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COMFORT WOMEN: HUMAN RIGHTS OF WOMEN FROM THEN TO PRESENT

by

JINYANG KOH

(Under the Direction of Gabriel M. Wilner)

ABSTRACT

This paper discusses the human rights of women through the atrocities in the Japanese comfort system during World War II. Approximately 100,000 military sexual slaves, so-called “comfort women,” were recruited coercively, raped and mostly killed under the control of the Japanese government and military. The stance of Japan which has denied any legal liability in this matter affects severely the retrogression of the human rights of women. In order to ameliorate the human right at both international and domestic levels ultimately, it is significant to observe the facts of the comfort women issue, to analyze the legal liabilities of the Japanese government, and to seek all possible remedies for the comfort women.

INDEX WORDS: Comfort Women, Human Rights of Women, School of Law, Jinyang Koh, LL.M., The University of Georgia

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I. INTRODUCTION

Soonie Hwang was born in 1922, and in 1934 when she was thirteen years old, she was recruited coercively as a comfort woman. Until 1945, she had forcibly provided sexual service to the Japanese soldiers in the combat areas in Mongolia, Hong Kong, and Singapore. After the end of World War II, she was so shamed that she was a comfort woman, and she did not come back to her hometown in South Korea again. Ultimately, she died alone of lung cancer on June 23, 2007.

This is one of the mournful stories of the comfort women that the “Korean Council for the Women Drafted for Military Sexual Slavery by Japan” – one of the civil organizations for the comfort women in South Korea – published on their website.¹

The surviving comfort women have suffered physically and emotionally, and have been hurt again on account of the attitude of the Japanese government that has denied any liability to them. As to them, the Second World War is not over yet. “Comfort women” is a euphemism for women who were forced to be prostitutes in the Japanese military brothels during World War II. Radhika Coomaraswamy, a Special Rapporteur in the Commission on Human Rights of the United Nations, opined that “the phrase “comfort women” does not in the least reflect the suffering, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in

¹ <http://www.womenandwar.net/bbs/?tbl=M017&mode=V&id=965>.

wartime” in her report.² Therefore, she contended that the phrase “military sexual slaves” was a far more suitable and accurate term.³

It is true that the issue of the comfort women has not been paid attention in the international community. Recently, the issue of the comfort women began to be discussed in earnest. On January 31, 2007, Representative Michael Honda introduced a resolution⁴ that demanded the Japanese government to acknowledge and apologize for their historical involvement in the coercion of the young women into sexual slavery during World War II. Since then, the Japanese government has frequently changed its stance, and thus, lost its propriety.

Part II of this paper provides the historical background information of the comfort system during World War II, its long term effects on the comfort women involved, and the efforts to investigate and redress the wrongs that were committed. Part III analyzes the atrocities such as slavery or forced labor, rape, and crimes against humanity in the Japanese comfort stations, and examines the legal liabilities of Japan under international law. In order to avoid any legal responsibility, the Japanese government contends that retroactive application of international law is inadmissible, an individual is not able to be a subject of legal rights and obligations under international law, such claims were already settled by the post-war treaties, and statutory limitations should also be applied. After the examination of the propriety of the allegations, Part IV and V deal with the unsuccessful attempts to redress in the Japanese and the United States courts, and all possible remedies at both international and domestic levels. Part VI discusses the ultimate goals to seek the remedies for the comfort women. Finally, Part VII emphasizes that the

² U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, ¶ 10, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996) (prepared by Radhika Coomaraswamy) [hereinafter Coomaraswamy Report].

³ *See id.*

⁴ H.RES. 121, 110th Cong. (2007).

Japanese government should take moral and legal liabilities for the inhuman treatment through the military sexual slavery system.

II. HISTORICAL BACKGROUNDS OF COMFORT WOMEN

A. History of Comfort Women during World War II

As the full-scale war was advanced, Japan felt the necessity of the military sexual slaves, and, ultimately, invented the comfort system for the purposes⁵ of (1) protecting the local women from the danger of rape by its soldiers⁶; (2) preserving the health of the troops by preventing the infection of venereal disease⁷; (3) the soldiers' gaining the fighting strength⁸; (4) stirring up the soldiers' morale, relieving combat stress and providing leisure⁹; (5) protecting "national security from espionage"¹⁰; and (6) increasing revenue through more varied sources such as the military brothels.¹¹

From 1931 to 1945, comfort stations were established in many places where the Japanese army combated or occupied, including China, Taiwan, Borneo, the Philippines, the Pacific islands, Singapore, Malaya, Burma, Indonesia as well as Japan.¹² Due to the concealment of the relevant documents by the Japanese government and a long lapse of time after World War II, it is impossible to estimate the exact number of the comfort women. In accordance with "the Japanese military plan devised in July 1941, 20,000 comfort women were required for every

⁵ There are mainly six reasons for the establishment of the comfort system during World War II.

See generally, Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women's L.J. 174, 177-78 (2001).

⁶ The first comfort station was set up in Shanghai, China in 1932. As the Japanese soldiers raped a lot of Chinese women in Nanjing, the Japanese military devised the military brothels in order to reduce the number of accidents of rape of civilians.

See YUKI TANAKA, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II* 94-95 (1996).

⁷ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 33-34 (1994).

⁸ *Id.* at 32-33.

⁹ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 32-33 (1994); YUKI TANAKA, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II* 95 (1996).

¹⁰ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women's L.J. 174, 177-78 (2001); YUKI TANAKA, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II* 96 (1996).

¹¹ Chin Sung Chung, *Korean Women Drafted for Military Sexual Slavery by Japan*, in *TRUE STORIES OF THE KOREAN COMFORT WOMEN* 14 (Keith Howard ed., 1995) (1993).

¹² Coomaraswamy Report, *supra* note 2, ¶ 18; GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 107 (1994).

700,000 Japanese soldiers, or 1 woman for every 35 soldiers.”¹³ As approximately 3.5 million soldiers were mainly sent to the pacific islands, the estimated number of the comfort women becomes 100,000.¹⁴ Nearly 80% of these women were the Korean women¹⁵, and others were taken from China, Taiwan, Malaysia, Burma, the Philippines and the Dutch East Indies.¹⁶ Most of the comfort women were also young. According to interviews of surviving women, many of the women were teenagers, even including an 11-year-old child.¹⁷ Regrettably, it seemed that the younger women were preferred.¹⁸

The Japanese government, along with the Japanese army, played a major role in the recruitment of the comfort women. There were three types of recruiting. First, the Japanese military recruited women who were already prostitutes and wanted to volunteer for the work.¹⁹ However, as supply was not able to meet the demand for the comfort system, other methods to recruit were devised. A second method involved the Japanese government and military luring the women into the well-paid jobs in restaurants, factories, and the like, only to actually force them to work in comfort camps.²⁰ The final method of recruitment constituted the massive

¹³ YUKI TANAKA, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II* 99 (1996).

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 *Hastings Int'l & Comp. L. Rev.* 497, 498 (1994).

¹⁷ Chin Sung Chung, *Korean Women Drafted for Military Sexual Slavery by Japan*, in *TRUE STORIES OF THE KOREAN COMFORT WOMEN* 17 (Keith Howard ed., 1995) (1993).

¹⁸ *Id.* at 18.

¹⁹ Coomaraswamy Report, *supra* note 2, ¶ 27.

²⁰ *See id.*

This deceiving method to recruit was well illustrated by the testimony of Turi Park, one former comfort women:

[S]he was the eldest of seven children; she had three younger brothers and three younger sisters. Her family was extremely poor and she thought that she had to work in order to support her family. When she was seventeen, three men came to her village to assemble young women. They told her, “If you work at a factory in Japan, you can make a fortune.” She thought it would be nice to work at a factory, support her parents financially, and eventually get married. She trusted the men and decided to go to the factory in Japan. ... She was taken to a comfort station. ... She was told to have sexual intercourse with a client.

See Taihei Okada, *The “Comfort Women” Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan*, 8 *Pac. Rim L. & Pol’y J.* 63, 73 (1999) [hereinafter *Judgment of Yamaguchi District Court*].

coercion and abduction of the women,²¹ where various threats were used, such as the intimidation of “physical harm to themselves or their family members.”²² Then, the recruited women were transported to the comfort stations throughout Asia by diverse means of transportation such as army vessels, trains, trucks and planes.²³ The head of the army supplies was charge with the transport of the comfort women.²⁴ Comfort women did not have to possess their passports because the Japanese Minister of Foreign Affairs ordered that military travel documents instead of passports be issued.²⁵ Because the Japanese government mostly utilized the recruiting methods of coercion and abduction, it seemed that the requirement of passports for these women were very inconvenient means of bringing them to the battlefields. Sadly, some transport lists at that time even registered these comfort women as “units of munitions or canteen supplies.”²⁶

The comfort stations themselves were operated by the Japanese government with the strict regulations.²⁷ From the permission of launching the enterprises to the abolishment of the stations, the government controlled the comfort system both directly and indirectly.²⁸ The conditions of the comfort stations were also extremely poor. The front-line stations were tent or wooden shacks, and the rooms were composed of “cramped, narrow cubicles, often as little as 3 feet by 5, with room for only a bed.”²⁹ The women regularly got the medical care, but the health

²¹ Coomaraswamy Report, *supra* note 2, ¶ 27.

²² Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women’s L.J. 174, 179 (2001).

²³ YUKI TANAKA, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II* 98 (1996).

²⁴ *See id.*

²⁵ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women’s L.J. 174, 179 (2001).

²⁶ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 83 (1994).

²⁷ Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 Hastings Int’l & Comp. L. Rev. 497, 504 (1994).

²⁸ The details about the involvement of the Japanese government will be treated in Section III(A).

²⁹ Coomaraswamy Report, *supra* note 2, ¶¶ 32-34.

The report described more specifically:

examinations were only for the prevention of the infection of venereal diseases, not for their health.³⁰ In addition, the minimum amount of food and clothing were provided, as Juhwang Kum (a former comfort women) testified, they received clothes two times a year and only rice cakes and water for food.³¹

In these comfort stations, the women were raped, tortured, and killed. They were repeatedly raped by the Japanese soldiers twenty to thirty per day.³² Those who resisted were “beaten, mutilated, or murdered, frequently with their fellow women forced to watch.”³³ The former comfort women who survived have “visible scars and permanent marks from the physical torture and beatings they suffered as a result of attempting to resist rape or escape from the comfort stations.”³⁴ Generally, the comfort women were never paid for their services. Regardless of the regulations that dictated service fee rates and the amounts the women earned, all this money was frequently lost through cheating the prices of the essential supplies and

[I]n some front-line locations, the women were forced to sleep on mattresses on the floor and were exposed to terrible conditions of cold and damp. The rooms were separated in many cases only by a tatami or rush mat which did not reach the floor, and so sound traveled easily from room to room.

See *id.* ¶ 34.

³⁰ *Id.* ¶ 35.

³¹ *Id.* ¶¶ 36, 56.

³² Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women's L.J. 174, 179 (2001).

³³ Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 Hastings Int'l & Comp. L. Rev. 497, 508 (1994).

The testimony of Oksun Chong, a former Korean comfort woman, reflected the brutality of the Japanese army very well:

[O]ne Korean girl who was with us once demanded why we had to serve so many, up to 40, men per day. To punish her for her questioning, the Japanese company commander Yamamoto ordered her to be beaten with a sword. While we were watching, they took off her clothes, tied her legs and hands and rolled her over a board with nails until the nails were covered with blood and pieces of her flesh. In the end, they cut off her head. Another Japanese, Yamamoto, told us that “it's easy to kill you all, easier than killing dogs.” He also said, “since those Korean girls are crying because they have not eaten, boil the human flesh and make them eat it.”

See Coomaraswamy Report, *supra* note 2, ¶ 54.

³⁴ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women's L.J. 174, 179 (2001).

robbery by the comfort station operators.³⁵ In the case front-line stations in particular, their earnings were meaningless because the women were constantly in peril of their lives.³⁶

B. Continuing Suffering of Comfort Women after World War II

Although about 100,000 women were recruited and transported to the battlefields, less than 30% of those women survived.³⁷ During the war, many of them were killed in the battle.³⁸ Others died because they could not endure the deteriorated conditions of the comfort stations, committed suicide because they felt shame, or were killed while attempting to escape.³⁹ After World War II ended, the existence of the comfort women itself became a trouble to the Japanese government and army. Most of them were forced to kill themselves with the troops⁴⁰ according to the tradition of “gyokusai,”⁴¹ they were murdered by the army⁴², or they were abandoned “in remote and dangerous areas with no means of returning to their homelands.”⁴³

Despite these obstacles, a small number of the comfort women did survive and return their homes. However, they had to continue to suffer both physically and emotionally. After returning home, the former comfort women suffered from the various aftereffects such as “sterility, health problems associated with sexually transmitted diseases contracted in the comfort

³⁵ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 91-92 (1994).

³⁶ *Id.* at 92.

³⁷ David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 32 Colum. J. Transnat’l L. 533, 542 (1995).

³⁸ USTINIA DOLGOPOL & SNEHAL PARANJAPE, *COMFORT WOMEN: AN UNFINISHED ORDEAL* 44 (International Commission of Jurists ed., 1994).

³⁹ Coomaraswamy Report, *supra* note 2, ¶ 38.

⁴⁰ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 153 (1994).

⁴¹ Gyokusai means “either fighting to the death or committing mass suicide as an alternative to surrender,” and the Japanese army thought that the comfort women should share this tradition.

See id.

⁴² Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women’s L.J. 174, 180 (2001).

⁴³ *See id.*

stations, insomnia, nervous breakdowns, psychological trauma, and shame.”⁴⁴ The former comfort women also had to keep silence. In the oriental countries such as China and Korea, the communities have been governed by the Confucianism. Due to “the high moral value attached to chastity” under this ideology, they could neither disclose the severe infringement of their human rights nor accuse their abusers.⁴⁵ After their miserable experiences were disclosed, many of them committed suicide after “facing ostracism from their families and communities.”⁴⁶ Absurdly, the women went through double-suffering, first from their own past experience as the comfort women and second, due to the hostile attitude of their societies.

C. Recent Developments

1. Biased Arrangements of Issue of Comfort Women

Right after the war, the victorious Allied Forces established tribunals in order to punish Germany and Japan for war crimes.⁴⁷ The international military tribunals in Nuremberg and Tokyo were set up under the lead of the United States.⁴⁸ Although the Allied Forces recognized the atrocities of the Japanese government under the comfort system, they simply ignored the issue of the comfort women.⁴⁹ In the Tokyo War Crimes trials, only a few Japanese perpetrators were found as guilty for war crimes.⁵⁰ There were some political reasons for this. The United States “tried to make Japan the center of a capitalist sphere in Asia, defending it against the

⁴⁴ *See id.*

⁴⁵ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 21 (1994).

⁴⁶ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 *Berkeley Women’s L.J.* 174, 180 (2001).

⁴⁷ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 *UCLA J. Int’l L. & Foreign Aff.* 461, 468 (2000-01).

⁴⁸ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia’s “Comfort Women,”* 14 *Tex. J. Women & L.* 121, 126 (2004).

⁴⁹ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 *UCLA J. Int’l L. & Foreign Aff.* 461, 468 (2000-01).

⁵⁰ *Id.* at 470.

spread of communism, and thus was lenient with the punishment of war criminals and Japan's repatriation."⁵¹ Regarding the legal responsibility of the comfort system, no one was prosecuted in the tribunal even though the system run by Japan was a severe crime and a serious violation of the fundamental human rights.

In the meantime, the Dutch Military Tribunal in Batavia was held in 1948.⁵² In this tribunal, the Allied Forces prosecuted the Japanese officers, charging them with the forced prostitution of 35 Dutch women in Indonesia.⁵³ It is surprising that the tribunal did not consider the human rights of many Indonesian comfort women who were in the same situation as the Dutch comfort women.⁵⁴ This fact reflects the obvious racial discrimination not only by Japan, but also by many countries of the Allied Forces, namely that only white comfort women could have justice before the international military tribunals. Ultimately, the Asian countries with the comparatively weak status in the international community were completely discounted at that time.⁵⁵

2. Full-Dress Emergence of Issue of Comfort Women

The existence of the Japanese military brothel system was hidden for many years. There are specific reasons for that. Most of all, the former comfort women were afraid of the disclosure of the fact. Because of the shame and the virtue of a woman's chastity under the Confucian culture, they were not encouraged to disclose their histories.⁵⁶ In addition, the Japanese government destroyed and concealed the evidence of the comfort system. The military

⁵¹ *Id.* at 469.

⁵² *Id.* at 468-69.

⁵³ USTINIA DOLGOPOL & SNEHAL PARANJAPE, COMFORT WOMEN: AN UNFINISHED ORDEAL 135 (International Commission of Jurists ed., 1994).

⁵⁴ David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 32 Colum. J. Transnat'l L. 533, 547 (1995).

⁵⁵ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int'l L. & Foreign Aff. 461, 469 (2000-01).

⁵⁶ GEORGE HICKS, THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR 21 (1994).

knew sexual slavery would damage “the honor of the Emperor’s sacred army,” and the Japanese government could be in a disadvantageous position if the Japanese citizens were to know that the national budget was spent on the system.⁵⁷ Moreover, the inconsistent treatment toward Japan in the international military tribunals caused “the delayed exposure of this issue.”⁵⁸ However, there is no such thing as a perfect cover-up in this world.

In 1978, Senda Kako published his book disclosing the subject of the comfort women to the public.⁵⁹ For many years, he researched and investigated the comfort system because the Japanese government thoroughly concealed the relevant records of the system, as discussed. Since then, more and more vital materials were found. In the 1990’s, the relevant documents about the comfort women were disclosed in earnest, and the issue has begun to attract attention from the international community. In 1990, Motooka Shoji, one of Socialist members of the House of Councillors of Japan, requested that “the Japanese government investigate the “Comfort Women” question.”⁶⁰ However, the Japanese government refused this demand, and continued to deny the involvement of the comfort system.⁶¹ Many civil organizations for the comfort women in South Korea strongly protested against the response of the Japanese government.⁶² In 1991, Haksun Kim, a former comfort women, told her horrible experience in

⁵⁷ Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 265 (1998).

⁵⁸ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 469 (2000-01).

⁵⁹ GEORGE HICKS, THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR 15-16 (1994); Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 265 (1998).

⁶⁰ Etsuro Totsuka, *Commentary on a Victory for “Comfort Women”: Japan’s Judicial Recognition of Military Sexual Slavery*, 8 Pac. Rim L. & Pol’y J. 47, 49 (1999).

⁶¹ *Id.*

⁶² The representative organization of them is the “Korean Council for the Women Drafted for Military Sexual Slavery by Japan.”

See id.

public for the first time⁶³ and since then, many former comfort women have taken courage to disclose the historic tragedy.⁶⁴

It was in 1992 that the significant documents found by Yoshimi Yoshiaki, a professor of Chuo University in Japan, were released.⁶⁵ These documents showed “Japan’s direct role in maintaining a large network of comfort houses.”⁶⁶ This disclosure resulted in the commencement of the investigations by both Japan and the international community.⁶⁷ Particularly, various international organizations such as the United Nations, the International Labour Organization, non-governmental organizations, labor unions and professional organizations had researched and investigated the history and legal issues of the comfort women, and then, prepared their own reports.⁶⁸

3. Asian Women’s Fund

As the international condemnation towards the Japanese government grew, in 1995 the Japanese Prime Minister Tomiichi Murayama set up the “Asian Peace, Friendship and Exchange Initiative (Asian Women’s Fund)” as a private fund for the compensation of the former comfort women.⁶⁹ The Japanese government explained that the purposes of this Fund were to allow the participation of Japanese people as an expression of apology and remorse, and to learn a lesson

⁶³ After the brave statement, the former comfort women including her filed the first lawsuit before the Tokyo District Court in Japan on December 6, 1991.

⁶⁴ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 11 (1994).

⁶⁵ Professor Yoshimi Yoshiaki could find these documents from the Library of the National Institute for Defence Studies attached to the Defence Agency in January.

See id. at 205-06.

⁶⁶ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 *Berkeley Women’s L.J.* 174, 181 (2001).

⁶⁷ Etsuro Totsuka, *Commentary on a Victory for “Comfort Women”: Japan’s Judicial Recognition of Military Sexual Slavery*, 8 *Pac. Rim L. & Pol’y J.* 47, 50 (1999).

⁶⁸ *Id.* at 50-51.

⁶⁹ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 *UCLA J. Int’l L. & Foreign Aff.* 461, 474 (2000-01).

from the severe infringement of the women's human rights.⁷⁰ It also addressed that the Fund was intended to "promote mutual understanding with the countries and areas concerned by the issue."⁷¹ The donations from the Japanese citizens, companies, and organizations would provide the victims with the costs of housing, medical care, and welfare.⁷²

However, the Japanese government emphasized that this Fund was not a governmental agency.⁷³ Through this private fundraiser, Japan avoided legal liabilities that might cause the government to pay for the comfort women's sufferings.⁷⁴ Furthermore, there is another reason to distrust the sincerity of the Japanese government. According to Yoshimi Yoshiaki, Prime Minister Hashimoto Ryōtarō used the word "owabi" in the 'letter of apology' which was sent from the Fund, and it is an expression that "denotes a sense of apology slightly more weighty than an "Excuse me" offered when one bumps shoulders with someone on the subway."⁷⁵ Thankfully, the former comfort women and the international community were not deceived. Many of the former comfort women refused to accept this money,⁷⁶ and the Fund became controversial with regard to the character of it in the international societies.⁷⁷ It should be noted that what the former comfort women really want the most is the sincere apology from the Japanese government itself, not just monetary compensation.⁷⁸

⁷⁰ Coomaraswamy Report, *supra* note 2, ¶ 132.

⁷¹ *See id.*

⁷² Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women's L.J. 174, 183 (2001).

⁷³ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int'l L. & Foreign Aff. 461, 474 (2000-01).

⁷⁴ Brooke Say, *Ripe for Justice: A New UN Tool to Strengthen the Position of the "Comfort Women" and to Corner Japan into its Reparation Responsibility*, 23 Penn St. Int'l L. Rev. 931, 961 (2005).

⁷⁵ YOSHIMI YOSHIKI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II 25 (1995).

⁷⁶ Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 269 (1998).

⁷⁷ Brooke Say, *Ripe for Justice: A New UN Tool to Strengthen the Position of the "Comfort Women" and to Corner Japan into its Reparation Responsibility*, 23 Penn St. Int'l L. Rev. 931, 961 (2005).

⁷⁸ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int'l L. & Foreign Aff. 461, 475 (2000-01).

III. VIOLATIONS AND LEGAL LIABILITIES UNDER INTERNATIONAL LAW

The human rights of the comfort women were atrociously infringed by the brutal treatment under the Japanese comfort system. Therefore, they should be redressed through all possible remedies such as official apology and monetary compensation from the Japanese government itself, and rightful prosecution of the perpetrators in the then Japanese government and military at both international and Japanese levels. In order for this, the violations and legal liabilities of Japan under international law must be analyzed.

A. Manifest Involvement of Japanese Government

As discussed earlier, the Japanese government had administered the military sexual slavery system with the strict regulations. Extensive involvement of the Japanese government and the operations of the Japanese army are proven by the recent research, investigation, and studies.⁷⁹ At last, in 1992, the Japanese government acknowledged that the comfort women were forced into prostitution by the government.⁸⁰ Thus, the substance of its argument has been changed from the denial of any involvement in the system to the extinguishment of its legal liabilities since then.⁸¹

Regarding the recruitment, the Japanese Governor-General had a duty to “line up young Korean women through deception and coercion” under the Japanese colonial system.⁸² In addition, the Japanese government had the authority to permit the establishment or abolition of

⁷⁹ As mentioned before, the relevant documents about both the comfort system itself and the involvement of the Japanese government have been revealed since 1990's. The details were treated in Section II(C)(2).

⁸⁰ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women's L.J. 174, 182 (2001).

⁸¹ *See id.*

The details of the contentions by the Japanese government will be explained in Section III(C).

⁸² Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 266 (1998).

the comfort stations,⁸³ to order the operators to submit the regular business and medical reports,⁸⁴ and to impose a business tax.⁸⁵ Also, it “provided security for comfort stations to prevent the escape of comfort women and the unauthorized entry of any nonmilitary or paramilitary men.”⁸⁶

B. Violations under International Law

The Japanese comfort system during World War II is a representative example of “systematic rape” and “sexual slavery” systems during armed conflict.⁸⁷ According to Gay J. McDougall, a Special Rapporteur in the Commission on Human Rights of the United Nations, the violations by Japan under international law can be defined as mainly 3 crimes – slavery, rape and crimes against humanity.

1. Slavery or Forced Labor

Slavery means that “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”⁸⁸ inclusive of “sexual access through rape or other forms of sexual violence.”⁸⁹ Also, forced labor is “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not

⁸³ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 89 (1994).

⁸⁴ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 89-90 (1994).

In particular, the Japanese government paid attention to the effective health measures regarding the comfort women because it believed the venereal diseases could threaten the fighting ability of the troops.

See YUKI TANAKA, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II* 96 (1996).

⁸⁵ Chin Sung Chung, *Korean Women Drafted for Military Sexual Slavery by Japan*, in *TRUE STORIES OF THE KOREAN COMFORT WOMEN* 14 (Keith Howard ed., 1995) (1993).

⁸⁶ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 *Berkeley Women’s L.J.* 174, 180 (2001).

⁸⁷ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (prepared by Gay J. McDougall) [hereinafter *McDougall Report I*].

⁸⁸ International Convention to Suppress the Slave Trade and Slavery art. 1, Sep. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter *1926 Slavery Convention*].

⁸⁹ *McDougall Report I*, *supra* note 87, ¶ 27.

offered himself voluntarily.”⁹⁰ Before World War II, “slavery” or “forced labor” was prohibited under customary international law.⁹¹ The prohibition of slavery or forced labor had been regarded as *jus cogens* at earlier times.⁹² It was clearly treated in the ‘Vienna’s Declaration Relative to the Universal Abolition of the Slave Trade’ in 1815.⁹³

Generally, this expression was referred to as customary international law.⁹⁴ The 1926 Slavery Convention explicitly codified the customary international law. This convention regulated the ban of slavery in order “to prevent and suppress the slave trade, and to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms”⁹⁵ in places including the “colonial territories.”⁹⁶ Japan implicitly joined the convention by “ratifying a number of international agreements proscribing slavery and slavery-like practices.”⁹⁷ About 7 years later, another treaty affirmed the customary international law prohibiting slavery. Although Japan was not a signatory of the ‘International Convention for the Suppression of the Traffic in Women of Full Age’,⁹⁸ this convention verified the existing principles of the ban of trafficking of women as customary international law.

In particular, under “the laws of armed conflict,” the 1907 Hague Convention⁹⁹ has been the basis of the prohibition of forced labor.¹⁰⁰ Article 46 of the convention states that “[f]amily

⁹⁰ Convention concerning Forced or Compulsory Labour art. 2, June 28, 1930, 39 U.N.T.S. 55 [hereinafter ILO Convention 29].

⁹¹ McDougall Report I, *supra* note 87, app. ¶ 12.

⁹² Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 Hastings Int’l & Comp. L. Rev. 497, 521 (1994).

⁹³ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia’s “Comfort Women,”* 14 Tex. J. Women & L. 121, 131 (2004); M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. Int’l L. & Pol. 445, 459-60 (1991).

⁹⁴ *See id.*

⁹⁵ 1926 Slavery Convention, *supra* note 88, art. 2.

⁹⁶ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia’s “Comfort Women,”* 14 Tex. J. Women & L. 121, 131 (2004).

⁹⁷ *Id.* at 131.

⁹⁸ International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

⁹⁹ Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention].

honour and rights, the lives of persons, and private property, as well as religious convictions and practices, must be respected.” The “family honour and rights” should be understood as the rights protecting one from “rape, other forms of torture and forced prostitution,” and the “religious convictions” should also be interpreted as these kinds of rights.¹⁰¹ Therefore, the Japanese comfort system is a representative example of forced labor in violation of the 1907 Hague Convention because the rights of the comfort women were infringed upon, not only with respect to their family honor and rights, but also as to their own religious convictions.¹⁰² Also, as many comfort women were killed by the Japanese army both during and after the war, the military sexual slavery system can be said to have disrespected the “lives of persons” and thus was a clear violation of this convention.¹⁰³

As for the character of the 1907 Hague Convention, the two international military tribunals defined it as customary international law. According to the judgment towards Nazi war criminals of the international military tribunal in Nuremberg, “the 1907 Hague Convention was clearly declaratory of customary international law by the Second World War.”¹⁰⁴ Also, the international military tribunal in Tokyo held that the convention was “good evidence of the customary law of nations to be considered by the Tribunal, along with all other available evidence, in determining the customary law to be applied in any given situation.”¹⁰⁵

¹⁰⁰ Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 *Hastings Int’l & Comp. L. Rev.* 497, 516 (1994).

¹⁰¹ Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 *Hastings Int’l & Comp. L. Rev.* 497, 515 (1994).

¹⁰² In the case of the oriental countries, the societies give the high moral value attached to chastity under the Confucianism.

See GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 21 (1994).

¹⁰³ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia’s “Comfort Women,”* 14 *Tex. J. Women & L.* 121, 135 (2004).

¹⁰⁴ McDougall Report I, *supra* note 87, app. ¶ 15.

¹⁰⁵ Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 *Hastings Int’l & Comp. L. Rev.* 497, 516 (1994).

Additionally, it should be noted that Japan declared the prohibition of slavery through a case convicting Peruvian slave traders in 1872.¹⁰⁶ Then, yet some 60 years later, the Japanese government itself committed the very same crime of slavery.

There were Approximately 20 conventions prohibiting slavery concluded by 1932.¹⁰⁷ Japan became a signatory of the ‘Convention Revising the General Act of Berlin and the General Act and Declaration of Brussels (Treaty of Saint-Germain-en-Laye)’¹⁰⁸ in 1919.¹⁰⁹ According to Article 11, the signatory powers should “endeavour to secure the complete suppression of slavery in all its forms and of the black slave trade by land and sea.”¹¹⁰ Japan clearly violated this obligation in that it created and operated the military sexual slavery system. Other treaties codifying the ban of slavery are the 1910 ‘International Convention for the Suppression of the White Slave Traffic,’¹¹¹ and the 1921 ‘International Convention for the Suppression of the Traffic in Women and Children’¹¹² which was a reaffirmed version.¹¹³ Japan ratified the latter in 1925.¹¹⁴ Article 1 of the ‘International Convention for the Suppression of the White Slave Traffic’ stipulated “[w]hoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished” without regard to the occurrences in different countries. Also, in Article 2, the illegal methods of trafficking were enumerated including fraud, means of violence, threats, abuse of authority or other methods. If the related legislation is not sufficient to treat the

¹⁰⁶ McDougall Report I, *supra* note 87, app. ¶ 13.

¹⁰⁷ *Id.* ¶ 14.

¹⁰⁸ Treaty of Saint-Germain-en-Laye, Sep. 10, 1919, 49 Stat. 3027, 8 L.N.T.S. 25.

¹⁰⁹ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia’s “Comfort Women,”* 14 Tex. J. Women & L. 121, 131 (2004).

¹¹⁰ *See id.*

¹¹¹ International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, GR. Brit. T.S. No. 20.

¹¹² International Convention for the Suppression of the Traffic in Women and Children, Sep. 30, 1921, 9 L.N.T.S. 415.

¹¹³ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 485 (2000-01).

¹¹⁴ *See id.*

violations, the signatories should “engage to take or to propose to their respective legislatures the necessary steps to punish.”¹¹⁵

There is much evidence that the Japanese government and army recruited young girls as the comfort women coercively and deceptively throughout Asia, and forced them to prostitute against their wills, generally without any payment for so-called their “services.” Therefore, Japan manifestly violated these conventions, especially the ‘International Convention for the Suppression of the Traffic in Women and Children’ which it ratified. However, there has been controversy about the interpretation of Article 14 of the ‘International Convention for the Suppression of the Traffic in Women and Children’.¹¹⁶ In accordance with the provision, it seems that colonies can be excluded in the application of the treaty. Thus, it was opined that Japan recruited as many as Korean women for the comfort women in order to take advantage of this territorial scope provision.¹¹⁷ Although the Japanese government contended that the non-protection of the Korean comfort women was allowable under Article 14, the provision should be interpreted in accordance with the intent of the drafters of the convention. That is to say, Article 14 was not “designed to further the future creation of the trafficking in women, but rather served to allow a slower phasing out of the practice in certain areas of the world.”¹¹⁸ To say nothing of the purpose of the treaty, Japan is still liable. Some of the non-Japanese comfort

¹¹⁵ International Convention for the Suppression of the White Slave Traffic art. 3, May 4, 1910, 211 Consol. T.S. 45, GR.Brit.T.S. No.20.

¹¹⁶ Article 14 of the convention provides:

[A]ny Member or State signing the present Convention may declare that the signature does not include any or all of its colonies, overseas possessions, protectorates or territories under its sovereignty or authority, and may subsequently adhere separately on behalf of any such colony, overseas possession, protectorate or territory so excluded in its declaration.

Denunciation may also be made separately in respect of any such colony, overseas possession, protectorate or territory under its sovereignty or authority, and the provisions of Article 12 shall apply to any such denunciation.

¹¹⁷ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 486 (2000-01).

¹¹⁸ *Id.* at 487.

women were initially transported in Japan,¹¹⁹ and then, sent to the various Asian battle fields. Others living in Japan were also recruited.¹²⁰ In those cases, the application of Article 14 as a defense became impossible, and thus, the Japanese government is clearly liable to those women.

In addition, Japan ratified the ILO Convention 29 in 1932.¹²¹ According to Article 1, member states should “suppress the use of forced or compulsory labour in all its forms within the shortest possible period.” As a part of their duties, they have to “ensure that the penalties imposed by law are really adequate and are strictly enforced.”¹²² The term “penalties imposed by law” should be interpreted as the signatories having definite obligations to legislate relevant laws¹²³ and to punish perpetrators through strict procedures. Furthermore, Article 11 made an exception of forced labor – only adult males “may be called upon for forced or compulsory labour,” and Article 13 and 14 stipulated the working hours¹²⁴ and remuneration.¹²⁵

The Japanese comfort system during World War II – at least from 1932 (the year of Japan’s ratification¹²⁶ of the ILO Convention 29) to 1945 (the end of World War II) – was clearly included among the kinds of prohibited forced labor. Also, the Japanese government was manifestly negligent to enact the relevant domestic laws to punish perpetrators and compensate the former comfort women for the forced labor of the military brothel system. More specifically, the comfort women “were not granted a day of rest and often had to service the sexual needs of

¹¹⁹ *Id.* at 486.

¹²⁰ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia’s “Comfort Women,”* 14 *Tex. J. Women & L.* 121, 133 (2004).

¹²¹ ILO Convention 29, *supra* note 90; See generally, Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 *UCLA J. Int’l L. & Foreign Aff.* 461, 481-85 (2000-01).

¹²² ILO Convention 29, *supra* note 90, art. 25.

¹²³ This duty was well explained in the decision of the Yamaguchi District Court in Japan.

See Section IV(A)(3).

¹²⁴ According to Article 13, the working hours should be “the same as those prevailing in the case of voluntary labour,” and those member states must grant a weekly day of rest.

¹²⁵ Forced labor should be “remunerated in cash at rates not less than those prevailing for similar kinds of work” under Article 14.

¹²⁶ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 *UCLA J. Int’l L. & Foreign Aff.* 461, 481 (2000-01).

Japanese military personnel at all hours of the day and night.”¹²⁷ Furthermore, most of them could not be paid for their services, as mentioned earlier. Therefore, the Japanese government, as a signatory of this treaty, is not able to avoid its responsibility regarding the violations of the prohibition of forced labor.

Most of all, the international military tribunals in Nuremberg and Tokyo recognized slavery as war crimes. Article 6(c) of the Nuremberg Charter included, as one of the war crimes, “ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory.”¹²⁸ Similarly, Article 5(c) of the Far East (Tokyo) Charter also mentioned slavery.¹²⁹ Therefore, the Japanese government, and its officials, should have been convicted for forced labor under the Charters of postwar international military tribunals to the extent that Japan established and operated the military sexual slavery system.

2. Rape

Rape is in “the broader category of sexual violence ... physical or psychological, carried out through sexual means or by targeting sexuality.”¹³⁰ Also, the term of “systematic rape” under some systems like the comfort system is spontaneously included in the category without any proof.¹³¹ The prohibition of rape was accepted as customary international law at earlier times, and it was codified through the laws of war. The laws of war prohibited rape and forced prostitution, as well as slavery.¹³² The 1863 Lieber Code provided for the protection of women from rape.¹³³ As the interpretation was also related to the ban of forced labor, the respect for the “family honor and rights” of Article 46 of the 1907 Hague Convention should also be understood

¹²⁷ *Id.* at 482-83.

¹²⁸ McDougall Report I, *supra* note 87, app. ¶ 16.

¹²⁹ *See id.*

¹³⁰ *Id.* ¶ 21.

¹³¹ *Id.* ¶ 17.

¹³² *Id.* app. ¶ 17.

¹³³ *See id.*

as protecting women from any atrocity like rape or forced prostitution.¹³⁴ Furthermore, the international military tribunals confirmed the 1907 Hague Convention was customary international law.¹³⁵

Under Article 27 of the 1949 Geneva Convention,¹³⁶ the phrase of “family honour and rights” was reaffirmed that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”¹³⁷ Also, Articles 3(1)(c) and 147 of this convention involve the prevention of rape and sexual abuse. Article 3(1)(c) provides the prohibition of “outrages upon personal dignity, in particular humiliating and degrading treatment.” Although rape was not on the list in this provision literally, it is implicitly included in the category of Article 3(1)(c).¹³⁸ According to Article 147, “torture or inhumane treatment” is enumerated as types of grave breaches, and the phrase “inhumane treatment” is meant to include the atrocities of rape or other sexual abuses.¹³⁹ Even though the 1949 Geneva Convention has been effective since the end of World War II, it must be noted that the treaty was a representative codification of customary international law.¹⁴⁰

The ‘Declaration on the Elimination of Violence against Women’¹⁴¹ – a General Assembly resolution adopted in 1993 – was also codified and reaffirmed as customary international law which had regulated the protection of women from rape and sexual violence.¹⁴²

¹³⁴ Yvonne Park Hsu, “*Comfort Women*” from Korea: Japan’s World War II Sex Slaves and the Legitimacy of Their Claims for Reparations, 2 Pac. Rim L. & Pol’y J. 97, 107 (1993).

¹³⁵ McDougall Report I, *supra* note 87, app. ¶ 15; Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 Hastings Int’l & Comp. L. Rev. 497, 516 (1994).

¹³⁶ Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention].

¹³⁷ McDougall Report I, *supra* note 87, app. ¶ 17.

¹³⁸ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 489 (2000-01).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 488.

¹⁴¹ Declaration on the Elimination of Violence against Women, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

¹⁴² Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 490 (2000-01).

The resolution clearly included “rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution” as the examples of “physical, sexual, and psychological violence.”¹⁴³ The international community had recognized rape as one of the most atrocious war crimes, and the prohibition of rape had been regarded as customary international law. In addition, the rules of war specified this ban as an explicit provision of many conventions. Thus, Japan definitely violated the important human right through the comfort system during World War II, and is liable for the infringement.

3. Crimes against Humanity

The military sexual slavery system of Japan during World War II violated not only the prohibition of war crimes, but also the ban of crimes against humanity. Regarding slavery, the Charters of international military tribunals provided the enumeration of crimes against humanity. According to Article 6(c) of the Nuremberg Charter, there are “enslavement, deportation and other inhumane acts committed against any civilian population as crimes against humanity.”¹⁴⁴ Also, Article 5 of the Tokyo Charter listed similarly.¹⁴⁵ Rape is also one of the notorious crimes against humanity. The Charters of the international military tribunals in Nuremberg and Tokyo affirmed rape as a crime against humanity.¹⁴⁶ Lately, the codifications in respect of crimes against humanity tend to list rape explicitly as a crime against humanity rather than to define implicitly as “the residual provision of other inhumane acts.”¹⁴⁷ The comfort system which violated the fundamental human rights of women has been sufficiently proven through massive

¹⁴³ Declaration on the Elimination of Violence against Women art. 2(b), U.N. Doc A/RES/48/104 (Dec. 20, 1993).

¹⁴⁴ McDougall Report I, *supra* note 87, app. ¶ 19.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* app. ¶ 20.

¹⁴⁷ *See id.*

According to the report, this trend was well illustrated by the Statute of the international criminal tribunal for the Former Yugoslavia and the international tribunal of Rwanda.

research and investigations since the 1990's. Nevertheless, the Japanese government has denied its responsibilities regarding crimes against humanity as well as war crimes.

C. Legal Liabilities of Japanese Government

Initially, the Japanese government had denied any involvement of the Japanese government and army as well as the existence of the comfort system. However, the important materials which were recorded about the existence and management of the military sexual slavery system have been discovered by the Japanese scholars since 1990's. Those disclosures and "mounting pressure from neighboring countries"¹⁴⁸ brought about the investigation of the Japanese government itself. At last, the results were announced on July 5, 1992.¹⁴⁹ In the announcement, the Japanese government admitted the existence of the military sexual slavery system, and accepted the direct involvement of the Japanese military.¹⁵⁰

Since then, the arguments of the Japanese government have been changed abruptly. In order to avoid legal liability and to pretend to accept moral responsibility, the Japanese government unduly made use of the favorable provisions of both international law and domestic law, and deceptively supported the Asian Women's Fund. Therefore, it is necessary to observe and analyze each argument of the Japanese government in order for the ultimate imposition of liabilities to the Japanese government.

¹⁴⁸ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women's L.J. 174, 182 (2001).

¹⁴⁹ Coomaraswamy Report, *supra* note 2, ¶ 128.

¹⁵⁰ The Japanese government stated:

[C]omfort stations were established in various locations in response to the request of military authorities at the time. ... Comfort stations existed in Japan, China, the Philippines, Indonesia, the then Malaya, Thailand, the then Burma, the then New Guinea, Hong Kong, Macao and the then French Indo-China. ... Even in those cases where the facilities were run by private operators, the then Japanese military was involved directly in the establishment and management of comfort stations by such means as granting permissions to open the facilities, equipping the facilities, drawing up the regulations for the comfort stations that set the hours of operation and tariff and stipulated such matters as precautions for the use of the facilities.

See id.

1. Retroactivity of International Law

The Japanese government contended that the comfort women scheme was not prohibited at that time. That is, it asserted that the notions of slavery, rape, and crimes against humanity were newly established in the Charters of the international military tribunals and the numerous international agreements¹⁵¹ after World War II, and thus, the application of international law retroactively is inadmissible.¹⁵² Even though retroactive application of law is not accepted, the Japanese government is still responsible for the military sexual slavery system. As discussed earlier, there were customary international law and several conventions prior to World War II that prohibited this behavior.

Customary international law regarding slavery, rape, and crimes against humanity existed a long time ago – prior to the war. According to Article 102 of the Restatement (Third) and Article 38 of the Statute of the International Court of Justice, there are 3 main sources of international law: international conventions, international custom, and the general principles of law.¹⁵³ Among them, customary international law as “evidence of a general practice accepted as law”¹⁵⁴ has long been accepted and “becomes binding law through repetition and adoption”¹⁵⁵ in the international community. In addition, later codifications of those customary international laws may be invoked as evidence of customary norm.¹⁵⁶ Particularly, the general prohibitions against the “inhumane treatment of civilians and prisoners of war, rape, torture, enforced labor,

¹⁵¹ The most representative international agreements are the 1949 Geneva Convention, and the Declaration on the Elimination of Violence against Women.

See Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int'l L. & Foreign Aff. 461, 490 (2000-01).

¹⁵² McDougall Report I, *supra* note 87, app. ¶ 25.

¹⁵³ LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 56-57 (4th ed. 2001).

In the meantime, the Statute of the International Court of Justice recognized judicial decisions and the teachings of the most highly qualified publicists of the various nations as the forth resource of international law.

See id.

¹⁵⁴ Statute of the International Court of Justice art. 38 (1)(b), June 26, 1945, 59 Stat. 1055, 3 Bevens 1179.

¹⁵⁵ Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 Hastings Int'l & Comp. L. Rev. 497, 511 (1994).

¹⁵⁶ *Id.* at 512.

and other rights violations ... are also considered to have been governed by *jus cogens* long before World War II.”¹⁵⁷ Article 53 of the ‘Vienna Convention on the Law of Treaties’¹⁵⁸ affirmed *jus cogens* as “a norm accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” In the case of the Japanese comfort system, customary international law treating the prohibition of slavery, rape and crimes against humanity had attained the status of *jus cogens*, and this has also been codified by international agreements later.¹⁵⁹

Additionally, there were significant treaties which regulated the prevention of those crimes before Japan committed. It is needless to mention the important status of international conventions in the international community. Actually, Japan was a signatory in the treaties which explicitly prohibited those crimes both before and during World War II.¹⁶⁰ Therefore, it is not understandable that the Japanese government denies liability despite the clear violations under the international agreements which Japan had ratified at the time of the comfort system.

2. Individual Compensation under International Law

The Japanese government also argued that an individual cannot be “a subject of rights or duties in international law”¹⁶¹ even if Japan violated international law. However, this assertion was groundless in that the opportunity of individuals to bring claims has been offered by international conventions, and by decision of the Permanent Court of International Justice. First of all, it is important to note the meaning of individual claims. The level of States’ assistance

¹⁵⁷ *Id.* at 521.

¹⁵⁸ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

¹⁵⁹ The specific explanation was introduced in Section III(B).

¹⁶⁰ Also, the details were treated in Section III(B).

¹⁶¹ Coomaraswamy Report, *supra* note 2, ¶ 109.

about their citizens is generally possible “only after private compensation efforts fail.”¹⁶² The issue of individual compensation becomes a beginning of reparation process, and thus, it is necessary to observe the possibility of individual claims.

As a prerequisite of individual claims, Article 3 of the 1907 Hague Convention stipulates that “a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” Literally, this provision requires that compensation must be made in case that there is a breach of international law.¹⁶³ Japan also accepted this notion and proposed some provisions that “a state is responsible for both intentional and negligent acts” in one draft codifying compensation factors in 1929.¹⁶⁴ Furthermore, the purpose of Article 3 of the 1907 Hague Convention was understood “to provide individual persons with a right to claim compensation for damages they suffered as a result of acts in violation of the Regulations.”¹⁶⁵ In addition, the “Treaty of Versailles”¹⁶⁶ in 1919 provided that individuals could demand reparation for their sufferings against States.¹⁶⁷ Furthermore, the Permanent Court of International Justice, in *Chorzów Factory*, held that “if the situation prior to an act in violation of international law could not be resorted (e.g. property returned), compensation must be paid” in 1927.¹⁶⁸ The physical and emotional sufferings that the former

¹⁶² Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 *Hastings Int’l & Comp. L. Rev.* 497, 526 (1994).

¹⁶³ *Id.* at 524-25.

¹⁶⁴ *Id.* at 525-26.

¹⁶⁵ McDougall Report I, *supra* note 87, app. ¶ 46.

¹⁶⁶ This treaty was a peace treaty between the Allied and Associated Powers and Germany after World War I.

¹⁶⁷ McDougall Report I, *supra* note 87, app. ¶ 45.

¹⁶⁸ *Id.* app. ¶ 47; *Factory at Chorzów*, 1927 P.C.I.J. (ser. A) No. 8-17, at 29 (July 26).

comfort women experienced were completely irreparable loss, and thus, the only way to recover is compensation from Japan with sincere apology.¹⁶⁹

Most of all, the Japanese government itself recognized and accepted the responsibility for individual claims.¹⁷⁰ Under the several post-war treaties,¹⁷¹ Japan clearly acknowledged and accepted its liability regarding individual compensation. Therefore, it is quite inconsistent for the Japanese government to assert that the comfort women cannot claim for compensation.

3. Validity of Post-War Treaties

Japan also maintained that although individual claims are possible under international law, those claims were settled by the post-war treaties.¹⁷² In other words, the Japanese government believed that such rights were nullified by the 1951 San Francisco Peace Treaty¹⁷³ and other bilateral agreements after World War II. This contention cannot be justified in various respects.

Most of all, these treaties cannot nullify reparation claims for the infringement on fundamental human rights. The prohibition of slavery, rape, and crimes against humanity had attained the status of *jus cogens*, and “a subsequent treaty cannot trump a claim based on a

¹⁶⁹ According to the report, the Rapporteur opined that “since restoration of the victims of the “comfort stations” to their status prior to this violation is clearly impossible, compensation must be paid.”

See McDougall Report I, *supra* note 87, app. ¶ 47.

¹⁷⁰ Yvonne Park Hsu, “Comfort Women” from Korea: Japan’s World War II Sex Slaves and the Legitimacy of Their Claims for Reparations, 2 Pac. Rim L. & Pol’y J. 97, 103 (1993).

¹⁷¹ To illustrate, there were the Greece-Japan Agreement, Great Britain-Japan Agreement, Canada-Japan Agreement, Switzerland-Japan Agreement, Sweden-Japan Agreement, and Denmark-Japan Agreement.

See *id.*

¹⁷² Coomaraswamy Report, *supra* note 2, ¶ 103.

¹⁷³ Treaty of Peace with Japan, Sep. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 [hereinafter 1951 San Francisco Peace Treaty].

violation of *jus cogens* norms” upon international law.¹⁷⁴ In other words, if any article of the post-war treaties stipulates the waiver of those claims, that provision would become void.¹⁷⁵

Furthermore, the settlement by the post-war treaties cannot affect the rights of the countries – North Korea, China, the Philippines and Taiwan – which were not the signatories.¹⁷⁶ Also, some of the former comfort women who lived in Japan are not influenced by those agreements because Japan itself was not a so-called beneficiary upon them.¹⁷⁷ Therefore, it is irrational for the Japanese government to continue to maintain that there is no legal liability with respect to their treatment of the comfort women.

Indonesia and the Philippines, which ratified the 1951 San Francisco Peace Treaty may be at a disadvantage in demanding the reparation claims.¹⁷⁸ Under Article 14(b) of the treaty, the signatories would waive all reparations claims, other claims of them and their nationals from any actions taken by Japan and its nationals, and claims of them for direct military costs of occupation.¹⁷⁹ However, this provision obviously indicates that “the waiver does not apply to compensation of the Allied Powers’ nationals” because the language distinctively enumerated “reparation claims of the Allied Powers” and “other claims of the Allied Powers and their nationals.”¹⁸⁰ Therefore, the former comfort women from those countries can sufficiently claim against the Japanese government according to the terms of the treaty. Furthermore, Article 14(a)

¹⁷⁴ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women’s L.J. 174, 190 (2001).

¹⁷⁵ Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 Hastings Int’l & Comp. L. Rev. 497, 538 (1994).

¹⁷⁶ *Id.* at 537.

¹⁷⁷ *See id.*

¹⁷⁸ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women’s L.J. 174, 189 (2001).

¹⁷⁹ Article 14(b) of the 1951 San Francisco Peace Treaty states:

[E]xcept as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

¹⁸⁰ McDougall Report I, *supra* note 87, app. ¶ 60.

states that “it is also recognized that the resources of Japan are not presently sufficient,”¹⁸¹ and thus, this provision suggests Japan’s “further restitution at a later time, when the reparations would not cripple its economy.”¹⁸²

In the case of China, there are more possibilities to seek compensation. Under Article 21 of the treaty,¹⁸³ China is entitled to the benefit of Article 14(a)(2) “which sets forth the specific reparations owed by Japan.”¹⁸⁴ As China was not a signatory, it would not be influenced by the waiver provision in Article 14(b), and thus the Chinese comfort women are able to claim for compensation. Also, China and Japan concluded a bilateral agreement,¹⁸⁵ whereby “China did not waive its nationals’ rights to bring individual war claims against Japan” in its settlement agreement.¹⁸⁶

As for the position of South Korea, the 1965 Korea-Japan Agreement¹⁸⁷ - the bilateral settlement between South Korea and Japan – was one of the biggest barriers to the former comfort women. According to Article 2 of the agreement, South Korea and Japan confirmed that the problems with regard to property, rights, interests of the two countries and their nationals and the claims between them and their nationals would be settled completely and finally.

¹⁸¹ The 1951 San Francisco Peace Treaty was concluded on September 8, 1951. At that period, Japan as a defeated nation had experienced economic difficulties severely owing to the arrangement of the settlement issues.

¹⁸² Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 494 (2000-01).

¹⁸³ Article 21 of the 1951 San Francisco Peace Treaty provided that “notwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2”

¹⁸⁴ McDougall Report I, *supra* note 87, app. ¶ 61.

¹⁸⁵ Joint Communiqué of the Government of Japan and the Government of the People’s Republic of China, Japan-P.R.C., Sep. 29, 1972, available at <http://www.mofa.go.jp/region/asia-paci/china/joint72.html>.

¹⁸⁶ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women’s L.J. 174, 189 (2001).

¹⁸⁷ Agreement between Japan and the Republic of Korea Concerning the Settlement of Problems in regard to Property and Claims and Economic Cooperation, Japan-Korea, June 22, 1965, 583 U.N.T.S. 173 [hereinafter 1965 Korea-Japan Agreement].

However, in contrast with other bilateral treaties,¹⁸⁸ other provisions of this agreement as well as Article 2 did not deal with the issue of individual claims¹⁸⁹ as the provisions referred to only “property and commercial relations between the two nations.”¹⁹⁰ In addition, the relevant documents from the Korean representatives showed that the matters of individual claims towards the violations – slavery, rape, and crimes against humanity – were not treated in the negotiations of the agreement.¹⁹¹ Presently, South and North Korea have joined hands to demand an official apology and compensation from the Japanese government in a joint statement for the comfort women made on May 21, 2007.¹⁹² If the government of North Korea, which was not any signatory of the post-war treaties, comes out in the international community and cooperates with the government of South Korea, Japan cannot continue to contend their actions as reasonable under those treaties any longer.

4. Statutory Limitations

As a last resort, the Japanese government argued that a statute of limitations must be applied because nearly 60 years have passed since Japan established and operated the comfort system at the time of the war.¹⁹³ However, this assertion is also groundless. Most of all, it is generally opined that claims for gross violations of the human rights should not have statutes of

¹⁸⁸ As mentioned earlier, other bilateral agreements - the Greece-Japan Agreement, Great Britain-Japan Agreement, Canada-Japan Agreement, Switzerland-Japan Agreement, Sweden-Japan Agreement, and Denmark-Japan Agreement – explicitly expressed the right to claim individually.

See Yvonne Park Hsu, “*Comfort Women*” from Korea: Japan’s World War II Sex Slaves and the Legitimacy of Their Claims for Reparations, 2 Pac. Rim L. & Pol’y J. 97, 103 (1993).

¹⁸⁹ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women’s L.J. 174, 188 (2001).

¹⁹⁰ McDougall Report I, *supra* note 87, app. ¶ 58.

¹⁹¹ *Id.* app. ¶ 59.

¹⁹² Hyegyong Hwang, *South and North Korea to Adopt Joint Statement on Comfort Women*, YTN NEWS, May 21, 2007, available at http://www.ytn.co.kr/_ln/0103_200705211623208238.

¹⁹³ Coomaraswamy Report, *supra* note 2, ¶ 124.

In particular, the period of the statute of limitations for civil cases in Japan is 20 years.

See Minpō (Civil Code), art. 167; Brooke Say, *Ripe for Justice: A New UN Tool to Strengthen the Position of the “Comfort Women” and to Corner Japan into its Reparation Responsibility*, 23 Penn St. Int’l L. Rev. 931, 951 (2005).

limitations applied to them.¹⁹⁴ In fact, Germany repealed the extinctive prescription regarding war crimes and crimes against humanity, and prepared a basis to punish the war criminals of World War II.¹⁹⁵ Also, the ‘Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity’ was adopted by the General Assembly of the United Nations in 1968.¹⁹⁶ In the resolution, the General Assembly affirmed that no statutory limitation should apply to war crimes and crimes against humanity.¹⁹⁷ Later, a draft of the 2000 ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’¹⁹⁸ was adopted by the General Assembly in 2005. Article 6 and 7 of this resolution treats statutes of limitations, and reaffirms the non-applicability of statutory limitations on serious violations of the human rights.¹⁹⁹ In the case of the comfort women, the Japanese government and military had repeatedly trampled upon the human rights of them through the military brothel system. The crimes committed by Japan – as war crimes and crimes against humanity – are definitely egregious violations of the fundamental human rights, and thus, it is inappropriate to apply statutory limitations to the claims of the former comfort women. Furthermore, if the prohibition from rape, slavery, and crimes against humanity attains the status

¹⁹⁴ Coomaraswamy Report, *supra* note 2, ¶ 124.

¹⁹⁵ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 *UCLA J. Int'l L. & Foreign Aff.* 461, 492 (2000-01).

¹⁹⁶ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, U.N. Doc. A/RES/2391(XXIII) (Nov. 26, 1968).

¹⁹⁷ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 *UCLA J. Int'l L. & Foreign Aff.* 461, 492 (2000-01).

¹⁹⁸ U.N. Econ. & Soc. Council [ECOSOL], *Comm. on Human Rights, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000) (prepared by M. Cherif Bassiouni).

¹⁹⁹ Brooke Say, *Ripe for Justice: A New UN Tool to Strengthen the Position of the “Comfort Women” and to Corner Japan into its Reparation Responsibility*, 23 *Penn St. Int'l L. Rev.* 931, 950 (2005).

of *jus cogens*, the statute of limitations cannot be applicable.²⁰⁰ As observed, those rules are manifestations of customary international law that serve as *jus cogens* norms. Therefore, the suits of the comfort women must not be a subject of any statute of limitations.

Regardless of this discussion, it should be noted that the application of statutory limitations to the comfort women cases is unfit for the purpose of the rule.²⁰¹ The purpose of the law, in both civil and criminal cases, is to provide “diligent prosecution of known claims” while evidence is still reliable, and to supply “finality and predictability in legal affairs.”²⁰² As the Japanese government has intentionally concealed and distorted the crucial evidences,²⁰³ it was in the 1990’s that the existence and operation of the military sexual slavery system was genuinely exposed.²⁰⁴ Therefore, the claims of the former comfort women should not be time-barred to the extent that the vital evidence could not be available at first. Moreover, even though statutory imitations may be applied, the Japanese government is still liable. It took almost 40 years for the international community to perceive the military brothel system during World War II though the former comfort women have been suffered for about 60 years.²⁰⁵ To illustrate the civil litigations in the Japanese courts, the period of the Japanese statutory limitations is 20 years, and the former comfort women have filed several civil lawsuits against the Japanese government since 1991. Thus, the right of them is not extinguished before the Japanese courts at present.

²⁰⁰ David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 32 Colum. J. Transnat’l L. 533, 576 (1995).

²⁰¹ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women’s L.J. 174, 191 (2001).

²⁰² BLACK’S LAW DICTIONLARY 1143 (7th ed. 2000).

²⁰³ Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II War-Rape Victims*, 17 Hastings Int’l & Comp. L. Rev. 497, 540 (1994).

²⁰⁴ Etsuro Totsuka, *Commentary on a Victory for “Comfort Women”: Japan’s Judicial Recognition of Military Sexual Slavery*, 8 Pac. Rim L. & Pol’y J. 47, 49 (1999).

²⁰⁵ Brooke Say, *Ripe for Justice: A New UN Tool to Strengthen the Position of the “Comfort Women” and to Corner Japan into its Reparation Responsibility*, 23 Penn St. Int’l L. Rev. 931, 951 (2005).

IV. UNSUCCESSFUL ATTEMPTS TO REDRESS IN PAST

A. Civil Suits in Japan

1. Lawsuits in Japanese Courts

On December 6, 1991, three South Korean comfort women filed the first class action against the Japanese government in the Tokyo District Court seeking reparation and an apology, and then, six more Korean women joined in the suit in 1992.²⁰⁶ Since then, the former comfort women from China, the Netherlands, the Philippines as well as South Korea have brought several civil lawsuits before the Japanese courts.²⁰⁷ On April 2, 1993 the former comfort women from the Philippines filed a civil action in the Tokyo District Court.²⁰⁸ After five years, the Court dismissed the case.²⁰⁹ Also, the Court denied a claim²¹⁰ by one Dutch comfort women on November 30, 1998.²¹¹ Recently, the Japanese Supreme Court rejected the compensation claim of the former comfort women from China on April 27, 2007.²¹² Other cases remain pending.²¹³

Significantly, there was a landmark judgment in the Yamaguchi District Court on April 27, 1998.²¹⁴ The Court awarded monetary damages to the three South Korean women for “the failure of the Japanese Diet to legislate a law to compensate the women constituted a violation of

²⁰⁶ Yvonne Park Hsu, “*Comfort Women*” from Korea: Japan’s World War II Sex Slaves and the Legitimacy of Their Claims for Reparations, 2 Pac. Rim L. & Pol’y J. 97, 98 (1993).

²⁰⁷ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict*, ¶ 74, U.N. Doc. E/CN.4/Sub.2/2000/21 (June 6, 2000) (prepared by Gay J. McDougall) [hereinafter McDougall Report II].

²⁰⁸ Etsuro Totsuka, *Commentary on a Victory for “Comfort Women”: Japan’s Judicial Recognition of Military Sexual Slavery*, 8 Pac. Rim L. & Pol’y J. 47, 49 n.5 (1999).

²⁰⁹ McDougall Report II, *supra* note 207, ¶ 76.

According to the report, 7 of the plaintiffs died during a five-year-trial although the 46 Philippine women sued the Japanese government at first. This showed the frustrating trial procedure in Japan well.

²¹⁰ On January 24, 1994, one Dutch comfort woman filed a suit in the Tokyo District Court.

See Etsuro Totsuka, *Commentary on a Victory for “Comfort Women”: Japan’s Judicial Recognition of Military Sexual Slavery*, 8 Pac. Rim L. & Pol’y J. 47, 49 n.5 (1999).

²¹¹ McDougall Report II, *supra* note 207, ¶ 76.

²¹² Norimitsu Onishi, *Japan Court Rules Against Sex Slaves and Laborers*, NEW YORK TIMES, Apr. 28, 2007, at A8, available at 2007 WLNR 8041372.

²¹³ Barry A. Fisher, *Japan’s Postwar Compensation Litigation*, 22 Whittier L. Rev. 35, 35 (2000).

²¹⁴ Judgment of Yamaguchi District Court, *supra* note 20, at 63.

Japanese constitutional and statutory law.”²¹⁵ However, three years later, the Hiroshima High Court overturned the decision, and the Japanese Supreme Court affirmed the holding of the High Court on March 25, 2003.²¹⁶

2. Attitude of Japanese Courts

As the comfort women mostly depended upon international agreements and customary international law, it is important to verify how Japan treats them in its domestic legal system. The Japanese Constitution provides that “the treaties concluded by Japan and established laws of nations shall be faithfully observed,”²¹⁷ and the established laws of nations generally mean “the customary norms and general principles of law that are accepted and practiced by nations.”²¹⁸ Therefore, Japan should carry out its duties in accordance with international conventions and customary international law.²¹⁹

Generally, the Japanese courts have been opposed to the post-war reparation claims. In *Shimoda*,²²⁰ five Japanese victims of the Hiroshima and Nagasaki bombings sought damages for injury and death in the Tokyo District Court.²²¹ The plaintiffs asserted that “the Japanese government had relinquished their claims, and this, they said, required Japan to compensate them under the National Tort Act and the Constitution of 1946.”²²² The Court dismissed the case in that the issue of relief measures was not a duty of the judiciary, but a duty of the legislature or

²¹⁵ McDougall Report II, *supra* note 207, ¶ 75.

²¹⁶ Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 Tul. J. Int'l & Comp. L. 59, 83 (2003).

More specific appreciation will be treated in Section IV(A)(3).

²¹⁷ KENPŌ (Constitution), art. 98(2).

²¹⁸ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int'l L. & Foreign Aff. 461, 493 (2000-01).

²¹⁹ *See id.*

²²⁰ *Shimoda v. Japan*, 355 HANREI JIHŌ 17 (Tokyo D. Ct., Dec. 07, 1963).

²²¹ Barry A. Fisher, *Japan's Postwar Compensation Litigation*, 22 Whittier L. Rev. 35, 38 (2000).

²²² *Id.* at 38-39.

the cabinet or the executive.²²³ In particular, not only has the Japanese government “vigorously defended” in the lawsuits regarding the comfort women,²²⁴ but also the Japanese courts have been “extremely hostile” to those plaintiffs.²²⁵

As of now, the success rate of comfort women claims is very low, and it does not seem that it will become higher. First, there are few cases which the courts have treated with regard to the matters of international law.²²⁶ Second, the Japanese judges have not trained for these issues, and thus, they are lacking the ability to deal with those matters.²²⁷ Third and most alarmingly, “the legal procedures in Japan are frustratingly slow and can never be an effective measure to settle these cases.”²²⁸ Considering most of the surviving comfort women are in the age of 70’s and 80’s, this is a really serious problem.²²⁹ In fact, some former comfort women died during their trials because of the delayed procedures in the Japanese legal system.²³⁰ Basically, it is questionable to expect that the Japanese judges can be unbiased and rule fairly regarding the comfort women cases “in light of the de facto impunity by the Japanese system of justice.”²³¹

3. Valuable Judgment in 1998

The date of April 27, 1998 was an unforgettable one as the decision of the Yamaguchi District Court was a small victory after the long and lonely fight of the former comfort women against the Japanese government. The Yamaguchi District Court held that the Japanese

²²³ Shimoda v. Japan, 355 HANREI JIHŌ 17 (Tokyo D. Ct., Dec. 07, 1963).

²²⁴ Barry A. Fisher, *Japan’s Postwar Compensation Litigation*, 22 Whittier L. Rev. 35, 44 (2000).

²²⁵ *Id.* at 36.

²²⁶ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 475 (2000-01).

²²⁷ *See id.*

²²⁸ *See id.*

²²⁹ *Id.* at 476.

²³⁰ McDougall Report II, *supra* note 207, ¶ 76.

²³¹ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 476 (2000-01).

government should pay 300,000 yen to each of three former comfort women.²³² Although this decision was overturned by both the Hiroshima High Court and later, the Japanese Supreme Court, the judgment itself is very meaningful in many respects.

On December 25, 1992, ten Korean women – three former comfort women and seven former members of Female Labor Volunteer Corps – filed a lawsuit in the Shimonoseki Branch of the Yamaguchi District Court.²³³ According to the advocates of the plaintiffs, the Shimonoseki Branch was “not only a practical choice, but also represented a strategic choice of forum that might be more likely to serve justice instead of serving entrenched government interests.”²³⁴ The anticipation seemed to be quite reasonable in that other plaintiffs who filed actions before the Tokyo District Court actually lost their cases.²³⁵ In any event, it was proved that their expectation was right.

Firstly, the plaintiffs asserted that the military sexual slavery system were covered by “the Cairo Declaration of 1943, the Potsdam Declaration of 1945, and the Japanese Constitution, specifically the Preamble and Article 9, interpreted to impose a ‘duty of a moral state’ on the defendant.”²³⁶ In particular, they maintained that the present Japanese Constitution provided the nation’s duties to apologize and compensate them for “Japan’s invasive war and colonization.”²³⁷

²³² Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 263 (1998).

This amount is equivalent to 2,270 dollars at that time. Considering the sufferings which the former comfort women have experienced were so serious and continuous, this amount as a nominal sum is too small. However, it is not important for the plaintiffs to get more money from the Japanese government.

²³³ The former members of Female Labor Volunteer Corps are who “were forced to work in the factories of Japan during the war.”

See Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 264 (1998).

²³⁴ Etsuro Totsuka, *Commentary on a Victory for “Comfort Women”*: Japan’s Judicial Recognition of Military Sexual Slavery, 8 Pac. Rim L. & Pol’y J. 47, 54 (1999).

²³⁵ The former comfort women from other countries did not succeed in their claims in the Tokyo District Court. They, in turn, lost their cases in October and November 1998.

See McDougall Report II, *supra* note 207, ¶ 76.

²³⁶ Judgment of Yamaguchi District Court, *supra* note 20, at 65.

²³⁷ See *id.*

Therefore, the plaintiffs demanded that the Japanese government should apologize officially and pay compensation to them for their physical and emotional sufferings through the infringement on their fundamental human rights.²³⁸ However, the Court held that the legal liability based on only these sources could not be recognized.²³⁹

Secondly, the plaintiffs argued that Article 27 of the 1889 Meiji Constitution previously stated those duties, and the military brothel system was operated for the Meiji Constitution period.²⁴⁰ Again, the Court decided that the Meiji Constitution did not exist at present after the “enactment of the post World War II Constitution,”²⁴¹ and the present constitution does not include any content in order to “carry over the effect of the previous constitution.”²⁴² Also, according to the Court’s reasoning, this Constitution lacked the specific provision of the duties even if “it is still effective consistent with the Japanese Constitution.”²⁴³

Thirdly, the plaintiffs protested that the speech of the former Minister of Justice, Nagano Shigemon damaged the dignity of the comfort women, and thus, contended that it would constitute a tortuous act under the State Liability Act.²⁴⁴ The Court did not accept the assertion of this tortuous act by reason that the Constitution did not contain a duty “to engage in legislative activities, requiring direct apology and compensation.”²⁴⁵

²³⁸ *See id.*

²³⁹ Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 273 (1998).

²⁴⁰ Judgment of Yamaguchi District Court, *supra* note 20, at 66.

²⁴¹ Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 275 (1998).

²⁴² Judgment of Yamaguchi District Court, *supra* note 20, at 95.

²⁴³ Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 273 (1998).

²⁴⁴ Judgment of Yamaguchi District Court, *supra* note 20, at 68.

He said in his inauguration that the comfort women “were public prostitutes at that time”.

See Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 273 (1998).

²⁴⁵ Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA Pac. Basin L.J. 263, 274 (1998).

Finally, the plaintiffs pointed out that the Diet has a duty to enact a law for reparation to war victims under not only the Constitution but also Articles 1(1) and 4 of the State Liability Act, and Article 723 of the Civil Law Act, and the Diet has been negligent for nearly 60 years.²⁴⁶ In the end, the Court held that the legislation of a compensation law for the comfort women was a constitutional duty of the Diet.²⁴⁷ Then, the Court opined that such legislative nonfeasance of the Diet had become illegal under the State Liability Act because the Diet failed to enact a law after the government's official report and comment admitting the establishment and operation of the comfort system.²⁴⁸

The judgment of the Yamaguchi District Court is phenomenal and unprecedented in that the Court accepted the testimonies of the former comfort women as reliable evidence and confirmed the establishment and operation of the military brothel system by both the Japanese army and government.²⁴⁹ Most of all, the Court understood the imperfect testimonies of the plaintiffs. Considering the lack of education and the failure of their memory, the Court held that “the lack of details does not impair the credibility of the testimonies.”²⁵⁰ In addition, the reliability of their testimonies was accepted in that the former comfort women had to keep silence about their shameful experience under their Confucian culture, but they testified bravely.²⁵¹ Also, the Court recognized the announcement of the report – “On the Issue of the Comfort Women” – by the Foreign Affairs Section under the Cabinet Secretariat in 1993 as the official acknowledgement of the establishment and maintenance of the comfort stations by the

²⁴⁶ Judgment of Yamaguchi District Court, *supra* note 20, at 66.

²⁴⁷ Etsuro Totsuka, *Commentary on a Victory for “Comfort Women”: Japan’s Judicial Recognition of Military Sexual Slavery*, 8 Pac. Rim L. & Pol’y J. 47, 56 (1999).

²⁴⁸ *See id.*

²⁴⁹ *Id* at 48.

²⁵⁰ Judgment of Yamaguchi District Court, *supra* note 20, at 76.

²⁵¹ *See id.*

Japanese government and army.²⁵² Based on this fact-finding, the Court determined that the enactment of a reparation law became the constitutional duty of the Diet after the announcement, and opined that the failure to enact was also illegal because there had been at least three years to legislate.²⁵³

Generally, the established facts in the District Courts are respected by the higher courts unless contradictory evidence appears and is accepted.²⁵⁴ In respect of the acknowledgement of the military brothel system itself, the vital materials against the arguments of the Japanese government have been discovered since the 1990's, and the possibility which can overturn this tendency is bare. Therefore, it should be noted that the facts recognized by the Yamaguchi District Court became credential and decisive evidence regardless of the decisions in the higher courts. In this respect, the decision of the Yamaguchi District Court is really meaningful and precious even though it was overturned by the Hiroshima High Court and the Japanese Supreme Court.

Meanwhile, the judgment also includes irrational standpoints. In the case of the request for an official apology, the Court held that it should be decided by the Diet, not the judiciary.²⁵⁵ The Court opined that “[i]t is unclear the court has jurisdiction over this issue.”²⁵⁶ At this point, the Court showed the typical attitude which other courts retain. It is regrettable that the most important judgment of the comfort women refused to decide the claim about an official apology.

Additionally, regarding the right to claim reparation under the 1889 Meiji Constitution, the Court did not accept this right.²⁵⁷ Because the Meiji Constitution was replaced by the present

²⁵² *Id.* at 101.

²⁵³ *Id.* at 102-03.

²⁵⁴ Etsuro Totsuka, *Commentary on a Victory for “Comfort Women”: Japan’s Judicial Recognition of Military Sexual Slavery*, 8 *Pac. Rim L. & Pol’y J.* 47, 59 (1999).

²⁵⁵ Judgment of Yamaguchi District Court, *supra* note 20, at 103.

²⁵⁶ *See id.*

²⁵⁷ *Id.* at 95.

Constitution and the later Constitution does not include any provision to succeed the Meiji Constitution, the Court opined that it was unclear to decide.²⁵⁸ However, the constitutional reform is not the matter of state succession. The issue of succession of states is discussed “if ... a state acquires sovereignty over territory from another state, or if disintegration of a state results in the emergence of more than one state in the territory in question.”²⁵⁹ If a state succeeds its predecessor state, the effect of the succession can be discussed in various arenas such as “membership in international organizations, the internal legal system of the successor state, public debt and other contracts, property rights, obligations arising from violations of international law, and nationality of natural persons.”²⁶⁰ As this case is simply the matter of constitutional change in the exact same country, it is needless to analyze the succession issue. That is, it is unnecessary to observe the later Constitution carry over all provisions of the former one literally. Therefore, the rationale of the Court in this regard was very narrow and unjustifiable.

Although the decision of the Yamaguchi District Court was hostile to the claims of the former comfort women in some respects, it must be very highly valued in that it was the first judgment in favor of the comfort women in the Japanese courts.

B. Alien Suits in United States

1. Hwang v. Japan

Fifteen former comfort women filed a civil action against Japan in the United States District Court for the District of Columbia under the Alien Tort Claims Act on September 18,

²⁵⁸ *See id.*

²⁵⁹ LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 348 (4th ed. 2001).

²⁶⁰ *Id.* at 349.

2000.²⁶¹ The statute provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁶² The plaintiffs asserted that they were forced into sexual slavery through the military brothel system of Japan during World War II, and sought reparations for the severe infringement of their human rights.²⁶³ The defendant Japan moved to dismiss this complaint upon the provisions of 12(b)(1) and 12(b)(6) under the Federal Rules of Civil Procedure.²⁶⁴

Japan may be immune from lawsuits under the Foreign Sovereign Immunities Act because Japan is a sovereign state.²⁶⁵ In this regard, the plaintiffs argued that the exceptions to the general rule of immunity should be applied.

First of all, the plaintiffs alleged that “Japan explicitly waived its sovereign immunity by agreeing to the terms of the Potsdam Declaration” in 1945 under Section 1605(a)(1)²⁶⁶ of the Foreign Sovereign Immunities Act.²⁶⁷ However, the Court opined that case law requested that “an explicit waiver must be unambiguous and intentional,” and held that the agreement of the Potsdam Declaration did not mean an explicit waiver.²⁶⁸ The plaintiffs then argued that the violations of *jus cogens* norms by Japan must be an implied waiver.²⁶⁹ The Court, again, did not

²⁶¹ Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 Asian-Pac. L. & Pol’y J. 2, 46 (2002).

²⁶² 28 U.S.C. § 1350 (1994).

²⁶³ Hwang et al. v. Japan, 172 F.Supp.2d 52, 54-56 (2001).

²⁶⁴ *Id.* at 55.

According to the defendant, there are several grounds for that: 1) the enjoyment of sovereign immunity, 2) the lack of personal jurisdiction over Japan, 3) the political character of this action, 4) the forum nonconveniens, 5) the international comity of nations, 6) the state limitations, 7) the Alien Tort Claims Act.

See id. at 55 n.1.

²⁶⁵ *Id.* at 56.

²⁶⁶ The section states that “A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.”

See 28 U.S.C. § 1605(a)(1).

²⁶⁷ Hwang et al. v. Japan, 172 F.Supp.2d 52, 59 (2001).

²⁶⁸ *Id.* at 60.

²⁶⁹ *See id.*

accept this claim stating the binding precedent in *Princz*.²⁷⁰ In *Princz*, the Court held that “*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1).”²⁷¹

Additionally, the plaintiffs contended that the atrocities of the Japanese government and military constituted the exception under the third clause of § 1605(a)(2)²⁷² of the Foreign Sovereign Immunities Act.²⁷³ In this respect, the former comfort women produced three reasons explaining “how these “commercial activities” had a “direct effect” inside the United States”: (1) the military brothels were set up in Guam and the Philippines which were the territories of the United States at that time, (2) the Japanese territories became part of the United States after the war, and (3) the use of those women by the United States servicemen after the war directly affected in the United States.²⁷⁴ However, the Court held that the serious inhuman treatment through the Japanese comfort system might be defined as war crimes or crimes against humanity, and the conduct of Japan was not related with a commercial activity.²⁷⁵ Although the plaintiffs illustrated that the payment of the Japanese soldiers for the services and this revenue as one of the sources for the tax income, the Court denied the contention finding the facts insufficient to show the character of the commercial activity.²⁷⁶ Upon these rejections of the assertions of the

²⁷⁰ *Id.* at 61.

²⁷¹ *Princz v. Germany*, 26 F.3d 1166, 1174 (1994).

²⁷² The section provides that “a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”

See 28 U.S.C. § 1605(a)(2).

²⁷³ *Hwang et al. v. Japan*, 172 F.Supp.2d 52, 61 (2001).

²⁷⁴ *See id.*

²⁷⁵ *Id.* at 63.

²⁷⁶ *Id.* at 64.

The District Court analyzed the commercial conduct in comparison with the character of ransom.

[A]s the D.C. Circuit noted in *Cicippio*, the fact that ransom “was allegedly sought from relatives of the hostages could not make an ordinary kidnapping a commercial act any more than murder by itself would be treated as a commercial activity merely because the killer is paid.”

See id.; *Cicippio v. Iran*, 30 F.3d 164, 168 (1994).

plaintiffs and upon the basis of the political questions doctrine, the District Court dismissed the case on October 4, 2001.²⁷⁷

The former comfort women appealed before the United States Court of Appeals for District of Columbia, but the Court of Appeals affirmed the judgment of the District Court on June 27, 2003.²⁷⁸ In its ruling, the Court of Appeals held that the commercial activity exception did not apply retroactively²⁷⁹ contrary to the rationale of the District Court. However, the Court reaffirmed that the established theories of the District Court: (1) it was expected that “Japan would not face suit in the courts of the United States for its actions during World War II” according to the 1951 San Francisco Peace Treaty, and (2) a violation of *jus cogens* was not regarded as an implied waiver under the Foreign Sovereign Immunities Act.²⁸⁰

However, the Supreme Court granted petition for writ of certiorari, remanded the case to the Court of Appeals.²⁸¹ On June 28, 2005, the Court of Appeals decided that it is unnecessary to resolve the question of the subject-matter jurisdiction of the District Court, and that the case was a “nonjusticiable political question” affirming the ruling of the District Court again.²⁸² Recently, the plaintiffs petitioned again, but the Supreme Court denied certiorari on the issue.²⁸³

2. Attitude of Courts in United States

The District Court rejected the claim of the former comfort women regardless of the retroactive application of the Foreign Sovereign Immunities Act. Upon its judgment, the Court opined that: “Assuming that the FSIA does govern plaintiffs’ claims, none of its exceptions apply. On the other hand, if the FSIA does not apply, and if Japan is not entitled to sovereign

²⁷⁷ Hwang et al. v. Japan, 172 F.Supp.2d 52, 67 (2001).

²⁷⁸ Hwang et al. v. Japan, 332 F.3d 679, 679 (2003).

²⁷⁹ *Id.* at 686.

²⁸⁰ *Id.* at 687.

²⁸¹ Hwang et al. v. Japan, 542 U.S. 901, 124 S.Ct. 2835 (2004).

²⁸² Hwang et al. v. Japan, 413 F.3d 45, 45 (2005).

²⁸³ On February 21, 2006, the petition for writ of certiorari to the Court of Appeals was denied.

See Hwang et al. v. Japan, 126 S.Ct. 1418 (2006).

immunity under pre-1952 law, plaintiffs' claims must still be dismissed because they are nonjusticiable."²⁸⁴ This opinion seems to indicate that the results of the impending legal analysis were decided in advance. In particular, the Court did not accept the comfort women case as an exception of an implied waiver or a commercial activity under the Foreign Sovereign Immunities Act. In the case of an implied waiver, the District of Columbia Circuit in *Creighton* opined that "the FSIA does not define an implied waiver. We have, however, followed the virtually unanimous precedents construing the implied waiver provision narrowly."²⁸⁵ Then, it is questionable what kinds of conduct can serve as an implied waiver. In the end, as the implied power provision is too narrowly construed, the stipulation of the phrase "by implication" of Section 1605(a)(1) under the Foreign Sovereign Immunities Act would be a dead letter.

Regarding the commercial activity exception, the District Court did not even consider the comfort stations had been "run as licensed businesses."²⁸⁶ By denying the Japanese comfort system as a commercial activity, the Court clearly analyzed the relevant facts "in order to reach the politically advantageous outcome being advocated by the U.S. government."²⁸⁷ The partial and flawed opinion of the Court has been criticized by the scholars,²⁸⁸ and the decision of the Court of Appeals seemed to reflect these criticisms and hold that the commercial activity exception was not applied retroactively.

²⁸⁴ Hwang et al. v. Japan, 172 F.Supp.2d 52, 58 (2001).

²⁸⁵ Creighton Ltd. v. Qatar, 181 F.3d 118, 122 (1999).

²⁸⁶ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women,"* 14 Tex. J. Women & L. 121, 144 (2004).

²⁸⁷ See *id.*

²⁸⁸ Christopher P. Meade, *From Shanghai to Globocourt: An Analysis of the Comfort Women's Defeat in Hwang v. Japan*, 35 Vand. J. Transnat'l L. 211, 279 (2002); Mary De Ming Fan, *The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery*, 27 Yale J. Int'l L. 395, 408-10 (2002); Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women,"* 14 Tex. J. Women & L. 121, 144 (2004).

The political effect was embodied in the District Court's ruling through the political question doctrine.²⁸⁹ In its defense, Japan contended that the claim "presented a nonjusticiable political question."²⁹⁰ In accordance with the Supreme Court in *Baker*, there are two rationales for the political question doctrine: "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination."²⁹¹ Also, the government of the United States filed a statement of interest, recommending the Court to dismiss the case under the political question doctrine, an action that vastly affected the judgment of the Court.²⁹² This attitude of the government was quite different from the viewpoint regarding the case of the Holocaust victims.²⁹³ In *Princz*, the government "was active in negotiating settlements for these lawsuits on behalf of these victims."²⁹⁴ Thanks to the progressive attitude of the government, the survivors could get paid compensation through the settlement process.²⁹⁵ This distinction between Holocaust victims and comfort women tends to show an inconsistent and discriminative stance of the government of the United States.

At last, the Court decided that this Court was not an appropriate forum "in which plaintiffs may seek to reopen those discussions nearly a half century later," and the claims of the comfort women should be treated "at the government-to-government level" like the previous

²⁸⁹ Hwang et al. v. Japan, 172 F.Supp.2d 52, 64-67 (2001).

²⁹⁰ *Id.* at 64.

²⁹¹ Baker et al. v. Carr, 369 U.S. 186, 210, 82 S.Ct. 691 (1962).

²⁹² Bruce Zagaris, *U.S. Court Dismisses for Sovereign Immunity "Comfort Women" Case against Japan*, 17 No. 12 Int'l Enforcement L. Rep. 512 (2001).

²⁹³ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women"*, 14 Tex. J. Women & L. 121, 142 (2004); *Princz v. Germany*, 26 F.3d 1166, 1168 (1994).

²⁹⁴ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women"*, 14 Tex. J. Women & L. 121, 142 (2004).

²⁹⁵ Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 Berkeley Women's L.J. 174, 200 (2001).

post-war treaties.²⁹⁶ Thus through the District Court that declared the case non-judiciable and the Court of Appeals that affirmed, the courts of the United States have shown the same attitude of the Japanese courts toward the ability of courts to give comfort women justice. Additionally, the tort claim of the former comfort women under the Alien Tort Claims Act was denied, and the contentions with regard to the exceptions under the Foreign Sovereign Immunities Act also rejected. This judgment represented not only “a setback for the use of the Alien Tort Claims Act” but also “a victory for the assertion by states of the defences within the FSIA.”²⁹⁷

²⁹⁶ Hwang et al. v. Japan, 172 F.Supp.2d 52, 67 (2001).

²⁹⁷ Bruce Zagaris, *U.S. Court dismisses for Sovereign Immunity “Comfort Women” Case against Japan*, 17 No. 12 Int’l Enforcement L. Rep. 512 (2001).

V. POSSIBLE REMEDIES AT PRESENT

A. International Forums

As the Japanese and United States courts have refused to decide the comfort women cases, the possible forums left may be the international forums requiring the cooperation of the international community. Specifically, under Article 11 of the 1951 San Francisco Peace Treaty, Japan accepted “the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan.” That is, the Japanese government clearly accepted “the jurisdiction of the international courts.”²⁹⁸ Although some countries which bear the issue of the comfort women were not the signatories of the treaty, like South Korea, the provision sufficiently proved that international forums can serve as effective courts in general. Regarding the reparation policies of the international regimes, a lot of different policies have resulted in the ineffective remedies for the victims of the human rights violations.²⁹⁹ Therefore, the necessity of the unified and effective compensation principles has risen.³⁰⁰ In response, the resolution of the ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ was adopted by the General Assembly of the United Nations in 2005.³⁰¹ Although it is uncertain whether this resolution would be referred because of the retroactivity, the resolution can serve as an effective method to give pressure to the Japanese government.

²⁹⁸ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 494 (2000-01).

²⁹⁹ Brooke Say, *Ripe for Justice: A New UN Tool to Strengthen the Position of the “Comfort Women” and to Corner Japan into its Reparation Responsibility*, 23 Penn St. Int’l L. Rev. 931, 938 (2005); Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 Tul. J. Int’l & Comp. L. 157, 170-71 (2002).

³⁰⁰ Brooke Say, *Ripe for Justice: A New UN Tool to Strengthen the Position of the “Comfort Women” and to Corner Japan into its Reparation Responsibility*, 23 Penn St. Int’l L. Rev. 931, 938 (2005).

³⁰¹ <http://www.ohchr.org/english/law/remedy.htm>.

1. International Court of Justice

As the principal judicial organ of the United Nations³⁰², the International Court of Justice (ICJ) was established in 1945 under the Charter of the United Nations, and began to work in 1946.³⁰³ It has two types of jurisdiction: to resolve legal disputes submitted by States, and to give advisory opinions to the organs of the United Nations and specialized agencies.³⁰⁴ As the issue of the comfort women became a legal dispute throughout Asia, the Asian countries including South Korea may be able to bring an action before the ICJ. However, there are some barriers to this approach.

First, Japan ratified the Charter of the ICJ with reservations.³⁰⁵ Among them, Japan included the reservation that Japan would not be “liable for any actions which arose before the time of the Charter’s ratification.”³⁰⁶ That is, as Japan ratified the Charter after the World War II, the war crimes and crimes against humanity committed during the war cannot be the subjects under the jurisdiction of the ICJ. Therefore, the ICJ has no jurisdiction over the atrocities under the Japanese comfort system at that time. Additionally, the consent of the potential parties is needed in order to file an action before the ICJ.³⁰⁷ As the possibility to attain the consent from Japan or even South Korea is very low, it seems that a lawsuit before the ICJ is impossible. Setting aside the standpoint of the Japanese government, the Korean government has shown the negative attitude³⁰⁸ to bring an action for the former comfort women before it.³⁰⁹ To illustrate,

³⁰² Statute of the International Court of Justice art. 1, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

³⁰³ <http://www.icj-cij.org/court/index.php?p1=1&PHPSESSID=649554a84ef618f73020e4fdbbc217d82>.

³⁰⁴ *See id.*

³⁰⁵ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int’l L. & Foreign Aff. 461, 478 (2000-01).

³⁰⁶ *See id.*

The author quoted the opinion of Etsuro Totsuka through the interview with him.

³⁰⁷ *See id.*

³⁰⁸ One of the reasons is the uncertain outcome: “the South Korean government, by losing such a case, may open itself up to pressing claims from the Japanese government.” There are other legal issues between two countries: the fishing right in the “East Sea,” and the sovereignty of the “Dokdo islets.”

the former President Youngsam Kim announced that the Korean government would not demand any reparation from Japan, and another former President Daejoong Kim stated that Japan should apologize officially in order to develop the diplomatic relationship between two countries, but did not mention anything with regard to the issue of the reparation.³¹⁰ However, these statements are sufficiently able to be retracted. Actually, the Japanese Diet denounced the official apology of the former Prime Minister Tomiichi Murayama³¹¹ explaining that the statement was not presented on behalf of the Japanese government.³¹² Therefore, on March 1, 2005, President Moohyun Roh retracting those statements indirectly, at last, announced that the Korean government would actively support the victims of Japan's atrocities made during World War II.³¹³ This attitude of the Korean government is very significant to the extent that Article 34(1) of the Statute of the ICJ provides that "only states may be parties in cases before the Court." Thus, the South Korea's willingness of bringing a suit before the ICJ has been proven lately. Therefore, it is desirable and ultimate to seek a resolution of the comfort women issue in the ICJ only if the Japanese government believes the justification of its assertions and would like to finalize the knotty problem.

See id. at 479.

³⁰⁹ *Id.* at 477-78.

³¹⁰ Jooha Gang & Jungoo Gang, *Statement of President Roh on March 1, with Earnest Agreement of the Various Civil Organizations*, KUKMINILBO, Mar. 1, 2005, available at http://news.naver.com/news/read.php?mode=LOD&office_id=005&article_id=0000196370.

³¹¹ The then-Prime Minister Tomiichi Murayama apologized in his statement on August 31, 1994: "on the issue of wartime 'comfort women', which seriously stained the honour and dignity of many women, I would like to take this opportunity once again to express my profound and sincere remorse and apologies."

See Coomaraswamy Report, *supra* note 2, ¶ 130.

³¹² Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 UCLA J. Int'l L. & Foreign Aff. 461, 473 (2000-01).

³¹³ Jooha Gang & Jungoo Gang, *Statement of President Roh on March 1, with Earnest Agreement of the Various Civil Organizations*, KUKMINILBO, Mar. 1, 2005, available at http://news.naver.com/news/read.php?mode=LOD&office_id=005&article_id=0000196370.

2. International Criminal Court

The judgment of the International Criminal Court (ICC) may be sought. Because the ICC “will not act if a case is investigated or prosecuted by a national judicial system,”³¹⁴ a case of the comfort women is suitable for the ICC trials. As discussed, the former comfort women’s claims were rejected before the national courts of Japan and the United States. Additionally, the ICC is “a criminal tribunal that will prosecute individuals”³¹⁵ in respect of the gravest crimes.³¹⁶ Therefore, as the individuals who were in charge of the Japanese military brothel system gravely infringed upon the human rights of the military sexual slaves, they can be prosecuted under the Rome Statute of the ICC.³¹⁷ The statute is a progressive international criminal law that deals with “gender-based crimes and sexual violence.”³¹⁸ It must be noted that the statute explicitly defines crimes against humanity³¹⁹ and war crimes³²⁰ as “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”³²¹ In addition, the statute implicitly stipulated sexual violence through the other provisions: ³²² genocide, ³²³ torture, ³²⁴ inhuman treatments, ³²⁵ outrages upon personal dignity,³²⁶ and violence to life and person, mutilation, cruel treatment.³²⁷ The Japanese comfort system did manifestly commit the crimes of sexual violence, and thus, the issue of the treatment of the comfort women is subject to jurisdiction of the ICC.

³¹⁴ <http://www.icc-cpi.int/about.html>.

³¹⁵ Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 Asian-Pac. L. & Pol’y J. 2, 52 (2002).

³¹⁶ <http://www.icc-cpi.int/about.html>.

³¹⁷ Rome Statute of the International Criminal Court, Dec. 31, 2000, 2187 U.N.T.S. 90, 37 I.L.M. 999.

³¹⁸ See generally, McDougall Report II, *supra* note 207, ¶ 27.

³¹⁹ Rome Statute of the International Criminal Court art. 7(1)(g), Dec. 31, 2000, 2187 U.N.T.S. 90, 37 I.L.M. 999.

³²⁰ *See id.* § 8(2)(b)(xxii).

³²¹ McDougall Report II, *supra* note 207, ¶ 28.

³²² *Id.* ¶¶ 33-34.

³²³ Rome Statute of the International Criminal Court art. 6(d), Dec. 31, 2000, 2187 U.N.T.S. 90, 37 I.L.M. 999.

³²⁴ *See id.* § 7(1)(f).

³²⁵ *See id.* § 8(2)(a)(ii).

³²⁶ *See id.* § 8(2)(b)(xxi).

³²⁷ *See id.* § 8(2)(c)(i).

Most importantly, the ICC has specific remedies for those crimes. The Statute stipulates measures³²⁸ to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”³²⁹ and to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”³³⁰ As for an international forum, the most significant issue is whether the judgment can be enforced or not. Therefore, the ICC becomes more effective forum in this regard. However, there are also some difficulties in bringing an action before the ICC. Initially, only crimes occurring after the ICC is established can be subject to its jurisdiction in accordance with Article 11(1) of the statute. If so, Japan’s egregious violations of the comfort women’s human rights at the time of the 1930’s and 1940’s are not able to be the subject under the jurisdiction of the ICC. Meanwhile, the Court generally has jurisdiction in three cases: (1) if the crime occurs on the territory of a State party; (2) if the person accused is a national of a State party; and (3) a crime is referred by the Security Council of the United Nations.³³¹

In the case of South Korea, the comfort women were recruited deceptively and coercively, and also, abducted by the Japanese military in the territories of South Korea. As South Korea is a State party under the statute, the ICC can have jurisdiction in this case. Furthermore, if the Security Council refers the comfort women case to the Prosecutor of the ICC, the Court may also adjudicate the case. Although it is questionable to file an action for the comfort women before the ICC under Article 11 of the statute, the existence of the ICC in the international community is very important. Even if the case cannot be brought before the Court, the Japanese government

³²⁸ McDougall Report II, *supra* note 207, ¶¶ 36, 38.

³²⁹ Rome Statute of the International Criminal Court art. 68(1), Dec. 31, 2000, 2187 U.N.T.S. 90, 37 I.L.M. 999.

³³⁰ See *id.* § 75(1).

³³¹ McDougall Report II, *supra* note 207, ¶ 43; Rome Statute of the International Criminal Court art. 12-13, Dec. 31, 2000, 2187 U.N.T.S. 90, 37 I.L.M. 999.

may feel obligated to acknowledge their legal liability toward the former comfort women in light of the important function of the ICC in the international community in similar cases.

3. People's Tribunal

Despite clear violations, the Japanese government has denied any legal liability to the issue of the comfort women. Moreover, the national courts and international forums have limitations and may not be able to force Japan to take responsibility. In this situation, a people's tribunal as one type of ad-hoc tribunals can be an effective international forum. In fact, the "Women's International War Crimes Tribunal" was established on December 8, 2000.³³² The prosecutors from ten countries³³³ asserted that the international military tribunals after the war did not complete their missions because "they had inadequately considered rape and sexual enslavement and had failed to bring charges arising out of the detention of women for sexual services."³³⁴ Therefore, the prosecutors defined this tribunal as an "addendum" to the earlier post-war tribunals, and indicted the officials of the Japanese government and military including Emperor Hirohito at that time.³³⁵ The tribunal consisted of the judges from the United States, Argentina, the United Kingdom, and Kenya³³⁶ examined the oral and documentary evidence presented by the prosecutors for three days.³³⁷ On December 12, 2000, the tribunal held that Emperor Hirohito was guilty and Japan was liable for slavery, trafficking, forced labor, rape, and

³³² Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 Am. J. Int'l L. 335, 335 (2001).

³³³ The prosecution team was composed of various nationals from South and North Korea, China, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, the Netherlands, and Japan.

³³⁴ Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 Am. J. Int'l L. 335, 337 (2001).

³³⁵ *See id.*

³³⁶ Christine Wawrynek, *World War II Comfort Women: Japan's Sex Slaves or Hired Prostitutes?*, 19 N.Y.L. Sch. J. Hum. Rts. 913, 918 (2003).

The judges were composed of "an international and gender-balanced array of qualified legal scholars."

See Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women"*, 14 Tex. J. Women & L. 121, 147 (2004).

³³⁷ Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 Am. J. Int'l L. 335, 337 (2001).

other crimes against humanity under treaties and customary international law during the war in its preliminary judgment.³³⁸ The final decision was delivered on December 4, 2001. In its judgment, the tribunal ordered that the Japanese government acknowledge its legal and moral liabilities, apologize officially, and pay compensation to the former comfort women.³³⁹

This tribunal, as a people's tribunal, had no legal authority, and thus, it could not enforce its findings "beyond making a recommendation to the Commission on Human Rights and UN members."³⁴⁰ However, it should be noted that the value of a people's tribunal must be highly appreciated. A people's tribunal can serve the functions of "both war crimes trials and truth commissions."³⁴¹ In the case of the comfort women, the complex factual and legal issues have been rooted together. Therefore, this case will decisively be settled through international forums like a people's tribunal. Furthermore, a people's tribunal is composed of the representatives of states, genders, and jurists.³⁴² That is, a people's tribunal itself can become the unified opinion of the international community, and thus, have "significant persuasive authority."³⁴³ Therefore, it is unfortunate for a people's tribunal not to have any power to enforce, but a people's tribunal has an indirect power nonetheless. In this regard, the victory of the comfort women in the

³³⁸ *Id.* at 338.

³³⁹ The tribunal held that:

[T]he Japanese government: (1) acknowledge fully its responsibility and liability for the establishment of the comfort system; (2) issue a full and frank apology, taking legal responsibility and promising non-repetition; (3) compensate the victims and survivors; (4) establish a mechanism to investigate the comfort system; (5) recognize and honor the victims through the creation of memorials, museums, and libraries; (6) include the history in textbooks to ensure the education of the population and future generations; (7) repatriate survivors who wish to be repatriated; (8) disclose all documents and materials in its possession relating to comfort stations; (9) identify and punish principal perpetrators; and (10) locate and return the remains of the deceased comfort women upon the request of family members or close associates.

See Christine Wawrynek, *World War II Comfort Women: Japan's Sex Slaves or Hired Prostitutes?*, 19 N.Y.L. Sch. J. Hum. Rts. 913, 919 (2003).

³⁴⁰ Brooke Say, *Ripe for Justice: A New UN Tool to Strengthen the Position of the "Comfort Women" and to Corner Japan into its Reparation Responsibility*, 23 Penn St. Int'l L. Rev. 931, 963 (2005).

³⁴¹ Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 Am. J. Int'l L. 335, 339 (2001).

³⁴² *Id.* at 338.

³⁴³ Afreen R. Ahmed, *The Shame of Hwang v. Japan: How the International Community Has Failed Asia's "Comfort Women"*, 14 Tex. J. Women & L. 121, 147 (2004).

“Women’s International War Crimes Tribunal” is very inspiring, and it is expected that there will be more people’s tribunals to condemn the Japanese government and punish both the perpetrators of the Japanese government and army, and the Japanese government itself indirectly.

B. Remaining Methods in Respective Countries

Some lawsuits are still pending in the Japanese courts. As discussed earlier, the possibility to win is very bare. The most serious obstacle to success is that the procedures in the Japanese legal system are too lengthy.³⁴⁴ It is expected that the former comfort women “must spend more than ten to twenty years to exhaust the three stages of the Japanese civil law procedure up to a judgment by the Supreme Court.”³⁴⁵ To illustrate, the case filed before the Yamaguchi District Court in 1992 was finalized in the Japanese Supreme Court after approximately 10 years. Since many plaintiffs are older in age, they will die before their suits are finally adjudicated, and thus, the time for effective compensation is short. However, the 1998 judgment of the Yamaguchi District Court proved that the view of the Japanese society with regard to the comfort women has changed. Therefore, the potential decisions about the pending cases can be in favor of the former comfort women if the international community gives pressure on the Japanese government and tries to conclude one of the vestiges of World War II.

In the meantime, 109 former comfort women submitted a constitutional complaint in the Korean Constitutional Court³⁴⁶ on July 5, 2006. In the petition, the women asserted that their

³⁴⁴ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 *UCLA J. Int’l L. & Foreign Aff.* 461, 475 (2000-01).

³⁴⁵ *Id.* at 475-76.

³⁴⁶ The Korean Constitutional Court as the highest court in South Korea was established in 1988 in order to protect the fundamental right of the Korean people and control the governmental powers. The functions of the Court include “deciding on the constitutionality of laws, ruling on competence disputes between governmental entities, adjudicating constitutional complaints filed by individuals, giving final decisions on impeachments, and making judgments on dissolution of political parties.”

See <http://www.court.go.kr/home/english/welcome.jsp>.

fundamental rights under constitutional law were violated because the Korean government failed to take appropriate diplomatic actions to demand the Japanese government to take legal and moral liabilities for them.³⁴⁷ The trial is proceeding at present. The Korean government has not been active to the issue of the comfort women although many Korean women became the victims under the Japanese comfort system. Instead, the civil organizations working for the former comfort women have taken an active part in seeking reparation as well as formal apology from the Japanese government.³⁴⁸ If the Court holds that the Korean government is liable, the dignity of the former comfort women who suffer even now will be restored and the legal status of them in the international community will become more clearly secured.

On January 31, 2007, Representative Michael Honda introduced a resolution that the Japanese government should apologize officially and accept historical responsibility for the military sexual slavery system during World War II.³⁴⁹ In March, Prime Minister Shinzo Abe announced that there was no proof that the Japanese army forced the comfort women into wartime brothels at that time.³⁵⁰ The statement was directly opposite of the details of the vital documents and the testimonies of the former comfort women that showed Japan recruited young Asian women as sexual slaves deceptively and coercively, and operated the brothel system treating them as one of its military supplies. Immediately, his announcement became the target of criticisms not only throughout Asia, but also in the United States. At last, he said, in a press

³⁴⁷ Jaeun Jang, *Request of Disclosed Trial of Comfort Women Case to Constitutional Court*, YONHAP NEWS, Mar. 15, 2007, available at http://news.naver.com/news/read.php?mode=LSD&office_id=001&article_id=0001575375§ion_id=102&menu_id=102.

³⁴⁸ The most representative organization is the “Korean Council for the Women Drafted for Military Sexual Slavery by Japan” set up in 1990. This civil organization has held the weekly demonstrations for the restoration from the severe violations on the human rights of the comfort women, provided the survivors with medical support and counseling. Most of all, the organization has worked in the international community, and for example, it co-indicted Japan in the Women’s International War Crimes Tribunal on the Japanese military sexual slavery system in 2000.

See http://www.womenandwar.net/english/menu_014.php.

³⁴⁹ H.RES. 121, 110th Cong. (2007) [hereinafter 2007 Comfort Women Resolution].

³⁵⁰ Norimitsu Onishi, *Japan Repeats Denial of Role in World War II Sex Slavery*, NEW YORK TIMES, Mar. 17, 2007, at A4, available at 2007 WLNR 5065444.

conference with President George Bush, that he whole-heartedly sympathized with the former comfort women, and that he was sorry that they had been put in those circumstances.³⁵¹ However, the statements were not official apology toward the former comfort women, meaning he just “avoided assigning responsibility for the practice and did not retract his denial of the military’s direct role in it.”³⁵² In any event, the controversy seems far from being ended with a tactful apology.

Japanese lawmakers published an advertisement that the comfort women were not forced to prostitute at that time in one newspaper in the United States.³⁵³ Also, in their advertisement, they mentioned that the United States requested the Japanese government to establish such brothels in 1945.³⁵⁴ Some representatives and senators were displeased with this distorted announcement of the history of World War II, and this advertisement has led to the possible adoption of the 2007 Comfort Women Resolution.³⁵⁵

There have been the failed attempts to enact a statute for the comfort women since 1997.³⁵⁶ The resolutions from 1997 to 2005, have requested the Japanese government to apologize officially and to pay reparations to the victims.³⁵⁷ Later, two resolutions in 2006 and

³⁵¹ Norimitsu Onishi, *Japan Court Rules against Sex Slaves and Laborers*, NEW YORK TIMES, Apr. 28, 2007, at A8, available at 2007 WLNR 8041372.

In a previous meeting with leaders of the House of Representatives, he mentioned that he was “filled with a sense of apology.”

See id.

³⁵² *See id.*

³⁵³ Yoshiyuki Komurata, *U.S. Vote Nears on ‘Comfort Women’*, ASAHI SHIMBUN, June 20, 2007, available at <http://www.asahi.com/english/Herald-asahi/TKY200706200082.html>.

³⁵⁴ *See id.*

³⁵⁵ Hawon Lee, *U.S. Unhappy with Japanese Comfort Women Ad*, CHOSUN ILBO, June 18, 2007, at A2, available at <http://english.chosun.com/w21data/html/news/200706/200706180018.html>.

³⁵⁶ Jennifer Kwon, *The Comfort Women Litigation and the San Francisco Treaty: Adopting a Different Principle of Treaty Interpretation*, 73 Geo. Wash. L. Rev. 649, 665 (2005).

³⁵⁷ There were five resolutions regarding these purposes in 1997, 2000, 2001, 2003, and 2005.

See H.CON.RES. 126, 105th Cong. (1997); H.CON.RES. 357, 106th Cong. (2000); H.CON.RES. 195, 107th Cong. (2001); H.CON.RES. 226, 108th Cong. (2003); H.CON.RES. 68, 109th Cong. (2005).

2007 emphasized formal apology from Japan and education of future generations.³⁵⁸ Although the 2007 Comfort Women Resolution does not deal with specific methods of reparation, it mainly treats the issue of an official apology, something that the former comfort women want the most. The adoption of the resolution will be very meaningful in that the United States is the world's most powerful state and it can exercise its influence all over the world. This is precisely why the former comfort women previously filed a tort action under the Alien Tort Claims Act in the United States. If the resolution passes, the dignity of the former comfort women may be restored, and ultimately, the human rights of women will ameliorate.

³⁵⁸ H.RES. 759, 109th Cong. (2006); H.RES. 121, 110th Cong. (2007).

VI. ULTIMATE GOALS TO RESOLVE ISSUE OF COMFORT WOMEN

A. Method to Overcome Vestiges of World War II

In order not to reiterate egregious violations of the human rights of women, the issue of the comfort women must be resolved. In this respect, it is essential to educate the future generations rightfully. The importance of the education has been emphasized through the resolutions introduced by some Representatives in the United States. In particular, the 2007 Comfort Women Resolution provides that the Japanese government should “educate current and future generations about this crime while following the international community’s recommendations with respect to the comfort women.”³⁵⁹ The Japanese government should be condemned in that it has not only denied any responsibility for the violations of the comfort women’s human rights, but also taught a distorted history regarding the atrocities to its nationals. Through the educational textbooks, the Japanese government has instructed the young generation in the wrong knowledge.

In the Japanese textbooks, the serious war crimes and crimes against humanity have not been treated, and some of the events are described as the “Asian liberation.”³⁶⁰ Specifically, the middle school textbooks in 2001 intentionally omitted the content of the comfort women.³⁶¹ Also, a publisher of the educational textbooks announced that the substance of the comfort women would be eliminated in 2005.³⁶² As a prerequisite to overcome the vestiges of World War II, the perverted history should be corrected. The attitude of the Japanese government is not

³⁵⁹ H.RES. 121, 110th Cong. (2007).

³⁶⁰ Timothy Tree, *International Law: A Solution or a Hindrance towards Resolving the Asian Comfort Women Controversy?*, 5 *UCLA J. Int’l L. & Foreign Aff.* 461, 471 (2000-01).

³⁶¹ Christine Wawrynek, *World War II Comfort Women: Japan’s Sex Slaves or Hired Prostitutes?*, 19 *N.Y.L. Sch. J. Hum. Rts.* 913, 920 (2003).

According to Japanese nationalist Nobukatsu Fujioka, “comfort women were hired as paid prostitutes and that the issue is a massive deception that should not be included in school textbooks.”

See id. at 921.

³⁶² Junghoon Kim, *No Forced Labor of Koreans during World War II?*, NOCUT NEWS, Mar. 5, 2005, available at <http://www.cbs.co.kr/nocut/show.asp?idx=46236>.

helpful in either resolving the remaining controversies in respect of the tragic war or in giving a desirable lesson to future generations.

B. Way to Develop Human Rights of Women

After World War II, a lot of international agreements that protect the human rights of women began to be concluded.³⁶³ In 1948, the General Assembly of the United Nations adopted the ‘Universal Declaration of Human Rights.’³⁶⁴ The human rights of women have also been treated under the ‘International Covenant on Civil and Political Rights’³⁶⁵ and the ‘International Covenant on Economic, Social and Cultural Rights’³⁶⁶ in 1966. At last, the General Assembly adopted the “Convention on the Elimination of All Forms of Discrimination against Women”³⁶⁷ in 1979.

Although many treaties were concluded, many women throughout the world still suffer from sexual violence during armed conflicts.³⁶⁸ From the 1990’s to 2000’s, the sexual slavery and other forms of sexual violence were committed in Afghanistan, Burundi, Colombia, the Democratic Republic of the Congo, Indonesia, Kosovo, Liberia, Myanmar, Rwanda, Sierra Leone, and Uganda.³⁶⁹ In Indonesia, rape was a tool of “torture and intimidation by certain elements of the Indonesian army” before 1998, and there were “widespread and systematic rapes of ethnic Chinese women and girls” in the 1998 riots.³⁷⁰ In Uganda, the army abducted approximately 10,000 children and utilized them as “forced labourers, child soldiers, and sexual

³⁶³ See generally, LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 674-76 (4th ed. 2001).

³⁶⁴ Universal Declaration of Human Rights, U.N. Doc. A/RES/217(III) (Dec. 12, 1948).

³⁶⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, 899 U.N.T.S. 171, 6 I.L.M. 368.

³⁶⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360.

³⁶⁷ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33.

³⁶⁸ <http://www.hrw.org/women>.

³⁶⁹ McDougall Report II, *supra* note 207, ¶ 10; <http://www.hrw.org/women>.

³⁷⁰ McDougall Report II, *supra* note 207, ¶¶ 11-12.

slaves.”³⁷¹ Also, the Albanian women and girls became the victims of the severe sexual violence during the armed conflict in Kosovo.³⁷² In Sierra Leone, the girls between the ages of 12 and 15 were abducted, and repeatedly raped by the rebel fighters during the eight-year war.³⁷³ Even if there is no armed conflict or war, violence against women has existed. For instance, in the Netherlands, there are about 20,000 prostitutes, and about two thirds of them are immigrant women from Eastern Europe.³⁷⁴ In 2004, there were more than 400 cases that minor girls as well as women were trafficked for prostitution.³⁷⁵

Why do these atrocities occur while the international community has tried to protect the human rights of women? It is because previous tragic incidents are not resolved, and thus, the similar crimes against women have been repeated. As the issue of the comfort women is still engaged in dispute now, the justifiable precedent to protect current women victims is not rooted. Therefore, the international community, as well as the Asian countries and Japan, should first make efforts to resolve the comfort women issue.

³⁷¹ *Id.* ¶ 13.

³⁷² *Id.* ¶ 14.

³⁷³ *Id.* ¶ 17-18.

According to the report, those girls got a physical examination in order to verify whether they were virgins or not before becoming the sexual slaves.

See *id.* ¶ 17.

³⁷⁴ G.A., Human Rights Council, *Violence against Women, its Causes and Consequences: Mission to the Netherlands*, ¶ 66, U.N. Doc. A/HRC/4/34/Add.4 (Feb. 7, 2007) (prepared by Yakin Ertürk).

³⁷⁵ *Id.* ¶¶ 67-68.

VII. CONCLUSION

The former comfort women have been sufficiently ignored for over 60 years. Neither the national courts nor the international forums relieve them from the severe infringement on their human rights. Their horrible experiences have even become a subject for the commercial profit. In 2004, one actress tried to publish her nude picture collection on the subject of the comfort women.³⁷⁶ The former comfort women still suffer and have died desolately, while their tragic experiences are degraded.

The comfort women were raped, forced into prostitution, and killed in a time of war. The human rights of them were inconceivably infringed. The Japanese government has denied any liability for these atrocities, despite that contrary evidence has been discovered. As discussed, the contentions of the Japanese government are groundless and inconsistent. Nevertheless, the comfort women did not obtain justice under national and international legal systems for both political and diplomatic reasons.

If the issue of the comfort women is not resolved, it is impossible to expect the development of the protections of the human right. It must be noted that pressure on Japan from the international community is mandatory to recover the human rights of the comfort women. In order for this, the cooperation of the states should be prioritized. In this regard, it is phenomenal that South and North Korea have collaborated with each other. In 2000, the prosecutors from both countries successfully co-indicted the Japanese government and the then-Emperor Hirohito

³⁷⁶ Jihee Kim, *Women's Main News in 2004*, SEGYE DAILY, Dec. 21, 2004, available at <http://www.segye.com/Service5/ShellView.asp?TreeID=1510&PCode=0007&DataID=200412211358000122>.

in the “Women’s International War Crimes Tribunal”³⁷⁷ and both governments announced a joint statement that the two countries would cooperate with each other for the comfort women.³⁷⁸

The unsuccessful attempts in the past were not wholly unsuccessful. Thanks to those persistent efforts, one District Court in Japan held in favor of the former comfort women, and one Congressman in the United States introduced a resolution to enact a statute that demand the Japanese government to take legal and moral responsibility. The indomitable wills of the surviving comfort women, the collaboration of various countries, and pressure from the international organizations will change the attitude of Japan eventually. In the near future, it is expected that the Japanese government will apologize sincerely, compensate the former comfort women for the severe violations on their human rights, and prosecute the perpetrators who were charged with the military brothel system at that time.

³⁷⁷ Christine M. Chinkin, *Women’s International Tribunal on Japanese Military Sexual Slavery*, 95 Am. J. Int’l L. 335, 336 (2001).

³⁷⁸ Hyegyong Hwang, *South and North Korea to Adopt Joint Statement on Comfort Women*, YTN NEWS, May 21, 2007, available at http://www.ytn.co.kr/_ln/0103_200705211623208238.

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