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The Interest of States in Accountability for Sexual Violence in Armed Conflicts: A Case Study of Comfort Women of the Second World War

Kiki Anastasia Japutra[*]

The term 'comfort women' or *ianfu* (also *jugun ianfu* or military comfort women) refers to hundreds of thousands of women recruited to serve the Japanese military as sex workers during the Second World War.[1] An estimated 80 per cent were Koreans while the rest comprised women from China, Southeast Asia, Taiwan and the Pacific region. To facilitate this practice, military installations known as so-called comfort stations were established all over Asia, in territories where Japanese troops were deployed.

The first military comfort station was established in Shanghai in 1932, at the time of the Shanghai Incident.[2] General Okamura Yasuji, the deputy Chief of Staff of the Shanghai Expeditionary Army, described the initial objective of this station as follows:

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[1] Some have argued that, because the term *jugun ianfu* (literally, military-accompanying comfort women) was not used prior to the end of the Second World War, the entire comfort women phenomenon is a myth. However, military documents of the time refer to *ianfu* (comfort women), *gun ianjo jugyo-fu* (women working at military comfort stations) and *gun ianjo* (military comfort stations). Therefore, it is not inaccurate to refer to women confined in comfort stations set up for Japanese troops as *jugun ianfu* or *Nihon-gun ianfu* (the Japanese military's comfort women). Center for Research and Documentation on Japan's War Responsibility, "Appeal on the Issue of Japan's Military 'Comfort Women'", 23 February 2007, p. 1.

[2] The Shanghai Incident was triggered by the detonation of the South Manchuria Railway track in Liutiaohu in northeast China (Manchuria) on 18 September 1931, an event known as the Manchuria or Mukden Incident. The explosion was made to seem as if it were the work of Chinese dissidents, thereby providing a reason for Japan to initiate war against China. In January 1932, the Japanese Imperial Army opened hostilities in Shanghai, an assault that became known as the January 28 Incident or First Shanghai Incident. Yoshimi Yoshiaki, *Comfort Women: Sexual Slavery in Japanese Military during World War II*, Columbia University Press, New York, 2000, p. 43.

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> To my shame, I am a founder of the comfort women system. In 1932 when the China incident occurred, a few rapes were reported. Then I as Vice-Chief of the Staff of the Shanghai Expeditionary Army followed the practice of the Navy and requested of the Governor of Nagasaki Prefecture to send a group of comfort women. I was pleased that no rapes were committed afterward.[3]

In a document from late 1938, entitled "In Regard to the Current State of Regulations on Private Prostitution in the Concession and the Regulation of Special Prostitutes Reserved for Japanese Citizens in Shanghai during 1938", the Consulate General of Shanghai remarked:

> With the great increase in military personnel stationed in the area due to the sudden outbreak of the Shanghai Incident, the navy established naval comfort stations as a mean to aid in supporting the comfort of those troops and those stations have continued to operate up to the present.[4]

Japanese military expansion in Asia was followed by an increasing number of soldiers deployed to different parts of the region. This sudden increase in the number of soldiers created problems as the number of sex workers taken from Japan could no longer satisfy the demands of the Japanese military which numbered some two million soldiers.[5] The comfort women initially comprised Japanese prostitutes recruited in Japan on a voluntary basis. The shortage of sex workers forced Japanese military leaders to resort to the recruitment of local women, whose participation was mostly involuntary. The method of recruitment varied from coercion and abduction to deception, through which most women were recruited on the basis they would be employed as nurses or factory workers without any knowledge that they would be forced to serve the military as comfort women.

This chapter addresses two sets of questions. First, international and domestic tribunals have been reluctant to address the issue of comfort women despite the clear evidence and testimony that have been presented.

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[3] The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery ('Women's Tribunal'), *The Prosecutors and the Peoples of the Asia-Pacific Region v. Hirohito Emperor Showa [et al.]*, Case No. PT-2000-1-T, Judgment, 4 December 2001, para. 142.

[4] Yoshiaki, 2000, p. 44, see *supra* note 2.

[5] Women's Tribunal, 2001, para. 786, see *supra* note 3.

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What are the possible reasons for the reluctance to address this issue? Second, has the Japanese government shown any indication of self-interest in conducting prosecutions? If not, why should such accountability of Japanese perpetrators be in the interest of Japan? In a broader context, why should it be in the interest of States to prosecute?

10.1. The Practice of Comfort Women in Japanese-Occupied Territories

The comfort system was established by recruiting hundreds of thousands of women to serve the Japanese military as sex slaves during the Second World War. Evidence in the form of documents, the testimony of survivors and admissions by the State of Japan makes it clear that comfort stations existed everywhere Japanese troops were present, including on the frontlines, and that the women had no ability to refuse sexual demands.[6]

The comfort stations were initially established to serve the following objectives: to suppress anti-Japanese sentiment among civilians due to rape committed by members of the Japanese Imperial Army; to prevent the spread of venereal diseases; and to prevent the infiltration of spies. It was a general trend in the Japanese Imperial forces that looting and rape, during combat operations in particular, were not only tolerated but even encouraged by many commanders as a means of arousing the fighting spirit of their men.[7] As Shannon Heit notes:

> [T]he rape of the enemy's women is considered as the conquering of the enemy's property, the rightful booty for the victor and the most humiliating symbol of defeat for the opposition.[8]

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[6] *Ibid.*, para. 789.

[7] Until it was revised, the Japanese Imperial Army Criminal Law, Article 86(2) regarded rape as a secondary crime punishable by between seven years' and life imprisonment. However, only a small number of soldiers were convicted for rape under this code of conduct each year. On 20 February 1942, the law was revised to acknowledge rape as a single major criminal offence punishable by imprisonment of between one year and life. However, the reason for this revision was not because rape constituted a crime against humanity, but mainly because it brought "shame" to the Japanese Empire. Yuki Tanaka, *Japan's Comfort Women: Sexual Slavery and Prostitution during World War II and the US Occupation*, Routledge, London, 2002, pp. 28–29.

[8] Shannon Heit, "Waging Sexual Warfare: Case Studies of Rape Warfare Used by the Japanese Imperial Army during World War II", in *Women's Studies International Forum*, 2009, vol. 32, no. 5, p. 364.

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The frequent rape of civilians provoked resistance among civilians of the occupied territories, causing Japanese military leaders to initiate the establishment of the comfort facilities. It was considered to be more convenient to have females locked up in buildings designed to sexually service large numbers of men than for men to have to take the time, energy and risks necessary to go out and locate, rape and then possibly kill women to cover up their crimes.[9] In principle, what was regarded as necessary to prevent rape was to provide physical and mental nourishment within the military that could enhance the working spirit of the soldiers and prevent undesirable conduct at the same time. But the military comfort stations failed to serve their stated purposes − widespread sexual abuses against women persisted in the occupied territories.

It was also argued that rape prevention was intended only to disguise the real objective, which was not to protect civilians but to protect soldiers from rapes of 'unknowns' who might transfer venereal diseases to soldiers and Japanese citizens.[10] Military leaders feared the spread of disease could potentially create massive public health problems back in Japan once the war ended, and the regulated system of comfort stations would prevent such a pandemic.[11] Contrary to the primary assumption, the spread of venereal diseases did not only come from the rapes, but also the failure to maintain control over the soldiers' health and hygiene. Ironically, the comfort stations caused the venereal disease rate to increase among both 'comfort women' and soldiers instead of reducing it.

The last reason given for the establishment of the comfort system was security. Japanese military leaders believed that spies could easily infiltrate private brothels and that prostitutes could be recruited as spies.[12] Contrary to this argument, documents reveal the existence of three types of facilities for sex slaves: those directly run by Japanese military authorities; those run by civilians but essentially set up and controlled by Japanese military authorities; and those that were mainly private facilities but

[9] Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, Martinus Nijhoff Publishers, The Hague, 1997, p. 81

[10] Tanaka, 2002, p. 30, see *supra* note 7; Yoshiaki, 2000, p. 47, see *supra* note 2; Askin, 1997, p. 80, see *supra* note 9; and Women's Tribunal, 2001, para. 537, see *supra* note 3.

[11] Tanaka, 2002, p. 30, see *supra* note 7.

[12] *Ibid*.

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with some priority for military use.[13] The fact that military authorities did not have complete control over the comfort stations used by Japanese soldiers negated the security argument over their establishment.

At the end of war, the Japanese army abandoned the comfort stations and the comfort women were left to fend for themselves.[14] Many victims of war, such as the comfort women, are still alive though very elderly. Many live under miserable conditions due to trauma and poverty, and suffer the after-effects of continuous violence without receiving proper aid and justice.[15] Survivors have reported serious and continuing medical and psychological problems due to being treated as sex slaves; most having been unable or unwilling to marry or have children and many having no family to support them.[16] In the case histories of the comfort women, physical afflictions such as sexually transmitted diseases, uterine diseases, hysterectomies, sterility and mental illnesses (including nervous diseases, depression and speech impediments) stand out.[17]

Many of these women were not willing to report crimes due to the shame that they and their families had to bear. The guilt of rape does not belong to the perpetrators but the victims themselves. A woman who experienced rape, especially in societies (such as those in Asia) where virginity is considered as a standard of measurement of the value of a woman, is viewed as dirty and worthless by society, is blamed for her inability to protect her chastity or in some cases is accused of inviting the rapes to occur. Reporting sexual violence means degrading a woman's own dignity and exposing the entire family to shame and social prejudice. Many former comfort women were subjected to social discrimination and family isolation.[18] For these reasons, most comfort women chose to live in isolation while refusing to marry due to their traumatic years of continu-

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[13] Karen Parker and Jennifer F. Chew, "The *Jugun Ianfu* System", in Roy L. Brooks (ed.), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, New York University Press, New York, 1999, p. 96.

[14] Women's Tribunal, 2001, para. 362, see *supra* note 3; and Yoshiaki, 2000, pp. 192–93, see *supra* note 2.

[15] See generally The Executive Committee International Public Hearing (ed.), *War Victimization and Japan: International Public Hearing Report*, Toho Shuppan, Osaka, 1993.

[16] Women's Tribunal, 2001, para. 97, see *supra* note 3; and Yoshiaki, 2000, pp. 192–97, see *supra* note 2.

[17] Yoshiaki, 2000, p. 193, see *supra* note 2.

[18] *Ibid.*, p. 196.

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ous violence. Memories of being a comfort woman were left behind as a dark past that each woman wishes to forget.

10.2. The Japanese Government's Political Responses to Allegations of Systematic Practice of Comfort Women

Until the early 1990s, the Japanese government continued to deny its involvement in the establishment and management of the comfort system. The Japanese government insisted that only private operators recruited comfort women, a position maintained until documents surfaced in the early 1990s that directly implicated the role of government and military officials.[19] In June 1990 the Japanese government grudgingly acknowledged that the comfort system had indeed existed, but still maintained that they bore no imprimatur of government.[20] It was the first comfort women lawsuit that same year – soon followed by other lawsuits and redress movements demanding a formal apology and reparations from the State of Japan – that succeeded in forcing the Japanese government to take notice of the issue.

Documents related to the wartime comfort women, previously claimed to be non-existent, were successfully retrieved by Professor Yoshimi Yoshiaki of Chuo University from the Library of the National Institute for Defence Studies attached to the Defence Agency in 1992, and these implicated both government and military agencies in the comfort women scheme.[21] The discovery and publication of these documents finally forced the Japanese government to issue an apology the same year. The Prime Minister Miyazawa Kiichi expressed his regrets and repeated this apology to the South Korean President in the National Assembly on 16 January 1992, five days after the publication of Yoshimi's findings in the Japanese newspaper *Asahi Shinbun*.[22]

On 6 July 1992 the Chief Cabinet Secretary Kato Koichi made a formal statement that admitted the involvement of the Japanese govern-

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19 Roy L. Brooks, "What Form of Redress?", in Brooks, 1999, p. 88, see *supra* note 13.

20 David Boling, "Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?", in *Occasional Papers/Reprints Series in Contemporary Asian Studies*, 1995, no. 3, p. 14.

21 George Hicks, "The Comfort Women Redress Movement", in Brooks, 1999, pp. 117–18, see *supra* note 13.

22 *Ibid*.

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ment "in the establishment of the comfort stations, the control of those who recruited 'comfort women', the construction and reinforcement of comfort facilities, the management and surveillance of comfort stations, the hygiene maintenance in comfort stations and among 'comfort women', and the issuance of identification as well as other documents to those who were related to comfort stations".[23] Following Kato's statement, the Japanese government released a report of the findings of a government investigation and document survey entitled "On the Issue of Wartime Comfort Women", issued by the Cabinet Councillor's Office of External Affairs on 4 August 1993. The report focused on the following points:

1. The comfort stations were established in response to the request of the military authorities at the time.
2. The objectives for their establishment were to prevent anti-Japanese sentiments as a result of rapes and other actions against civilians, to prevent diseases and espionage.
3. The widespread nature of the comfort stations in Japanese-occupied territories over a long period of time and the existence of a great number of comfort women.
4. The direct and indirect involvement of the Japanese military in the establishment and management of the comfort stations.
5. The enforced movement, deprivation of freedom and misery that the comfort women endured.
6. The coercive method of recruitment of the comfort women against their will.

The statement of the Chief Cabinet Secretary Kono Yohei further elaborated upon this report on the same day:

> Undeniably, this was an act, with the involvement of the military authorities of the day, that severely injured the honor and dignity of many women. The Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incur-

[23] Larry Niksch, "Japanese Military's 'Comfort Women' System", Congressional Research Service Memorandum, 3 April 2007, p. 11.

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> able physical and psychological wounds as comfort women.[24]

Through Kono's statement, the government finally acknowledged the military's involvement in the comfort system, as well as the coercion and other forceful methods used to obtain and recruit comfort women.

In 1995 the Prime Minister Tomiichi Murayama established the Asian Women's Fund, which aimed to provide reparations for former comfort women as a form of atonement and remorse. The organisation's undertakings included:

1. To raise funds from the private sector as a means to enact the Japanese people's atonement for former comfort women.
2. To support those who conduct medical and/or welfare projects and other similar projects which are of service to former comfort women through the use of government funds and others.
3. When these projects are implemented, to express once again the nation's sentiment of sincere remorse and apology to the former comfort women.
4. To collate historical documents on 'comfort women' as a source of the lessons of history.[25]

The majority of the former comfort women refused to accept this atonement money, arguing that this was not a formal atonement since the funding came from private sources and not from government itself. Experts have noted that most of the victims in the Philippines, Taiwan, South Korea and Indonesia refused to accept money from the Asian Women's Fund. Five Filipina comfort women who accepted money re-

[24] Ministry of Foreign Affairs of Japan, "Statement by the Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of 'Comfort Women'", 4 August 1993 (https://www.legal-tools.org/doc/cb4732/).

[25] The statement of the objectives of the establishment of the Asian Women's Fund was made by Chief Cabinet Secretary Kozo Igarashi in June 1995. See "Japan's Official Responses to Reparations", in Brooks, 1999, p. 129. The amount offered to each person was ¥ 2 million (about USD 17,000) for a total 285 former comfort women in the Philippines, South Korea and Taiwan. In addition, ¥ 700 million (about USD 5.8 million) has been given to support a medical and welfare project, ¥ 255 million (about USD 2.12 million) for a project to help former comfort women in the Netherlands and ¥ 380 million (about USD 3.2 million) for social welfare services in Indonesia. See Ministry of Foreign Affairs of Japan, "Recent Policy of the Government of Japan on the Issue known as 'Comfort Women'" (https://www.legal-tools.org/doc/ddbcdb/).

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turned a letter of apology from Prime Minister Hashimoto Ryutaro because it was not a government admission of its official accountability for the abuses committed against them by the military.[26] They said they wanted "honour and dignity, not charity money".[27]

In March 2007 another controversial statement was issued by Prime Minister Abe Shinzo, in which he in effect claimed that there was no evidence of coercion in the recruitment of comfort women. Nakagawa Shoichi, then head of the ruling Liberal Democratic Party's policy-making body in the parliamentary Diet, supported Abe's claim:

> [T]here currently is no evidence that permits us to declare the military, the strongest expression of state authority, took women away and forced them to do things against their will.[28]

Abe's statements drew both support and criticism from within Japan. Some of the statements also drew criticism from the United States and a warning from the US Ambassador to Japan, Thomas Schieffer, that attempts to alter the earlier Kono Statement and revise historical accounts of the comfort system would have a negative impact in the United States.[29] The statements on coercion were later revised, providing that "[t]here probably was not anyone [comfort women] who followed that path because they wanted to follow it. In the broad sense, there was coercion".[30] Together with the withdrawal of the denial of acts of coercion committed during military occupation, Abe affirmed that he stood for the Kono Statement and expressed heartfelt sympathy and sincere apologies to the women who suffered immeasurable pain and hardship.[31] A chro-

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[26] Committee of Experts on the Application of Conventions and Recommendations (CEACR), "Individual Observation concerning Convention No. 29, Forced Labour, 1930 Japan (ratification: 1932)" (https://www.legal-tools.org/doc/c6283a/).

[27] Women's Tribunal, 2001, para. 986, see *supra* note 3.

[28] Niksch, 2007, p. 2, see *supra* note 23.

[29] For criticisms by the former Assistant Secretary of Defense, Kurt Campbell, and the former National Security Council Asian Affairs Director, Michael Green, see Yoichi Kato, "U.S. Experts Concerned about Prime Minister Abe's Remarks about Comfort Women Issue", in *Asahi Shimbun*, 10 March 2007. For Schieffer's remarks, see Chris Nelson, "The Nelson Report", 12 March 2007, p. 3, cited in Niksch, 2007, p. 3, *supra* note 23.

[30] Martin Fackler, "No Apology for Sex Slavery, Japan's Prime Minister Says", in *New York Times*, 6 March 2007.

[31] "Press Guidance Statement of the Japanese Ministry of Foreign Affairs", 2007, cited in Niksch, 2007, p. 5, see *supra* note 23.

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nology of Japanese political responses regarding war crimes atrocities, including the issue of comfort women, can be found in Appendix 1.

10.3. Comfort Women as a Crime Against Humanity in International Law

To argue that a crime as egregious in nature as the comfort women system should not remain unprosecuted, it is necessary to determine the gravity of the crime involved and whether it satisfies the necessary requirements to be prosecuted under international law. The first question that should be raised is whether the crime of the comfort women system was sufficiently established as a matter of international law during the commission of the crime to satisfy the requirements of *nullum crimen sine lege*.

The Japanese government has argued in other contexts that rape during armed conflict was not prohibited by the regulations annexed to the Hague Convention No. IV of 1907 or by applicable customary international norms in force at the time the acts were committed.[32] It has also argued that the 1929 Geneva Convention is not applicable because Japan was not a signatory and that the Convention was not evidence of custom.[33] Another argument that may be raised is that the term 'crimes against humanity' had only been recognised during the Nuremberg and Tokyo Tribunals, and the definition and recognition of rape and sexual enslavement as crimes against humanity were not established until the International Criminal Tribunal for the former Yugoslavia ('ICTY') Judgment in the *Foča* case (2001). Based on these arguments, Japan has considered the actions committed during the period from 1937 to 1945 as not constituting a crime under international law based on the principle of non-retroactivity.

Despite the absence of the term 'crimes against humanity' prior to the Nuremberg and Tokyo Tribunals, the concept of crimes against humanity had existed in international legal sources before the first comfort stations were created. The first 'official' international use of the concept dates back to 24 May 1915, when the governments of France, Great Britain and Russia issued a joint declaration condemning the deportation and systematic extermination of the Armenian population of the Ottoman Em-

[32] Women's Tribunal, 2001, para. 52, see *supra* note 3.
[33] *Ibid*.

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pire and denouncing these acts as constituting "new crimes against humanity and civilisation" for which all members of the Turkish government would be held responsible together with its agents implicated in the massacres.[34] In the 1919 report of the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties, the majority of members concluded that the German Empire and its allies carried out the war "by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity" and "all persons belonging to enemy countries […] who have been guilty of offences against the laws and customs of war or the laws of humanity are liable for criminal prosecution".[35] Even though the statement may neither legislatively create new crimes nor create customary international law, the aggravating nature of crimes against humanity had been acknowledged prior to the Second World War.

With regard to sexual slavery, Japan appears to have declared the prohibition of sexual slavery as early as 1872 in a case in which it convicted Peruvian traders of the crime of slavery, and, pursuant to a representative sample of States, Japan included the prohibition of slavery in its national law in 1944.[36] Among the international slavery prohibition treaties concluded prior to 1937, the only treaty found to have been ratified by Japan at the time was the International Convention for the Suppression of the Traffic in Women and Children (1921), which was ratified in 1925.[37]

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[34] Sévane Garibian, "Crime against Humanity, Online Encyclopedia of Mass Violence", 19 June 2008, available at http://www.massviolence.org/Crime-against-Humanity, last accessed on 5 April 2015.

[35] Commission on the Responsibility of the Authors of War and on Enforcement of Penalties, "Report Presented to the Preliminary Peace Conference, March 29, 1919", in *American Journal of International* Law, 1920, vol. 14, nos. 1/2, pp. 113–14; Vincent Sautenet, "Crimes Against Humanity and the Principles of Legality: What Could the Potential Offender Expect?", in *Murdoch University Electronic Journal of Law*, 2000, vol. 7, no. 1, available at http://www.murdoch.edu.au/elaw/issues/v7n1/sautenet71_text.html, last accessed on 5 April 2015.

[36] Prior to 1944 the crime of enslavement was subsumed under applicable crimes of kidnapping and forcible confinement under Japanese criminal law. Gay J. McDougall, Special Rapporteur, "Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict", Economic and Social Council, Commission on Human Rights, Geneva, 1998, E/CN.4/Sub.2/1998/13, paras. 13–14.

[37] Reservation, however, was made not to include Korea, Taiwan, the leased Territory of Kwantung, the Japanese portion of Saghalien Island and Japan's mandated territory in the South Seas. See M. Cherif Bassiouni, "Enslavement as an International Crime", in *New York University Journal of International Law and Politics*, 1991, vol. 23, p. 445.

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Unfortunately, under Article 14 of the Convention, colonial powers could exclude their colonies from the provisions that prohibited further trafficking in women and children, for which Japan took full advantage of in its dealings with Korea (claiming that Korea was a colony).[38] The 1926 Slavery Convention, although not ratified by Japan, has been regarded as customary international law as of 1937 and the abolition of slavery amounted to *jus cogens*.[39] In other words, although Japan was not party to the 1926 Convention, there was no excuse for disregarding the prohibition, and any act amounting to slavery (such as the comfort women system) should be considered as criminal under international law even before the establishment of the comfort stations.

The prohibition of rape and forced prostitution was prominently expressed in the 1863 Lieber Code, which explicitly claimed that the act of violence committed against persons in the invaded country "are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense".[40] Rape and sexual slavery are also delineated as a form of attack on the society in Article 46 of the Hague Convention of 1907 regarding the protection and respect on "family honour and rights".[41] Although not explicitly mentioned in the provision, such an interpretation can be based on the Martens Clause, which stands for the proposition that even though positive law fails to prohibit certain inhumane acts, such acts can be legitimately treated as crimes if their character is accepted as criminal in nature, but the offending conduct is not necessarily explicitly named.[42] The interpretation of "family honour and rights" in the context of rape and sexual violence is strengthened by the acceptance of the Hague Convention as customary international law governing the laws of war and by other law of war sources that confirm the international prohibition on the rape of civilians during armed con-

38 Joseph P. Nearey, "Seeking Reparations in the New Millennium: Will Japan Compensate the 'Comfort Women' of World War II?", in *Temple International and Comparative Law Journal*, 2001, vol. 15, no. 1, p. 130.

39 McDougall, 1998, para. 14, see *supra* note 36.

40 Instruction for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Article 44.

41 The concept of family honour includes the rights of women in a family not to be subjected to the humiliating practice of rape. McDougall, 1998, para. 17, see *supra* note 36.

42 Women's Tribunal, 2001, para. 520, see *supra* note 3.

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flict.[43] The comfort system was, by nature, a way to dehumanise and humiliate the citizens of States colonised by Japan due to the role of women as family and community property in a patriarchal order.[44] Considering the existence of provisions referring to the elements of crime contained in the practice of the comfort system, though not explicitly mentioning 'crimes against humanity', it can be concluded that the concept existed by 1937, which is relevant when assessing the requirements of the *nullum crimen sine lege* principle.

Having established how the principle of legality may be satisfied, the next examination should focus on the requirements of 'crimes against humanity'. The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery ('Women's Tribunal'), conducted in 2001, enlisted the following threshold to determine whether particular acts constituted crimes against humanity from 1937 to 1945: the prohibited acts must be committed (1) before or during war, (2) as part of a large-scale or systematic attack committed against a civilian population, and (3) in connection with war crimes or crimes against peace.[45] The nexus to armed conflict is no longer required as a matter of customary international law today, but the Women's Tribunal accepted the assertion of this requirement as an essential condition for crimes against humanity to be justiciable in the Tokyo Tribunal, and thus be applied in this case.[46] Evidence suggest that all acts of rapes and sexual slavery committed as part of the comfort system were committed before and during the war in China and the expanded war in the Asia-Pacific region.[47] The first requirement has therefore been satisfied.

With regard to the second requirement, the practice of comfort women satisfies both the "large-scale" and "systematic" requirements, although the element is disjunctive – the fulfilment of one criterion is deemed sufficient for crimes against humanity. The exact number of comfort women, as well as other relevant facts, is impossible to determine accurately since most relevant documents were either hidden or destroyed at the end of the war. Estimates, however, were made based on evidence that

43 McDougall, 1998, para. 28, see *supra* note 36.
44 Heit, 2009, p. 364, see *supra* note 8.
45 Women's Tribunal, 2001, para. 534, see *supra* note 3.
46 *Ibid.*, para. 530.
47 *Ibid.*, para. 535.

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still exists. According to the Japanese military plan devised in July 1941, 20,000 comfort women were required for every 800,000 Japanese soldiers, or one woman for every 40 soldiers.[48] There were 3.5 million Japanese soldiers sent to China and Southeast Asia during the war, and therefore, by this calculation, an estimated 90,000 women were mobilised.[49] Another estimate comes from the discovery of a memo in the operations journal of Setsuzo Kinbara, chief of the Medical Affairs Section in the Medical Affairs Department of the War Ministry, which mentioned "1 woman for 100 soldiers".[50] Records also suggest that comfort stations were established in every territory where Japanese soldiers were present throughout the Asia-Pacific region. The number of comfort women recruited during the Second World War, as well as the spread of comfort stations in every territory where Japanese soldiers were present, clearly indicates the large scale of the system.

It is also evident that the practice of the comfort system was methodically planned, highly regulated, and invariably sustained by the Japanese military and civilian authorities wherever the troops were stationed.[51] The number of women acquired was so enormous and the pressure to expand the system was so strong that the crimes involved had to have been known to high-level participants of the system, as well as to those who oversaw its maintenance and the continuing supply of women.[52] The evidence suggests that the comfort stations provided food supplies (however minimal), condoms, medical personnel, and often dangerous 'treatments' for sexually transmitted diseases and pregnancy.[53] The costs involved in procuring, transporting and maintaining the system had to have been substantial and required a significant allocation of resources.[54]

Substantive evidence of the pervasive responsibility for comfort station policy-making and operation at all levels of the government hierarchy

[48] Tanaka, 2002, p. 31, see *supra* note 8.

[49] *Ibid*.

[50] Digital Museum: The Comfort Women Issue and the Asian Women's Fund, "Number of Comfort Stations and 'Comfort Women'", available at http://www.awf.or.jp/e1/facts-07.html, last accessed on 15 March 2010.

[51] Women's Tribunal, 2001, para. 538, see *supra* note 3.

[52] *Ibid*., para. 797.

[53] *Ibid*., para. 789.

[54] *Ibid*.

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was evident in the recruitment memorandum sent on 4 March 1938 by an adjutant general in the Japanese War Ministry to the chiefs of staff of the North China Area Army and the Central China Expeditionary Forces. The memorandum provides an insight into the military's efforts to disguise the coercive nature of the comfort system, the complicity of local authorities, and the military supervision of and involvement with private actors in the recruitment process.[55] It provides compelling evidence that the Ministry of War was aware of the coercive methods used to force women into the system. The Women's Tribunal found that the Ministry of War failed to give clear instructions ensuring that the women agreed to provide sexual services, which demonstrates that the ministry knowingly authorised forcible and coercive methods of recruitment in acquiring women for the comfort stations.[56] It is evident that the comfort system was not only approved by but conducted under the direct instruction of the State (represented by the Ministry of War) as a means to achieve its military objectives. The comfort system was, in essence, "systematic" State-sanctioned rape and enslavement.[57]

The final threshold of "connection with war crimes or crimes against peace" is satisfied by observing the main objectives of the establishment of the comfort system: to prevent rape of the locals, to prevent the spread of venereal diseases, to prevent espionage and to increase the spirit of the soldiers. It can be concluded that the basic objective of the establishment was to support Japan's war effort, and many of the crimes were connected to Japan's unlawful war of aggression. The comfort women were treated as essential supplies, as the 'booty' of war, and were considered a necessary cog in the wheel of the Japanese war machine.[58] The requirement of the connection with war crimes or crimes against peace must therefore be considered satisfied. The Japanese military committed crimes against humanity.

[55] *Ibid.*, para. 92.
[56] *Ibid.*, para. 95.
[57] *Ibid.*, para. 798.
[58] *Ibid.*, para. 542.

PURL: http://www.legal-tools.org/doc/08dd00/

10.4. Legal Proceedings Regarding the Issue of Comfort Women

10.4.1. International Tribunals

The International Military Tribunal for the Far East ('IMTFE') was established in 1946 to try Japanese leaders for crimes against peace (Class A), war crimes (Class B) and crimes against humanity (Class C) committed during the Second World War.[59] The Tribunal was created on similar lines to the Nuremberg Tribunal, which was empowered to prosecute international crimes. The IMTFE was distinct due to the existence of the crime of conspiracy for which Japanese military leaders were tried for the acts committed on the basis of a common plan. Statements relevant to the comfort women issue were presented a number of times, but the Tribunal failed to identify it as a distinct type of crime.[60] Despite of the gravity of the crime involved and evidence indicating systematic sexual slavery, the IMTFE failed to address this issue and the egregious crime remains unprosecuted.[61]

The only known war crimes trial which succeeded in prosecuting rape and forced prostitution was the Batavia Military Tribunal in 1948. It tried the case of 35 Dutch comfort women against 12 Japanese army officers on the grounds of having committed war crimes in defiance of the laws and customs of war in the Dutch East Indies in 1944.[62] The Batavia Tribunal succeeded in prosecuting the perpetrators, with one of the ac-

59 University of Virginia Law Library, "The Tokyo War Crimes Tribunal: A Digital Exhibition", available at http://lib.law.virginia.edu/imtfe/tribunal, last accessed on 29 March 2015.

60 The IMTFE Judgement notes: "[D]uring the period of Japanese occupation of Kweilin, they committed all kinds of atrocities such as rape and plunder. They recruited women labour on the pretext of establishing factories. They forced the women thus recruited into prostitution with Japanese troops". International Military Tribunal for the Far East, Judgment, Tokyo, 1 November 1948, para. 1021 (https://www.legal-tools.org/doc/28ddbd/).

61 According to Judge B.V.A. Röling, the IMTFE did know of the comfort system and, despite the testimony at the IMTFE, the issue of comfort women was not raised when the Tribunal prosecuted war criminals. However, in the IMTFE judgment, the comfort women were mentioned briefly: "[…] forced women thus recruited into prostitution with Japanese troops". *Ibid*. See also Askin, 1997, pp. 85–86, *supra* note 9.

62 Nina H.B. Jørgensen and Danny Friedmann, "Enforced Prostitution in International Law Through the Prism of the Dutch Temporary Courts Martial at Batavia", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 2*, FICHL Publication Series no. 21, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. 331–54 (https://www.legal-tools.org/en/doc/7c217c/).

PURL: http://www.legal-tools.org/doc/08dd00/

cused condemned to death and others sentenced to imprisonment ranging from two to 15 years. However, the documents that state the names of both victims and the accused have been sealed, and the archives of this proceeding are not scheduled to be opened until 2025.[63]

10.4.2. Findings of the Women's International War Crimes Tribunal

With the continuous failure to address the comfort women issue, in December 2000 the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery was convened through the efforts of non-governmental organisations throughout Asia to ensure some form of accountability for the aging former comfort women. The case was brought against Emperor Hirohito and the government of Japan. The Women's Tribunal found Emperor Hirohito "guilty of responsibility for rape and sexual slavery as a crime against humanity" and that the government of Japan has incurred State responsibility for the establishment and maintenance of the comfort system.[64] The judgment, however, has no legally binding effect and therefore failed to advance justice. However, the Women's Tribunal succeeded in placing enormous pressure on the Japanese government, and its findings are significant in laying a blueprint for future litigation against the Japanese government in real international tribunals or in the court system of other nations.[65]

10.4.3. Inter-State Litigation

On 18 September 2000 Hwang Geum Joo, a former comfort woman, filed the first and only lawsuit in the United States District Court of Columbia, claiming that "the actions of the Japanese government in establishing and maintaining the system of sexual slavery from 1932 until 1945 violated *jus cogens* norms of international law and are not subject to the defence of

[63] Askin, 1997, pp. 85–86, see *supra* note 9.

[64] Nearey, 2001, p. 144, *supra* note 38.

[65] The judgment was appealed to the UN Sub-Commission on Human Rights and further referred in Resolution 16 (1999), which includes States' obligations, "to provide effective criminal penalties and compensation for unremedied violations", and states that such obligations cannot "be extinguished by peace treaty, peace agreement, amnesty or by any other means". See Sub-Commission on the Promotion and Protection of Human Rights, "Systematic Rape, Sexual Slavery and Slavery-like Practices", Resolution 1999/16, 33rd session, 26 August 1999, paras. 12–13.

PURL: http://www.legal-tools.org/doc/08dd00/

sovereign immunity".[66] The demands included: (1) to declare the Japanese government violated international treaties and customary law; (2) to declare that the Japanese government violated the Alien Tort Claims Act and prohibition against enforced prostitution and rape; (3) to direct the Japanese government to make available forthwith all documents or other records related to the operation of military rape camps and/or comfort women; (4) to award plaintiffs and the class compensatory and punitive damages arising out of the unlawful behaviour of the Japanese government; and (5) a jury trial on all issues. The plaintiff further filed a motion for declaratory judgment, arguing that Japanese conduct did not enjoy sovereign immunity, which was dismissed by the District Court.

On 27 April 2001, the US Department of Justice issued a Statement of Interest of the United States of America, which claimed that

> [t]he United States District Court for the District of Columbia had no jurisdiction over plaintiffs' claims due to Japan's sovereign immunity and by virtue of international obligations entered into by the United States and other nations with Japan at the close of World War II.[67]

The statement further argued that if individual plaintiffs were allowed to impose their interpretation of the 1951 San Francisco Peace Treaty on a piecemeal basis through litigation, this would have a potentially serious negative impact on US–Japan relations and could affect the United States' treaty relations globally by calling into question the finality of US commitments. The US government asserted that the individual interpretation of the treaty could have a serious impact on the stability of the East Asian region, especially given the tension between Japan, China and Korea. In August 2002, the plaintiffs appealed to the District Court to reverse its statement that Japan enjoys sovereign immunity for trafficking in women and slavery, and that the appellants' tort law claims are non-justiciable.[68] The appeal was again dismissed by the District Court which reclaimed that Japan is entitled to sovereign immunity and further argued that the

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[66] United States District Court for the District of Columbia, *Hwang Geum Joo, et al. v. Japan*, Case No. 00-CV-2233. See Memory and Reconciliation in the Asia-Pacific, "Comfort Women: U.S.: Hwang Geum Joo, et al. v. Japan", 18 September 2000 (https://www.legal-tools.org/doc/8ae55c/).

[67] Memory and Reconciliation in the Asia-Pacific, "Comfort Women: U.S.", see *supra* note 66.

[68] *Ibid*.

PURL: http://www.legal-tools.org/doc/08dd00/

courts of the United States are not authorised to hear the case. The case was petitioned to the US Supreme Court. On 21 February 2006, the Supreme Court denied it and closed the case.

10.4.4. Japanese Courts

In the 1990s, war crimes victims began filing lawsuits against the Japanese government. As of April 2010, there had been 10 lawsuits focusing specifically on Japanese military sexual slavery, and, among these, eight lawsuits are still pending (one at the district court level, five at the high court level and two before the Supreme Court) while two have been dismissed by the Supreme Court of Japan, thus exhausting all domestic remedies.[69] The lawsuits generally consist of Japan's violation of international treaties and the devastating situation in which comfort women were forced to live. The Japanese government denied all claims on the grounds that: (1) Japan is subject to sovereign immunity; (2) Japan has settled its war crimes compensation issues by signing the San Francisco Peace Treaty in 1951 and other bilateral treaties with the countries involved; (3) individual victims' claims for damages are not justified under international law; and (4) Japan has no legal obligation to compensate the victims due to the expiration of the 20-year statute of limitations.[70]

The first lawsuit was filed by Korean victims (including Kim Hak-soon) in the Tokyo District Court on 6 December 1991, who demanded: (1) an official apology; (2) compensatory payment to survivors in lieu of full reparation (¥ 20 million for each victim or about USD 154,000); (3) a thorough investigation of their cases; (4) the revision of Japanese school textbooks identifying the comfort women issue as part of the colonial oppression of the Korean people; and (5) the building of a memorial museum.[71] The government responded to these demands by reversing the earlier claims that it had no responsibility regarding the comfort women issue, admitting its involvement in the system, and further recognised the

[69] Violence Against Women in War – Network Japan (VAWW-NET Japan), "Lawsuits against the Government of Japan Filed by the Survivors in Japanese Courts".

[70] Memory and Reconciliation in the Asia-Pacific, "Judicial Proceedings: Comfort Women", available at http://www.gwu.edu/~memory/data/judicial/comfortwomen.html, last accessed on 2 April 2015.

[71] Memory and Reconciliation in the Asia-Pacific, "Comfort Women: Japan", 6 December 1991, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/haksun.html, last accessed on 2 April 2010.

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sufferings of the victims.[72] The compensation demand, on the other hand, was dismissed on 26 March 2001 by the Tokyo District Court on the following grounds:

1. Individuals cannot exercise the rights or undertake the obligations provided by international law, and damages inflicted upon individuals are supposed to be dealt with the States they belong to.
2. Customary international law can only be established when the majority of States exercise a similar practice that becomes common practice in the international community.
3. The treaties – both ratified by Japan (including the Hague Conventions and the International Convention for the Suppression of the Traffic in Women and Children) and not ratified (but having achieved the status as customary law) did not provide any clause that can be interpreted as recognising the right of victimised individuals to make claims for compensation.

An appeal was made to the decision in March 2001 and was rejected by the Tokyo High Court on the grounds that the right to demand compensation had already expired. The plaintiff further brought the case to the Japanese Supreme Court but was again rejected on 29 November 2004.[73]

The second lawsuit was filed on 25 December 1992 with the Shimonoseki branch of the Yamaguchi District Court in Fukuoka prefecture against the Japanese government, in which 10 South Korean women demanded an official apology and a total of ¥ 564 million (USD 6.66 million) based on the State Redress Law.[74] This was the first time a Japanese court granted compensation to comfort women (¥ 300,000 or USD 2,800 to each of the three plaintiffs). The court admitted that Japan had neglected its legal duty to take measures to provide reparations for the wartime victims, and further declared the comfort women system a clear case

[72] Ministry of Foreign Affairs of Japan, "Statement by Chief Cabinet Secretary Koichi Kato on the Issue of the so-called 'Wartime Comfort Women' from the Korean Peninsula", 6 July 1992 (https://www.legal-tools.org/doc/cb2016-1/).

[73] See the Japanese text of the Supreme Court's ruling upholding the Tokyo High Court (https://www.legal-tools.org/doc/fec7d9/).

[74] Memory and Reconciliation in the Asia-Pacific, "Pusan Comfort Women and Women's Labor Corps Members", 25 December 1992, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/pusan.html, last accessed 2 April 2015.

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of sexual and ethnic discrimination, as well as a violation of human rights. The court further stressed that the Japanese government had failed to enact a law to fully compensate the victims, and that Japan had a responsibility to stop the suffering of the former comfort women from intensifying. The lawsuit was appealed to the Hiroshima High Court on 1 May 1998, claiming that the amount awarded was an insult to women "who were treated lower than human beings".[75] The High Court rejected the appeal on the ground that the Japanese Constitution did not clearly state the government's obligation to introduce a law on compensation, and stated that the abduction of the comfort women was not a serious violation. An appeal was brought to the Supreme Court on 12 April 2001, but was again rejected on 25 March 2003, stating that the plaintiffs had insisted on technical matters that should not constitute an appeal to the highest court. The Court also nullified the 1998 ruling which had ordered the government to compensate the plaintiffs.

The third lawsuit was filed by 18 former comfort women from the Philippines with the Tokyo District Court on 2 April 1993, to seek ¥ 360 million and to have the comfort women issue mentioned in school textbooks.[76] The lawsuit was dismissed by the District Court on the following grounds:[77]

1. The 1907 Hague Convention only defined compensation obligations "between States, and did not provide for individual victims the right to seek compensation from a State", and no international common law existed that would support the plaintiffs' demand.
2. Even if the conduct of the Japanese military constituted a crime against humanity as the plaintiffs claimed, that fact alone did not offer a legal basis for obligating the Japanese government to compensate the victims through a civil proceeding.
3. The right to make claims had already lapsed under Japanese law since the case was brought before the court more than 20 years after the end of the Second World War, exceeding the statute of limitation.

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[75] *Ibid.*

[76] Memory and Reconciliation in the Asia-Pacific, "Filipino Comfort Women", 2 April 1993, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/filipina.html, last accessed 3 April 2015.

[77] *Ibid.*

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4. Japan and the Philippines abandoned any claims for compensation from each other with Japan's payment of war reparations stipulated in the 1951 San Francisco Peace Treaty.

An appeal was made to the Tokyo High Court in December 2000, but was rejected on the same grounds. The case was finally closed after the failure to appeal to the Supreme Court of Japan.

On 3 April 1993, Song Shin-do filed a lawsuit with the Tokyo District Court against the Japanese government, seeking an official apology and ¥ 120 million (USD 1 million) in compensation.[78] The case was dismissed on the grounds that individuals had no right to seek damages for what a nation did to them, and further stated that Song's suffering could not be covered by the State Redress Law as she demanded, since the law was enacted in 1947 and thus did not cover what happened before that date.[79] An appeal was made to the Tokyo High Court but was dismissed, acknowledging Japan's legal responsibility had she sued years earlier. A further appeal made to the Supreme Court of Japan in December 2000 was also dismissed, stating that Japan had no legal obligation to pay reparations due to the expiration of the 20-year statute of limitation, which put an end to this case.

A fifth lawsuit was filed on 24 January 1994. The plaintiffs, consisting of eight Dutch citizens (seven men – one former prisoner of war and six civilians – and one former comfort women), filed a lawsuit with the Tokyo District Court demanding ¥ 2.45 million each (a total of USD 176,000) in compensation for being made into forced labour and tortured by Japanese soldiers in Indonesia, which was then under Dutch control.[80] The lawsuit stated that the Japanese Imperial Army's acts violated the Geneva Conventions of 1949, as well as other international agreements prohibiting the torture of prisoner of war ('POW') as well as women.[81] The court accepted the plaintiff's argument that they were ill-treated or

[78] Memory and Reconciliation in the Asia-Pacific, "Song Shin-Do", 3 April 1993, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/Song_Shin-do.html, last accessed on 3 April 2015.

[79] *Ibid*.

[80] Memory and Reconciliation in the Asia-Pacific, "Dutch POWs and Civilian Detainees (including former Dutch comfort woman)", 25 January 1995, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/Dutch.html, last accessed on 3 April 2015.

[81] *Ibid*.

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driven into forced labour but rejected the demands for compensation, arguing that: (1) individuals have no right to seek reparations under international law, and (2) the issue of compensation for former Dutch POWs and civilian internees had been settled under the San Francisco Peace Treaty in 1951 and a bilateral protocol in 1956. The case was appealed to the Tokyo High Court in December 1998, but was dismissed in 2001 upholding the District Court's ruling. A final appeal was made in October 2001 to the Supreme Court of Japan but was dismissed in March 2004.

Two consecutive lawsuits were filed by Chinese war victims before the Tokyo District Court on 7 August 1995, demanding ¥ 220 million and official apologies for the atrocities committed during the 1937–1945 Sino-Japanese War, which included germ warfare experiments, sexual slavery and the Nanjing Massacre in 1937.[82] The claim was dismissed with no factual findings, stating that an individual had no right to sue a country for compensation and that the reparations issue was resolved by the Sino-Japanese Joint Communiqué issued on 29 September 1972. Both lawsuits were rejected by the Tokyo High Court on the grounds that the Japanese government has no responsibility and the statute of limitation had expired.[83] The appeal to the Supreme Court was also dismissed on the grounds that the 1972 Joint Communiqué bars Chinese individuals from seeking compensation.

Another lawsuit was made by Chinese plaintiffs on 23 February 1996, seeking an apology and compensation of ¥ 20 million each.[84] In March 2002, the case was dismissed on the same "individuals have no right to demand compensation from the state" argument. An appeal was made in March 2005, but the High Court upheld the ruling of the District Court. The court further asserted that the sexual assault committed against them was not systematically conducted or authorised by the Japanese government.[85] The further appeal to the Supreme Court was again re-

[82] Memory and Reconciliation in the Asia-Pacific, "Chinese Comfort Women: (1st Group)", 7 August 1995, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/Chinese%20%281st%20group%29.html, last accessed on 3 April 2015.

[83] *Ibid.*

[84] Memory and Reconciliation in the Asia-Pacific, "Chinese Comfort Women (2nd group)", 23 February 1996, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/Chinese%20%282nd%20group%29.html, last accessed on 3 April 2015.

[85] *Ibid.*

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jected, suggesting that the issue of compensation could be settled outside the court.

On 30 October 1998, another lawsuit was filed before the Tokyo District Court by Chinese plaintiffs accusing the Japanese government of failing to provide compensation, seeking a total of ¥ 200 million in damages.[86] Unlike other lawsuits, the claim was based on the allegation of systematic rape conducted from 1941 to 1943, in which young women were abused, raped and abducted by Japanese soldiers. The District Court dismissed the claim based on the application of the law (no legal requirement to compensate victims and the expiration of the statute of limitation). Nevertheless, it called for a legislative and administrative settlement with the plaintiffs. An appeal was made to the High Court on 31 March 2005, which was rejected by upholding the ruling of the Tokyo District Court. The final appeal to the Supreme Court was also rejected in November 2005.

On 14 July 1999, nine Taiwanese comfort women filed a lawsuit with the Tokyo District Court seeking compensation of ¥ 10 million (USD 84,000) each and an official apology from the Japanese government.[87] The claim was supported by the Ministry of Foreign Affairs in Taiwan, providing evidence of the enforced sexual labour of 766 Taiwanese comfort women. The case was dismissed with no factual findings. A further appeal was made in October 2002 to the Tokyo High Court (during which two of the nine women had died), but was rejected in February 2004, arguing that there is no legal procedure for compensation stipulated under the Japanese Constitution and that a decision to redress would go beyond the reach of existing law.[88] The appeal to the Supreme Court was rejected in 2005.

[86] Memory and Reconciliation in the Asia-Pacific, "Women from Shan-xi Province, China", 30 October 1998, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/Shanxi.html, last accessed on 3 April 2015.

[87] Memory and Reconciliation in the Asia-Pacific, "Taiwanese Comfort Women", 14 July 1999, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/Taiwanese.html, last accessed on 3 April 2010.

[88] *Ibid*.

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The last lawsuit was made by eight former comfort women who come from indigenous minorities in Hainan Island in China.[89] The lawsuit was filed with the Tokyo District Court on 26 July 2001, demanding a total of ¥ 24 million in compensation and an official, published apology from the Japanese government for the women's deprivation of honour and continuous post-traumatic stress disorder due to their experiences as comfort women. The District Court admitted the fact that these women were kidnapped and forced to work as sex slaves, but further ruled that their legal right for seeking compensation had expired.[90] An appeal to the Tokyo High Court in 2007 was dismissed based on the previous rulings that Chinese individuals had no legal right to sue the Japanese government.

10.5. Facts behind and Reasons for Failure in Accountability

10.5.1. The Tokyo Trials

During the Tokyo Trials, the major problem encountered by the IMTFE was the lack of evidence to establish guilt. When the Japanese government accepted unconditional surrender on 15 August 1945, it ordered the destruction of evidence by burning and concealment of documents in order to exempt the Emperor from responsibility and to protect State officials from incrimination for war crimes and crimes against humanity.[91]

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[89] Memory and Reconciliation in the Asia-Pacific, "Hainan Island Comfort Women", 16 July 2001, available at http://www.gwu.edu/~memory/data/judicial/comfortwomen_japan/hainan.html, last accessed on 3 April 2015.

[90] *Ibid*.

[91] In an affidavit prepared for the tribunal, another expert, Professor Yoshida Yutaka, referred to the 1978 statements of Hirose Toyosaku, the Finance Minister at the time of surrender, in which he declared, "Immediately after the end of the war, I also burned documents according to the government policy. This is what we decided at a Cabinet meeting". According to Yoshida, Oyama Fumio, former Army lieutenant general in charge of legal affairs, confirmed in response to the Justice Ministry's post-war survey that documents were destroyed under a government order. Yoshida's affidavit also includes a 5 December 1960 public statement by Okuno Seisuke, a Home Ministry employee during the war. Participating in a Jichi University radio programme entitled "The Talk of the Days of Home Minister Yamazaki", Okuno Seisuke said that he had been ordered to destroy official documents related to the war at the end of the Second World War. Another expert, Professor Arai Shinichi, documented that just after the declaration of surrender, the General Staff Office, the Army Military and the Navy gave notice to all units to have confidential documents burned, and that the Ministry of Home Affairs burnt public documents. Cited in Women's Tribunal, 2001, para. 945, see *supra* note 3.

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The remaining documents have been classified and few have been declassified by either the Japanese government or the Allied Powers.[92] The Women's Tribunal found that the policy of incineration, as well as the concealment of documents, represents recognition by Japan itself of its wrongful acts.[93]

It has also been argued that the reason for the neglect in addressing the issue was the failure to identify the comfort women system as a separate type of crime, distinct from 'systematic rape'. The seriousness of rape itself was yet to be recognised. Although the crime was considered a violation of customs of war under the category of 'crimes against humanity' in the Tokyo Charter, it was only classified as a crime of 'other inhumane acts'.[94] Nevertheless, we cannot rule out the possibility that the failure was intentional. What might have caused the failure to prosecute is possible to assess by examining the practice of the IMTFE, Japan, the Allied Powers, and the politics linking them at the end of the Second World War.

The IMTFE is still considered controversial. Critics suggest that the Tribunal was merely the implementation of victor's justice, with the main objective of prosecuting high-ranking Japanese military leaders. This is evident from the fact that the Tribunal overlooked crimes committed by Allied forces, including the series of bombing of 67 Japanese cities (including Hiroshima and Nagasaki), and the rapes conducted by members of the Allied forces. Judges and prosecutors were also chosen from the nations that had suffered from Japanese military activity, not from Japan or neutral nations.[95] Judging from these circumstances, it may be assumed that the IMTFE's main ambition was to punish and execute Japanese political and military leaders *not* for the atrocities they committed against the people of Asia and the Pacific (crimes against humanity), but for waging a war against the white world, and for violating their colonial entitlements, properties and privileges in that region. The atrocities committed against the non-Allied nations were considered to be less important.[96]

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92 *Ibid.*, para. 90.

93 *Ibid.*, para. 946.

94 Nearey, 2001, p. 136, see *supra* note 38.

95 Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, NJ, 1971, p. 76.

96 Lisa Yoneyama, "Traveling Memories, Contagious Justice: Americanization of Japanese War Crimes at the End of the Post-Cold War", in *Journal of Asian American Studies*, 2003, vol. 6, no. 1, p. 65.

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Among the three categories of crimes, Class A (crimes against peace) were relevant for the top Japanese leaders, while Class B (war crimes) and Class C (crimes against humanity) could be charged against Japanese at any level, and only those individuals whose charges included crimes against peace were to be tried by the Tribunal.[97] It has also been argued that the anticipation of the imminent Cold War with the Soviet Union, which started soon after the Second World War, influenced the IMTFE immensely in its prosecutorial policies. The United States attempted to gain Japanese support in the Cold War by rehabilitating Japan as a robust pro-Western, anti-communist capitalist regime, and by exempting a number of central figures from the trial, including Kishi Nobusuke, a high-ranking military commander who was suspected of Class A crimes but was later released without trial.[98]

It has also been argued that the reluctance to address the issue of comfort women was caused by the fact that most victims came from non-Allied countries – some were countries whose political interests were ambiguously positioned between the enemy and the Allied Powers, such as Korea and Taiwan.[99] Furthermore, the comfort women mostly came from marginalised societies (poor, non-white, indigenous, uneducated and considered to be of lower class), which made their existence as human beings less visible and their interests not shared by the rest of the world. As Catherine MacKinnon has stated, "[w]hat happens to women is either too

[97] The verdict counts include: the overall conspiracy (count 1), waging war against China (count 27), against the United States (count 29), against the British Commonwealth (count 31), against the Netherlands (count 32), against France (count 33), against the Soviet Union at Lake Khassan (count 35), against the Soviet Union at Nomonhan (count 36), ordering, authorising or permitting atrocities (count 54), and disregard of duty to secure observance of and prevent breaches of Laws of War (count 55). Minear, 1971, pp. 21, 203, see *supra* note 95.

[98] Yoneyama, 2003, p. 66, see *supra* note 96.

[99] According to Utsumi Aiko, "There were twenty-three Koreans and twenty one Taiwanese among the 984 individuals who were executed for war crimes. And of the 3,419 people sentenced to life or limited imprisonment, 125 were Korean and 147 were Taiwanese". Aiko Utsumi, "Korean 'Imperial Soldiers': Remembering Colonialism and Crimes against Allied POWs", in T. Fujitani, Geoffrey M. White and Lisa Yoneyama (eds.), *Perilous Memories: The Asia-Pacific War(s)*, Duke University Press, Durham, NC, 2001, p. 211. During the post-war occupation, the US adjudicated, imprisoned and executed more than 300 Taiwanese and Korean former POW guards. The occupation forces also continued to utilise the Chinese forced labour formerly mobilised by the Mitsubishi Mining Industry at the Miuta coalmines in Hokkaido, instead of treating them formally as POWs who needed to be protected and repatriated. Yoneyama, 2003, p. 78, see *supra* note 99.

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particular to be universal or too universal to be particular, meaning either too human to be female or too female to be human".[100]

Another possible reason is evident by observing two of the main issues that the IMTFE failed to prosecute: (1) the comfort women, and (2) Unit 731 biological experimentation. The two crimes reflected the United States' own violations of international law during the Second World War, and it was in the interests of the US to prevent the scrutiny of the image of the 'good war' and 'victor's justice'. Unit 731 may be considered one of the most serious war crimes committed by the Japanese Imperial Army during the second Sino-Japanese War and Second World War.[101] Despite the silence of the IMTFE regarding Unit 731, there had been indications that by the time of the Tokyo Trials the US occupying forces knew of the existence of the Japanese biological warfare experiments. Nevertheless, by the time the Tribunal had concluded its work, not a single perpetrator from Unit 731 had been indicted.[102] On the contrary, evidence suggests that the US military had secretly granted immunity to former Unit 731 members in exchange for their research data on bacteriological warfare, including information on human experiments.[103] The US government felt the necessity to secure the data for two reasons: (1) human experimenta-

[100] Catherine A. MacKinnon, "Crimes of War, Crimes of Peace", in *UCLA Women's Law Journal*, 1993, vol. 4, pp. 59, 65.

[101] Unit 731 is also known as the Japanese "Factory of Death". The victims – primarily Chinese – were infected with various pathogenic bacteria (including bubonic plague, anthrax, cholera, typhus, smallpox, tuberculosis and other diseases). Some victims had vivisections performed on them. Those who did not die from the infections were no longer "viable experimental material" and were killed, and their bodies burned in crematoria. Field trials of delivery mechanisms (bombs, aerial spraying, poisoning of water and animals) were conducted on Chinese villages and cities. In Nanjing, during the two-month slaughter and rape-fest of 1937–1938, Chinese POWs were given dumplings laced with typhus and released to spread the disease, while children were given chocolate infected with anthrax. In border skirmishes with Soviet troops, pathogens were spread to thousands of Red Army soldiers. Around 30,000 to 50,000 people are estimated to have been killed from the experiments alone in the biological warfare bases, while victims of the open-air field trials reached six figures. The human suffering was incalculable. Phil Shannon, "Why the US Let Japanese War Criminals Go Free", in *Green Left Online*, 28 August 2002, available at https://www.greenleft.org.au/node/26840, last accessed on 15 April 2015.

[102] *Ibid*.

[103] Kyodo News, "Occupation Censored Unit 731 ex-Members' Mail: Secret Paper", in *The Japan Times*, 10 February 2010, available at http://www.japantimes.co.jp/news/2010/02/10/national/occupation-censored-unit-731-ex-members-mail-secret-paper/#.VSZVc2a4luU, last accessed on 12 April 2015.

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tion would be impossible to conduct inside the US, and (2) the research had to be secured from reaching the Soviet Union.[104]

US biological weapons research had been conducted since 1943 with government funding of USD 60 million.[105] The programme was expanded during the Korean War (1950−1953) following the arms race with the Soviet Union, and former members of Unit 731 (which at that time had been dissolved) were invited to join the programme. Dr. Shiro Ishii, who had led Unit 731, was invited to Maryland to advise on bio-weapon projects, while other former members were employed with the payment of somewhere between ¥150,000 to ¥200,000 (equivalent to about ¥20 million [USD 2.37 million] to ¥40 million today).[106] Some leading doctors and scientists returned to Japan, changed their identities and began new lives, and some rose once again to influential positions in the medical sciences.[107]

The same argument may be applied in the case of comfort women. Evidence suggests that even before the establishment of the IMTFE, US occupation forces had been aware of the existence of the systematic sexual slavery conducted by the Japanese military. This was evident in a report entitled "Amenities in the Japanese Armed Forces" prepared in February 1945 by the Allied Translator and Interpreter Service, which gives detailed explanations regarding the comfort women system, including the management, operation and regulations of the system.[108] Despite US

[104] Anita McNaught, "Unit 731: Japan's Biological Force", in BBC News, 1 February 2002, available at http://news.bbc.co.uk/2/hi/programmes/correspondent/1796044.stm, last accessed on 12 April 2015.

[105] Shannon, "Why the US let Japanese war criminals go free", see *supra* note 101.

[106] See Richard Drayton, "An Ethical Blank Cheque" in *The Guardian*, 10 May 2005, available at http://www.theguardian.com/politics/2005/may/10/foreignpolicy.usa, last accessed on 12 April 2015; and Kyodo News, "US Paid for Japanese Human Germ Warfare Data", in *ABC News*, 15 August 2005, available at http://www.abc.net.au/news/2005-08-15/us-paid-for-japanese-human-germ-warfare-data/2080618, last accessed on 12 April 2015.

[107] Franziska Seraphim, *War Memory and Social Politics in Japan, 1945–2005*, Harvard University Press, Cambridge, MA, 2006, p. 290.

[108] A comfort women interrogation report was also made around the same period by a US psychological warfare team, entitled "Psychological Warfare: Interrogation Bulletin No. 2" under the sub-section "A Japanese Army Brothel in the Forward Area", to gather information concerning the psychological conditions of Japanese soldiers in the battlefield. The team also indicated the violation to the comfort women and the deception method of procurement by the Japanese forces in its Interrogation Report No. 49. Other reports, data and images referring to the awareness of the existence of the comfort women prior to the Tokyo Tribunal were also found at the US National Archives, the National Archives of the

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knowledge of the existence of the comfort system, the fact that it was overlooked indicates that the Tokyo Tribunal had decided to ignore the issue. The reason for this may have been the fact that the US Army itself approved of and used comfort women during their occupation of Japan. Records suggest that numerous comfort stations were established for US soldiers by order of the office of Japan's Ministry of Home Affairs following Japan's official surrender on 18 August 1945, administered by the Japanese Kempeitai (which had been in charge of forced prostitution during the war) and the Recreation and Amusement Association ('RAA') using Japanese government funds.[109] The Japanese government argued that the establishment was necessary to protect 'good' and 'respected' Japanese women from the possibility of "mass rape" by the occupation forces (in reaction to those committed by Japanese troops during the war).[110] Based on this, a massive number of comfort women from the Philippines, Korea, China and Japan were gathered together and shipped to comfort stations even after the war had ended.[111]

Although mass rape and murder did not occur as feared, rapes and other atrocities by US soldiers were rampant from the first day of the occupation.[112] The moment the occupying forces landed, the comfort stations were flooded with soldiers, which forced the RAA to recruit new women to fill the demand.[113] The comfort system for the American forces was based on the previous Japanese comfort stations, and the only difference was the fact that post-war Japanese comfort women were paid prop-

UK in London and the Australian War Memorial. Tanaka, 2002, pp. 84-87, see *supra* note 7.

[109] Lys Anzia, "Trafficking is A Long Standing Crime", in *Women News Network*, 29 September 2007, available at http://womennewsnetwork.net/2007/09/29/trqafficking-a-long-standing-crime-us-troop-use-of-japans-trafficked-women-1945/, last accessed on 12 April 2015.

[110] Tanaka, 2002, p. 133, see *supra* note 7.

[111] Anzia, 2007, see *supra* note 109.

[112] According to reports compiled by the Police and Security Bureau of the Ministry of Home Affairs on the assaults by Allied soldiers against Japanese civilians in Kanagawa prefecture: on 30 August 1945, two rape cases were reported together with one case of kidnapping, one case of bodily harm, one act of violence and 197 cases of extortion. On 31 August 1945, one rape case and 212 cases of extortion were reported. On 1 September 1945, 12 rape cases, one case of bodily harm and 75 extortion cases were reported. Almost every day from 30 August until mid-September 1945, rape, bodily harm, extortion, burglary and murder were reported. Tanaka, 2002, p. 116, see *supra* note 7.

[113] Anzia, 2007, see *supra* note 109.

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erly.[114] Like its predecessor, abuses and violence were not uncommon in the comfort stations. Ironically, even with the establishment of the comfort stations, rape and violence by the occupying forces remained out of control.[115] The military brothels serviced the US soldiers for almost a year, and were closed in the spring of 1946 by General Douglas MacArthur as Japan began its attempt to resurrect itself from its three million dead and nine million homeless.[116] In conclusion, the cases of comfort women and Unit 731 have one main similarity which arguably triggered the failure to prosecute: both cases involved Allied forces.

10.5.2. Impact of Peace Treaties and Reparations Agreements

Outside the context of the IMTFE, there seem to be two main obstacles for almost all comfort women litigation before Japanese domestic courts: (1) the peace treaties and reparations agreements which prohibited any claims of war victims for reparations, and (2) the rights of individual to raise claims under international law.

The Treaty of San Francisco signed by 48 countries on 8 September 1951 marked the formal end of the Second World War. Despite its significance in bringing peace to the entire Asia-Pacific region, analysis shows that most Asian countries victimised by Japan resisted the process and the terms of this treaty.[117] The treaty was criticised as extremely generous, as it did not exact heavy reparations nor impose any post-treaty supervision over Japan, and yet its implementation has been aggressively defended by both the US and Japanese governments.[118] The formulation of the treaty was also dominated mainly by the US government, including

[114] Tanaka, 2002, p. 147, see *supra* note 7.

[115] *Ibid.*, pp. 116–32.

[116] Anzia, 2007, see *supra* note 109.

[117] Neither the People's Republic of China nor the Republic of China (Taiwan) were invited to the peace conference, and neither were North and South Korea; India and Burma refused to participate; Indonesia signed but never ratified the treaty; while Philippines, though present, neither signed nor ratified the treaty until 1956. Global Alliance for Preserving the History of WW II in Asia, "Peace Treaties and Negotiations: San Francisco Peace Treaty", 2001, available http://www.global-alliance.net/SFPT.html, last accessed on 12 April 2015.

[118] John Price, "A Just Peace? The 1951 San Francisco Peace Treaty in Historical Perspective", in *Japan Policy Research Institute Working Paper*, no. 78, June 2001, available at http://www.jpri.org/publications/workingpapers/wp78.html, last accessed on 12 April 2015.

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the clauses related to war reparations and victims' claims. The Chinese government criticised this as a violation of the Potsdam Agreement between the United States, the United Kingdom and the Soviet Union for the military occupation and reconstruction of Germany, which stated that "[t]he 'Preparatory work of the Peace Settlements' should be undertaken by those States which were signatories to the terms of surrender imposed upon the Enemy State concerned". While excluding the countries that suffered the most damage during the Japanese occupation in the Asia-Pacific, the US government monopolised the formulation of the Treaty of San Francisco and relieved Japan from full war reparations, arguing that full reparations would harm Japan's economy and create a breeding ground for communism.[119]

Article 14(a) of the Treaty of San Francisco stipulates that the Japanese economy was not "presently" capable of bearing the full responsibility for war reparations. It can be argued that the damage suffered by the Japanese economy merely delayed the imposition of complete reparations, but did not permanently waive it. In fact, Japan paid war compensation to Allied POWs of a total amount of GBP 4.5 million through the International Committee of the Red Cross, but the funds were suspected to have originated from contributions of the US, British and Dutch governments during the final year of the war and not from Japan itself.[120] The funds were claimed to be unspent Allied relief money, which, under terms of Article 16 of the Treaty of San Francisco, was turned over for redistribution to the 14 Allied nations (that were signatories to the treaty), and whose citizens had suffered in Japanese captivity.[121] In the case of POWs, each was paid GBP 76 in 1952, which was said to represent the average wage of a Japanese male for 12 months at the end of the Second World War, but it would have represented only about 11 to 12 weeks' pay for an adult British male at the time.[122]

Examples have to be derived from the case of POWs since the comfort women did not publicly exist during the payment period. The comfort

[119] *Ibid*.

[120] Linda Goetz Holmes, "Compensation to Allied POWs", in *The Japan Times*, Letter, 22 February 2009, available at http://www.japantimes.co.jp/opinion/2009/02/22/reader-mail/compensation-to-allied-pows/#.VUYxr5Msrnh, last accessed on 12 April 2015.

[121] *Ibid*.

[122] Royal British Legion, "Background Briefing for Parliamentarians on the Claim for a Special Gratuity for Former Far East Prisoners of War (FEPOWS)", 1999.

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women started to reveal their existence in the 1990s when all issues of compensation had been settled. It can be concluded that, unlike other war victims, comfort women were not eligible for compensation under any of the peace treaties that were mostly concluded in the 1950s. In fact, the failure of the IMTFE to recognise the comfort women system as a crime shows that the comfort women were not viewed as victims of Japanese war atrocities. The calculation of damages and reparations during the formulation of the peace treaties arguably included only the victims and their families who could be identified by the time of the settlement, and this did not include comfort women. It can therefore be argued that these treaties are inapplicable to the comfort women, who still have the right to pursue compensation. Countering Japan's traditional argument on the execution of the peace treaties, the UN Human Rights Sub-Commission has stated that

> the rights and obligation of States and individuals with respect to the violations referred to in the present resolution cannot, as a matter of international law, be extinguished by peace treaty, peace agreement, amnesty or by any other means.[123]

The peace treaties themselves, therefore, are no obstacle for individuals and States (especially to comfort women) to exercise their rights to seek compensation. This argument should include those who have not received any compensation for their suffering, and those who have received too small an amount.

The second issue is that of individual rights to raise claims against foreign States. Most lawsuits regarding comfort women have indeed been fought only by individuals without the help of their governments, with the exception of the Taiwanese case in 1999. In lawsuits that concern Japanese war atrocities − not only comfort women − most governments refused to provide support in the litigation processes. This includes the US, British, Indonesian, Chinese and South Korean governments − the States with the biggest concentrations of Japanese war victims − specifically when the issue concerns the individual rights to raise a claim for wartime atrocities against a foreign government.

[123] Sub-Commission on the Promotion and Protection of Human Rights, 1999, para. 13, see *supra* note 65.

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10.5.3. States' Reluctance to Support International Lawsuits

In the United States, the California Code of Civil Procedure §354.6[124] allows any forced labour victim or their heir to bring an action against the entity for whom the labour was performed. Despite this, most cases in the United States[125] regarding forced labour victims and POWs of the Second World War have been dismissed on various grounds.[126] The British gov-

[124] The code had originally authorised those who were formerly victimised by Nazi persecution and forced labour, as well as their descendants, to bring lawsuits to demand compensation from companies and other organisations that had benefited from such forms of labour exploitation between 1929 and 1945. The amendment expands the category of the "Second World War slave labour victim" to "any person taken from a concentration camp of ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labour without pay for any period of time between 1929 and 1945, by the Nazi regime, *its allies and sympathisers, or enterprises* transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers". Yoneyama, 2003, p. 65, emphasis added, see *supra* note 96.

[125] There were approximately 27,000 American POWs and 14,000 civilian internees captured and interned by Japan during the Second World War. Gary K. Reynolds, "U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan", CRS Report for Congress, 27 July 2001, available at http://fas.org/man/crs/RL30606.pdf, last accessed on 12 April 2015.

[126] On 21 September 2000, all cases filed by former Allied POWs in US courts were dismissed on the grounds that the plaintiffs' claims were barred by the Peace Treaty of 1951. On 19 September 2001, a US court ruled that other cases of victims whose countries were not signatories to the Peace Treaty of 1951 should also be dismissed on the following grounds: (1) for the Philippine victims, victims were barred by the 1956 bilateral agreement between Japan and the Philippines; (2) for Chinese and Korean victims, the California statute was unconstitutional since it "infringes on the federal government's exclusive power over foreign affairs". One claim succeeded in reaching the Superior Court in 2001 (see *Jae Won Jeong v. Onoda Cement Co. Ltd, et al.*, Superior Court of the State of California for the County of Los Angeles, Case No. BC 217805) for which Judge Lichtman ruled that the 1951 Peace Treaty did not and does not bar the claims of the plaintiff, a naturalised Korean American, because he was not a citizen of the United States at the time that the Peace Treaty was signed. He also rejected other arguments that the claim intruded upon the foreign relations powers of the federal government that federal law pre-empted the plaintiffs' claims. (The ruling by federal court judge Walker five days later upholding these arguments does not bind state cases.) In the case of *Hwang Geum Joo, et al. v. Japan* (United States District Court for the District of Columbia, Case No. 00-CV-2233), both the US and Japanese governments argued that the government of Japan is immune from the jurisdiction of the US court (the issue of sovereign immunity). Kinue Tokudome, "POW Forced Labor Lawsuits against Japanese Companies", in *Japan Policy Research Institute Working Paper*, no. 82, November 2001, available at http://www.jpri.org/publications/workingpapers/wp82.html, last accessed on 12 April 2015.

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ernment similarly shows an unwillingness in supporting any claims by former British POWs.[127]

In 1996 the Indonesian government cited two 1958 treaties, "the adverse social effects of massive compensation windfalls to individuals, a preference for compensation that benefits the whole community and the feelings of the people", as reasons for not helping comfort women plaintiffs; there was still much appreciation for Japanese soldiers who fought alongside Indonesians in the war against the Dutch after 1945.[128] The government represented by the Minister of Social Affairs, Endang Suweno, announced on 14 November 1996:

> For the people of Indonesia, the comfort women issue represents a dark, unforgettable side of their history, and it is important that every effort be made to learn from this lesson to prevent such an occurrence from ever happening again. The Government empathizes with the endless psychological and physical trauma and pain of the women who were victims of violence. However, the Government, representing a people imbued with the Panchasila philosophy, does not intend to introduce measures or policies strongly colored by emotion, and will work hard to protect the honor of women who were victimized and their families. The Government of Indonesia is of the understanding that the question of war reparations, material restitution and the right to claim from the Japanese Government was settled by two accords signed in 1958 − the Treaty of Peace Between Japan and the Republic of Indone-

[127] In October 2008 the British government decided not to bring charges against Japanese commanders for the massacre of around 548 British and Dutch POWs who were machine-gunned in November 1943, even though there was sufficient evidence to charge the three perpetrators of the incident. The POWs were machine-gunned when the *Suez Maru* transporting them was sunk by an American torpedo attack in the Flores Sea off Indonesia. Senior politicians in Britain had debated the issue in 1949 and concluded that it was best not to pursue any charges, considering that the German war trials were finishing and around 700 war criminals had been executed in the Tokyo Trials. See Kyodo, "Britain Covered Up Japan Massacre of POWs: BBC", in *The Japan Times*, 17 October 2008, available at http://www.japantimes.co.jp/news/2008/10/17/national/history/britain-covered-up-japan-massacre-of-pows-bbc/#.VSaFpGa4k3g, last accessed on 12 April 2015. See Jon Swaine "Japanese Massacre of British PoWs Was 'Covered Up'", in *The Telegraph*, 18 September 2008, available at http://www.telegraph.co.uk/news/uknews/2983447/Japanese-massacre-of-British-PoWs-was-covered-up.html, last accessed on 12 April 2015.

[128] Philip A. Seaton, *Japan's Contested War Memories: The 'Memory Rifts' in Historical Consciousness of World War II*, Routledge, London, 2007, p. 69.

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> sia, and the Reparations Agreement Between Japan and the Republic of Indonesia. In Indonesia, the Asian Women's Fund should promote projects and assistance programs related to the comfort women issue through the Indonesian Government (primarily through the Department of Social Affairs), not through any other organization or individual.[129]

Despite intense pressure against the Japanese government, the Chinese government has also been silent regarding the issue of individual complaints, neither helping nor blocking them.[130] In the case of South Korea, the rights of both "the State and its people" to seek additional redress were waived in 1965,[131] but since August 2005 the State has started pressing the Japanese government over "legal responsibility". Viewing the governments' standing towards the issue of individual complaints, it can be concluded that they have no interest in addressing this issue. Two possible reasons for this lack of interest are: (1) they deem they are bound by the Peace Treaty of 1951 and therefore *unable* to act, or (2) they are *unwilling* to act.

Several reasons can be presented regarding this unwillingness on the part of States. First, thousands of war victims seeking compensation individually would place tremendous burdens on global legal systems to verify the facts of each case, and to try, dispense justice and accommodate appeals procedures.[132] Compensation may be considered as more practical at the State level, but at the same time they will encounter the problem of effectiveness, as compensation may not reach each and every victim.[133]

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[129] Digital Museum, "The Comfort Women Issue and the Asian Women's Fund: Projects by country or region – Indonesia", available at http://www.awf.or.jp/e3/indonesia-00.html, last accessed on 12 April 2015.

[130] Seaton, 2007, p. 69, see *supra* note 128.

[131] Hiroshi Tanaka, "Nihon no sengo hoshō to rekishi ninshiki", in Awaya Kentaro (ed.), *Sensō sekinin, sengo sekinin: Nihon to Doitsu wa dō chigau ka*, Asahi Shinbunsha, Tokyo, 1994, p. 59.

[132] Seaton, 2007, p. 69, see *supra* note 128.

[133] Indonesia signed a memorandum of understanding with the Asian Women's Fund on 25 25 March 1997, which handed over a total of ¥ 380 million Japanese (about USD 2.8 million) collected from donors to establish houses in the places where there were reported concentrations of former comfort women. "Indonesian Assembly Chairman Seeks Solution to Comfort Women Issue", in *People's Daily*, 14 February 2002, available at http://en.people.cn/200202/14/eng20020214_90439.shtml, last accessed on 12 April 2015. In 2002 a visiting delegation of the Japanese Parliamentary Diet found that no one in the Japan-funded facilities for the elderly seemed to have been a comfort woman. The Indone-

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The second argument is related to the issue of human rights versus State rights. States with active militaries (such as the US, United Kingdom, Indonesia and China) have much to fear if legal precedents are set for States to be considered liable for conventional war crimes committed by their armed forces in lawsuits brought by non-national individual plaintiffs.[134] It can be assumed that States choose to take a passive stance as any success in raising individual claims for war atrocities may make liable those States whose armed forces are more exposed to the risk of committing atrocities during armed conflict.

The last argument is related to the fact that Japan has successfully established a significant presence on the world stage through its Official Development Assistance ('ODA') projects and donations to international organisations, including the United Nations.[135] Within just three decades since the end of the war, Japan had managed to position itself side-by-side with the United States as one of the top three largest global donors. Between 1991 and 2000, Japan became the largest ODA donor with 24.8 per cent of the world share. Since Japan is frequently also one of the most important trading partners for other States, these States cannot afford to take a confrontational stance. Despite the declared objectives of promoting the economic development and welfare of recipient countries, the amount of assistance that is provided as grant aid is incomparable to the amount of loans that have to be repaid, which at some point creates a tremendous amount of debt for the recipient countries. Among the highest Japanese ODA loan recipients are China and Indonesia.

10.5.4. Japan's Lack of Will to Acknowledge Accountability

Despite a series of public apologies, the Japanese government still refuses to fully acknowledge its war responsibilities. The apologies delivered have been criticised as spoken merely on behalf of the individual and

sian survivors have received neither any form of redress nor the Prime Minister's "letter of apology". See "An NGO Shadow Report to CEDAW. Japan: The 'Comfort Women' Issue", 44th Session, 2009, New York, p. 3, available at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/ComfortWomen_Japan_cedaw44.pdf, last accessed on 12 April 2015.

[134] Seaton, 2007, p. 70, see *supra* note 128.

[135] *Ibid.*, p. 69.

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failed to represent the government as a whole.[136] The statement of guilt and apology by Kono in 1993 was also criticised by the Women's Tribunal as including unacceptable euphemisms, which failed to recognise the gravity of the crime:

> By acknowledging only that the "comfort women" lived under a "coercive atmosphere," the statement conceals the direct and utter brutality to which the Japanese military knowingly and intentionally subjected the "comfort women" as an integral part of its war effort. Furthermore, by stating that the women "lived in misery" and suffered "injury to their honour and dignity," the government avoided admitting that they were raped repeatedly and subjects of a system of sexual slavery.[137]

The apologies have also been nullified by various actions that are considered offensive to the dignity and memory of the victims of atrocities, such as the visits by the heads of government to the Yasukuni and other war memorial shrines.[138] The Asian Women's Fund, which was claimed as representing the Japanese people's "feelings of apology and remorse", was also controversial due to the unofficial nature of the funding which came from Japanese public donations and not government expenditure.[139] In fact, until its termination in March 2007, there was no actual reparation, acknowledgement of legal liability nor any prosecutions that provided justice for the comfort women. Even today, the issue of war memory is still considered sensitive, both inside and outside Japan.

Japanese failures to prosecute and provide reparations are arguably due to its lack of willingness to address past atrocities. Since its formal

[136] "Japan's Mass Rape and Sexual Enslavement of Women and Girls from 1932–1945: The 'Comfort Women' System", 2 July 2001.

[137] Women's Tribunal, 2001, para. 964, see *supra* note 3.

[138] For a chronological record of shrine visits and political statements by members of the Japanese government up to 2005, see Appendix 1.

[139] Critics suggested that by shifting the responsibility to the public, the Japanese government has been able to maintain its position of not paying out even one yen in reparations, which also leaves the government free to emphasise in private that while it does have some "moral responsibility" to former comfort women, the brunt of that responsibility rests with private citizens. See Yoshiaki, 2000, p. 24, *supra* note 3. The Women's Tribunal argued: "Privately raised funds cannot be used in lieu of official compensation in satisfaction of the state's obligation, particularly where there has been for decades no financial barrier to the state's ability to provide the compensation from the public fisc". Women's Tribunal, 2001, para. 987, see *supra* note 3.

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enrolment in the UN in 1956, Japan has participated actively in its social and economic activities. By 1990 its contribution reached approximately 11 per cent of the regular UN budget, second only to the United States which contributed 25 per cent.[140] In 2006 Japan's contribution to the UN budget reached 19.5 per cent, making its presence very influential in UN decision-making, to the extent that Japan was said to deserve a permanent seat on the Security Council.[141] Additionally, Japan is the main contributor to Cambodia's rehabilitation and reconstruction since the high-profile UN Transitional Authority (UNTAC) mission and election in 1993, providing some USD 1.2 billion in total ODA since 1992, and remains Cambodia's top donor.[142] Japan spent USD 4.17 million on the UN-supported Extraordinary Chambers in the Courts of Cambodia, making it the biggest donor to the tribunal.[143] Compared to the budget that has been allocated to its participation in international politics, any reasonable assessment of the amounts demanded for reparations by former victims of Japanese war crimes would not have any significant impact on the country's economy. Japan has the capacity to provide a substantial amount of reparations for former victims, as well as a functioning judicial system in which to conduct prosecutions. If so, what may have caused the reluctance to conduct prosecutions and provide reparations?

The main problem is presumably rooted in the Japanese people's perception of the Second World War, especially memories of the defeat, which contradicts those of other countries, in particular those victimised by Japan during the war. The national bias, which arguably emerged from the government's effort to create an image of a 'peace-loving nation'

[140] Marjorie Ann Browne and Luisa Blanchfield, "United Nations Regular Budget Contributions: Members Compared, 1990–2010", Congressional Research Service, 15 January 2013, RL30605, p. 3, available at https://www.fas.org/sgp/crs/row/RL30605.pdf, last accessed on 10 April 2015.

[141] Philip Sherwell, "U.N. Budget Crisis Looms after Third World Veto", in *The Standard*, 1 May 2006, available at http://www.thestandard.com.hk/archive_news_detail.asp? pp_cat =17&art_id=17703&sid=7749159&con_type=1&archive_d_str=20060501, last accessed on 10 April 2015.

[142] Gordon Jones, "Inside Out: Business in Cambodia", in Japan Inc, 31 August 2008, available at http://www.japaninc.com/mgz_september_2008_business-in-cambodia, last accessed on 10 April 2015.

[143] Sopheng Cheang, "Japan Donates $4 million to Khmer Rouge Genocide Tribunal to Pay Cambodian Staff", in *The Gaea Times*, 1 May 2009, available at http://news.gaeatimes.com/japan-donates-4-million-to-khmer-rouge-genocide-tribunal-to-pay-cambodian-staff-47037/, last accessed on 10 April 2015.

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through the reconstruction of history, may be considered as crucial in maintaining Japanese patriotism and national pride, as well as preventing feelings of guilt and shame by the old generation of Japanese to be passed down. The complications of Japanese war narratives can be observed in three controversial issues: (1) the Yasukuni Shrine visits, (2) history textbooks, and (3) the comfort women issue.

The Yasukuni Shrine was built in 1869 for those who fought and died for Japan. The memorial currently enshrines more than 2,446,000 people who sacrificed their lives for the nation.[144] Among these are the 1,068 individuals who were sentenced and executed by the IMTFE, including Prime Minister Tojo Hideki and another 13 Class A war criminals.[145] For the Japanese, the shrine visits by prime ministers and members of the Japanese parliament are considered acts of commemoration, showing appreciation and paying respects. On the other hand, other nations – specifically those countries that suffered Japanese invasion – consider this as an act of glorification of the war, disrespect of the victims of atrocities and a refusal to bear responsibility for the war. This is where the first contradictory perception arguably lies. The individuals, who were labelled war criminals, are Japanese national heroes, the pride of Japan, who sacrificed themselves for the Emperor and the nation, and their executions are not considered a punishment but a sacrifice. Many Japanese today still refuse to admit past wrongs and quite a few actually believe that the executed war criminals were victimised by the Allied's 'victor's justice'. A published pamphlet of the Yasukuni Shrine notes:

> War is a really tragic thing to happen, but it was necessary in order for us to protect the independence of Japan and to prosper together with Asian neighbours. […] Some 1,068 people, who were wrongly accused as war criminals by the Allied court, were enshrined here.[146]

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[144] The number includes both soldiers and victims from the Sino-Japanese War, Russo-Japanese War, First World War, the Manchurian Incident, the China Incident and the Second World War. Yasukuni Shrine, "History", available at http://www.yasukuni.or.jp/english/about/index.html, last accessed on 12 April 2015.

[145] Japan Guide, "Yasukuni Shrine", available at http://www.japan-guide.com/e/e2321.html, last accessed on 12 April 2015.

[146] "Where War Criminals Are Venerated", in CNN, 14 January 2003, available at http://edition.cnn.com/2001/WORLD/asiapcf/east/08/13/japan.shrine/ last accessed on 12 April 2015.

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The views that the IMTFE was a mere exercise of 'victor's justice' and that war responsibility is a consequence of defeat are contentious. The argument may have emerged from two anomalies: (1) the fact that the IMTFE addressed none of the Allies' war atrocities, and (2) the US itself has not delivered any apology for dropping atomic bombs on Hiroshima and Nagasaki.

The second contradiction arguably lies at the heart of the narratives of the Second World War. This is evident from observing the post-war development of Japanese history textbooks, in which many facts have been revised and war-related words have been euphemised.[147] Japanese history textbooks have emphasised the cruelty of war and a 'victim consciousness' by teaching about the tragedy experienced by Japanese war victims, centred on Hiroshima and Nagasaki. The dropping of the atomic bombs has been considered the embodiment of the victimisation of the Japanese people as the world's only atomic bomb victims.[148] The 'victim consciousness' itself may have originated from the argument that war acts were conducted by the government officials and high-ranking military leaders, and the Japanese people should not be subject to collective responsibility for acts they did not commit nor had knowledge of – Japanese people should not be guilty for merely being *Japanese*.

Records from Japanese wartime newspapers suggest that during the war period most Japanese remaining in the country were not well informed about the actual situation in the battlefield. Most domestic media

[147] The most notable history textbook controversy was the 32-year Ienaga Textbook Authorisation Suits (1965–1997) in which the plaintiff, Professor Ienaga Saburō from the Tokyo University of Education, sued the government, claiming the textbook authorisation system to be "unconstitutional and illegal". The plaintiff claimed that the screeners tried to minimise the cruelty of war and the importance of anti-military demonstrations. The changes requested included the following original passage: "Okinawa prefecture became the battlefield of the ground war, and about 160,000 residents, old and young, men and women died violently in the war. Among them there were quite a few people who were killed by the Japanese Army", to be rendered as: "About 160,000 [Okinawa] residents died naturally by bombs and mass suicide. Among them there were quite a few people who were killed by the Japanese Army". Another controversy arose in 1982, when a major Japanese newspaper announced that a new high school textbook had changed Japan's "invasion" (*shinryaku)* of China during 1930s into "advance" (*shinkō*). The action triggered international attention to the Japanese textbook authorisation system and the issue of war narratives. Miki Y. Ishikida, *Toward Peace: War Responsibility, Postwar Compensation, and Peace Movements and Education in Japan*, iUniverse, Lincoln, NE, 2005.

[148] *Ibid*.

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reporting during the war was dedicated to creating the image of a 'good war': Japan's holy mission to liberate Asian countries, the heroic actions of the troops in the battlefield, the evil US and British armies and Japanese war victims; neither atrocities nor invasions by the Japanese military were included.[149] The only realities that the people knew and experienced were when the Allies attacked Japanese territory, which reached its climax with the use of atomic bombs on Hiroshima and Nagasaki. It should also be noted that while the Japanese defeat meant celebration for many countries, for the Japanese this marked the beginning of occupation and war devastation. The defeat caused deep frustration and embarrassment among the people as the population had exhausted all their resources to support the government's war and the deaths of their countrymen became meaningless. It can be argued that the defeat of the Imperial Army undermined the people's sense of nationalism, as those who gave their utmost effort to support the war without being informed about the realities of the war were forced to bear the collective responsibility of the entire nation for the crimes committed by the government and high-ranking military officers. The reconstruction of the war narratives may therefore be considered crucial to maintaining the Japanese sense of nationalism and patriotism, and to avoiding the imposition of guilt on younger Japanese.

The third contradiction lies in the issue of the comfort women. Japanese war responsibility, which was criticised as the international bias of 'victor's justice', had arguably started to fade after nearly six decades since the end of the war.[150] The comfort women (as well as other war victims) may have been the only remaining fragments of the war memories that are still able to redirect history. It should be remembered that it was the testimonies of the comfort women in 1990 that forced Japan to admit its mistakes. Documents and evidence may have been destroyed, but the comfort women are living witnesses whose testimonies are undeniable

[149] David C. Earhart, *Certain Victory: Images of World War II in the Japanese Media*, M.E. Sharpe, New York, 2008, pp. 215–459.

[150] A survey conducted in 2001 by a leading television company regarding public opinion on the official government visits to Yasukuni Shrine revealed that 68 per cent of people who were in their twenties considered that there was nothing wrong in paying homage to the war dead, while 46 per cent of people in their sixties and above were against it. Suvendrini Kakuchi, "Japan: Worship of War Dead Rekindles Brutal Memories", in IPS News, 16 August 2004, available at http://www.ipsnews.net/2004/08/japan-worship-of-war-dead-rekindles-brutal-memories-2/, last accessed on 12 April 2015.

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references to Japan's past atrocities. By conducting prosecutions, delivering formal apologies and paying real reparations, Japan may consider itself as admitting its past atrocities and accepting its war responsibilities. The Japanese government may have feared that the continuous demands and pressures of the comfort women would damage the nation's sense of nationalism and pride, subjecting the country to international scrutiny, as well as challenging its desired self-image as a peace-loving nation. The comfort women's success in litigation might result in the following scenarios: a revision of all Japanese history textbooks; domestic and international media reporting of the comfort women issue and other past atrocities; further research that might reveal other long-forgotten atrocities; and a flood of war victims seeking reparations. Japan's efforts to mend its history for the sake of its future generations will also be in vain as the younger generation Japanese will continue to bear the guilt and shame of the war, and there will be no peace for national heroes.

From this, it can be concluded that Japan has shown no interest in addressing its past atrocities, either to prosecute or to provide reparations. The self-defined interests of the State can be said to have overridden its obligations under international law.

10.6. State Self-Interest in Accountability

10.6.1. Positive and Negative Interests

A State's decision whether to initiate prosecution is influenced by the different interests revolving around it. At least two types of interests can be identified: positive and negative interests. The expression 'positive interests' refers to the advantages that a State may acquire, and the unfavourable situations that can be avoided, by initiating prosecution. 'Negative interests', on the other hand, refer to the unavoidable responsibilities and obligations to prosecute perpetrators as stipulated in international law. It should also be noted that the term 'interests' focuses on the issue of the willingness of a State to conduct prosecutions and not its ability.

Lack of interest. As described in the previous section, the failure to prosecute in the case of the comfort women was heavily influenced by the lack of interest behind both international and domestic judicial systems to prosecute. In addition to Japan's reluctance to prosecute, the international judicial institutions (such as the IMTFE) showed either an inability or

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unwillingness to address this issue in an adequate manner. Although international law has emphasised the duty of States to prosecute, the lack of an effective enforcement mechanism and effort to ensure respect for international law provisions can still seriously impact on a State's assumption of negative interests, which was the issue in the case of the comfort women. In other words, the case of the comfort women experiences continuous failure because it attracts neither positive nor negative interests that can initiate prosecution.

The obligation to prosecute. The arguments related to a State's interest to prosecute have focused heavily on the State's negative interests. The most common reason why it should be in the interest of a State to prosecute individual perpetrators is *because they are obliged to do so*. This argument may provide an answer to why a State *should* prosecute, but it fails to reply to the question of interest as to why a State would *want* to prosecute. The possible reason for the over-exposure of negative interests may have been the existence of international law provisions which are considered a constant variable. The duty to prosecute under international law is considered as a constant in the sense that the imposition does not depend on the interest of each State, and the significance of the obligation itself is treated as amounting to the level of *jus cogens*. The interest of international law is assumed to be the desire to achieve justice. Nevertheless, the comfort women case suggests that a State's assumption of negative interests may also be influenced by the interests of international judicial institutions, and that negative interests are not merely a duty of the State under international law.

The importance of both interests. A strong emphasis on negative interests may attract prosecution, but as an enforced act, prosecution would have to face unfavourable situations, such as the State's reluctance or even refusal to co-operate. It can therefore be argued that the assumption of both positive and negative interests is essential to end the domestic culture of impunity, and one is incomplete without the other – although either one is arguably sufficient to attract prosecution. Nevertheless, priority should be given to the enhancement of the State's positive interests in complying with the principle of complementarity as promulgated in the Statute of the International Criminal Court ('ICC'). Negative interests should be treated as a safeguard mechanism to prevent failure in conducting domestic prosecution due to a lack of positive interests.

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In case the State is willing but unable to prosecute, negative interests exercised by the international community can be employed to assist the State in creating the capacity to conduct prosecution. Such a role can be carried out by international tribunals, international treaty bodies, non-governmental organisations and other institutions that have the capacity to support unable States and influence unwilling States.

Many arguments regarding prosecutorial interests have revolved around not entirely persuasive arguments such as deterrence, which are arguably insufficient to convince a State to prosecute or surrender individual perpetrators.[151] In many high-profile crimes, perpetrators are high-ranking government officials and military leaders who possess a strong political interest in the perpetration of the crime, and this interest is shared among the lower-rank perpetrators as a form of political conviction. Fear of prosecution is arguably a weak incentive in preventing the commission of crimes as the value of achieving political objectives is often much higher than the risk of punishment. Unless there has been a transition, prosecuting high-profile leaders may result in self-condemnation for a State, degrading the dignity of the State, and denying political convictions. The State may feel that the price of shielding the perpetrators is much lower than the burden of the prosecutorial outcomes.

To attract prosecution, the State should be convinced that it can benefit from domestic prosecution, that it is more advantageous for both the State and the international community when prosecution is conducted. The next part of the chapter will therefore identify the positive interests that may attract prosecution instead of relying merely upon the enforcement of a State's obligation. It will also argue that the commitment to conduct effective prosecution will benefit the State by positively affecting its reputation and credibility, as well as the reputation and credibility of its armed forces and its people.

[151] John R. Bolton (then Under Secretary of State for Arms Control and International Security of the United States) criticised the ICC's argument on the prospect of deterrence as a "hopelessly legalistic view of international life" and "a cruel joke". He further argued, "hard men like Hitler and Pol Pot are often not deterred from aggression even by cold steel, let alone by a weak and distant institution with no real enforcement powers". John R. Bolton, "Flaws Undermine Concept: World Court Would Be Ineffective, Threaten U.S. Powers", in *USA Today*, 18 January 2000.

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10.6.2. Positive Interests: Why It Should Be in the Interest of Japan and Other States to Prosecute Atrocities

As mentioned earlier, positive interest entails the benefits of conducting prosecution as opposed to the obligations imposed as a result of external influences.

Self-scrutiny may preserve sovereignty. By initiating prosecution, the State may secure its sovereignty while at the same time avoiding scrutiny of other aspects of its internal affairs that may rise from international intervention. The issue of sovereignty is one of the main concerns for States' (such as the US, India and China) reluctance to accept the jurisdiction of the ICC.[152] The constantly developing practice regarding the ICC has become a concern for many States, as joining the ICC means that the jurisdiction of the ICC over the State is not optional, and the referral of cases can be made based on the initiative of the prosecutor or by other States Parties to the ICC Statute. States might consider ratifying the ICC Statute as allowing other States to scrutinise their internal affairs, which may put the integrity of the State at risk. Moreover, the referral by the UN Security Council under Article 13(b) expands the ICC's jurisdiction to non-States Parties, thus refusal to join the ICC does not exempt a State from the jurisdiction of the ICC. For example, the Security Council referred the case of Darfur, Sudan to the ICC, despite Sudan not being party to the ICC Statute. The ICC's subsequent decision to issue an arrest warrant against President Omar al-Bashir has been criticised as "trying to affect peace talks with [the] Darfur rebels and reform in Sudan".[153] The measures taken by international agencies do not always satisfy the interest

[152] The issue of sovereignty was one of the main concerns for the US government's (Bush administration) opposition to the legitimacy of the ICC. The US, as represented by Bolton, deemed the ICC an organisation that "runs contrary to fundamental American precepts and basic constitutional principles of sovereignty, checks and balances, and national independence". See John R. Bolton, "American Justice and the International Criminal Court", in *Remarks at the American Enterprise Institute*, Washington DC, 3 November 2003. See also Usha Ramanathan, "India and the ICC", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 3, p. 628. China's arguments lie on the fact that the jurisdiction of the ICC is not based on the principle of voluntary acceptance. The ICC Statute is claimed to impose obligations on non-State Parties without their consent, which violates the principle of state sovereignty. LU Jianping and WANG Zhixiang, "China's Attitude towards the ICC", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 3, p. 611.

[153] Guillaume Lavallee, "Sudan: ICC Trying to Affect Darfur Peace Talks", in Middle East Online, 3 February 2010.

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of the State in question. The initiation of domestic prosecution as an act of good faith may arguably prevent the undesirable intervention which could result in the incursions to State sovereignty.

Capacity building and judicial independence. Domestic prosecution may also improve and strengthen a State's judicial capacity to investigate and prosecute serious crimes including high-profile crimes, such as war crimes, crimes against humanity and genocide, while at the same time protecting its population from these atrocities.[154] By developing an efficient judiciary, a State may claim its legitimacy and credibility to prosecute international crimes. This may arguably be a good move to pre-empt any undesirable intervention from international agencies.

Less external influence over judicial process. Capacity building domestic prosecution also allows State agencies to manage the content of the judicial process and ensure that the outcome will not cause excessive damage to the credibility of the State. This includes the prevention of any foreseeable substantial loss that may occur as an outcome of an international prosecution.[155] Nevertheless, it should be noted that the role magnification of positive interests as described above is a double-edged sword. Although the exercise of positive interests is desired to be of higher priority, the independence of the judicial process may be put at risk. The State may use this loophole as a quick escape from its full moral and legal responsibility, which may be detrimental to the legitimacy and credibility of the State's judicial proceedings. Taking the Indonesian *ad hoc* tribunal for East Timor as an example, it was criticised as "seriously flawed and lacked credibility".[156] Another example is the case of the Sudan, in which

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[154] The UN General Assembly stated that the UN intends itself "as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crisis and conflicts break out". See United Nations, General Assembly, Resolution Adopted by the General Assembly: 60/1. World Summit Outcome 2005, 24 October 2005, A/RES/60/1.

[155] The ICC Statute is silent regarding the State's obligation to provide reparation. The negotiators of the ICC Statute rejected the proposals to impose any kind of responsibility (even financial) on States for their officials' actions, even if the convicted defendant was acting on behalf of the State. Linda M. Keller, "Seeking Justice at the International Criminal Court: Victims' Reparations", in *Thomas Jefferson Law Review*, 2007, vol. 29, no. 2, p. 197.

[156] The tribunal, which was conducted in Jakarta in 2003, resulted in 12 acquittals and six convictions, five of which were overturned on appeal. Only the conviction of a pro-Indonesian East Timorese militia commander was upheld, but his sentence was halved to

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the three special courts established by the government as a response to the alleged Darfur crimes became a mere symbolic action to prove that the State was taking action to realise justice.[157] The reliance on the domestic judiciary may significantly reduce the administrative burden and cost of prosecuting, but it will also increase the chances that the independence of the State's judiciary is compromised by political interests. To prevent this, the international enforcement of the obligation to prosecute under international law is deemed crucial – not as a priority, but rather as a safeguard mechanism – to prevent abuse of justice by the State that may arise in its exercise of positive interests.

Adjustability and compatibility. By organising the judicial process, the State can also adjust the conduct of proceedings according to the specific needs and situations encountered. The substantive and systematic context of the proceedings may also be integrated into the State's domestic law, as well as the cultural, religious and normative needs of the population, which allows more flexibility in the conduct of proceedings. India, for example, considers the issue of judicial compatibility, namely, the amount of amendment to domestic criminal law which would be necessary in order to cohere with the jurisdiction of the ICC, as one of the main obstacles to joining the ICC.[158] Initiating and prioritising domestic prosecution may significantly lessen the burden of amendment needed in the State's domestic law and constitutions in order to be able to incorporate with the ICC. Such amendments can simply involve the importation of core crime elements, and the adjustment of punitive measures as necessary, to enable domestic courts to prosecute international crimes. The ac-

five years and he remains free pending appeal. Ellen Nakashima, "Indonesia Attempts to Avert Tribunal to Probe East Timor Jakarta Wants Truth Commission on 1999 Abuses", in *The Washington Post*, 16 July 2005.

[157] The controversial first ICC Prosecutor, Luis Moreno Ocampo, claimed that Sudan's self-scrutiny is a "cover-up" as the courts only address cases with no importance. The appointed head of the committee on Darfur Human Rights, Ahmed Haroun (the Minister for Humanitarian Affairs), is himself the subject of an ICC arrest. See Thijs Bouwknegt, "Sudan's Self-examination Is Cover-up", in Radio Netherlands Worldwide, 12 February 2008. Observers to the courts claimed that the court showed a complete lack of will as the courts never tried anyone linked to the Darfur atrocities, and instead preferred to prosecute local petty thieves. Cases are also dismissed if witnesses fail to turn up. See Thijs Bouwknegt, "Sudan in Turmoil as It awaits ICC indictment", in Radio Netherlands Worldwide, 6 January 2009.

[158] Ramanathan, 2005, p. 631, *supra* note 156.

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ceptance of the jurisdiction of the ICC will act as a safeguard mechanism when domestic remedies have been exhausted, and the State is no longer capable of conducting prosecution. This way, the State would be able to strengthen its capacity to determine its own status of 'unwillingness' or 'inability' instead of leaving it to the discretion of the ICC.

Prevention of public scrutiny and shame. It is also possible to avoid prolonged condemnation by victims and other parties that may lead to international scrutiny and shame, such as in the case of comfort women. The fact that Japan has refused to fully acknowledge its past atrocities and provide reparations for victims has triggered continuous criticism and long-lasting tensions in its relations with other States. Since the emergence of the issue in the 1990s, the contingency of the issue is no longer focused only on comfort women, but has broadened to scrutiny of other sectors, including politics, socio-economic life and education. It can be argued that an early initiation of prosecution can prevent the dispersal of an issue before it outgrows the State's capacity to deal with it. Effective prosecution, while returning rights and dignity to the victims of atrocities, creates substantial satisfaction for the victims. This way, the State can avoid disproportionate public commotion and over-exposure by the media which can be harmful to the perceived integrity of the State. In this sense, prosecutions act as a means of enhancing the State's public image and its efforts to gain the trust of other States, such as by smoothing reconciliation processes and relationship building.

Individualisation of responsibility. Particularly when the crime is conducted by an organ of State, such as its armed forces, prosecution may prevent the crime from being attributed to the State. Armed forces, as well as other State organs, represent the State, and the conduct of armed forces during hostilities can be attributable to the State. 'Attributable' in this context refers to both moral and legal responsibility of a State for the conduct of its armed forces. The conduct of the armed forces during hostilities may be considered as the conduct of the State, and the act of each individual may be identified as an act of State, if criteria set by the Draft Articles on State Responsibility are fulfilled. The State can also be held liable for the conduct of its organs as a legal person under international law as evidenced by the ICJ Judgment on Serbia-Montenegro, for which Bosnia-Herzegovina accused Serbia-Montenegro of the crime of genocide. Individual accountability clearly identifies where and to whom the responsibility (both legal and moral) of a criminal act is attributable.

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Without this form of identification to determine the imposition of responsibility, there will be no clear separation between the act of the individual and the act of the State. In such a situation, responsibility will automatically be shifted to the State. By punishing individual perpetrators, the State may individualise the responsibility and argue that the crime was not in the interest of the State.

Moral enhancement and deterrence. For the armed forces as an organ of the State and individual soldiers as part of the armed forces, identification of the individual culprit may: (1) distinguish the innocent members from the guilty ones, thereby putting them in a different category to law-abiding soldiers; (2) relieve the good, innocent soldiers from the moral responsibility and shame of being a part of the same armed forces to which the guilty individuals belong; (3) be an effective means of maintaining the morale of the soldiers; and (4) nurture more rational, disciplined and professional soldiers. Strong disciplinary and justice measures, while punishing the guilty individuals, also set an example to others by illustrating the consequences of committing violations. Disciplined soldiers are, more than anything, an effective preventive measure for future violations.

The protection of younger generations. Prosecution, as a form of reparation and atonement, may also relieve the burden of guilt and shame of the younger generation. David Palmer has argued that

> [i]f the people of a country do not recognize their past − and the atrocities committed in the name of their nation − even new generations become part of the guilt. […] In fact, it is actually better to assume responsibility and from there work towards reconciliation, than just spend time talking about guilt and endlessly moralizing. For the younger generation in particular, recognition of history is essential, while moralizing about how the younger generation is "guilty" can obstruct real understanding.[159]

In other words, the recognition of past wrongs and war responsibility may actually become the source of its people's sense of national identity, instead of continuous shame and guilt that may come from denials and ignorance.

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[159] David Palmer, "What is Reconciliation in the Light of War Responsibility?", Keynote Address to Japan Australia Peace Forum, Melbourne, 23 May 2009.

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10.7. Conclusion

As outlined in the introductory section, this chapter has focused on addressing two main issues: (1) the reasons for the reluctance of international and domestic courts to prosecute comfort women crimes, and (2) why it should be in the interests of Japan − as well as other States − to prosecute. The comfort women case is considered as the best portrayal of the two main issues, as all but one of the prosecutorial efforts (the Batavia Military Tribunal) have ended up in failure and none of the legal actions has succeeded in achieving justice. The analysis of the political response of the Japanese government, as well as the judicial response by the Japanese courts, suggests that the failures to address the comfort women issue originate in the State's lack of will. At the international level, most cases regarding the comfort women have also met a dead end due to the unwillingness of both international judicial institutions and States to address the issue.

Various arguments can be offered to explain the lack of will by both international and domestic courts to address the issue of comfort women. First, prosecutions of the types of crime that can be committed by any participant in war – including third party participants, for example, peacekeepers, inter-governmental organisation and non-governmental organisation personnel, and volunteers – such as sexual violence, arguably attracts less interest. An armed conflict is still based on an unwritten social convention that there has to be one side in which justice is prevalent. The prosecution of crimes that tend to be committed by all parties to the conflict may distort the concept of a just war, as even a hero can be perceived as a victimiser. Moreover, States are less likely to take a confrontational stance against a high-profile State, whose role in international politics and the global economy is considered as important. It can therefore be argued that the interest in prosecution is still influenced by a State's political interests. Prosecution of issues, the outcome of which may be detrimental to the credibility and legitimacy of the State, may be assumed as less likely to be conducted.

Another reason seems to be the fact that many victims are marginalised within constituencies that are far removed from the international community. These groups of victims are often people with no access to justice, while experiencing suppression by their own governments. Unless the atrocities are committed on a large scale, it is less likely that the issue

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will attract prosecution. This is especially so in the case of sexual violence, the fact that many victims are often reluctant to report crimes – as they fear being subjected to discrimination and mistreatment by society – may be considered as contributing to delays and failures to prosecute. The guilt and shame of rape and sexual violence are still considered as belonging to the victims rather than the victimisers.

In many cases, the reluctance to prosecute originates from the lack of incentives − positive interests − which can motivate States to initiate prosecution. The bias of international judicial entities has been overemphasised in the enforcement of a State's obligations under international law, and relying merely on weak arguments, such as deterrence, to encourage States to prosecute. In such cases, it is not unusual for a State to refuse to prosecute. Many States, especially those that have not yet seen regime transition, may consider prosecution as self-condemnation, a mere obligation with no positive gain. An egocentric approach to force a State to comply with its obligations may result in a stronger resistance, as the State may do anything in its power to secure its right to sovereignty and integrity. Even with the mandate of the UN Security Council, there are still obstacles to the effective implementation of international law. International law still leaves much to be desired to be able to effectively breach the 'barrier of sovereignty'. In the case of the ICC, for example, the fact that many States are not party to the ICC Statute significantly limits its jurisdiction.

It can be argued that a State should be convinced that it can benefit from initiating prosecution, and more attention should be given to the enhancement of positive interests, in other words, a soft approach should be taken. Such interests may include: (1) the State's ability to secure its right to sovereignty while preventing the scrutiny of its internal affairs by international agencies or other States; (2) the contribution to judicial capacity building which may lead to an independent, credible and impartial judicial system; (3) the ability of domestic institutions to control the process and outcome of the proceedings, thereby avoiding the uncertainty which would arise if an external mechanism were to undertake them instead; (4) the possibility of avoiding demonstrations and bad publicity caused by prolonged victims and other parties which may lead to further scrutiny and shame; (5) the clear identification of the imposition of individual guilt which may prevent the shifting of responsibility onto the State itself; and (6) the protection and enhancement of the moral quality of the State's

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armed forces, which may arguably prevent future misconduct. The State's initiation of domestic prosecution will arguably benefit both the State and international community. However, domestic prosecution may open the possibilities for abuse of justice by the State in question. It is therefore important that the State's act of self-scrutiny be carefully monitored, specifically on crucial aspects that may have a significant impact on the impartiality and credibility of the proceedings, such as the protection of witnesses and evidence. This is arguably where the safeguard mechanism of negative interest should be implemented. The recognition of a State's positive interest in individual accountability may well motivate States to assume their duty to prosecute, which may attract more voluntary initiation of domestic prosecution.

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Appendix 1

Prime Ministerial Apologies versus Yasukuni Worship, 1972–2005[160]

Prime Minister Date of Accession to Office	**Major Prime Ministerial Apology**	**Number of visits to Yasukuni Shrine**
Tanaka Kakuei **7 July 1972**	**25 September 1972**: As part of the restoration of Sino–Japanese relations, expresses remorse for the "trouble" (*meiwaku*) Japan caused. The comments cause some anger because *meiwaku* is not seen as sufficiently strong.	Five.
Miki Takeo **9 December 1974**		Three. In 1975 Miki was the first prime minister to worship on 15 August. Deliberately "private" (starting the "official" versus "private" worship issue).
Fukuda Takeo **24 December 1976**		Four.
Ōhira Masayoshi **7 December 1978**		Three. Worships despite being a practicing Christian.
Susuki Zenko **17 July 1980**		Nine. Worships with the cabinet on 15 August 1980, 1981 and 1982.
Nakasone Yasuhiro **27 November 1982**	**22 August 1984:** In Korea he expresses "deep remorse" (*fukai hansei*) for the trouble and "terrible damage" (*sangai*) in the past.	Ten. First prime minister to worship at New Year, 5 January 1984. 15 August 1985: "Official" worship marks the internationalisation of the Yasukuni issue.

[160] Seaton, 2007, pp. 88–91, see *supra* note 132.

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Takeshita Noboru **6 November 1987**	**6 March 1989**: In the Diet, says the "militaristic aggression" (*gunjishugi ni yoru shiryaku*) of the country cannot be denied. **30 March 1989**: expresses deep remorse and "feelings of regret" (*ikan no i*) for colonial rule to North Korea, the first such statement to the North. The comments are welcomed by Kim Il-sung on 4 April.	None.
Uno Sōsuke **3 June 1989**		None.
Kaifu Toshiki **10 August 1989**	**28 September 1990**: A cross-party delegation led by Kanemaru Shin signs a joint declaration in North Korea saying Japan should "apologise" (*shazai*) and compensate for its colonial rule. **3 May 1991**: At the ASEAN summit in Singapore, Kaifu expresses deep remorse for the "unbearable suffering and sadness" (*taekuni kurushimi to kanashimi*) caused by "our nation's acts". **10 August 1991**: Expresses remorse on a trip to China.	None.
Miyazawa Kiichi **5 November 1991**	**17 January 1992**: Revelations in the *Asahi* newspaper force an apology (*owabi*) to the comfort women on Miyazawa's trip to Korea.	One. A secret visit in 1992.
Hosokawa Morihiro **9 August 1993**	**10 August 1993**: Comments it was "an aggressive war and a mistake" (*shinryaku sensō*). **15 August 1993**: Hosokawa becomes first prime minister to offer condolences to all Asians. Speaker of the House, Doi Takako, announces parliament is considering a Diet resolution offering an official apology (*shazai*) for aggression against Asian nations. The remarks are widely welcomed in Asia. **19 August 1993**: Secretary of State Takemura Masayoshi reiterates Hosokawa's aggressive war (*shinryaku sensō*) stance, but maintains that "all compensation claims are resolved". **23 August 1993**: Hosokawa tones down	None.

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	his "aggressive war" comments to "aggressive acts" (*shinryaku kōi*). **27 September 1993**: Hosokawa speech at the UN: "We must not forget remorse for the past". **6 November 1993**: In Korea, Hosokawa lists specific Korean grievances (such as the comfort women issue and Koreans being forced to use Japanese names) and comments that "as the aggressor" (*kagai-sha to shite*) he expresses remorse and a "deep apology" (*fukai chinsha*). This apology is very well received. **20 March 1994**: While in China, expresses remorse and an "apology" (*ow-abi*) as well as a desire to look to the future. Participated in a wreath-laying ceremony to soldiers who fought against the Japanese.	
Hata Tsutomu **28 April 1994**		None.
Murayama Tomiichi **30 June 1994**	**24 August 1994**: In Manila, expresses remorse and proposes new initiatives for joint historical research. Meanwhile, in Singapore, Leader of the House Doi lays a wreath at a memorial to Chinese massa-cred during the Japanese occupation. **3 May 1994**: Expresses remorse for the unbearable suffering caused on a trip to China. LI gives a lukewarm approval: "We agree with your views". Murayama becomes the first serving prime minister to visit the Marco Polo Bridge. **15 August 1995**: The Murayama com-muniqué (*danwa*) supplements the widely criticised parliamentary statement (9 June). This personal "heartfelt apology" becomes the standard prime ministerial apology, but eight members of the cabi-net worship at the Yasukuni Shrine. South Korean President Kim Young-sam calls for "correct views of history in Ja-pan", which indicates that the apology has not been so well received.	None.

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Hashimoto Ryutarō **11 January 1996**	**26 January 1996**: In the Diet, Hashimoto states it was aggression, and restates the Murayama communiqué, but scepticism exists because of earlier comments (24 October 1994) when, as Minister of Trade and Industry, he said he had lingering doubts about whether it could be called a war of aggression. **23 June 1996**: Hashimoto apologises (*owabi*) to the comfort women. Korea and Japan have been made co-hosts of the 2002 FIFA World Cup, necessitating closer ties. **15 August 1996**: Hashimoto expresses remorse to Asians, but after remembering those who died fighting "for the security of their nation". He also praises the precious sacrifice (*tōtoi gisei*) of the war generation. **4 September 1997**: Hashimoto in China repeats the Murayama communiqué to British POWs via Prime Minister Blair who is in Tokyo.	One. Ex-head of the War Bereaved Association. Worships "privately" on his birthday, 29 July 1996.
Obuchi Keizō **30 July 1998**	**15 August 1998**: Obuchi repeats the Hashimoto and Murayama position. **8 October 1998**: Expresses remorse (*hansei*) to President Kim Dae-jung as part of the Japan–Republic of Korea Joint Declaration. **5 November 1998**: President Jiang Zemin of China visits Japan. Obuchi issues a verbal apology, but there is a wrangling over a written joint declaration which only mentions remorse.	None.
Mori Yoshirō **5 April 2000**		None.
Koizumi Junichirō **26 April 2001**	**8 October 2001**: Koizumi expresses remorse and apology (*owabi*) in China and visits the Marco Polo Bridge and the Anti-Japanese War Museum. Koizumi's apologies are ignored in favour of warnings about textbooks and his Yasukuni Shrine worship. **15 October 2001**: Koizumi expresses the same remorse and apology in Korea, as well as a proposal for joint historical	Five (to October 2005). Triggers a major diplomatic row with his 13 August 2001 worship on 21 April 2002, 14 January 2003 and 1 January 2004. 17 October 2005:

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	research. But the response is the same: warnings about textbooks and Yasukuni. **17 September 2002**: The Pyongyang Declaration includes an apology to North Korea, but the apology is lost in the Japanese preoccupation with the abduction issue (Japanese citizens abducted by North Korea, five of whom returned with Koizumi to Japan). **22 April 2005**: apology at an ASEAN summit, but by now relations in Asia have dipped to a new low.	worships in the same way as a private citizen.

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Military Self-Interest in Accountability for Core International Crimes

Morten Bergsmo and SONG Tianying (editors)

Is it in the enlightened self-interest of armed forces to have perpetrators of core international crimes brought to justice? This anthology adds the 'carrot' perspective of self-interest or incentives to the common rhetoric of 'stick' – legal obligations and political pressures. Twenty authors from around the world discuss why military actors themselves often prefer accountability: Richard Saller, Andrew T. Cayley, William K. Lietzau, William J. Fenrick, Arne Willy Dahl, Richard J. Goldstone, Elizabeth L. Hillman, Bruce Houlder, Agus Widjojo, Marlene Mazel, Adel Maged, Kiki A. Japutra, Christopher Mahony, Christopher Jenks, Franklin D. Rosenblatt, Roberta Arnold, Róisín Burke, Elizabeth Santalla Vargas, Morten Bergsmo and SONG Tianying.

The self-interests presented in this book are multi-dimensional: from internal professionalisation to external legitimacy; from institutional reputation to individual honour; from operational effectiveness to strategic stakes; from historical lessons to contemporary needs; from religious beliefs to aspirations for rule of law; from minimizing civilian interference to pre-empting international scrutiny. The case is made for long-term self-interest in accountability and increased military 'ownership' in repressing core international crimes. In his foreword, William K. Lietzau observes that of "all the international community's well-intended endeavours to foster accountability and end impunity, none is more important than that addressed in this book".

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