various crimes. *See War Crimes Trials*, THE LAW OF WAR, *supra* note 64, at 781-782. *See also* F. B. Schick, *The Nuremberg Trial and the International Law of the Future*, 41 AM. J. OF INT'L L. 770 (1947). This Comment discusses the Charter and the cases tried by the Military Tribunal to illustrate the types of conduct which were considered punishable, such as enslavement and rape. Also, a distinguishing factor between the cases tried by the Military Tribunal and the present case is that the government of Japan was actively involved in the forced prostitution of the comfort women.

[85] *See* Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1547, 82 U.N.T.S. 288; *see also* KHUSHALANI, *supra* note 63, at 14-15.

[86] International Military Tribunal at Nuremberg, *supra* note 84. The Tribunal held those individuals responsible for the codified crimes criminally liable. However, in the present case, since the persons in command who were actually responsible for the acts are no longer alive, only civil liability against the State remains.

proportion of the convictions resulted from violations of women. The Tribunal found Shunroko Hata, Japan's Minister of War, guilty under Count 55, for his failure to prevent breaches of the laws of war in respect to prisoners of war and civilian internees.[87] This charge was related to the atrocities the troops under his command committed in Nanking, which included the widespread rape, torture and murder of civilians.[88] The Tribunal also convicted Koki Hirota, who held the offices of Foreign Minister and Prime Minister, for his inaction toward the atrocities committed in Nanking.[89] The Tribunal explained that Hirota's inaction allowed hundreds of murders, violations of women, and other atrocities to be committed daily.[90] The Tribunal also held responsible Iwane Matsui, the Commander–in–Chief who captured the city of Nanking.[91] The Tribunal convicted Akira Muto, Chief–of–Staff to General Yamashita in the Philippines, for his responsibility in "a campaign of massacre, torture and other atrocities" the civilian population suffered at the hands of Japanese troops.[92] Rape of women served as a significant element of the evidence in all of these convictions.[93]

The United States Military Commission at Manila entered verdicts similar to those of the Tokyo Tribunal concerning crimes against humanity. The Military Commission held General Yamashita responsible for his role in a series of atrocities that were not sporadic in nature but "methodically supervised by Japanese officers and noncommissioned officers."[94] Rape was a specific element of proof against General Yamashita. The Military Commission underscored the gravity of that crime by holding the leader responsible for the atrocities his subordinates committed. The crime for which the tribunals punished the military leaders, namely rape, does not differ from the nature of Japan's treatment of the comfort women.

On December 11, 1946, the United Nations General Assembly adopted without dissent a resolution which affirmed the principle of the Charter of the International Military Tribunal.[95] The General Assembly thus confirmed that crimes against humanity were punishable even prior to World War II.

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87 Friedman, *supra* note 26, at 1126-1127, 1131.
88 *Id.* at 1060-1064.
89 *Id.* at 1132-1134.
90 *Id.*
91 *Id.* at 1141-1143.
92 *Id.* at 1143-1144.
93 These convictions lead to the punishment of death by hanging. *Id.* at 1157-1158.
94 *Id.* at 1596-1623.
95 Matas, *supra* note 58, at 94; *see also* Telford Taylor, *Foreword* to THE LAW OF WAR: A DOCUMENTARY HISTORY, Vol. I, at xxii (Leon Friedman ed., 1972).

The Civilian Geneva Convention, August 12, 1949,[96] also codified existing customary law concerning the human rights of civilians in times of war and extended those rights.[97] It guarantees that:

> In cases not covered by this protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, *from the principles of humanity and from the dictates of public conscience* (emphasis added).[98]

This declaration affirms the goals already established in the preambular language of the Fourth Hague Convention of 1907, and reinforces its important features.[99] The Civilian Geneva Convention expounds upon those features and prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment."[100] The Civilian Geneva Convention also proclaims that women shall receive special protection "against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[101] Forced deportation is another strictly prohibited act under the Civilian Geneva Convention: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[102] These provisions confirm the pre-existing principles regarding fundamental human rights, and in particular emphasize the unlawfulness of violations of women. Moreover,

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[96] 75 U.N.T.S. 287 (1950), *reprinted in* THE LAW OF WAR, *supra* note 64, at 641.

[97] This Convention is also known as Geneva Convention Relative to the Protection of Civilian Persons in Time of War. DOCUMENTS, *supra* note 63, at 271-272; *see also* KHUSHALANI, *supra* note 63, at 40. The atrocities committed against civilians during World War II made clear the need to adopt an international agreement for the protection of civilians in time of war. The Civilian Geneva Convention is the first international agreement that exclusively addresses the treatment of civilians. However, it does not introduce any new ideas. Rather, it is an extension of pre-existing provisions of international law. Hence, it supplements the relevant articles in the Hague Regulations.

[98] Article 1(2) of Protocol Additional to the Civilian Geneva Convention. KHUSHALANI, *supra* note 63, at 48.

[99] *See supra* note 64 and accompanying text. "...by the laws of humanity and by the demands of public conscience."

[100] DOCUMENTS, *supra* note 63, at 271-273, Article 3(1)(c).

[101] *Id.* at 282, Article 27.

[102] *Id.*, para 1, Article 49. *See also* COMMENTARY OF IV GENEVA CONVENTION, *supra* note 60, at 129. Note: "protected persons" do not include nationals of the Occupying Power. Article 4, para 1. *See infra* notes 109-118 and accompanying text on the issue of nationality under the State Responsibility doctrine.

these human rights instruments form a basis for redress which the comfort women now struggle to obtain.

3. *Principles of State Responsibility*

State Responsibility is the international law of tort applicable to States.[103] This doctrine describes for the duty of a State that has violated an international legal obligation to make reparations.[104] A historically prominent aspect of the doctrine of State Responsibility is the law governing the responsibility of States for injuries to aliens.[105] The purpose of this doctrine is to extend the protection of international law to those who travel or live abroad and to facilitate social and economic ties between States.[106] This doctrine developed during the nineteenth and twentieth centuries, because several strong states took an interest in the welfare of their nationals in states they targeted for economic expansionism and imperialism.[107] Unfortunately, under the traditional principle of international law, the nationals of target states remained unprotected. A dominant shortcoming in the traditional principle existed in this distinction between aliens and nationals.[108]

Traditionally, only nations could become subjects of international law.[109] In order to extend protection to individuals, the courts created the legal fiction that the injury suffered by the alien abroad was an injury to the

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[103] George T. Yates, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era, in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 213 (Richard B. Lillich ed., 1983).

[104] L. Sohn & R. Baxter, Final Draft of the Convention on the International Responsibility of States for Injuries to Aliens, Article 1, *in* F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 133 (1974). *See also* Wladyslaw Czaplinski, *State Succession and State Responsibility*, 28 Canadian Y.B. of Int'l L. 339 (1990); *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Preliminary report submitted by Mr. Theo van Boven, Special Rapporteur*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 42nd Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub. 2/1990/10 (1990), para. 24 [hereinafter *Preliminary study concerning the right to restitution*].

[105] GARCÍA-AMADOR, *supra* note 104, at 1.

[106] Louis B. Sohn & R. R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. OF INT'L L. 545 (1961).

[107] Economic expansionism occurred through the states that had already achieved a large measure of economic development, who then sought outlets for further development in colonies or independent countries that were on the threshold of development. The investors from these "strong," expansionist countries scrambled for markets and for sources of raw materials, and they received state support for these activities. *See* Philip C. Jessup, *Responsibility of States for Injuries to Individuals*, 46 COLUM. L. REV. 903, 905-906 (1946).

[108] GARCÍA-AMADOR, *supra* note 104, at 3-4.

[109] Jessup, *supra* note 107, at 903.

alien's State.[110] This legal fiction enabled a State to bring claims on behalf of its nationals, but denied the individuals standing on their own. The fact that the law did not apply directly to the individual was another obvious weakness in the traditional principle.[111]

The traditional principle of State Responsibility, however, served as the foundation for the recognition that individuals have rights as human beings and that international law protects these rights, regardless of one's nationality. The establishment of an international standard inevitably suggested a similar provision for States in their relationships with their own nationals.[112] The requirement of a certain minimum standard of conduct from States in their treatment of aliens thus encouraged protection of human rights generally.[113]

With the receding tide of imperialism after World War II, extensive re-examination of this branch of international law took place.[114] Contemporary international standards of justice ultimately came to reflect the understanding that individuals, irrespective of their nationality, should be guaranteed certain "essential rights."[115] Under this new essential rights doctrine, the distinction between nationals and aliens no longer has any *raison d'être*.[116] Since the human rights revolution that began at the 1945 San Francisco Conference of the United Nations, States have conceded that

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110 GARCÍA-AMADOR, *supra* note 104, at 150-151. In the *Nottebohm Case*, the International Court of Justice stated: "Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defense of the rights of the State." 1955 I.C.J. Reports 4, 24. This legal fiction has not been completely abandoned. In the *Barcelona Traction* Case, the Court observed that "a State may exercise diplomatic protection... for it is its own rights that a State is asserting...." 1970 I.C.J. Reports 3, 45.

111 Jessup, *supra* note 107, at 903.

112 GARCÍA-AMADOR, *supra* note 104, at 144.

113 *Id.*

114 S. N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55 AM. J. OF INT'L L. 863, 865 (1961); *see* GARCÍA-AMADOR, *supra* note 104.

115 GARCÍA-AMADOR, *supra* note 104, at 4-5. For example, one of the purposes of the United Nations is "to achieve international co-operation... in promoting and encouraging respect for human rights and for fundamental freedoms for *all* without distinction as to race, sex, language or religion" (emphasis added). Article 1, Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, *entered into force* Oct. 24, 1945. Article 55 also proclaims that "the United Nations shall promote... universal respect for, and observance of, human rights and fundamental freedoms for all...." In a similar vein, article 5 of the Charter of the Organization of American States vouches "the fundamental rights of the individual *without distinction as to race, nationality, creed, or sex.*" Charter of the Organization of American States, April 30, 1948, 119 U.N.T.S. 3, *entered into force* Dec. 13, 1951.

116 GARCÍA-AMADOR, *supra* note 104, at 1.

individuals deserve the status of subjects of international law.[117] Accordingly, legal scholars have suggested that the "responsibility of states for injuries to aliens" be transformed into the "responsibility of states for injuries to individuals."[118] This proposal confirms the evolution international law has experienced toward a more equitable treatment of individual rights.

II. DUTY TO MAKE REPARATIONS

Japan's obligation to pay reparations to the comfort women arises out of numerous violations of customary norms of international human rights. Those violations include deportation, rape, forced prostitution, and torture. The comfort women's claims for compensation arise from the consequences of those violations: physical sufferings and injuries, moral damages, loss of human dignity, and loss of consortium to the survivors of victims.

Several military personnel have attested to the harm the comfort women suffered. According to Mitsuyoshi Nakayama, a military doctor, a number of Japanese soldiers married Korean comfort women but none of the women were able to bear children.[119] Ken Yuasa, another military doctor, explained that many of the women became sterile because of sexual abuse and inadequate medical treatment.[120] The military doctors also indicated that some women who became pregnant were forced to have abortions.[121]

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[117] Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. UNIV. L. REV. 1 (1982). International legal scholars have enthusiastically lauded this trend. Professor Otto Kimminich stated:

> It is human beings who ultimately suffer.... This is perhaps the most striking feature of the latest developments of international law: the human factor has become apparent beyond all doubts, and the considerations concerning it go far beyond the old theoretical discussion about the subjects of international law. We have become aware of the fact that international law must serve the needs of human beings and ultimately derive its normative strength from the convictions of human beings.

Otto Kimminich, *Material, Economic and Human Limits to the Activities of Humankind in* THE SPIRIT OF UPPSALA: PROCEEDINGS OF THE JOINT UNITAR-UPPSALA UNIVERSITY SEMINAR ON INTERNATIONAL LAW AND ORGANIZATION FOR A NEW WORLD ORDER 366 (Atle Grahl-Madsen and Jiri Toman eds., June 1981).

[118] *See* Jessup, *supra* note 107, at 907; GARCÍA-AMADOR, *supra* note 104, at 1-7.

[119] *Doctors Recall Steps to Curb VD at Brothels: Concern for Troops' Health Outweighed Suffering of "Comfort Women"*, *supra* note 18.

[120] *Id.*

[121] *Id.*

The International Commission of Health Professionals[122] reported that many victims of crimes against humanity continue to suffer from both physical and mental injuries for the rest of their lives, even long after the crimes cease.[123] As Mr. Theo van Boven, a Special Rapporteur to the U.N. Human Rights Commission, noted, "passage of time has often no attenuating effect, but on the contrary an increase in post–traumatic stress, requiring all necessary material, medical, psychological and social assistance and support over a long period of time."[124] Hence, the lawsuit of the Korean comfort women represents a struggle to rectify past crimes against humanity that continue to inflict harm. From both legal and moral perspectives, Japan has a duty to make amends for those crimes.

A. Legal Obligations

Legally, Japan has the duty to make reparations to the comfort women. Since Japan breached its obligation to respect certain fundamental human rights, it has a state responsibility to make reparations. Past intergovernmental agreements do not provide an adequate basis for full absolution of the wrongs inflicted upon individual victims. Therefore, Japan has a continuing duty to make reparations. Furthermore, judgments of international courts confirm Japan's legal obligations toward the comfort women.

1. State Responsibility for Reparations

Japan's violation of international human rights norms against the comfort women created a state responsibility. The duty to make reparation for the injury sustained is a traditional principle of international law.[125] As a time–honored maxim instructs, " . . . a wrong done to an individual must be redressed by the offender . . ."[126] Once Japan acknowledges the crime it has committed against the individual victims of war, it has a duty to make

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122 International Commission of Health Professionals is a leading non-governmental organization comprised of medical professionals who actively pursue human rights issues.

123 *See* Communication from the War Amputations of Canada to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, App., at 1 (August, 1992).

124 *Preliminary study concerning the right to restitution, supra* note 104, at 10.

125 *See* the *Chorzów Factory* Case, PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, COLLECTION OF JUDGMENTS, Series A, No. 9, Pg. 21; Series A, No. 17, Pg. 29 (June 27, 1928), *reprinted in* EDWARD HAMBRO, THE CASE LAW OF THE INTERNATIONAL COURT 163, 165 (1952); *see also* GARCÍA-AMADOR, *supra* note 104, at 9.

126 Roy, *supra* note 114, at 863.

reparations.[127] International law recognizes that a State can no more act with impunity than an individual.[128]

Humanitarian law clearly recognizes the obligation of States to make reparations for breaches of the laws and customs of war. The Fourth Hague Convention (1907) declares specifically that a belligerent party who violates the provisions of the Convention will be liable to pay compensation, if the case demands.[129] A statement appearing in the articles adopted in the first reading by the Third Committee of the Hague Conference (1930) includes: "The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation."[130]

International laws and customs of war imposed the duty upon Japan to protect basic human rights. The government of Japan violated these laws and customs when it forcibly recruited women for prostitution; thus, Japan has an obligation to make reparations for those violations.

According to the Constitution adopted by Japan immediately following World War II, every person who has suffered through an illegal act of any public official may sue for redress.[131] Therefore, the comfort women should have standing to sue for compensation within the domestic court of Japan.

Japan will probably contend, however, that the Japanese Constitution does not apply to those who are no longer nationals of Japan. When Taiwanese plaintiffs sought compensation for deaths and injuries as former soldiers in the Japanese Imperial Army,[132] the Supreme Court of Japan

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127 While traditional law of state responsibility only permitted state-to-state redress, the contemporary international law recognizes that individuals also have standing as "subjects" of international law. In a similar vein, the former colonial status of the Korean people as subjects of Japan placed them outside the scope of protected persons under the traditional humanitarian principles, but the doctrine of state responsibility has evolved towards more equitable treatment, with less emphasis on one's nationality. *See supra* notes 109-118 and accompanying text for discussion of the state responsibility doctrine.

128 Impunity is discussed in the context of sovereign immunity. Yates, *supra* note 103, at 213.

129 Hague IV, *supra* note 64, at 310.

130 GARCÍA-AMADOR, *supra* note 104, at 11.

131 THE CONSTITUTION OF 1947, art. 17, THE CONSTITUTION OF JAPAN AND CRIMINAL STATUTES (Ministry of Justice trans., 1958), *reprinted in* THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67 304 (Dan Fenno Henderson ed., 1968). This law is presumed to be retroactive, since Japanese soldiers who suffered injuries during World War II received compensation under the law. *See infra* note 133 and accompanying text.

132 Japan conscripted 207,000 Taiwanese and 242,000 Koreans during World War II, based on the fact that they were the subjects of the Japanese Emperor. *Review of further developments in fields with which the sub-commission has been concerned, supra* note 2, para. 4.

rejected their claim.[133] Although their Japanese counterparts received large pensions, Japan maintained that the Taiwanese soldiers had no analogous claim, as Taiwanese are no longer Japanese nationals.[134] According to this decision, the Korean plaintiffs would also lack valid claims because of the change in their nationality. But this decision does not coincide with the contemporary notion of state responsibility. If individuals suffered through wrongs committed by the state, the state must assume responsibility, irrespective of the nationality of the individuals.[135]

Arguably, the law of state responsibility applicable to individuals prior to the end of World War II pertains only to aliens. Since the relevant violations occurred while Japan occupied Korea,[136] Japan may contend that the Korean comfort women were not aliens vis–à–vis Japan, thus making the law inapplicable in this situation. Note, however, that Japan cannot assert Koreans were not aliens vis–à–vis Japan and argue at the same time that Koreans are no longer Japanese nationals. In the case of the Taiwanese soldiers, the Japanese court chose to base the decision on the current nationality of the plaintiffs. The current nationality of Koreans places them in the status of aliens vis–à–vis Japan. Therefore, it may be argued that Japan has responsibility for injuries to the Korean women as aliens under the state responsibility doctrine. Regardless of the outcome of this nationality argument, the contemporary notion of state responsibility dictates that an individual be compensated for the harm inflicted by a State.

2. *Continuing Duty*

Japan has argued that the Settlement of Claims with Korea completely resolved the issue of reparations.[137] The text of the agreement, however, represented a state–to–state economic settlement.[138] This intergovernmental diplomatic exchange cannot alleviate Japan's obligations to compensate

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133 Decision of April 28, 1992. *Supreme Court Rejected Claim by Taiwanese*, UNIVERSAL PRINCIPLE: HUMAN RIGHTS REPORT FROM JCLU 1 (Spr. 1992).

134 Taiwanese and Koreans renounced their Japanese nationality when the San Francisco Peace Treaty with Japan came into force on April 28, 1952. *Japan's Denationalisation of the Korean Minority*, *supra* note 2, at 30.

135 *See supra* notes 112-118 and accompanying text.

136 *See supra* note 1 and accompanying text.

137 *See supra* notes 28-33 and accompanying text. The preamble of the Settlement of Claims reads: "Japan and the Republic of Korea, Desiring to settle problem concerning property of the two countries and their nationals and problem concerning claims between the two countries and their nationals, and Desiring to promote the economic co-operation between them, Have agreed as follows...."

138 *See supra* notes 34-38 and accompanying text.

individual victims. Historically, a state could waive the presentation of a claim of its national, because states alone used to be the subjects of international law.[139] Eventually, international law recognized that individuals were not mere "objects" of state relations, and hence extended opportunity for redress to individuals.[140] In light of these considerations, Japan cannot maintain that Korea waived the claims of its nationals. Hence, Japan has a continuing duty to provide reparations for individuals.

Since the Settlement of Claims did not account for individual reparations, it cannot be regarded as "final and complete". Mr. Kim Yong-sik, the former Foreign Minister of Korea who participated in the negotiations for the normalization, stated that Japan provided financial assistance to meet claims for restoration and not to address reparations for individual victims of war.[141]

Furthermore, when Japan signed the treaty, it did not acknowledge having inflicted crimes against humanity on the Korean people. Mr. Kanichiro Kuboda, the chief negotiator for Japan during the normalization talks, promised that Japan would pay compensation for its atrocities, if there had been any such cases.[142] Although the treaty representing the final settlement does not reflect Mr. Kuboda's remarks, his comment provides helpful insight as to the limited scope of the treaty.[143] Moreover, his comment suggests additional settlements in the event mistakes of fact surfaced in the future. At the time of signing the Settlement of Claims, the Japanese government had not conceded its involvement in the forced prostitution of Korean women.[144] If this fact had been admitted at the time, Korea and its nationals could have waived their rights to present further claims by signing the Settlement of Claims. Since this is not the case, the individual victims are entitled to make their claims now.

The Multilateral Treaty of Peace with Japan[145] sheds light on why the Settlement of Claims was so limited in scope. Regarding reparations, the Treaty of Peace reads:

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139 *See supra* note 108 and accompanying text.

140 *See supra* notes 112-118 and accompanying text.

141 *Legal Ground Cited for Japanese Compensation*, *supra* note 34.

142 Mr. Kuboda stated, "Japan is willing to compensate for any looting or acts of destruction it committed in Southeast Asian countries during the war. But as no such case had occurred in Korea, I think we have no compensation to make to Korea. But if such cases did occur we will pay for them." Records of the meeting of representatives from the two countries on October 13, 1953. *Id.*

143 *See id.*

144 *See supra* note 12 and accompanying text.

145 Multilateral Treaty of Peace with Japan, *supra* note 28.

> It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.[146]

The decision of the Allies reflected the resolve not to re–live the repercussions of Germany's burden of reparations after World War I.[147] Nevertheless, a nation should not be completely absolved of its crimes until it has fulfilled its obligations. Today, Japan has the means to compensate the individual victims[148] and hence the opportunity to resolve the issue of wartime reparations.

A treaty which only speaks to nation–to–nation redress cannot remove the rights of individuals.[149] Governmental representatives have no legal authority to discharge individual human rights.[150] A person's right to compensation is fundamental. The International Bill of Human Rights explicitly states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[151] A treaty by which a State abandons the individual right to compensation is null and void.[152] The International Committee of the Red Cross (ICRC) agrees that individuals who suffered

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[146] *Id.* at art. 14.

[147] The burden of reparations lead to bankruptcy, which helped Hitler's rise to power. *Legal Ground Cited for Japanese Compensation*, *supra* note 34.

[148] *See id.*

[149] Communication of the War Amputations of Canada to the Human Rights Commission, *reprinted in A Delegation of the War Amputations of Canada to Appear Before the United Nations Sub-commission on Human Rights*, CANADA NEWSWIRE, Feb. 24, 1992, *available in* LEXIS, Nexis Library, News File [hereinafter Communication of the War Amputations]; *see also Why Japan Owes Former POWs*, THE TORONTO STAR, Feb. 4, 1991, A16, *available in* LEXIS, Nexis Library, News File. *See infra* note 178 for information regarding the War Amputations of Canada.

[150] Communication of the War Amputations, *supra* note 149.

[151] Article 8, Universal Declaration of Human Rights, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948). The Declaration is considered to be the instrument which captures recognized human rights in existence. Louis B. Sohn, *Protection of Human Rights through International Legislation*, *in* AMICORUM DISCIPULORUMQUE LIBER, 325-328 (I. René Cassin ed., 1969). *See* KHUSHALANI, *supra* note 63, at 84. Japan violated the fundamental rights granted to the comfort women by the Meiji Constitution. *See supra* notes 49-57 and accompanying text. Japan has denied that former subjects, who are no longer nationals of Japan, have the right of reparations under the Japanese constitution. *See supra* notes 131-134 and accompanying text.

[152] *See Review of further developments in fields with which the sub-commission has been concerned*, *supra* note 2, at 3.

violations of their human rights are not bound by the actions of their government.[153] The ICRC states:

> . . . a State remains responsible for breaches of the Convention and may not absolve itself from responsibility on the grounds that those who committed the breaches have been punished. For example, it remains liable to pay compensation.[154]

Therefore, the Settlement of Claims did not abrogate the rights of individual victims to seek redress, and Japan remains liable to address the claims of the comfort women.

International humanitarian law affirms this conclusion. Article 3 of the Fourth Hague Convention recognizes that States have the obligation to pay compensation for breaches of the laws and customs of war.[155] All four Geneva Conventions of 1949 pronounce that no State may absolve itself of any liability incurred by itself with respect to grave breaches listed in the Conventions.[156] Japan is subject to the principles of these conventions and it cannot absolve itself without first meeting its obligations.

Finally, where there is a conflict between the rule of law and the principles of justice, justice must prevail.[157] As a former judge once said, law is no more than "an instrument of justice."[158] Where the waiver of the claims of individuals operates harshly or unjustly, even a binding rule of law cannot be given effect.[159] Even if the Settlement of Claims can be considered a binding rule of law, it cannot be given effect in light of the confirmed findings about the treatment of comfort women. Justice urges that the Settlement of Claims be re–considered.

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153 Communication of the War Amputations, *supra* note 149.

154 *Id.*

155 Article III of the Fourth 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." *See* Hague IV, *supra* note 64, at 310.

156 Geneva Conventions, art. 51/52/131/148. *See* A Communication from Brian N. Forbes, Legal Counsel to the War Amputations of Canada, et al. to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Aug. 1992, at 3.

157 *See* Roy, *supra* note 114, at 868.

158 *Id.* S. N. Guha Roy served as a judge for the High Court of Calcutta.

159 *Id.*

3. *Decisions of International Courts*

In the 1927 *Chorzów Factory* Case,[160] the Court of International Justice addressed the duty to make reparation. The Court emphasized that the breach of an engagement involves an obligation to make adequate reparation.[161] The Court stated that reparation must "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[162] If this is not possible, payment of compensation is due.[163] It is plainly impossible to return the former comfort women to their prior status. Japan may still perform its obligation, however, by making satisfactory compensation.

In the *1989 Velásquez Rodriguez* Case, the Inter-American Court of Human Rights followed the reasoning of the *Chorzów Factory* Case.[164] The Court in the *Velásquez Rodriguez* Case, which involved an involuntary disappearance in Honduras, unanimously decided the State of Honduras should pay compensation to the family of Velásquez Rodriguez.[165] The Court made it clear that as a principle of international law, every violation of an international obligation which results in harm creates a duty to provide adequate reparation.[166] Under this view, Japan should fulfill its responsibility to render adequate reparation to the Korean plaintiffs. The Court also found that the scope of the reparation includes investigation into the facts, the punishment of those responsible, a public statement condemning the practice, and fair compensation taking into account both material and moral damages.[167] As long as the means are feasible, the decision of the *Velásquez Rodriguez* Case commands Japan to extend a similar form of reparation.

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160 The *Chorzów Factory* Case held that restitution was the appropriate remedy for the violation of a treaty forbidding the taking of certain types of property. *Supra* note 125. *See also* Sohn & Baxter, *supra* note 106, at 556.

161 *Id.*

162 The *Chorzów Factory* Case, *supra* note 125, at 167.

163 *Id.*

164 *Velásquez Rodriguez Case*, Inter-Am. C.H.R. 35, OAS/ser. L./V/III.19, doc. 13 (1988).

165 The compensation included reparation to the family of the victim for material and moral damages they suffered. *Id.*, 52, 58-60.

166 *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Progress report submitted by Mr. Theo van Boven, Special Rapporteur*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 43rd Sess., 4th Agenda Item, U.N. Doc. E/Cn.4/Sub.2/1991/7, at 14 (1991) [hereinafter *Progress report concerning the right to restitution*].

167 Duty to compensate for moral damages arises out of harmful psychological impacts upon the victims. *See id.* at 15.

B. Moral Obligations

Japan should carefully examine the moral and ethical dimensions of the claims of the comfort women. As Professor Bassiouni expressed, moral–ethical considerations shape social consciousness and social consciousness affects the development of law.[168] Thus, moral considerations have a major impact on influencing future conduct. The decision regarding the comfort women will not only set an influential precedent in Japanese law, but may also determine a future course of national conduct in the area of human rights.

In post–war Germany, many attributed the institution of a reparations policy to Konrad Adenauer, the first chancellor of the Federal Republic of Germany.[169] Adenauer felt morally obligated to establish the Federal Republic of Germany as a "legitimate, friendly world entity."[170] The chancellor "made every effort to fill his people with a new spirit of democracy and deep respect for moral and spiritual values, which alone constitute an effective guarantee against a revival of the horrors of the past."[171] In his autobiography, Adenauer wrote that he believed in the dignity and liberty of the individual over the concerns of the state.[172] He also regarded it a duty of honor for Germany to do its utmost to redress the crimes it committed against the Jewish people.[173] Adenauer felt that the agreement for reparations was not based strictly on legal grounds, but rather on a moral obligation strong enough to be elevated to a legal obligation.[174]

Such attitudes have contributed to the extensive reparation for the victims of the Nazis and their survivors.[175] Since 1959, Germany has paid approximately $50 billion in compensation to the victims of the National

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168 Comment by M. Cherif Bassiouni, Professor of Law, DePaul University; Secretary-General, International Association of Penal Law. *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, AMERICAN SOCIETY OF INTERNATIONAL LAW, Proceedings of the 80th Annual Meeting, Washington, D.C., April 9-12, 1986, at 60.

169 Mary R. Osaka, *Japanese Americans and Central European Jews: A Comparison of Post-War Reparation Problems*, 5 HASTINGS INT'L & COMP. L. REV. 211 (1981).

170 *Id. See also* THE GERMAN PATH TO ISRAEL (R. Vogel ed., 1969); K. ADENAUER, MEMOIRS (1966); R. HISCOCKS, THE ADENAUER ERA (1966).

171 The statement made by Dr. Nahum Goldmann, then chairman of the Conference of Jewish Claims Against Germany. Osaka, *supra* note 169, at 218.

172 ADENAUER, *supra* note 170.

173 Osaka, *supra* note 169, at 219.

174 *Id.* at 224.

175 Communication of the War Amputations, *supra* note 149.

Socialist Regime.[176] It is estimated that by the year 2000, another $15 billion will be spent for the same cause.[177] Given this record of German reparation payments, the War Amputations of Canada[178] stated that it is "wholly untenable for the Japanese to suggest that they do not bear a similar responsibility and international obligation under law" for their war crimes.[179] The precedent of Germany's system of restitution for injustice and the attitude of Adenauer should serve as an authoritative example for Japan in resolving the issue with the comfort women.

C. Grounds for Denial of Redress

Japan will probably raise several rationales for the denial of redress. As discussed earlier, Japan has already asserted that the Settlement of Claims completely resolved all claims.[180] Another argument might be the administrative difficulty related to the proof of identity. Japan may also contend that a successor government should not be held responsible for the acts of a predecessor government. These arguments, however, ignore the crucial question of whether Japan owes legal and moral obligations to redress its violations of basic human rights.

Administrative difficulty presents a realistic obstacle, but it hardly suffices as a legitimate basis to ignore the option of reaching an equitable resolution. The proof of identity may impose an onerous burden, since more than fifty years have passed since the women were taken from their villages to foreign lands and forced into prostitution. Nevertheless, numerous documents detailing the locations and methodologies of the military brothels, as well as personal testimonies of former military personnel, exist to

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176 Gerald Utting, *The Fight for Justice*, THE TORONTO STAR, Aug. 17, 1991, *available in* LEXIS, Nexis Library, News File. Germany has compensated those who suffered physical, moral and material injuries as a result of the Nazi persecution. Jews, as well as those politically opposed to the Nazis, received compensation. Lump sum payments were made to former concentration camp internees, and survivors of the deceased victims were guaranteed financial assistance. *See* Communication of the War Amputations, *supra* note 149, App. D. Israel and Jewish institutions have also received compensation. Clyde H. Farnsworth, *German Unity Revives Hopes on War Claims*, THE NEW YORK TIMES, June 25, 1990, at 9, *available in* LEXIS, Nexis Library, News File.

177 Utting, *supra* note 176.

178 The War Amputations of Canada is a non-governmental organization representing Canadian prisoners of war in their claims against Japan for compensation. *See* Communication of the War Amputations, *supra* note 149.

179 *Id.* at app. D.

180 *See supra* notes 137-159 and accompanying text for analysis of the Settlement of Claims assertion.

corroborate the statements of the comfort women.[181] The use of this evidence could facilitate an equitable resolution.

The law of state succession[182] also fails to provide a proper basis for denial of redress. A change in the government does not necessarily imply that a state is a successor.[183] In particular, a mere internal change in the framework or ideology of a government does not affect the rights and obligations of the state.[184] When Japan adopted the new constitution[185] following World War II, it did not create a successor government.

As a matter of policy, the present government should not attempt to evade its responsibility.[186] By dealing forthrightly with past human rights abuses, the present government would be able to alleviate some of the pain and anguish and prevent the recurrence of such abuses.[187] Any attempt to lessen the responsibility of governments would weaken the protection of human rights and the rule of international law.[188] Rather than avoiding its obligations, it is important for Japan to adopt a clear policy to rectify its human rights abuses, thus affirming its commitment as a humanitarian state.

III. MEANS OF REDRESS

As an often cited legal maxim goes, rights without remedies are illusory.[189] Redress means that full justice should be done vis-à-vis society as a whole, including the persons responsible and the victims.[190] Although

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[181] *See supra* notes 13-16 and accompanying text. Newspapers (several of which have been cited in this Comment) have reported that since the Japanese government began the investigation into the comfort women issue, it has found evidence all over Asia corroborating the comfort women's claims.

[182] "State succession" refers to the "replacement of one State by another in the responsibility for the international relations of territory." Vienna Convention on Succession of States in Respect of Treaties, *adopted* Aug. 22, 1978, art. 2(b), 17 I.L.M. 1488, 1490. The law of state succession purports to determine the impact of state succession on the status of states' rights and obligations. *Taking Reichs Seriously: German Unification and the Law of State Succession*, 104 HARV. L. REV. 588 (1990).

[183] Alfred R. Cowger, Jr., *Rights and Obligations of Successor States: An Alternative Theory*, 17 CASE W. RES. J. INT'L L. 285, 286 (1985).

[184] *Id.*, at 289; *see also* GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, 315 (F. Kelsey trans. 1925).

[185] Japan adopted a new constitution under the allied occupation, which shifted the government from imperial to popular sovereignty. THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, *supra* note 131.

[186] *See supra* notes 125-136 and accompanying text. *See also* Osaka, *supra* note 169, at 214.

[187] José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints*, 13 HAMLINE L. REVIEW 623, 628 (1990).

[188] *See id.* at 626.

[189] *See* Marbury v. Madison, 5 U.S. 137 (1803); Submission of Brian N. Forbes, legal counsel, et al. on behalf of the War Amputations of Canada to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (August, 1992), at 2.

[190] *Progress report concerning the right to restitution, supra* note 166, at 14.

reparation usually takes the form of restitution, compensation or both, other means of granting redress to the victims exist.[191] A disclosure of the truth after an official and thorough investigation of the facts and circumstances followed by an apology for the wrongs committed offers one form of satisfaction.[192] Taking steps to prevent a recurrence of the offense provides another form of satisfaction.[193] Full disclosure and revision of inaccurate historical accounts will aid in deterring similar injustices in the future. Therefore, an appropriate method of redress for the comfort women might consist of an unequivocal apology, full disclosure of the egregious events, which would include mandatory textbook revisions, and fair compensation. Although the main focus remains on fulfilling the rights of victims, these forms of satisfaction will also have broad implications pertaining to social and political justice.[194]

A. Apology

Thus far, Japan has not made an unequivocal apology for the injustices inflicted upon the comfort women. Although the government now admits its involvement with the comfort women, it still denies the use of coercion.[195] This denial further deprecates the comfort women. The comfort women did not volunteer but were forced to become prostitutes.[196] In order to restore the dignity that these women lost, Japan must publicly acknowledge the full extent to which it violated the women and thereby proffer an earnest apology.

1. Disclosure of the Complete Truth

An apology from Japan will not be convincing until the government discloses the complete truth. Unless Japan delivers an honest account of the facts and circumstances, it cannot fulfill the policy objective of dealing with

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191 *See Preliminary study concerning the right to restitution, supra* note 104, para. 9. Application of the general concepts of reparation must depend closely upon the issues in the particular case. IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I 234 (1983). For example, the pleadings of the *Barcelona Traction* Case indicated that practical obstacles to *restitutio in integrum* and the restoration of the *status quo ante* permitted reparation only in terms of compensation. Final submissions of Belgium, I.C.J. Reports 4, 24 (1970).

192 BROWNLIE, *supra* note 191, at 235.

193 *Id.*, at 199. *See also* Zalaquett, *supra* note 187, at 628.

194 *Preliminary study concerning the right to restitution, supra* note 104, para. 41.

195 *See supra* notes 17-27 and accompanying text for discussion of the coercion issue.

196 *Id.*

past human rights abuses.[197] For the society as a whole to make an informed decision in setting a human rights policy, a full disclosure of the nature and extent of violations is essential.[198] A former Chair of the Amnesty International Executive Committee, noted that concealing the truth perpetuates the suffering of the victims.[199] A full public disclosure effectuates a vital step towards laying the foundation for a sound human rights policy as well as meeting the needs of the victims.

2. Textbook Revision

By revising its history textbooks to disclose the crimes it has committed in the past, Japan can offer a genuine apology. Failure to fully disclose its past will impair the efforts to prevent the recurrence of human rights violations.[200] Over the years, Asian nations have harshly criticized Japan's attempts to conceal and falsify its wartime aggression in its textbooks.[201] Professor Constatino of Philippines stated, "The Japanese say they are a peace-loving people now, but have never expressed sincere contrition or accepted moral responsibility for the bloodshed."[202] Even some Japanese view the governmental measures to conceal the whole truth as signs of infidelity to progressive democratic values.[203] The revelation of the Japanese government's involvement with the forced prostitution of the comfort women has once again emphasized the need for textbook revisions. The Korean government has reiterated the exigency for clarifying the historic records between the two countries.[204]

In response to this request to reflect the issue of comfort women in Japanese textbooks, Chief Cabinet Secretary Koichi Kato said the

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197 *See* Zalaquett, *supra* note 187 at 629.

198 *Id.*

199 *Id.*

200 *See id.*

201 Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, 53 LAW & CONTEMP. PROBS. 39, 65-66 (1990).

202 Professor Renato Constatino, 78, is a professor of history at the University of the Philippines. Colin Nickerson, *Neighbors Fear a Japan Militarily Resurgent*, THE BOSTON GLOBE, June 28, 1992, at 68, *available in* LEXIS, Nexis Library, News File.

203 Lawrence W. Beer, *Education, Politics and Freedom in Japan: The Ienaga Textbook Review Cases*, 8 LAW IN JAPAN: AN ANNUAL 73 (1975).

204 A Foreign Ministry official who was in charge of compiling the White Paper, Korean government's initial report on the comfort women issue, stated that it is important to set straight the historic records between the two countries. He said the Japanese government should reflect the true picture of their past wrong-doings in school textbooks. Shin Hak-Lim, *"Comfort Girl" Report Opens Way to Discuss Indemnity*, THE KOREA TIMES, Aug. 1, 1992.

government has no right to force textbook publishers to include certain facts.[205] But the problem does not lie with the textbook publishers' unwillingness to depict history in its whole context. In reality, the government consistently engages in determining the contents of textbooks prior to their publication.[206] The Ministry of Education routinely reviews the contents of history textbooks.[207] The *Ienaga Textbook Review*[208] cases attest to the abundant government screening process.[209] For instance, while reviewing Professor Ienaga's textbooks, the government ordered the deletion of the phrase "violated women".[210]

Textbook revision will promote several important goals. First, it will convey the sincerity of Japan's denunciation of its wartime atrocities and the resolve not to engage in further acts of aggression. Second, it will help the children of Japan understand the nature of wars and the crimes against humanity.[211] Third, acknowledging the historical truth will assist the young people of Japan to recognize, condemn and prevent violations of fundamental human rights, such as the forced prostitution of women.

B. Compensation

Apologies are not sufficient to redress the sufferings of the comfort women. The best form of reparations would be restitution — to restore the victim to the position she was in before the crime was committed. When restoration of the original status is impossible or insufficient, however, a form

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[205] *Japan to Set Compensation for Korean Comfort Girls*, *supra* note 14, at 1. Mayumi Moriyama, the Minister of Education, expressed the same view as the Chief Cabinet Secretary. *Japan Cannot Promise on "Comfort Women" in Textbooks*, JAPAN ECONOMIC NEWSWIRE, March 30, 1993, *available in* LEXIS, Nexis Library, News File.

[206] CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 196 (Lawrence W. Beer ed., 1992); *see also* National League for Support of the School Textbook Screening Suit, TRUTH IN TEXTBOOKS, FREEDOM IN EDUCATION AND PEACE FOR CHILDREN: THE 27 YEAR STRUGGLE OF THE IENAGA TEXTBOOK LAWSUITS (July 31, 1992) [hereinafter TRUTH IN TEXTBOOKS]; Beer, *supra* note 201.

[207] TRUTH IN TEXTBOOKS, *supra* note 206, at 2.

[208] Professor Saburo Ienaga is a famous historian who has devoted himself since the 1960's to opposing in court the Ministry's attempts to cover up unpleasant facts about Japan in his high school history textbooks. *Id.*

[209] *Id.* The Supreme Court of Japan upheld the right of the Education Ministry to screen and dictate the contents of history textbooks on March 16, 1993. Irene Kunii, *Supreme Court Says Japan Can Rewrite History*, THE REUTER LIBRARY REPORT, March 16, 1993, *available in* LEXIS, Nexis Library, News File.

[210] Professor Ienaga wrote the following about the Nanking Massacre: "When the Japanese Army occupied Nanking, they murdered large numbers of Chinese soldiers and civilians and many of the Japanese officers and soldiers violated Chinese women." TRUTH IN TEXTBOOKS, *supra* note 206, at 1-2.

[211] *See id.* at 11.

of redress that most often aids victims of human rights violations is compensation.[212] As Makoto Tanabe, chairman of the Social Democratic Party of Japan, aptly stated in favor of compensation for the comfort women, "Words of apology can carry weight only if followed by deeds," since compensation and apologies are "two sides of the same coin."[213] Compensation is an indispensable element of an equitable reparations package.

Compensation is available through either judicial or legislative measures. Independent from the outcome of the trial, Japan might decide to establish a governmental fund for the comfort women.[214] Previously, when former Taiwanese soldiers in the Japanese Imperial Army sought compensation for their injuries, the courts rejected their claim.[215] However, in 1987, the Diet passed a bill under which the seriously injured or the surviving family members would be awarded 2 million yen per dead or seriously injured person.[216] On the positive side, such a legislative measure acknowledges the need for action on behalf of the war claimants. Nevertheless, a nominal amount of compensation awarded through a fund[217] may convey a mere gesture to appease outrage by the international community. Indirect compensation may also signal Japan's attempt to avoid guilt and legal liability.[218]

Although an equitable legislative redress is conceivable, a judicial resolution is more favorable in the present case. Since the lawsuit is already in progress, the plaintiffs will be better served by a decision of the court clearly delineating the injuries to the victims and Japan's obligation to make

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212 Frank C. Newman, *Redress for Gulf War Violations of Human Rights*, 20 DENV. J. OF INT'L L. & POL'Y 213, 216 (1992). *See also* CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 189 (1928); *Chorzów Factory* Case, *supra* note 125.

213 *Reparations Are Needed, Tanabe Says*, THE JAPAN TIMES, December 9, 1991, at 1.

214 According to the Kyodo News Service, Prime Minister Kiichi Miyazawa indicated that the government is considering compensation for the comfort women. Kyodo reported that Miyazawa's remarks implied Japan could move to compensate the women through a fund. *Japan Hints at Compensation for WWII "Comfort Women"*, THE KOREA TIMES, July 18, 1992. Specific measures for the fund have not been determined to date. *Gov't Mulling "Comfort Women" Issue 1 Year After Lawsuit*, JAPAN ECONOMIC NEWSWIRE, Dec. 7, 1992, *available in* LEXIS, Nexis Library, News File.

215 *See supra* notes 132-136 and accompanying text.

216 *Supreme Court Rejected Claim by Taiwanese*, *supra* note 133. 2 million yen was equivalent to about 16,000 U.S. dollars in 1987. *Japanese "Condolence Money" for WWII Taiwan Draftees*, CENTRAL NEWS AGENCY, December 29, 1987, *available in* LEXIS, Nexis Library, News File.

217 The amount designated by the bill for the Taiwanese plaintiffs was still significantly lower than the figure awarded to the Japanese in the same situation. *Supreme Court Rejected Claim by Taiwanese*, *supra* note 133.

218 Itaru Oishi, *Government to Indirectly Pay WWII "Comfort Women,"* THE NIKKEI WEEKLY, March 1, 1993, at 2, *available in* LEXIS, Nexis Library, News File.

reparations. If the court does not recognize their rights, the plaintiffs may face future prejudice. For instance, as in the case of the Taiwanese plaintiffs, the Diet may not feel compelled to compensate the victims adequately. Some fear that the government fund plan may obscure the truth.[219] In order for Japan to adduce an equitable form of reparations, it must offer a sincere apology and provide sufficient compensation.

IV. CONCLUSION

Today Japan faces a profound challenge to prove to the international community that the present administration takes human rights violations seriously. Japan can meet this challenge by facing its legal and moral obligations and setting a clear standard for dealing with human rights abuses, starting with its duty to the comfort women.

By dealing with its obligations to the comfort women squarely, Japan will benefit both the victims and Japan's future generations. The individual victims will regain, to the extent possible, some of the dignity they once lost. They will be better able to cope with the continuing physical and moral sufferings. Furthermore, Japan's future generations will hopefully learn from their nation's past abuses of human rights, and foster measures to prevent Japan's militant past from re-occurring. Finally, by meeting its duty to protect fundamental human rights, Japan will gain the trust of its neighbors, as well as that of its own citizens.

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219 *Group in Seoul Rejects Idea of "Comfort Women" fund*, THE JAPAN TIMES, Oct. 15, 1992, at 3.