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Compensation for Japan's World War II War-Rape Victims

Karen Parker

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Compensation for Japan’s World War II War-Rape Victims

By Karen Parker* and Jennifer F. Chew**

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I. INTRODUCTION

"I could speak no Japanese and I was a virgin. Every day my body was soiled by [fifteen] Japanese soldiers. I was so tired I wanted to die. It lasted four years. After it was over, I could not have children."¹

They were *jugun ianfu*—"comfort women."² As many as 200,000 women were tricked or abducted into slavery for sexual services for the Japanese Imperial Army during World War II.³ Women and girls as young as twelve were taken from their homes in Korea, China, the Dutch East Indies, Taiwan, Malaysia, Burma, and the Philippines.⁴

1. Statement of a 69 year old Korean survivor during a Japanese television broadcast. Mark O'Neill, *Koreans Forced Into Prostitution by Japan Army Demand Payment*, REUTER LIBR. REP., Dec. 2, 1991, available in LEXIS, World Library, Lbyrpt File.

2. "Comfort women" is a direct translation of the Japanese phrase "*jugun ianfu*" and is a widely used term for these victims. The authors prefer the terms "women and girls forced into sexual slavery," "war-rape victims," or "sex slaves." "War-rape victims" is a term used also by many claimants. See, e.g., Letter to Prime Minister K. Miyazawa, in WAR VICTIMIZATION AND JAPAN: INTERNATIONAL PUBLIC HEARING REPORT 148 (Executive Committee International Public Hearing ed., 1993) [hereinafter WAR VICTIMIZATION AND JAPAN] (copy on file with author).

3. While no figure can probably be proven now, investigators now generally indicate about 200,000 women were war-rape victims of Japan. Then Japanese Prime Minister Ki-ichi Miyazawa admitted this figure. See *Japan Should Compensate Canadian POWs, Expert Says*, TORONTO GLOBE AND MAIL, Aug. 17, 1993, at 3D; U.N. SUB-COMM'N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; STATEMENT OF DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, U.N. Doc. E/CN.4/Sub.2/SR.10, at 14, 15 (1993) (noting that investigation carried out by the Committee for the Investigation of Damage Caused by Japanese Imperialists During Their Occupation of Korea placed the figure at 200,000) [hereinafter STATEMENT OF KOREA] [the Sub-Commission is hereinafter SUB-COMM'N ON PREVENTION OF DISCRIMINATION]. Sources that indicate fewer victims discuss the difficulties in verifying any number. See, e.g., George Hicks, *They Won't Allow Japan to Push the "Comfort Women" Aside*, INT'L HERALD TRIB., Feb. 10, 1993, at 2.

4. See WAR VICTIMIZATION AND JAPAN, *supra* note 2 (discussing historical and personal testimony of sex slaves from North Korea, South Korea, Philippines, China, the Dutch East Indies, including both Indonesian and Dutch nationals, and Taiwan). In February 1993, a number of Malaysian women publicly admitted that they had been sex slaves. See Gwen Benjamin, *2 Malaysian "Comfort Women" Seek Japanese Compensation*, JAPAN ECON. NEWSWIRE, Feb. 19, 1993, available in LEXIS, Asiapc Library, JEN file (citing evidence that about 200 women abducted from Kelantan State alone). Some sources verify sex slaves from Burma. Interview with See Sein, World War II survivor from Burma (Karenni State), in New York, N.Y. (Nov. 18, 1993) (stating many Karen, Karenni, and Mon women and girls taken to "sex camps"); see also George Hicks, *Ghosts Gathering*, FAR E. ECON. REV., Feb. 18, 1993, at 32 (indicating sex slaves from Burma). A report of the Celebes Civil Administration (Indonesia) contained in a Japanese Military Report of June 20, 1942 lists "Toradjas, Javanese, Makassars, Karossas, Enrekangese, Mandalese" women. *Army Regulations Governed Care of Forced Prostitutes*, JAPAN TIMES, Aug. 8, 1992, at 3. A 1945 Australian document contains testimony of Australian nurses who resisted attempts to force them into being sex slaves and discusses the presence of civilian

They were sent to locations throughout Japanese-occupied Asia where they were imprisoned in facilities known as "comfort houses,"⁵ raped daily by soldiers, and forced to endure torture and abuse. Only about twenty-five percent survived this treatment.⁶ Of these postwar survivors, possibly only 2,000, now about sixty-five to eighty-five years old, are still alive.⁷ Never compensated, they continue to suffer from their brutal treatment.

After nearly fifty years of silence, a growing number of surviving war-rape victims have come forth publicly to present their stories in an effort to obtain apologies from the Japanese government, full disclosure of all the facts, and monetary compensation.⁸ Many now have filed legal actions for compensation in Japanese courts, claiming that what was done to them violated then-existing law.⁹ Although the Japanese courts have not awarded these victims any compensation, these

internees at "pleasure houses." Letter from Major-General Lloyd to General Headquarters in Melbourne (Sept. 28, 1945) (document from Australian National Archives, marked "Secret and Confidential") (copy on file with author).

5. Yoshiaki Yoshimi, *Historical Understandings on the "Military Comfort Women" Issue*, in *WAR VICTIMIZATION AND JAPAN*, *supra* note 2, at S1, S2. (verifying documents showing facilities for sex slaves in China, Hong Kong, French-Occupied Indochina, the Philippines, Malaysia, Singapore, British-occupied Borneo, the Dutch East Indies, Burma, New Britain, Trobriand, Okinawa, and Ogasawara).

6. Representative Seijuro Arahune, late of the Japanese Diet (Liberal Democratic Party), made public statements as early as 1975 that 145,000 Korean sex slaves died during World War II. Interview with Senator Tamako Nakanishi, in Tokyo, Japan (Dec. 8, 1992). Representative Arahune's remarks were recently raised in Diet debates. See *STATEMENT OF KOREA*, *supra* note 3. This statement also contains a quote from a November 20, 1975 campaign speech of Representative Arahune: "142,000 Korean comfort women died. The Japanese soldiers killed them." *Id.*

7. This figure is the author's speculation based on interviews and review of documents.

8. See, e.g., Kang Soon-Ae, *Brother, Don't Avoid Me*, in *WAR VICTIMIZATION AND JAPAN*, *supra* note 2, at 16; Maria Rosa Luna Henson, *Fortunate to Speak: Out About My Experiences During the War*, in *WAR VICTIMIZATION AND JAPAN*, *supra* note 2, at 38; Kim Yong-Sil, *How Can We Permit Their Sins?*, in *WAR VICTIMIZATION AND JAPAN*, *supra* note 2, at 56; Jeanne O'Herne, *Cry of the Raped*, in *WAR VICTIMIZATION AND JAPAN*, *supra* note 2, at 60; Wan Ai-Hua, *I Hate Japanese Soldiers*, in *WAR VICTIMIZATION AND JAPAN*, *supra* note 2, at 68; A Taiwanese Woman, *Like an Animal on Timor Island*, in *WAR VICTIMIZATION AND JAPAN*, *supra* note 2, at 79; see also *Comfort Without Joy*, *ECONOMIST*, Jan. 18, 1992, at 32; Gail Swainson, *Woman Recounts Wartime Sex Slavery, Probe Urged into WWII "Torture" of Koreans by Japanese Troops*, *TORONTO STAR*, Nov. 14, 1992, at A3.

9. Interviews with Kunio Aitani, Takakashi Niimi, Kim Kyeung Duk, and Kenichi Takagi, Tokyo, Japan (Dec. 8-12, 1992); see KAREN PARKER, *INTERNATIONAL EDUCATIONAL DEVELOPMENT, INC., COMPENSATION FOR JAPAN'S WORLD WAR II VICTIMS* (1993) [hereinafter *PARKER IED REPORT*]. Plaintiffs with actions currently pending in Japanese courts seek from \$20,000 to \$200,000 each in damages. According to the *Mainichi Shimbun*, plaintiffs, including war-rape victims, prisoners of war, and forced laborers, are seeking a combined 19.3 trillion *yen* in compensation for World War II war crimes. *Asia-*

legal actions have led to community and legal support for redress.¹⁰ For example, many Japanese lawyers have formed special committees to represent victims.¹¹

Concerned about the time legal actions usually take in Japan,¹² frustrated by the lack of response by the Japanese government, and fueled by worldwide outrage at their plight, war-rape victims and their representatives have now presented their cases to human rights bodies of the United Nations.¹³

The Japanese government initially denied any coercion or even official involvement in sexual slavery.¹⁴ However, recent investigation into events described by these victims has revealed army documents stored in Japan's Self-Defense Agency that clearly indicate involvement by the Japanese government and the Japanese Imperial Army in the capture and recruitment of women and in the operation of facili-

Pacific Nations Seek 19.3 Trillion Yen Redress, JAPAN ECON. NEWSWIRE, Sept. 7, 1993, available in LEXIS, Asiapc Library, JEN File.

10. For example, a number of Japanese citizen's groups sponsored "An International Public Hearing Concerning Post-War Compensation in Japan" on December 9, 1992, attended by the author. The public hearing was followed on December 10, 1992 by a symposium called "War and Human Rights—Legal Analysis on Post-War Settlement" sponsored by the Japan Federation of Bar Associations.

11. Eighteen lawyers groups have been formed by the Association of Lawyers for Coordinating Activities Seeking Post-War Compensation. Letter from Yoshitaka Takagi, Vice Director, to Karen Parker (May 24, 1993) (on file with author). Lawyers groups have also been formed in the sex slaves' own countries. For example, in the Philippines, five human rights lawyers associations have formed the Filipino Panel of Lawyers to assist Philippine claimants, now said to number 55. Letters from Indai L. Sajor, Asian Women Human Rights Council, to Karen Parker (January 23, 1993 and July 8, 1993) (on file with author); Interviews with Indai L. Sajor, in Tokyo, Japan (Dec. 8-10, 1992) and in Vienna, Austria (June 16, 1993). Similar groups have formed in Taiwan, the People's Democratic Republic of Korea, and the Republic of Korea. Interviews with Wang Ching-Feng, Taipei Comfort Women Project Task Force, Lee Mi-Gyeong, Korean Council, and Ho Sok-Till, Committee for Measures on Compensation to "Comfort Women," in Tokyo, Japan (Dec. 8-11, 1992); see generally WAR VICTIMIZATION AND JAPAN, *supra* note 2.

12. See *infra* note 182 and accompanying text.

13. The sex slave cases were initially presented by International Educational Development, Inc., (IED) and others at the 1992 session of the U.N. Commission on Human Rights (U.N. Commission). See, e.g., U.N. COMM'N ON HUMAN RIGHTS; STATEMENT OF INTERNATIONAL EDUCATIONAL DEVELOPMENT, U.N. Doc. E/CN.4/SR.30/Add.1, at 3 (1992). The U.N. Economic and Social Council, in resolutions 5(I) of February 16, 1946, and 9(II) of June 21, 1946, established the U.N. Commission to advise and recommend on any matter of human rights. The U.N. Commission now has a full range of activities with working groups and rapporteurs addressing a variety of human rights issues. See UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS at 15-18, U.N. Doc. ST/HR/2/Rev.3, U.N. Sales No. E.88.XIV.2 (1988).

14. See, e.g., U.N. COMM'N ON HUMAN RIGHTS; STATEMENT OF JAPAN (RIGHT OF REPLY), U.N. Doc. E/CN.4/SR.34, at 16 (1992) [hereinafter STATEMENT OF JAPAN].

ties.¹⁵ Yet the present Japanese government still refuses to acknowledge fully these atrocities or to provide adequate compensation. The government maintains, *inter alia*, that all claims arising out of World War II were settled under the Treaty of Peace with Japan¹⁶ and the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation Between Japan and the Republic of Korea.¹⁷

This Article describes Japan's *jugun ianfu* scheme and presents Japan's wartime acts in light of international human rights and humanitarian (armed conflict) law. Focusing mainly on rape and slavery, this Article will show that these acts were violations of then-existing customary international law. It will then show that the right to compensation following such violations is a fundamental principle of international law. The Article then describes the German compensation programs as a viable compensation scheme, discusses the initiatives presently before the United Nations to address these violations, and refutes Japan's legal responses to the issue.¹⁸ Finally, this Article offers a comprehensive scheme by which the Japanese government can fulfill its obligations to provide compensation.

15. Yoshiaki Yoshimi, Address at International Public Hearing Concerning Post War Compensation of Japan (Dec. 9, 1992). Yoshimi, a leading scholar in this field, discovered and compiled many of the relevant documents. JUGUN IANFU SHIRYO SHU [DOCUMENTS ON MILITARY COMFORT WOMEN] (Yoshiaki Yoshimi ed., 1992) (Japanese only) [hereinafter DOCUMENTS] (copy on file with author); see also *Wartime Army Directly Involved in Brothels, Report Says*, UPI, Jan. 27, 1992, available in LEXIS, World Library, UPI File. Veterans of the Japanese Imperial Army also began recounting incidents in which they either witnessed or, more likely, personally participated. Tony Wong, *An Old Soldier Admits His Crime: Ichiro Ichikawa Ran a Brothel of "Comfort Girls" for Japanese Army*, TORONTO STAR, Nov. 23, 1992, at A17; see also Mark O'Neill, *Japan Soldiers Face Wartime Guilt After 50 Years*, REUTER LIBR. REP., Jan. 22, 1992, available in LEXIS, World Library, Lbyrpt File; *Wartime Official to Testify on "Comfort Women" in Dict.*, JAPAN ECON. NEWSWIRE, Feb. 24, 1992, available in LEXIS, Asiapc Library, JEN File.

16. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 [hereinafter Allied Treaty]. Japan raised this treaty as a defense at a U.N. session. See, e.g., STATEMENT OF JAPAN, *supra* note 14, at 16.

17. Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation, June 22, 1965, Japan-Korea, 583 U.N.T.S. 173 [hereinafter Korean Treaty]. The Japanese government has presented this defense at U.N. sessions. See, e.g., STATEMENT OF JAPAN, *supra* note 14, at 17.

18. This Article will also refute other defenses raised by Japan.

II. THE JUGUN IANFU SCHEME

A. Overview

In 1991, Kim Hak-Sun became the first war-rape victim to speak out about her experience.¹⁹ Prior to that time, war-rape victims remained silent due to extreme social stigma and shame.²⁰ Some could not bear to talk about what they experienced, even to close family members, because the pain was too raw. The Japanese soldiers who had perpetrated the acts also maintained silence for similar reasons, but many of these soldiers have subsequently come forward to discuss the events.²¹ Additionally, many documents relating to the sex-slave policy had been destroyed by the Japanese Imperial Army.²² Finally, knowledge of the facts, especially by the United States, was kept quiet after the War and important documents held by the United States and other Allies were "buried." Consequently, these grim facts remained hidden from public view for many years.

After the silence was finally broken, Japanese scholars began to amass proof. Yoshiaki Yoshimi discovered documents in Japan that link the Japanese government to the *jugun ianfu* scheme. This find led to a search for corroborating documents from the Allies,²³ which ulti-

19. See Hicks, *supra* note 3, at 2. Kim Hak-Sun, a Korean, testified publicly in August 1991, and with two other Korean victims, filed suit in Tokyo District Court on December 7, 1991. *Id.*

20. See, e.g., Kim, *supra* note 8, at 58 (stating "[f]rom that time I have lived a life of shunning people out of fear of revealing my disgraceful past. I decided not to marry because I was so ashamed of my past."); Wan, *supra* note 8, at 71 (stating "[m]y adopted family and villagers called me dirty and didn't want then to have me around. So I moved out of the village to Tai Yuan where I live alone."); see also Lee Mi-Gyeong, *Realities of the "Comfort Women" in South Korea*, in WAR VICTIMIZATION AND JAPAN, *supra* note 2, at 8 (indicating policy of Japanese government to keep these events secret); Wang Ching-Feng, *Japan's Military Sexual Slavery of the Taiwanese during World War II*, in WAR VICTIMIZATION AND JAPAN, *supra* note 2, at 72, 73 (explaining silence because "a raped woman, living in humiliation, is always in fear of others knowing of the disaster").

21. In Japan, a hotline was opened to which veterans called to confess what they remembered of the "comfort women." In all, there were 230 calls from ex-soldiers, doctors, and nurses. Attorney Kenichi Takagi, who helped set up the hotline, said, "Most had not spoken about it even to their wife and children. [Now] they wanted to confess their guilt." O'Neill, *supra* note 1. Ironically, a book, *MILITARY COMFORT WOMEN* by S. Kakoh, had been published in Japan in 1972, several years before the remarks of Representative Aruhune, but the book generated little reaction at the time. See Yoshimi, *supra* note 5, at 88.

22. Interview with Yoshiaki Yoshimi, in Tokyo, Japan (Dec. 8, 1992).

23. *Id.*; see also Louise do Rosario, *A Quest for Truth*, FAR E. ECON. REV., Feb. 18, 1993, at 37.

mately yielded conclusive documents in various archives in the United States and Australia.²⁴

The documents show that the primary purpose for the *jugun ianfu* scheme was to reduce the large number of rapes committed by Japanese soldiers. The scheme is thought to have arisen especially because of the Nanking massacre.²⁵ The rapes fueled anti-Japanese sentiment among the civilian populations and led to attacks against army patrols.²⁶ They also led to the widespread occurrence of venereal disease among Japanese soldiers, which then spread to the civilian population of Japan upon the return of the soldiers.²⁷ General Okabe Naosaburo issued an order to establish "comfort houses" in China on a mass scale as soon as possible to prevent Japanese soldiers from continuing to rape.²⁸

B. Facilities

After establishing the program in China, the Japanese government duplicated it in other locations under its occupation, which by 1942 included large parts of the Asia/Pacific region. The Japanese Im-

24. Interview with Yoshiaki Yoshimi, *supra* note 22. Yoshimi also indicates documents in the archives of the Netherlands. Yoshimi, *supra* note 5, at 82.

25. Yoshimi, *supra* note 5, at 85 (citing Diary of Iinuma Mamoru, Chief of Staff, Japanese Expeditionary Force in Shanghai, entry on December 11, 1937); see also *Nankin Sen-shi Shiryoshu*, in DOCUMENTS, *supra* note 15, at 211. According to Yoshimi, Japan feared reaction from the United States, Europe, and China because of extensive rapes during the sieges of Nanking and Shanghai. Yoshimi, *supra* note 5, at 85. The Chief of Staff for the Japanese Expeditionary Force in Shanghai conjectured that the first "comfort houses" were established in Shanghai in 1932. Okabe Naosaburo Taisho No Nikki [General Okabe Naosaburo's Diary], cited in Yoshimi, *supra* note 5, at 81.

26. DOCUMENTS, *supra* note 15, at 209.

Recently sabotage of transportation networks in Shandong Province has been frequently reported. . . . [I]t is . . . also true that illegal conduct by soldiers and officers towards local residents has stirred up their hatred and resistance. . . . Reported rapes involving Japanese officers and men in various places have spread over the whole area, fermenting unexpectedly serious anti-Japanese sentiment. Local residents are in the habit of uniting in retaliation, making it a rule to kill a person who has committed rape.

Order of June 27, 1938 by Okabe Naosaburo, Chief of Staff, Japanese Expeditionary Force in North China, reprinted in *Rapes Sparked Call for Facilities*, JAPAN TIMES, Aug. 5, 1992, at 3 [hereinafter Naosaburo Order]; see also DOCUMENTS, *supra*, at 209; Colin Nickerson, *Japan Admits Forcing Koreans into Wartime Prostitution*, BOSTON GLOBE, Jan. 14, 1992 (Nat'l/Foreign), at 1.

27. See Naomi Hirakawa & Rieko Tenaka, *Secret Service Monitored Brothels*, JAPAN TIMES, Aug. 6, 1992, at 3.

28. Naosaburo Order, *supra* note 26, at 3 ("It is vital to strictly control the conduct of individual officers and men and also to establish facilities for providing sexual comfort as soon as possible."); see also DOCUMENTS, *supra* note 15, at 209.

perial Army established facilities for sex slaves in the following places: China, Korea, Hong Kong, French Indochina, Philippines, Malaya, Singapore, British Borneo, Dutch East Indies, Burma, a number of Pacific Islands (New Britain, Trobriand), and Okinawa.²⁹

Documents reveal three types of facilities for sex slaves: (1) those directly run by Japanese military authorities; (2) those run by civilians, but essentially set up and controlled by Japanese military authorities; and (3) those that were mainly private facilities but with some priority for military use.³⁰ Despite these differences, there are characteristics common to at least the first two types of facilities or "comfort houses." These include: (1) the facilities were used exclusively by Japanese soldiers and army civilian employees; (2) the facilities were under strict control of the Japanese Army, which helped to establish and to manage these facilities and helped to recruit sex slaves; (3) the facilities had to obtain a permit from the army and accept its support and control in all procedures; and (4) all facilities followed written regulations created by the Japanese Army.³¹

The Japanese Army set out regulations for all facilities for the sex slaves, though compliance varied widely.³² For example, while each facility's working hours varied somewhat on paper, generally, working hours were to begin at nine or ten in the morning and end at six or seven in the evening for enlisted men and later for officers. The rank of the soldier would determine the length of time allowed for a visit, ranging from thirty minutes to one hour. Even after regular working hours, the facilities could be used throughout the night, mostly by officers. In many cases, even where a time schedule did exist, it was rarely adhered to, especially on weekends when many soldiers would arrive.³³

29. Yoshimi, *supra* note 5, at 82. The authors refer to the places where the sex slaves were detained as "facilities for sex slaves" rather than "comfort houses" or "brothels" because the sex slaves were detained involuntarily. The terms "brothels" or "comfort houses" imply that the presence of these sex slaves was voluntary. There were in fact brothels with voluntary prostitutes, but this Article is not about them.

30. Interview with Yoshiaki Yoshimi, in Tokyo, Japan (Dec. 9, 1992). Documents thus far discovered describe four types of comfort houses. The fourth type were ordinary brothels, where most of the women were presumed to be "voluntary" prostitutes and not sex slaves. See Yoshimi, *supra* note 5, at 84.

31. Lee, *supra* note 20, at 9-10; see also DOCUMENTS, *supra* note 15, at 105-06, 324-26, 367.

32. Lee, *supra* note 20, at 13-15.

33. Kim Hak-Soon, a former sex slave, recounts, "[Japanese soldiers] visited us day and night. We had to received [sic] some twenty soldiers on normal days and more than thirty soldiers when the troops returned from field operations." Park, Research on War

These facilities varied in the fees they charged, with some having strict control on the ticketing process.³⁴ Usually, the amount of fees varied according to the soldier's rank and the ethnicity of the sex slave, with higher fees charged for Korean women. These regulations did not provide for payments to the women themselves, and many war-rape victims report that they were never paid at all.³⁵ Some were provided with cosmetics and clothing while others were given occasional tips.

C. Abduction and Fraudulent Recruitment

Sex slaves were either abducted³⁶ or "recruited" under false pretenses.³⁷ Those "recruited" were usually promised jobs such as hospital assistants, file clerks, or teachers. The following is an account of typical recruitment methods taken from a formerly classified document of the United States Office of War Information:

Early in May of 1942 Japanese agents arrived in Korea for the purpose of enlisting Korean girls for "comfort service" in newly con-

Crimes and Crimes Against Humanity (Dec. 10, 1992) (unpublished manuscript on file with author).

34. According to two reports by Americans who interrogated 20 Korean women forced into becoming sex slaves in Burma, the Japanese facility owners operated on detailed instructions from the army. The women provided sex daily for up to 90 noncommissioned officers and soldiers and 15 officers. They were paid up to sixteen cents per man depending on rank. The facility owner subsequently took up to 60% of the woman's gross earnings. *Wartime Army Directly Involved in Brothels, Report Says*, *supra* note 15.

35. When asked if she was ever paid, Kim Hak-Soon, a former comfort woman stated, "The Japanese treated us like slaves, and gave us nothing but food, just enough to survive." Park, *supra* note 33. Another woman, allowed to also work in a grocery store, saved more than 10,000 Japanese *yen*. After the war, this was worth very little, and she never took it, claiming "I did not withdraw it because I could not stand the fact that the money which I got for the rapes I suffered, for my abused youth and for my miserable life became nothing. I lost my bankbook, but my friend, who went with me to Timor Island with me, still keeps hers." A Taiwanese Woman, *supra* note 8, at 80.

36. Seiji Yoshida, a veteran in charge of recruitment efforts, stated that he and 10 other soldiers kidnapped 205 Korean women in Cheju in 1943 under military orders. Zeno Park, *Korean "Comfort Girl" Recalls Days as a Sex Slave*, AGENCE FRANCE PRESSE [AGENCE FR. PRESSE], Jan. 15, 1992, available in LEXIS, World Library, AFP File. Another veteran stated, "We did not treat these women like human beings. The Japanese government is still saying they weren't forced, but I know they were forced, because I was there." Wong, *supra* note 15.

37. An investigation into the issue of Korean sex slaves was carried out by the government of the Republic of Korea, clearly showing that "coercion and violence had been employed at both the recruitment stage and thereafter." U.N. COMM'N ON HUMAN RIGHTS; STATEMENT OF THE REPUBLIC OF KOREA at 12, U.N. Doc. E/CN.4/1993/SR.27. Kim Hak Sun states, "My youth was stolen from me. I was promised a job as a file clerk, and instead was shipped to China to be defiled by Japanese soldiers. All I wanted was to die." Nickerson, *supra* note 26.

quered territories in Southeast Asia. The nature of this "service" was not specified but it was assumed to be work connected with visiting the wounded in hospitals, rolling bandages, and generally making the soldiers happy On the basis of these false representations many girls enlisted for overseas duty.³⁸

Military police and army personnel were also ordered to find and capture women and girls from local villages.³⁹ Women, including mothers and girls as young as twelve, were physically seized, often torn from the arms of their families.⁴⁰ Whole villages were emptied of young girls and women.⁴¹ War-rape victim Wan Ai-Hua describes her abduction:

38. UNITED STATES OFFICE OF WAR INFORMATION, "PSYCHOLOGICAL WARFARE TEAM ATTACHED TO U.S. ARMY FORCES INDIA-BURMA THEATER," JAPANESE PRISONER OF WAR INFORMATION REPORT, NO. 49 1 (1944) (copy on file with author). A Taiwanese woman's experience illustrates this tactic: "I hear from some of my friends that there was a Japanese man (not a military man) who was recruiting nurses for Southeast Asia. I thought that working in [my] hospital would not have a good future, so I joined the group. . . . There were more than ten girls in our group. All of us thought we were going to be nurses." A Taiwanese Woman, *supra* note 8, at 79.

39. A former Japanese military police officer, Ichiro Ichikawa, stated that, "The M.P.s [military police] would go into an area saying that we were rounding up people for the security of the area, but they were really looking to get girls." Wong, *supra* note 15. Seiji Yoshida, a veteran in charge of recruitment efforts, stated, "When we arrived at a village, we dragged all women out into the streets. If anyone tried to flee, she would be beaten with a baton and loaded onto a truck. We beat down screaming young mothers and if two- or three-year-old babies followed us, crying, they would be thrown away. The whole village turned into pandemonium." Ho Sok-Till, *Report on the Former "Comfort Women" in North Korea*, in WAR VICTIMIZATION AND JAPAN, *supra* note 2, at 49, 51.

40. Kiyoharu Yoshida, a wartime official in charge of Korean forced laborers, stated that police and military officials took Korean mothers who were still nursing their babies to satisfy the army's demand for at least 50 new comfort women per week. *Wartime Official to Testify on "Comfort Women" in Diet*, *supra* note 15.

41. Witnesses recall seeing the girls being dragged away. Yi Tong-Chun was residing in Waesong-tong, a central district of Pyongyang, when women from his neighborhood were abducted by the Japanese. Yi said that words fail to depict the sorrow, sufferings, and humiliation of the Korean women taken away as comfort girls. "In my home village in Chongpyong county, South Hamyong Province, the Japanese imperialists took away many girls, saying they would wait on 'Imperial Army' soldiers." *KCNA Cites Eye-Witnesses on "Brutal Atrocities" Endured by "Comfort Girls," BBC SUMMARY OF WORLD BROADCASTS*, Jan. 29, 1992, § 3, at A3, available in LEXIS, World Library, BBCSWB File. Chang Chin-Su was residing in Haksu-tong, Pyongsong, South Pyongan Province when he witnessed what he calls the "barbarity of the Japanese imperialists in taking away Korean women as 'comfort girls for the army.'" *Id.* He was later drafted into the fatigue party of the Fourth Fleet Command of the Japanese Navy based in the South Sea Islands in the Pacific in the summer of 1941. There, Chang said, he was taken to a house with a sign-board of "Nankokuryo" on it. He recounts,

Japanese soldiers were always standing in long queue in front of the house. The Japs beat brutally and tortured women if they resisted a little or did not act as they wanted. What they ate was moth-eaten rotten rice. Countless Korean wo-

I was first caught on June 7, 1943. As the rumor spread about the Japanese coming, I hid myself in the sewage hole near Tao Zhuang, but they found me anyway. . . . Four other girls from the same village were likewise abducted and locked in separate rooms in the same building. . . . Although we were aware that women from the same village were taken captive in the building, we were not allowed to see each other.⁴²

Women and girls were also abducted from camps for civilian detainees. A Dutch war-rape victim describes her abduction from Camp Ambarawa in Java:

All single girls seventeen and up were to line up in the compound Half the girls were sent away By this time all the girls were crying and we were forced into the trucks. Six other girls joined our miserable group. A total of sixteen girls were taken from Ambarawa camp, forced against their will.⁴³

D. Treatment and Living Conditions

Once abducted, the women experienced overwhelmingly inhumane and degrading treatment and living conditions. Many women were removed from their homelands and transported to distant places where linguistic and cultural differences made it easier for the Japanese to keep the women isolated from local populations.⁴⁴

While abuse was not limited to torture in the form of repeated rapes, rape is clearly the abuse that produced the most suffering and most strongly affected the women. One victim testified:

One by one the girls were dragged out . . . they pleaded, they screamed, they kicked and fought with all their might. I can find no words to describe this most inhuman and brutal rape. To me it was worse than dying. Even today, I break out in cold sweat and am paralysed with fear.⁴⁵

men died of spiritual and physical sufferings, forced to a life of sex slaves day and night, beastly Japs madly pouncing upon them to gratify their sexual desire. And they were thrown into the sea, even a small patch of soil grudged them.

Id.

42. Wan, *supra* note 8, at 68-69.

43. O'Herne, *supra* note 8, at 60-61.

44. Nickerson, *supra* note 26. A Taiwanese former sex slave was shipped to Timor. A Taiwanese Woman, *supra* note 8, at 79.

45. O'Herne, *supra* note 8, at 64-65.

Another victim recalls, "Even now when I remember my experience under the hands of the Japanese, I sometimes go numb and do not speak for several days. Until now there are bad effects on me."⁴⁶

These victims were typically raped many times each day. Victim Kang Soon-Ae reports about fifteen rapes per day,⁴⁷ while Kim Yong-Sil recalls between twenty to thirty each day.⁴⁸ As one veteran recounted, "It was sometimes especially hard on the women, because there were never enough. If 500 soldiers came to town and there were only 50 women, then they would each have to take 10 men apiece."⁴⁹

Besides rape and sexual abuse, other forms of torture and abuse were common.⁵⁰ Women who resisted their violators were beaten, mutilated, or murdered, frequently with their fellow women forced to watch.⁵¹ They were very poorly fed⁵² and lived under extremely difficult conditions.

46. Interview with Rosa Henson, in Tokyo, Japan (Dec. 9, 1992); *see also* Henson, *supra* note 8, at 38, 45.

47. Kang, *supra* note 8, at 16, 23.

48. Kim, *supra* note 8, at 56-57.

49. Wong, *supra* note 15.

50. One former sex slave stated, "[They] poured water in my nostril. When my stomach was swollen, they pressed my belly hard stamping a board on it. Every time I woke from unconsciousness, they repeated the pouring of water. Other girls . . . watch[ed] in horror From then on I have lived shunning people in fear of revealing my disgraceful past." Kim, *supra* note 8, at 56-57. Another stated, "After they pulled out most of the hair, they started yelling at me as they beat and kicked me. This torture did not stop until my ribs and some of my pelvic bones were broken. . . . They dragged my naked body and threw me in the river nearby. . . . [A]n old man found me I could not move and had to stay in bed for three years." Wan, *supra* note 8, at 68, 70-71.

51. One victim reports, "I had to serve from 9 a.m. until late at night, sometimes until dawn. One day a girl named 'Tokiko' spoke in Korean. After that, an officer gathered us in the yard to teach us a lesson by cutting her neck with a sword. Horror-stricken, we fled with a cry of terror." Kim, *supra* note 8, at 56-57. Another sex slave from Taiwan recounted, "They could kill us or mistreat us as they wished. There was no humanity." A Taiwanese Woman, *supra* note 8, at 79-80; *see also* Ho, *supra* note 39, at 52 (reporting that when epidemic broke out in Shanghai facility, Japanese soldiers shot women at random and threw hand grenades at them, killing 30 and leaving only 5 survivors); *KCNA Cites Eye-Witnesses on "Brutal Atrocities" Endured by "Comfort Girls," supra* note 41. Some sex slaves were killed shortly before Japanese soldiers surrendered. One report from the Philippines indicates that the women were lined up and beheaded. Indai L. Sajor, *Present Situation of "Comfort Women" in the Philippines*, in *WAR VICTIMIZATION AND JAPAN*, *supra* note 2, at 27, 34.

52. "I suffered constant starvation as I was given nothing but a lump of rolled barley and a bowl of thin soup." Kim, *supra* note 8, at 57. "I got only two or three spoonfuls of rice, which was usually only a remnant of what the Japanese had eaten. When they were in a bad mood, which happened quite often, I was given no food at all." Wan, *supra* note 8, at 69.

The harshness of their conditions is perhaps best illustrated by the fact that thousands of sex slaves died in captivity.⁵³ Although many sex slaves were murdered in cold blood, some of these deaths may be attributed to wartime conditions. For example, some facilities were sometimes located near front lines and consequently many women were killed during military operations.⁵⁴ Others died during distant travels under wartime conditions. Deaths also occurred due to lack of or inappropriate medical care. For example, some died from ill-performed abortions,⁵⁵ while others died from malaria and a variety of other diseases, especially since many victims were weakened by near-starvation diets.⁵⁶ Injuries from beatings were rarely treated, and many women died from broken bones or internal injuries.⁵⁷ A fairly large number committed suicide because of their physical and psychological anguish.⁵⁸

Daily existence was degrading. For example, the majority of the sex slaves were regularly examined by army doctors for venereal diseases. Many of these women were forced to clean used condoms.⁵⁹ Some were ordered to clean their vaginas with an antiseptic solution every time they served a soldier. Some report receiving injections called "number 606." Despite these regulations, many soldiers did not

53. See generally *supra* note 6.

54. Interview with Yoshiaki Yoshimi, *supra* note 22 (commenting on number of facilities in combat zones and testimonies of war-rape victims regarding military attacks on them).

55. Some commentators also report on crudely performed hysterectomies. See Hicks, *supra* note 3, at 33.

56. Medical care that existed generally was for venereal disease and was provided primarily so that Japanese soldiers would not return home infected. Interview with Yoshiaki Yoshimi, *supra* note 22 (discussing prevention of rape and venereal disease as primary motive for having facilities, as illustrated by large number of documents containing regulations expressing concern about spread of venereal diseases to returning soldiers); see also *Daitoa Senso Kankei Shohei No Seibyō Shoshi Ni Kansuru Ken* [Sex Disease Treatment for Officers and Men Dispatched Overseas for the Great East-Asia War], in DOCUMENTS, *supra* note 15, at 171-72.

57. See, e.g., Wan, *supra* note 8, at 68, 70 (victim left to die with ribs and pelvic bones broken).

58. "Very few of the Koreans returned after the war. They were killed by the soldiers because they were a nuisance, or they died of illness or starvation. Some committed suicide because of the shame of what they had done." Fumiko Kawada, *The House With the Red Tiles*, cited in O'Neill, *supra* note 1; see also Wang, *supra* note 20, at 73.

59. Lee, *supra* note 20, at 14 (commenting that sex slaves were "disgusted" at cleaning condoms, each used up to five times); see also Naomi Hirakawa & Maya Maruko, *Doctors Recall Steps to Curb VD at Brothels*, JAPAN TIMES, Aug. 7, 1992, at 3. The soldiers were ordered to use condoms provided by the Army, but they were usually in short supply. See, e.g., *Rules for Hygiene*, JAPAN TIMES, Aug. 7, 1992, at 3 (excerpts from wartime documents of the Japanese Army).

use condoms, and many former sex slaves were infected with venereal diseases.⁶⁰

Survivors who have come forward almost uniformly report serious continuing medical and psychological problems due to being treated as sex slaves.⁶¹ Most have been unable or unwilling to marry or have children, and many have no family to support them. As these victims age, their medical problems are becoming more acute and their financial needs ever higher.⁶² Today, former sex slaves are dying as a direct result of their treatment at the hands of the Japanese military.

III. VIOLATIONS OF THEN-EXISTING CUSTOMARY INTERNATIONAL LAW

The brutalities that the Japanese inflicted upon the war-rape victims violated customary international law. The Charter of the International Military Tribunal,⁶³ the Charter of the Military Tribunal for the Far East,⁶⁴ and the Control Council Law No. 10⁶⁵ describe these atrocities as customary international crimes that justify international criminal sanctions for World War II violators. The Charter of the International Military Tribunal established jurisdiction for:

- (b) war crimes: namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation for slave labour or for any other purpose of the civilian population of or in occupied territory
- (c) crimes against humanity: namely, murder . . . enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war⁶⁶

60. See Lee, *supra* note 20.

61. See generally WAR VICTIMIZATION AND JAPAN, *supra* note 2.

62. *Id.*

63. The Charter was annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 3 Bevans 1238, 1240.

64. The Charter for the International Military Tribunal for the Far East, T.I.A.S. No. 1589, 4 Bevans 20, 27 [hereinafter Tokyo Charter]. The Tokyo Charter was not a treaty but a special proclamation by the Supreme Commander for the Allied Powers, General Douglas MacArthur on January 19, 1946.

65. Control Council Law, Official Gazette of the Control Council for Germany, No. 3, Jan. 1946, reprinted in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY (L. Friedman ed., 1971).

66. *Id.* art. VI. The Tokyo Charter duplicates this language in its definition of crimes against humanity. Tokyo Charter, *supra* note 64, art. 5(c), 4 Bevans at 28. The Tokyo Charter omits the listing of particular crimes in its definition of war crimes. *Id.* art. 5(b), 4 Bevans 28.

The definition of crimes against humanity in Council Control Law No. 10 lists some inhumane acts:

(c) crimes against humanity [are] atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population⁶⁷

The Nuremberg Charter, the Tokyo Charter, and the Council Control Law declare that these acts violate customary law, but they do not discuss how this conclusion was reached. This section indicates that this conclusion was based on sound legal doctrine.

Customary international law is the general practice of states which, over a period of time, becomes binding law through repetition and adoption.⁶⁸ While multilateral treaties play an important role in defining, identifying or creating rules derived from custom, "the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."⁶⁹ Section 102(2) of the Restatement of Foreign Relations Law reflects this, stating that custom-

67. Control Council Law, *supra* note 65, art. II(c) (emphasis added). Control Council Law No. 10 defined war crimes as: "[a]trocities of offenses against persons or property constituting violations of the laws or customs of war, including, but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of the civilian population from occupied territory, murder or ill treatment of prisoners of war" *Id.* art. II(b).

68. The Statute of the International Court of Justice identifies "international custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice, June 26, 1945, art. 38(b), 59 Stat. 1055. Moreover, the general principles of law recognized by civilized nations is a source of international law. *Id.* art. 38(c). A useful test for showing international custom is set out by the Inter-American Commission on Human Rights: "a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; b) a continuation or repetition of the practice over a considerable period of time; c) a conception that the practice is required by or consistent with prevailing international law; and d) general acquiescence in the practice by other states." Case 9647 (Death Penalty Case), Inter-Am. C.H.R. 147, 166, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987); see Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 417 (1989); see generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990); T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

69. Continental Shelf (Libya v. Malta), 1985 I.C.J. 12, at 29 (June 3). State practice includes any act, articulation, or other behavior of a state that discloses the state's conscious attitude with respect to its recognition of a customary rule. In the North Sea cases, the Court stated that:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.

ary international law "results from a general and consistent practice of states which is followed by them from a sense of legal obligation."⁷⁰

Although no rule establishes the number of states that must follow a particular practice for it to become a custom, complete universality is not required.⁷¹ A state need not act in perfect conformity with the law at all times to be shown to recognize a rule of customary law.⁷² Codification of a norm in treaty form or municipal laws of a particular country is not necessary to bind that country to the customary norm.⁷³ Codification by other states and municipal laws of other states may serve as evidence of a customary norm.⁷⁴

North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 4, 44 (Feb. 20); see also M. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985); BROWNIE, *supra* note 68, at 4-11.

70. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 10-2(2) (1987). Customary international law is judicially enforceable in national courts. *E.g.* United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (customary law regarding piracy); *Paquete Habana*, 175 U.S. 677, 700 (1900) (customary law regarding coastal fishing and war); *Ex Parte Quirin*, 317 U.S. 1 (1942) (customary rules of war); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (customary law on torture). The process for determining the content of customary law in United States courts requires "consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Smith*, 18 U.S. (5 Wheat.) at 160-61. Later courts have concurred with this formula. For example, in *Paquete Habana*, the Court determined that customary international law is found by studying the "customs and usages of civilized nations; and as evidence of these, the works of jurists and commentators." *Paquete Habana*, 175 U.S. at 700 (citing *Hilton v. Guyot*, 159 U.S. 113, 163-64, 214-15 (1894)). The Statute of the International Court of Justice follows this same formula, which itself is considered customary law: "(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of the rules of law." Statute of the International Court of Justice, art. 38(d), 59 Stat. 1055.

71. Case 9647, Inter-Am. C.H.R. at 167, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987); see also, Louis B. Sohn, "Generally Accepted" *International Rules*, 6 WASH. L. REV. 1073, 1074 (1986).

72. Military and Paramilitary Activities in and against Nicaragua, (Nicar. v. U.S.) 1986 I.C.J. 14, 88 (June 27). "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule." *Id.*

73. The International Court of Justice considered what factors must be present to create customary law from a treaty or treaty provision in the *North Sea Continental Shelf* case. 1969 I.C.J. at 41-43. Denmark and The Netherlands claimed that the boundary rule of the Convention on the Continental Shelf treaty had become customary law and therefore binding on non-party Germany. The Court, in disagreeing, gave the following test: The treaty or treaty provision must be norm-creating in character; there must be wide-spread and representative state practice even by non-party states; there must be indication of the norm in the *opinion juris*; and a sufficient lapse of time. *Id.* at 41-42. Time could be short if the other factors are strongly present. *Id.*

74. For example, in *Paquete Habana* the Court found rules from, inter alia, royal orders of 1403, treaties of 1521, scholarly works from 1661, and an 1894 treaty between Japan

The status of customary international law at the time of the *jugun ianfu* program is important because prior to World War II, relatively few treaties existed that codified the existing customary international human rights norms, only a few of which had been ratified by Japan.⁷⁵ At the same time, a number of treaties existed that codified rules of warfare—some dating to the Middle Ages.⁷⁶ However, except for the Hague Convention of 1907,⁷⁷ Japan was not a party to them.⁷⁸

A. Customary International Law Prohibiting Rape and Other Forms of Torture

While all forms of torture were condemned long prior to World War II, torture in the form of rape had received special attention as a particularly grave offense in international law.⁷⁹ As early as the sixteenth century, rape began to be specifically mentioned in treaties, primarily in bilateral ones. For example, the 1785 Treaty of Amity

and China binding on the United States in 1900. *Paquete Habana*, 175 U.S. at 657-700. The International Law Commission listed the following as classical forms of evidence of customary norms: "treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and practice of international organizations." *Report of the International Law Commission to the General Assembly*, [1950] 2 Y.B. Int'l L. Comm'n 364, 368-72, U.N. Doc. A/1316/SER.A/1950.

75. Japan ratified the International Labour Organization Convention Concerning Forced or Compulsory Labour (No. 29), June 28, 1930, 39 U.N.T.S. 55 [hereinafter ILO Convention (No. 29)], in force for Japan on May 1, 1932. Japan also ratified the International Convention for the Suppression of the Traffic in Women and Children, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 416, in force for Japan on Dec. 15, 1925.

76. One of the earliest set of laws regulating the conduct of hostilities was a law imposed by the government of the army by Richard II of England in 1386. See YOUNGDEA KHUSHALANI, *DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS* 3 (1982).

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

78. The Hague Convention was signed by Aimaro Sato for Japan and subsequently ratified by Japan.

79. Prior to World War II, practically all mention of rape in international law was in the context of armed conflict (humanitarian) law. The question of whether rape was forbidden in war was raised very early in modern legal history. See, e.g., PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS* 177-78 (Herbert Nutting trans., 1936) (original published in 1563) (crime of rape was traditionally punished by death); ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* 257 (John Rolph trans., 1935) (original published in 1612) ("[T]o violate the honour of women will always be held to be unjust. . . . [I]t is not lawful for any captive to be visited with insult. He is foolish who connects with the laws of war the unlawful acts committed in time of war. In this connexion I make no allowance for retaliation."). Hugo Grotius asserted in 1625 that, although there appeared to be two views at the time, the better view was that under the law of nations rape should not go unpunished in war any more than in peace. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 161 (Francis Kelsey trans., 1949) (original published in 1625).

and Commerce between the United States and Prussia⁸⁰ provided: "If war should arise between the two contracting parties . . . all women and children . . . shall not be molested in their persons."⁸¹

The notion of rape as a war crime or crime against humanity⁸² also began to appear in domestic law and in treaties relatively early. For example, General Winfield Scott's General Orders 20 set forth in 1847⁸³ identifies rape as an offense: "[T]he honor of the United States and the interest of humanity imperiously demand that every crime enumerated [in Article 2] should be severely punished."⁸⁴

The Lieber Code,⁸⁵ the first international attempt to codify the rules of war, also singled out rape.⁸⁶ Lieber based the code primarily on his study of existing international customs of war, with a special concern to codify the protection of the civilian population or non-combatants during times of war. To this end, the Lieber Code also provides:

The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; . . . the persons of the inhabitants especially those of *women*; and the *sacredness of domestic relations*. Offenses to the contrary shall be rigorously punished.⁸⁷

The Lieber code was eventually adopted by Prussia, the Netherlands, France, Russia, Spain, and Great Britain.⁸⁸

The Declaration of Brussels of 1874,⁸⁹ which further developed the laws of war, provides: "The honour and rights of the family . . .

80. Treaty on Amity and Commerce, July 9-Sept. 10, 1785, U.S.-Prussia, 8 Stat. 84.

81. *Id.* art. XXIII.

82. The term "crime against humanity" should be interpreted as acts that are so atrocious that all of humanity suffers the damage and demands redress.

83. See WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 581 (2d ed. 1904).

84. *Id.*

85. The Lieber Code (General Orders 100), War Dept. Classification No. 1.12, Oct. 8, 1863, reprinted in 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY*, *supra* note 65, at 158.

86. *Id.* art. XLIV. "All wanton violence . . . all rape, wounding, maiming or killing . . . [is] prohibited under penalty of death, or other such severe punishment as may seem adequate . . ." *Id.* Francis Lieber, a Prussian born in Berlin around 1800, emigrated to the United States around 1830 after having fought under Blucher at Waterloo and receiving war injuries at the Battle of Namur. He also fought in the Greek War of Independence and was imprisoned in Prussia. He became the leading scholar of armed conflict law of his day and, in the code that bears his name, sought to codify existing customary norms. See Baxter, *The First Modern Codification of the Law of War, Francis Lieber and General Orders No. 100*, *INT'L REV. OF THE RED CROSS*, Apr. 1963, at 131, and May 1963, at 234.

87. Lieber Code, *supra* note 85, art. XXXVII (emphasis added).

88. *Id.*

89. The Declaration of Brussels of 1874, reprinted in 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY*, *supra* note 65, at 194.

should be respected. . . ."⁹⁰ Although the declaration was never adopted as a treaty, its provisions found their way into military manuals of various countries.⁹¹

The Hague Convention of 1907⁹² contains a more general prohibition of torture and other atrocities carried out against both combatants and civilians.⁹³ Regarding civilians in occupied territories, it provides, "[F]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."⁹⁴ The phrase "family honor and rights" should be read to encompass the right of women to be protected from rape, other forms of torture, and forced prostitution. Also, because every major religion condemns rape, the reference to "religious convictions" supports an interpretation of the Hague Conventions as prohibiting rape, torture, and forced prostitution during war.⁹⁵

The Hague Convention of 1907 was not intended to be exhaustive in its enumeration of prohibited acts. To cover all cases not sufficiently addressed by or omitted from the Convention, the drafters included the famous Martens Clause:

Until a more complete code of laws of war has been issued . . . in cases not included in the Regulations . . . *the inhabitants and belligerents* remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.⁹⁶

90. *Id.* art. XXXVIII.

91. KHUSHALANI, *supra* note 76, at 7.

92. Hague Convention of 1907, *supra* note 77, 36 Stat. 2277, 1 Bevans 631. This convention closely follows an earlier convention. Convention with Respect to the Laws and Customs of War on Land (Hague II) and Annexed Regulations, July 29, 1899, 32 Stat. 1803, T.S. No. 403 [hereinafter Hague Convention of 1899].

93. The Lieber Code, however, greatly influenced the final text of the Hague Conventions and Regulations. See JAMES B. SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907* 525-27 (1909); see also James Childress, *Francis Lieber's Interpretation of the Laws of War: General Orders 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34 (1976).

94. Hague Convention of 1907, *supra* note 77, annex art. 46, 36 Stat. 2277, 1 Bevans at 651.

95. KHUSHALANI, *supra* note 76, at 10.

96. Hague Convention of 1907, *supra* note 77, pmbl., 36 Stat. 2277, 1 Bevans at 633 (emphasis added); see also *Ex Parte Quirin*, 317 U.S. 1, 14 (1942). Martens, a Russian soldier, was a member of his country's delegation to the Hague Conference. See Stanislaw E. Nahlik, *The Role of the 1977 Geneva Protocols in the Progress of Armed Conflict Law in EUROPEAN CONFERENCE ON HUMANITARIAN LAW* 11, 17 (1979) citing *THE LAWS OF ARMED CONFLICT* (Dietrich Schindler & Jiri Toman eds., 1973). Martens also drafted a

Thus, acts viewed as insufficiently addressed in the operative text can be shown to be condemned by the Martens Clause.

The Hague Conventions of 1899 and 1907 have served as the basis of the law of armed conflicts (humanitarian law) since its passage, and they have been recognized for their norm-producing force by two postwar international tribunals. In 1946, the International Military Tribunal stated in its judgment: "By 1939 the rules of land warfare laid down in the 1907 Convention had been recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war."⁹⁷ Similarly, the International Military Tribunal for the Far East stated that in its judgment the Hague Conventions of 1907 was "[g]ood 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."⁹⁸

The Hague Conventions were first applied during World War I. After the war, the Commission on the Responsibilities of the Authors of the War and the Enforcement of Penalties (Versailles Commission) was created by the preliminary peace conference to inquire into and report on "the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies."⁹⁹ The Versailles Commission found Germany guilty of numerous war crimes despite "explicit regulations [of] established customs [and the] clear dictates of humanity."¹⁰⁰ These war crimes included rape.¹⁰¹

similar phrase in the preamble to the Hague Convention of 1899: "[P]opulations . . . remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." Hague Convention of 1899, *supra* note 92, pmbl., 32 Stat. 1803, T.S. No. 403.

97. JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF MAJOR WAR CRIMINALS, 1946, CMD 6964, at 64. This postwar finding is especially significant because the Hague Convention of 1907 includes a clause precluding application "except between contracting powers and then only if all the belligerents are parties to the convention." Hague Convention of 1907, *supra* note 77, art. 2, 36 Stat. 2277, 1 Bevans at 640.

98. The United Nations War Crimes Commission, *Judgment of the International Military Tribunal for the Far East of 1948*, 15 L. REP. OF TRIAL OF WAR CRIM. 13 (1949).

99. *Violations of the Laws and Customs of War: Report of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibilities*, Conference of Paris, 1919, reprinted in 14 AM. J. INT'L L. 95 (Supp. 1920).

100. *Report of the Commission on the Responsibilities of the Authors of War and the Enforcement of Penalties*, reprinted in 14 AM. J. INT'L L. 95 (1920).

101. *Id.*

B. Customary International Law Prohibiting Slavery and Forced Labor

Slavery and forced labor also received strong international condemnation long before World War II. Whereas international condemnation of rape usually appeared in instruments relating to armed conflict, condemnation of slavery and forced labor was prominent in general international law. That slavery and forced labor were the sole subjects of a number of treaties indicates its importance in the prewar period.

The 1815 Declaration Relative to the Universal Abolition of the Slave Trade¹⁰² was the first international instrument to condemn slavery and, with emphasis, the slave trade.¹⁰³ International focus on the slave trade continued with the Treaty of London,¹⁰⁴ the General Act of Berlin of 1885,¹⁰⁵ and the General Act of the Brussels Conference of 1890.¹⁰⁶ By the early twentieth century, emphasis had shifted to complete suppression of slavery in all forms.¹⁰⁷ At the time, the Council of the League of Nations appointed a Temporary Slavery Commission whose report¹⁰⁸ led to the creation and promulgation of the 1926 Slavery Convention,¹⁰⁹ which defines slavery as "the status or

102. Declaration Relative to the Universal Abolition of the Slave Trade, Feb. 8, 1815, 63 Consol. T.S. No. 473.

103. The Declaration asserts that the slave trade had always been viewed by "just and enlightened men at all times as repugnant to the principles of humanity and universal morality." *Id.*; see generally BENJAMIN WHITAKER, *SLAVERY*, U.N. Doc. E/CN.4/Sub.2/20/Rev.1, Sales No. E/84.XIV.1 (1984); Ved Nanda & M. Cherif Bassiouni, *Slavery and the Slave Trade: Steps Toward Eradication*, 12 SANTA CLARA L. REV. 424 (1972); M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445 (1991).

104. Treaty for the Suppression of the African Slave Trade, Dec. 20, 1841, 92 Consol. T.S. No. 437 [hereinafter Treaty of London]. The Treaty of London analogized the slave trade to piracy, which was already recognized as an international crime. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat) 153, 160-61 (1820).

105. General Act of the Conference of Berlin Concerning the Congo, Feb. 26, 1885, 10 Martens Nouveau Recueil (ser. 2) 414, reprinted in 3 AM. J. INT'L L. 7 (Supp. 1989).

106. Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, Spirituous Liquor, July 2, 1890, 27 Stat. 886, T.S. No. 383 [hereinafter General Act of the Brussels Conference].

107. See, e.g., The Convention Revising the General Act of Berlin and the General Act and Declaration of Brussels, Sept. 10, 1919, 49 Stat. 3027, T.S. No. 877.

108. See N.O. Umozurike, *The African Slave Trade and the Attitudes of International Law Towards It*, 16 How. L.J. 334 (1971).

109. Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253. This convention remains the leading international instrument on slavery and has not been ratified by Japan. The Protocol amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51, substitutes the United Nations and its mechanisms for the League of Nations. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 40, augments

condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."¹¹⁰

Forced labor was addressed in International Labour Organization Convention (No. 29) Concerning Forced Labour, which entered into force on May 1, 1932.¹¹¹ The Forced Labour Convention defines forced labor as "all work or service which is exacted from any person under the menace of a penalty and for which the person has not offered himself voluntarily."¹¹² While the convention does not prohibit forced labor in its entirety,¹¹³ forced labor may only be required of "adult able-bodied males,"¹¹⁴ and then for no more than sixty days¹¹⁵ and with the same prevailing work-days and wages as for voluntary labor.¹¹⁶ Japan ratified this convention in 1932.

Substantial prewar efforts were made to also promulgate international agreements to end the slavery-like practice of forced prostitution.¹¹⁷ First, the International Agreement for the Suppression of the White Slave Traffic¹¹⁸ condemned forced prostitution and provided coordination of information regarding the procurement of women and girls for prostitution and immoral purposes by abuse or compulsion.¹¹⁹ Six years later, further efforts were made to prohibit forced prostitu-

the definitions to include slave-like practices such as debt bondage, forced marriage, or transfer of women and child labor. *Id.* art. 1, 18 U.S.T. at 3204. It also expands culpability, *id.* art. 6, 18 U.S.T. at 3206, and denies states the right to make reservations. *Id.* art. 9, 18 U.S.T. at 3206.

110. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 109, art. 1, 18 U.S.T. at 3204.

111. See ILO Convention (No.29), *supra* note 75, 39 U.N.T.S. 55.

112. *Id.* art. 2, 39 U.N.T.S. at 58.

113. The Convention allows forced labor for military service and normal civic obligations, as a consequence of criminal conviction and in cases of emergency. *Id.* art. 2.2 (a)-(e), 39 U.N.T.S. at 58.

114. *Id.* art. 11, 39 U.N.T.S. at 64.

115. *Id.* art. 12, 39 U.N.T.S. at 64.

116. *Id.* arts. 13, 14, 39 U.N.T.S. at 66.

117. Forced prostitution, also referred to as "white slavery," is equally condemned in international law as a slave-like practice. A number of pre-World War II treaties addressed this particular issue. See, e.g., International Agreement for the Suppression of the White Slave Traffic, Mar. 18, 1904, 1 L.N.T.S. 83.; Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. No. 45. Japan was well aware of the international condemnation of these practices. A letter dated February 23, 1938 from the Home Ministry to the prefectural governors expressed concern that the "recruitment activities . . . run . . . counter to the spirits of the international convention for prohibiting trade in women." *Brothels were Controlled to Preserve Military Honor*, JAPAN TIMES, Aug. 6, 1992, at 3.

118. International Agreement for the Suppression of the White Slave Traffic, *supra* note 117, 1 L.N.T.S. 83.

119. *Id.*; see also Nanda & Bassiouni, *supra* note 103, at 439.

tion with the International Convention for the Suppression of the White Slave Traffic.¹²⁰ This treaty expanded on the first by providing for criminal punishment for offenders, but left the subject matter within the domain of individual nation-states.¹²¹

By the end of World War I, white slavery was condemned as a war crime by the Versailles Commission, and its work was echoed in the International Convention for the Suppression of the Traffic in Women and Children¹²² and the International Convention for the Suppression of the Traffic in Women of Full Age.¹²³ These treaties mandate enforcement duties on the states and require the international community to provide information and cooperation.¹²⁴

C. *Jus Cogens and Erga Omnes*

Rape, torture, and slavery are violations of *jus cogens* (peremptory) norms¹²⁵ and of obligations *erga omnes*.¹²⁶ *Jus cogens* rules are

120. See Convention for the Suppression of the White Slave Traffic, *supra* note 117, 211 Consol. T.S. No. 45.

121. Nanda & Bassiouni, *supra* note 103, at 439.

122. International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416, reprinted in 18 AM. J. INT'L L. 130 (Supp. 1924); see NATALIE HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN 92 (1983). Japan ratified this convention on December 15, 1925.

123. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431, reprinted in 6 INTERNATIONAL LEGISLATION: 1909-1945 469 (M. Hudson ed., 1972); see HEVENER, *supra* note 122, at 98.

124. See, e.g., International Convention for the Suppression of Traffic in Women and Children, *supra* note 122, art. 2 ("The contracting countries to the Convention agree to punish anyone who, by means of fraud, violence, threats, abuse of power or other measure, coerces or kidnaps a female who has become of age with the intention of making her engage in a loathsome profession to satisfy other persons' sexual desires.").

125. A literal definition of *jus cogens* is "known" or "cogent" law. Parker & Neylon, *supra* note 68, at 414; see also Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27) (separate opinion of Judge Singh and separate opinion of Judge Sette-Camara); Case 9647, Inter-Am. C.H.R. 147, 166, 16S-73, OEA/Ser. L/V/II.71, doc. 9 rev. 1 (applying prohibition of execution of minors against United States, a persistent objector, because of *jus cogens*); see generally BROWNIE, *supra* note 68; Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); CONFERENCE ON INTERNATIONAL LAW, PAPERS AND PROCEEDINGS 11, THE CONCEPT OF *Jus Cogens* in International Law (1967). Older commentaries use the term crime *jure gentium*. See, e.g., T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW § 103 (4th ed. 1910); CHRISTIAN WOLFF, *JUS GENTIUM* (1764).

126. The International Court of Justice has articulated the doctrine of state obligations *erga omnes* in Barcelona Traction, Light and Power Co. (Belg. v. Spain) 1970 I.C.J. 3, 32 (Feb. 5). *Erga omnes* obligations of a State are owed to the international community as a whole. *Erga omnes* means "flowing to all" and according to the Court, "by their very nature are the concern of all States." *Id.* These obligations, like those of *jus cogens*, bind states independently of any treaty obligations. See W. Paul Gormley, *The Right to Life and*

the highest rules of international law¹²⁷ and function as "very strong rule[s] of customary international law,"¹²⁸ similar to an international constitutional law, overturning all that is contrary.¹²⁹ In the wartime context, violations of these *jus cogens* norms are war crimes and crimes against humanity.¹³⁰ While *jus cogens* norms may address individuals and their rights under international law, *erga omnes* obligations address duties that states largely owe other states.¹³¹ For example, Australia claimed that France had an obligation *erga omnes* to abstain from nuclear testing in its case brought to the International Court of Justice.¹³² Recently, the Organization of American States declared that the obligation to respect and guarantee civil and political rights is an obligation *erga omnes*.¹³³

Rape, torture, and slavery must be viewed as contravening *jus cogens* by 1937 because these violations were included as war crimes by the Versailles Commission and the post-World War II tribunals and

the Rule of Non-Derogability: Peremptory Norms of Jus Cogens, in THE RIGHT TO LIFE IN INTERNATIONAL LAW 120 (B.G. Ramcharan ed., 1985) (discussing similarities between rights *erga omnes* and rights *jus cogens*); Attila Tanzi, *Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 1, 15-20* (Marina Spineda & Bruno Simma eds., 1987) (discussing *erga omnes* and *jus cogens*).

127. *Committee of United States Citizens in Nicar. v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988).

128. A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 132 n.73 (1971).

129. Mark W. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT'L L. (1988).

130. See Parker & Neylon, *supra* note 68, at 429, 434.

131. See Juste Ruiz, *Las obligaciones erga omnes en derecho internacional publico, in ESTUDIOS DE DERECHO INTERNACIONAL* 230 (1979); Paolo Piccone, *Obblighi reciproci e obblighi erga omnes nel campo della protezione internazionale dell'ambiente marino dall'inquinamento, in DIRITTO INTERNAZIONALE E PROTEZIONE DELL'AMBIENTE MARINO* (Vincenzo Starace, ed. 1983), *cited in* Tanzi, *supra* note 126, at 16.

132. *Nuclear Tests (Austl. v. Fr.)*, 1973 I.C.J. Pleadings (1 Nuclear Tests) 322 (July 12); *Nuclear Tests (Austl. v. Fr.; N.Z. v. Fr.)*, 1974 I.C.J. 253, 457 (Dec. 20). The Court has subsequently invoked *jus cogens* in circumstances where *erga omnes* might be viewed as more exacting, thereby further blurring the already hard to discern distinctions between the two. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 14, para. 190 (June 27) (discussing principle of prohibition of use of force in international affairs as having character of *jus cogens*). In 1949, in language reflecting both *jus cogens* and *erga omnes*, the Court ruled that failing to warn that mines had been laid in areas where there is an international right of passage was a violation of the principles "underlying" its expression in certain treaties and was a violation of "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war." *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9).

133. Statement by Inter-American Commission on Human Rights, Organization of American States, Press Communiqué no. 13/93, May 25, 1993 (on file with author).

Control Council listings of war crimes.¹³⁴ Slavery is widely acknowledged to be one of the first crimes to be a violation *jus cogens*.¹³⁵ In *Barcelona Traction*, the International Court of Justice singled out protection from slavery as one of two examples of obligations *erga omnes* arising out of human rights law.¹³⁶ International norms on the inhumane treatment of civilians and prisoners of war, rape, torture, enforced labor, and other rights violations presented by these cases are also considered to have been governed by *jus cogens* long before World War II.¹³⁷

D. Postwar Developments in Human Rights and Humanitarian Law

Shortly after World War II, the international community began to codify international human rights norms and customary international law. The two main documents are the Charter of the United Nations¹³⁸ and the Universal Declaration of Human Rights (Universal Declaration).¹³⁹ The Universal Declaration condemns slavery,¹⁴⁰ gov-

134. Parker & Neylon, *supra* note 68, at 430-35, 437-38; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987). Because a source of *jus cogens* relating to wartime incidents is the dictates of the public conscience, a way to assess *jus cogens* standing for human rights norms is to monitor public reaction when presented with relevant information. The public conscience has unquestionably been deeply affected by Japan's use of sex slaves.

135. AMOS S. HERSHEY, *ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION* 230 (1921); LEAGUE OF NATIONS COVENANT art. XXII (purpose of League to eradicate slavery); *see also* REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY, U.N. Doc. A/CN.4/Ser.A/Add.1 (1963). "[Prohibition against slavery] is one of the oldest and best settled rules of *jus cogens*." *Id.* International Court of Justice Judge Manfred Lachs even posits that the concept of *jus cogens* itself evolved to address the special gravity of slavery. Manfred Lachs, *The Law of Treaties: Some General Reflections on the International Law Commission*, in *RECUEIL D'ETUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM* 391, 399 (1968).

136. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)* 1970 I.C.J. 3, 32 (Feb. 5). The other human rights norm identified as an *erga omnes* obligation is racial discrimination. *Id.* The Court also stated that the prohibition against aggression and genocide are also obligations *erga omnes*. *Id.*

137. The language of the Martens clause set out above is essentially a statement of *jus cogens*. Treaty of Versailles, June 28, 1919, 11 Martens Nouveau Recueil (ser. 3) 323, 2 Bevans 43. Findings of the Versailles Commission also reflect the *jus cogens* status of humanitarian norms.

138. "The Purposes of the United Nations are: to . . . promot[e] and encourag[e] respect for human rights and fundamental freedoms." U.N. CHARTER art. 1.

139. *Universal Declaration of Human Rights*, G.A. Res. 217(II), U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]. The Universal Declaration is recognized as a statement of binding customary international law. PROCLAMATION OF TEHRAN, U.N. Doc. A/CONF.32/41, U.N. Sales No. E.68XIV.2 (1968). A number of human rights treaties were subsequently signed. *See, e.g.*, International Covenant on Economic, Social and Cultural

ernment-ordered killing in any form,¹⁴¹ and "torture . . . cruel, inhumane or degrading treatment or punishment."¹⁴² It also grants everyone the right to free choice of employment at fair and adequate wages.¹⁴³

Modern usage also evinces the trend toward incorporating slave-related practices into the universal condemnation of slavery. For example, a 1975 U.N. report stated, "It is generally agreed that the definition [of slavery] should be flexible enough to be applicable to any new form of slavery which might emerge in the future and not to limit the scope of investigation of all its possible manifestations."¹⁴⁴ A 1982 U.N. report on slavery¹⁴⁵ sets out a number of contemporary slavery-like practices involving women and forced labor¹⁴⁶ that reinforce the modern trend towards a flexible definition of slavery, which encompasses systematic rape.

The Geneva Conventions of 1949 followed the Universal Declaration and also condemned these violations.¹⁴⁷ Geneva Convention IV specifically protects civilians and includes the right to be free from slavery, most types of forced labor,¹⁴⁸ and rape.¹⁴⁹ These conventions

Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; *see also* UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS (1988) (containing texts of significant human rights instruments).

140. *Universal Declaration*, *supra* note 139, art. 4 ("No one shall be held in slavery or servitude; slavery and servitude shall be prohibited in all their forms.").

141. *Id.* art. 3.

142. *Id.* art. 5.

143. *Id.* art. 23.

144. SUB-COMM'N ON PREVENTION OF DISCRIMINATION, WORKING GROUP ON CONTEMPORARY FORMS OF SLAVERY, U.N. Doc. E/CN.4/Sub.2/AC.2/3, para. 12 (1975).

145. WHITAKER, *supra* note 103.

146. *Id.* at 11-18.

147. Geneva Convention I of 1949, Oct. 21, 1950, 6 U.S.T. 3114, 75 U.N.T.S. 31 (armed forces in the field); Geneva Convention II of 1949, Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85 (armed forces at sea); Geneva Convention III of 1949, Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV of 1949, Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 267 (civilians).

148. Geneva Convention IV, *supra* note 147, arts. 27, 51, 95, 147, 6 U.S.T. at 3536, 3550, 3578, 3618. Article 51 allows forced labor in certain war-related circumstances such as feeding or sheltering the civilian population, but only with fair wages and many other restrictions. Article 147 identifies grave breaches and includes inhumane treatment applicable to slavery.

149. In a general condemnation of inhumane treatment, rape is singled out: "Women shall be especially protected against . . . rape, enforced prostitution, or any form of indecent assault." *Id.* art. 27, 6 U.S.T. at 3536.

brand rape and civilian torture as grave breaches of humanitarian law¹⁵⁰—war crimes in international law.¹⁵¹

The Geneva Conventions of 1949 restates the Martens clause set forth in the Hague Convention of 1907 and provide that even if a signatory party to the Geneva Conventions denounces the conventions, it remains bound by “the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”¹⁵²

IV. COMPENSATION

A. *Right to Compensation*

People wronged are entitled to appropriate compensation.¹⁵³ This right in some form is one of the most basic principles of law, without which the rule of law is not possible.¹⁵⁴ As stated by former Calcutta High Court Judge Roy, “[It is] a timeless axiom of justice without which social life is unthinkable, that a wrong done to an individual must be redressed by the offender himself or by someone else

150. *Id.* art. 147, 6 U.S.T. 35618. When parties to the Geneva Conventions are aware of grave breaches being committed, they are all obliged “to search for persons alleged to have committed or ordered to have committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.” *Id.* art. 146, 6 U.S.T. 3516. An identical provision is in each of the other three Geneva Conventions of 1949.

151. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 11, 1970, 754 U.N.T.S. 73; *see* U.N. COMM’N ON HUMAN RIGHTS; RAPE AND ABUSE OF WOMEN IN THE TERRITORY OF THE FORMER YUGOSLAVIA, U.N. Doc. E/CN.4/1994/5, at 6 (1993). “Rape constitutes an extremely grave violation of international humanitarian law as recognized by Article 27 (2) of the Fourth Geneva Convention . . . and is defined as a war crime according to Article 147 of the same convention. The definition covers not only rape, but any attack on a women’s honour.” *Id.*

152. Geneva Convention III, *supra* note 147, art. 142, 6 U.S.T. 3424; Geneva Convention IV, *supra* note 147, art. 158, 6 U.S.T. 3622.

153. In United States jurisprudence, this rule has perhaps the best expression in *Marbury v. Madison*, 5 U.S. (Cranch) 137, 163 (1803). “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. [Blackstone] says, ‘it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.’” *Id.*

154. Hugo Grotius listed the obligation to make restitution for wrongful acts fourth in his five basic elements of law. GROTIUS, *supra* note 79, at 12. A prominent Japanese scholar calls the Grotius fourth element or axiom self-evident. Furukawa Terumi, *Punishment, in A NORMATIVE APPROACH TO WAR: PEACE, WAR AND JUSTICE IN HUGO GROTIUS* 221, 240 (Onuma Yasuki ed., 1993). Terumi says that the Grotius axioms are incorporated into legal systems. *Id.*

against whom the sanction of the community may be directed."¹⁵⁵ The right to redress following an international wrong is recognized by scholars as a fundamental principle of customary law.¹⁵⁶ Recognition of this right clearly pre-dates World War II, and it has been incorporated into both treaties and international legal opinions, the most celebrated being the *Chorzow Factory* case.¹⁵⁷

In the context of international law, the right to redress arises out of the international law concept of state responsibility, which is the duty of a state to compensate for breaches of its obligations.¹⁵⁸ As the Permanent Court International of Justice stated, "[A]ny breach of an engagement invokes an obligation to make reparation."¹⁵⁹ Furthermore, reparations are required even though the precise amount of loss cannot be clearly established.¹⁶⁰

In armed conflict (humanitarian) law, evidence of an understanding that states must pay for breaches predates the Hague Conventions.¹⁶¹ For example, one of the earliest cases decided by the

155. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961); see also Benjamin Ferencz, *Compensating Victims of the Crimes of War*, 12 VA. J. INT'L L. 343 (1972).

156. THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 17-18 (1892). "The right of redress exists in the case of individuals. . . . Redress consists of compensation for injury inflicted and for its consequences." *Id.*; STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: PRELIMINARY REPORT, SUBMITTED BY THEO VAN BOVEN, SPECIAL RAPPORTEUR, U.N. Doc. E/CN.4/Sub.2/1990/10 (1990) (hereinafter VAN BOVEN). "There is no doubt that the obligation to provide for compensation as a means to repair a wrongful act or a wrongful situation is a well established principle of international law." *Id.* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 169 (1953). "It is a principle of international law that the breach of a legal duty involves an obligation to make reparations." *Id.*; see also Daisy Collins, *The United States Owes Reparations to the African States for the Slave Trade*, 16 HOW. L. J. 314, 320 (1971).

157. *Chorzow Factory (Indemnity)*, 1928 P.C.I.J. (ser. A.) No. 17. In *Chorzow Factory*, the Court also commented on reparation for breach of treaty, claiming that the right to reparation is an "*indispensable complement* . . . [and need not] be stated in the convention." *Id.* at 29 (emphasis added). In a section called "The duty of humanity," Woolsey writes: "[c]ruelty may also reach beyond the sphere of humanity; it may violate rights, and justify self-protection and demand for redress." WOOLSEY, *supra* note 156, at 23.

158. See VAN BOVEN, *supra* note 156, para. 36.

159. *Chorzow Factory*, 1928 P.C.I.J. at 29. "[R]eparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would . . . have existed if the act had not been committed." *Id.* at 47.

160. *Id.*

161. Grotius recognized the right to reparation for violations of the law of nations as early as the seventeenth century. GROTIUS, *supra* note 79, Bk. I, ch. 20, § 1, and Bk. III, ch. 18, § 6; see also JOHN MOORE, 6 INTERNATIONAL LAW DIGEST 655 (1906). In *Paquete Habana*, the United States Supreme Court ordered damages and costs to private claimants

fledgling U.S. Supreme Court discussed compensation for private claimants for violations of the rules of war.¹⁶² By the mid-nineteenth century, private suits for compensation were also upheld in state courts of the United States.¹⁶³ Liability for these types of acts existed even when the acts in question were not ordered by the state or were unintentional.¹⁶⁴

The Hague Convention of 1907 clearly reflects this understanding of a duty to compensate in international law. It states, "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for *all* acts committed by persons forming part of its armed forces."¹⁶⁵

Other pre-World War II treaties specifically provided for individual claims. For example, the Treaty of Versailles¹⁶⁶ established mixed arbitration tribunals for private persons to present damage claims against Germany, even against the wishes of their own governments.¹⁶⁷ There was also attention at the international level directed at codifying some basic elements of compensation, especially in relation to state responsibility, for example the Harvard Draft.¹⁶⁸ In the

after their vessel had been confiscated by the United States as a prize of war in violation of a customary international law rule. *Paquete Habana*, 175 U.S. 677 (1900).

162. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 279 (1796). "[These] rights [are] fully acquired by private persons during the war, more especially if derived from the laws of war . . . [and] against the enemy, and in that case *the individual might be entitled to compensation*." *Id.* (emphasis added).

163. See, e.g., *Christian County Court v. Rankin*, 63 Ky. (2 Duv.) 502, 505 (1866) (granting private compensation in action against Confederate soldiers for burning courthouse in violation of "the laws of nations").

164. MOORE, *supra* note 161, at 758 (quoting 1885 statement from U.S. Secretary of State Bayard: "[T]he mere fact that soldiers . . . commit acts 'without orders from their superiors in command,' does not relieve their government from the liability for such acts."). One pre-World War II case required the United States to pay compensation to the parents of a girl killed by an American soldier. *Decision of the General Claims Commission, United States and Mexico, Garcia v. United States* 1926 (Docket No. 292) Dec. 3, reprinted in 21 AM. J. INT'L. L. 581 (1927).

165. Hague Convention of 1907, *supra* note 77, art. III, 36 Stat. 2277, 1 Bevans at 640 (emphasis added).

166. Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 Bevans 43, reprinted in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 65, at 842.

167. *Id.* In addition to the Treaty of Versailles, the Treaty Respecting the Establishment of the Central American Court of Justice (1907), while in force only ten years, also provided for private claims. Central American Peace Conference: Central American Court of Justice, Dec. 20, 1907, 2 Martens Nouveau Recueil (ser. 3) 913, reprinted in 2 AM. J. INT'L L. 231, 243 (Supp.).

168. See, e.g., *Harvard Draft of The Law of Responsibility of States for Damages Done in their Territory to the Persons or Property of Foreigners*, 23 AM J. INT'L L. 131 (Special Number 1929) [hereinafter *Harvard Draft*]. Article 7 of the *Harvard Draft* provides that states are responsible for injuries caused by an act or omission of the state. *Id.*

process of developing the Harvard Draft, proposals from Japan included provisions that a state is responsible for both intentional and negligent acts.¹⁶⁹ Moreover, states generally aid their citizens in obtaining damages from foreign states only after private compensation efforts fail.¹⁷⁰

The right to redress can be understood either as a norm of *jus cogens* or as a fundamental principle of law.¹⁷¹ Fundamental principles of law of civilized nations are a main source of international standards according to the statutes of both the prewar Permanent Court of International Justice and the postwar International Court of Justice.¹⁷² The Permanent Court of International Justice affirms the "general principles of law" aspect of the right to redress by declaring it "a principle of international law, and even a general conception of law."¹⁷³

The right to redress, including monetary compensation, was strongly set out in the postwar international human rights and humanitarian law instruments. The Universal Declaration of Human Rights provides the "right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by constitution or by law."¹⁷⁴ The International Covenant of Civil and Political Rights also provides the right to effective remedy¹⁷⁵ and specifically mandates an enforceable right to compensation for unlawful arrest or detention.¹⁷⁶ Regional human rights instruments also

169. L'ASSOCIATION DE DROIT INTERNATIONAL DU JAPON, DRAFT RULES PREPARED BY THE KOKUSAIHO-GAKKAI (1926), reprinted in 23 AM. J. INT'L L. (Special No. 1929).

170. "A State is not ordinarily responsible (under a duty to make reparations to another state) until the local remedies available to the injured alien have been exhausted." *Harvard Draft*, *supra* note 168, at 133.

171. In the international community, the *jus cogens* nature of the right to redress is especially self-evident, being clearly "indispensable to the existence of the law of nations as an international legal order and the observance of which is required by all members of the international community." German Federal Constitutional Court, Judgment of Apr. 7, 1965, BVerfGE.

172. Statute of the International Court of Justice, *supra* note 68. As stated in *Rankin*, "For every wrong the common law provides an adequate remedy . . . on international and common law principles." *Christian County Court v. Rankin*, 63 Ky. (2 Duv.) 502, 505-06 (1866).

173. *Chorzow Factory (Indemnity)*, 1928 P.C.I.J. (ser. A.) No. 17, at 29 (emphasis added).

174. *Universal Declaration*, *supra* note 139, art. 8.

175. International Covenant on Civil and Political Rights, *supra* note 139, art. 2; see also THEO VAN BOVEN, STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: PROGRESS REPORT, U.N. Doc. E/CN.4/Sub.2/7 (1991) (discussing Human Rights Committee cases ordering compensation).

176. International Covenant on Civil and Political Rights, *supra* note 139, art. 9.

contain the right to compensation.¹⁷⁷ In postwar humanitarian law,¹⁷⁸ the Geneva Conventions of 1949 forbid states from "absolv[ing] themselves of liability" for grave breaches.¹⁷⁹ Protocol Additional I of the Geneva Conventions provides for liability for all acts of members of a state's armed forces and mandates compensation for serious breaches.¹⁸⁰

The right to compensation and the corresponding duty to pay does not necessarily mean that all individual claimants should have to press claims in national courts. While national courts may be the best fora for providing an effective remedy, they may present obstacles and a lengthy, complex judicial process.¹⁸¹ Procedural barriers to recourse

177. American Convention on Human Rights, July 18, 1978, art. 10, O.A.S.T.S. No. 36; European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, art. 5, Europ. T.S. No. 5. Regarding the right to redress, the Inter-American Court of Human Rights states: "The State has a legal duty . . . to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible and to impose appropriate punishment and to ensure the victim compensation." Velasquez Rodriguez Case, 1988 Inter-Am. C.H.R. (Ser. C) No. 4, para. 174, reprinted in 28 I.L.M. 291 (1989) (emphasis added). See VAN BOVEN, *supra* note 175, at 13-15 (annotating OAS cases); THEO VAN BOVEN, STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: SECOND PROGRESS REPORT, U.N. Doc. E/CN.4/Sub.2/1992/8 at 15-17 (presenting cases in European Commission and Court of Human Rights).

178. According to Nuremberg General Council Benjamin Ferencz, the strength of the rule that victims of war crimes and crimes against humanity are entitled to compensation mandates an organized [international] program for such compensation. Benjamin Ferencz, *Compensating Victims of the Crimes of War*, 12 VA. J. INT'L L. 343 (1972).

179. Geneva Convention I, *supra* note 147, art. 51, 6 U.S.T. at 3148; Geneva Convention II, *supra* note 147, art. 52, 6 U.S.T. at 3250; Geneva Convention III, *supra* note 147, art. 131, 6 U.S.T. at 3420; Geneva Convention IV, *supra* note 147, art. 148, 6 U.S.T. at 3618.

180. Protocol Additional I to the Geneva Convention of 1949, Dec. 7, 1978, art. 91, 1125 U.N.T.S. 3, 45.

181. Private claimants in Germany were judged not to have standing to sue private industrialists or their companies. See Benjamin Ferencz, *West Germany: Supreme Court Bars Claims of Forced Laborers Against German Industrial Concerns*, 15 AM. J. COMP. L. 561 (1967) (discussing German high court refusal to allow private claims against Krupp, I.G. Farben, AEG, and Telefunken). Private claimants from Vietnam were barred from legal action for damages against Lt. Calley, Secretary of Defense Laird, and Secretary of the Army Resor in their private capacities. Civil Action No. 1473 (M.D. Ga. 1971), cited in Ferencz, *supra* note 155, at 348 n.20. Private claims against the United States for injuries caused by the atom bombs dropped on Hiroshima and Nagasaki were dismissed on the grounds that in the Allied Treaty Japan promised to waive claims of Japanese nationals in its national courts. Decision of Tokyo District Court of Dec. 7, 1969 (Case No. 2,914 and Case No. 4,177), 355 HANJI 17 (1963), reprinted in 8 JAPANESE ANN. INT'L L. 212, 248-49 (1964). The Court stated that the defendant state (Japan) "caused many nationals to die, injured them, and drove them to a precarious life by the war which it opened on its own authority and responsibility. . . . Needless to say the defendant state should take sufficient relief measures in this light." *Id.* at 250.

in national courts, however, should not free governments from the duty to compensate. If the courts decline jurisdiction or if other conditions militate against judicial redress, governments must provide for compensation through some alternative mechanism.

For these war-rape victims, an alternative mechanism may be preferable to Japanese courts. First, compensation sought on a case-by-case basis may be unduly burdensome to a national court system since the volume of cases may effectively tie up the national courts.¹⁸² National court systems may have rigid requirements for evidence, and these women, who rarely spoke Japanese and who were frequently transported to unknown locations, may not be able to present sufficient documentation for national courts.¹⁸³ Victims may be intimidated by, or be unable to effectively use, unfamiliar legal systems. Costs may also be prohibitive for foreign claimants, especially in these cases where many victims are poor and when litigation costs in Japan tend to be very high.¹⁸⁴ Also, since the Japanese government is implicated in these cases, fear of bias in the Japanese legal system is reasonable.¹⁸⁵

B. Germany's Postwar Reparation Scheme

Because international law provides little guidance on how compensation should be paid, a brief review of the German postwar reparation scheme for individual victims will be useful as one example of a compensation scheme. Germany has paid billions of dollars in direct compensation to its World War II victims and considers compensation a matter of national honor and a statement of its commitment to principles of international law.¹⁸⁶ Payments continue today, and new com-

182. Japanese attorneys working on these cases have also indicated that these types of cases typically can take up to ten years to reach a final disposition.

183. In special claims procedures, the burden of proof may be more flexible than in national courts.

184. The nature of these violations requires that compensation awards be high. Because of attorneys fees, on a contingency or other basis, and other court costs, compensation actually paid to the victims may be significantly reduced. This concern was raised by U.N. Sub-Commission member Claire Palley at the Sub-Commission's 1993 session. See *Statement of Claire Palley, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. ESCOR, 45th sess., 10th mtg., at 21, U.N. Doc. E/CN.4/Sub.2/SR.10 (1993).

185. See generally RICHARD B. LILICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* (1962); RICHARD B. LILICH & GORDAN CHRISTENSON, *INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION* (1962).

186. German leaders considered compensation for victims "an essential moral prerequisite for Germany's readmission to the family of civilized nations." Ferencz, *supra* note 155, at 353.

pensation schemes address previously uncompensated victims.¹⁸⁷ This compensation scheme was created primarily through legislation resulting from political negotiations, mainly between West Germany and Israel, and not through the judicial process.

The German postwar claims process began with the Potsdam Protocol.¹⁸⁸ Subsequently, the Allies set forth in a number of plans a compensation scheme whereby they forced Germany to pay reparations to the community of nations. However, none of these plans addressed restitution and compensation for individual victims of German violations of international law during World War II. Consequently, on September 20, 1945, Dr. Chaim Weizmann, soon to be the first president of Israel, demanded from the Germans several forms of remedy (restitution, indemnification, and compensation) for the Jewish people, estimating material losses alone of \$8 billion.¹⁸⁹ However, Allied reparation efforts still largely ignored claims for individual and collective compensation, and only small sums were distributed. From 1945 to 1949, the British, French and U.S. administrations initiated some legislation for restitution and compensation,¹⁹⁰ but these fell far short of Weizmann's demands. Then, in September 1949 the Federal Republic of Germany (West Germany) came into existence, and on November 11, 1949, Chancellor Konrad Adenauer publicly initiated his policy to restore German relations with the Jews by offering Israel DM 10 million worth of German-made goods.¹⁹¹ Although Israel did not initially respond to Adenauer's offer, a series of negotiations between Germany and Israel ensued, some open and some secret.

187. German industries that utilized forced or slave labor have also made recent reparations. For example, in 1986 Feldmuele Nobel AG (successor to Flick Industries) paid \$2 million to the Conference on Jewish Material Claims for 1,300-1,500 survivors. *Reparation Paid for Jewish Slave Labor*, CHI. TRIB., Jan. 9, 1986, at 5. Friedrich Flick received a seven-year sentence at the Nuremberg Tribunal. *United States v. Flick*, reprinted in UNITED STATES GOVERNMENT PRINTING OFFICE, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER COUNCIL CONTROL LAW No. 10 (1952). In 1983 Daimler-Benz agreed to pay \$11.7 million to survivors of some 46,000 laborers used by Daimler-Benz. *Daimler-Benz To Pay \$12 Million for War Forced Labor*, L.A. TIMES, June 12, 1988, §1, at 9.

188. Berlin (Potsdam) Conference, Aug. 2, 1945, 3 Bevans 1207, reprinted in 39 AM J. INT'L L. 245 (Supp. 1945).

189. N. BALABKINS, WEST GERMAN REPARATIONS TO ISRAEL 84 (1971) (citing ISRAEL, MINISTRY OF FOREIGN AFFAIRS, DOCUMENTS RELATING TO THE AGREEMENT BETWEEN THE GOVERNMENT OF ISRAEL AND THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY 9-12 (1953)).

190. *Id.* at 85.

191. *Id.* at 86. Although Adenauer was aware that the offer was only a symbolic gesture, he was nevertheless taking the first step in placing responsibility for the Holocaust on the German people. *Id.*

The negotiations culminated in the 1952 Luxembourg Treaty,¹⁹² which is composed of four related but separate documents: The Israel or Shilumin Agreement and three protocols. In the Israel Agreement, West Germany agreed to pay DM 3 billion to Israel. Protocol No. 1, between West Germany and the Claims Conference, required West Germany to initiate legislation for individual compensation to victims. Protocol No. 2, also between West Germany and the Claims Conference, required West Germany to pay DM 3.45 billion to Israel and DM 450 million to the Claims Conference for rehabilitation of victims and the work of Jewish relief organizations around the world.¹⁹³ Protocol No. 3 required Israel to refund to West Germany the value of secular property (mostly that of the Knights Templar) located in Israel.¹⁹⁴

In fulfillment of Protocol No. 1, West Germany passed the Federal Indemnification Law of 1953 (BEG),¹⁹⁵ which provides compensation for "persons who, by reason of race, religion, nationality, or political conviction have suffered discriminatory or other terror action at the hands of the Third Reich."¹⁹⁶ The BEG provided immediate assistance to returnees, as well as compensation to individuals for a number of injuries: loss of life; impairment of health and limb; loss or impairment of freedom and civil liberties; damage to property, wealth and discriminatory payments; damage to vocational progress; damage

192. Luxembourg Treaty, Sept. 10, 1952, Isr.-F.R.G., 162 U.N.T.S. 205; see DIE HAAGER VERTRAGSWERKE: ALLGEMEINE WOCHENZEITUNG DER JUDEN IN DEUTSCHLAND 23-36 (1952); NANA SAGI, GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS (1980).

193. See Luxembourg Treaty, *supra* note 192, 162 U.N.T.S. 205.

194. *Id.*

195. BEG, Federal Indemnification Law of 1953 (amended 1956), cited in G. Vernon Leopold, *A Survey of the Indemnification Law of the Federal Republic of Germany*, MICH. ST. BAR J., Jan. 1958, at 59-60.

196. *Id.* Eligibility was further conditioned on residence requirements. Clients needed to show:

(a) [They were] permanently domiciled within the Federal German Republic on December 31, 1952, or if their decedents' death had occurred prior to said date, that they maintained their last permanent domicile with the Federal Republic, or (b) That they had emigrated, fled, or been deported prior to December 31, 1952 from territories which, on December 31, 1937 formed part of the German Reich, except that persons who resettled behind the iron curtain are for all intents and purposes barred, or (c) That they are either displaced persons, returnees from confinement or internment as prisoners of war, or can meet special qualifications applicable to expellees from certain German language areas beyond December 31, 1937 borders of the former German Reich.

See Leopold, *supra* note 195, at 60.

to economic progress; and interruption of education.¹⁹⁷ Individuals could apply for benefits through any German consulate up to April 1, 1958. Persecution was presumed where the claimant was part of a categorically persecuted minority or group. Proof of damages and other necessary elements could be supported by affidavits.

This compensation scheme cost an estimated five to six billion dollars.¹⁹⁸ The adjudicative phase of the program was completed by December 31, 1962, but the payment phase did not officially expire until 1965.¹⁹⁹

The BEG was not the sole program for payment of reparations to individual victims of the Third Reich. Several of the West German Lander instituted compensation programs, some predating Protocol No. 1 and the BEG.²⁰⁰ West Germany also paid victims residing in Europe: Between 1959 and 1964 agreements were made with eleven European countries for compensation for these victims.²⁰¹ Nor was compensation limited to West Germany. For example, in 1988, Austria passed a law to pay one-time payments of between \$208 and \$416 per person supplemented by lifetime pensions for those victimized by the Nazis when Austria was under German rule during World War II.²⁰² Similarly, in 1990, the East German government reversed forty years of Communist opposition to payment of reparations and agreed to pay \$3.65 million to an Israeli foundation that helps ease survivors' psychological and physical suffering. Under this law, the former East Germany was to pay an additional \$59,000 to a branch of the foundation to be located in East Germany.²⁰³

The German compensation schemes for individual claimants have been modified and enlarged as new claimants have pressed for compensation. For example, in November 1992, the German government

197. *Id.* at 60-64.

198. *Id.* at 65.

199. *Id.*

200. See Luxembourg Treaty, *supra* note 192, protocol no. 1, art. 1, 162 U.N.T.S. at 270. "Insofar as legislation now in force in the Lander contains more favourable regulations these will be maintained." *Id.* For discussion of these laws, see Ferencz, *supra* note 155, at 353 n.35.

201. Under these agreements, Luxembourg, Norway, Denmark, Greece, the Netherlands, France, Belgium, Italy, Switzerland, the United Kingdom, and Sweden received payments for victims. See BRIAN FORBES ET AL., SUBMISSION OF WAR AMPUTATIONS OF CANADA TO THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, app. G, 2 (1993).

202. *Austria Adopts New Plan for Payments to Victims of Nazis*, N.Y. TIMES, Mar. 27, 1988, § 1, at 21.

203. *E. Germans for First Time Giving Funds to Aid Holocaust Survivors*, L.A. TIMES, Apr. 24, 1990, at A14.

agreed to pay millions of dollars to victims who previously received minimal reparations or none at all because they had been living in the former East Germany and other Eastern European countries.²⁰⁴ The World Jewish Congress stated that the agreement could cover an estimated 50,000 people, mostly from Eastern Europe and the former Soviet Union. The German Finance Ministry said that it had agreed to pay up to an additional \$630 million by the end of the century to these victims.²⁰⁵ To date, the Federal Republic of Germany has paid over \$55 billion in reparations to Israel and victims.²⁰⁶

V. UNITED NATIONS ACTION

From the initial presentation of these war-rape cases at the 1992 session of the U.N. Commission on Human Rights (U.N. Commission), U.N. human rights bodies have devoted much attention to the issue, especially the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (U.N. Sub-Commission)²⁰⁷ and the U.N. Sub-Commission's Working Group on Contemporary Forms of Slavery (Working Group on Slavery).²⁰⁸ Additionally, a confidential communication for compensation was presented under a special procedure,²⁰⁹ but it has not yet been determined if the U.N. Commission or the U.N. Sub-Commission can issue a binding compensation order under that procedure.

204. *Bonn to Pay Jewish Victims of Nazis in East*, L.A. TIMES, Nov. 7, 1992, at A10.

205. *Id.* Those eligible for reparations are those who were imprisoned in a concentration camp for a minimum of six months, those who lived in a Nazi-administered ghetto for a minimum of 18 months, and those who lived in hiding under severe conditions for at least 18 months. As of May 1993, about 30,000 applications had been received for a lump sum payment of about \$3,200 and \$320 per month for life. Nora Frenkiel, *The Last Holocaust Victim*, WASH. POST, May 18, 1993, at E1.

206. *Id.*

207. The Sub-Commission, an independent expert body now composed of 26 members, was originally established by the U.N. Commission at its first session in 1947 to make recommendations to the U.N. Commission in the field of discrimination and minorities and to "perform any other functions that may be entrusted to it by the Economic and Social Council or by the Commission on Human Rights." 1946-47 U.N.Y.B. 528, U.N. Sales No. 147.I.18.

208. The U.N. Economic and Social Council approved the proposal that the Sub-Commission establish a five-person working group to "review developments in the field of the slave trade and the slavery-like practices of *apartheid* and colonialism and the traffic of persons and the exploitation of the prostitution of others as defined in [international instruments]." REPORT OF THE WORKING GROUP ON CONTEMPORARY FORMS OF SLAVERY, U.N. Doc. E/CN.4/Sub.2/34, at 1 (1992).

209. See U.N. COMM'N ON HUMAN RIGHTS; STATEMENT OF WAR AMPUTATIONS OF CANADA, U.N. Doc. E/CN.4/SR.32 (1993).

In spite of uncertainties regarding compensation under the special procedure, the United Nations has contributed to the resolution of these violations in public procedures by providing these victims with an opportunity to present their cases and elicit responses from governments, experts and nongovernmental organizations. For example, shortly after the 1992 session of the U.N. Commission, these cases were presented to the 1992 session of the Working Group on Slavery which in turn:

request[ed] the Secretary-General to submit to the Special Rapporteur on the right to restitution, compensation and rehabilitation . . . information received by the Working Group on Contemporary Forms of Slavery regarding the situation of women forced to engage in prostitution during wartime.²¹⁰

At the 1992 U.N. Sub-Commission session, public testimony continued with several governments joining nongovernmental organizations to speak on these issues.²¹¹ Unfortunately, Japan failed to address compensation. Testimony was again presented during the debates of the U.N. Commission at its 1993 session²¹² and at the 1993 session of the Working Group on Slavery.²¹³ The response at the 1993 session of the Working Group on Slavery was more concrete, especially because the U.N. Sub-Commission's rapporteur on restitution, compensation, and rehabilitation expressed interest in preparing a special study on wartime sexual exploitation.²¹⁴ The Working Group

210. REPORT OF THE WORKING GROUP ON CONTEMPORARY FORMS OF SLAVERY, U.N. Doc. E/CN.4/Sub.2/34, at 28 (1992).

211. See, e.g., SUB-COMM'N ON PREVENTION OF DISCRIMINATION; STATEMENT OF IED, U.N. Doc. E/CN.4/Sub.2/SR.7, at 7 (1992); SUB-COMM'N ON PREVENTION OF DISCRIMINATION; STATEMENT OF DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, U.N. Doc. E/CN.4/Sub.2/SR.7, at 12 (1992); SUB-COMM'N ON PREVENTION OF DISCRIMINATION; STATEMENT OF THEO VAN BOVEN, SUB-COMMISSION RAPPOREUR ON COMPENSATION, U.N. Doc. E/CN.4/Sub.2/SR.26, at 15-19 (1992); SUB-COMM'N ON PREVENTION OF DISCRIMINATION; STATEMENT OF REPUBLIC OF KOREA, U.N. Doc. E/CN.4/SR.7, at 12 (1992) ("[H]is government had urged the government of Japan to undertake a thorough investigation . . . and to adopt the proper remedial measures . . . for the victims whose suffering remained unmitigated, almost 50 year[s] since the end of World War II.").

212. See, e.g., U.N. COMM'N ON HUMAN RIGHTS; STATEMENT OF KAREN PARKER, U.N. Doc. E/CN.4/SR.38 (1993).

213. See REPORT OF THE WORKING GROUP ON CONTEMPORARY FORMS OF SLAVERY, U.N. Doc. E/CN.4/Sub.2/30, at 16, 17, 19, 27, 28 (1993) [hereinafter 1993 REPORT OF WORKING GROUP ON SLAVERY] (summarizing statements by International Fellowship of Reconciliation, Liberation, International Commission of Jurists, and Third World Movement Against the Exploitation of Women). Japan, the Democratic People's Republic of Korea, and the Republic of Korea also spoke during the session. *Id.* at 28-30.

214. U.N. Doc. E/CN.4/Sub.2/AC.2/9 (1993).

on Slavery noted the rapporteur's interest²¹⁵ and presented the question to the U.N. Sub-Commission as a whole.²¹⁶

At its 1993 session, the U.N. Sub-Commission nominated a rapporteur to report on war-rape victims, including "systematic rape, sexual slavery and slave-like practices in particular during wartime."²¹⁷ Meanwhile, the U.N. Commission or the U.N. Sub-Commission could adopt resolutions condemning Japan and requesting states to implement sanctions until reasonable compensation is made, especially if Japan fails to proceed with some form of compensation scheme.

To date, efforts to obtain just compensation for war-rape victims have centered on the U.N. human rights bodies, but U.N. action in such cases need not be limited to these bodies. For example, the Secretary-General,²¹⁸ the General Assembly,²¹⁹ the Security Council,²²⁰ or the Economic and Social Council²²¹ could act singly or in concert with the U.N. Commission, Sub-Commission, or the Sub-Commission's Working Group on Slavery. These bodies could also request assistance from the International Court of Justice or could help arrange for international arbitration. Any of them can also assist Japan in setting up a compensation claims process and provide guidance on reasonable monetary award levels that fully address the requests and needs of the victims.

215. 1993 REPORT OF WORKING GROUP ON SLAVERY, *supra* note 213, at 40.

216. *Id.* The Working Group also encouraged the rapporteur to take account of information from the session in his final report under his 1989 mandate to be presented to the Sub-Commission at its 1993 session. *Id.*

217. The U.N. Sub-Commission named member Linda Chavez (United States) as rapporteur rather than Theo von Boven, who was the special rapporteur on compensation, due to his intervening appointment to another U.N. position.

218. The Secretary-General has authority to present issues threatening international peace and security to the Security Council. U.N. CHARTER art. 99; see DAVID COYLE, *THE UNITED NATIONS AND HOW IT WORKS* 148 (1955); see generally B.G. RAMCHARAN, *HUMANITARIAN GOOD OFFICES IN INTERNATIONAL LAW: THE GOOD OFFICES OF THE UNITED NATIONS SECRETARY-GENERAL IN THE FIELD OF HUMAN RIGHTS* (1983).

219. See U.N. CHARTER arts. 10-17. Article 13 gives the General Assembly authority to study and recommend on issues of human rights. Article 15 gives the General Assembly authority to "receive and consider reports from other organs of the United Nations."

220. The Security Council has primary responsibility for maintaining international peace and security. U.N. CHARTER art. 24(1). It can carry out any activity or establish subsidiary bodies at will. *Id.* arts. 29-30.

221. The Economic and Social Council has authority to "make recommendations for the purpose of promoting respect for and observance of, human rights and fundamental freedoms." U.N. CHARTER art. 62(2). It also has authority over the U.N. Commission and its Sub-Commission. *Id.* art. 68.

VI. JAPAN'S RESPONSES

After the discovery of relevant documents by Professor Yoshimi, and after being forced to recant its initial denial of any involvement in the *jugun ianfu* scheme,²²² Japan began to research these events and released some findings of its inquiries in July 1992. Japan still denied that the program was other than "voluntary," although it was forced to concede some episodes involving Japanese soldiers.²²³ However, in its more comprehensive study, released on August 4, 1993, the government acknowledged that its agents were responsible for "coaxing and intimidating these women to be recruited against their own will."²²⁴ The Japanese government also indicates that it will continue to research the events.

The Japanese government has now made a number of public apologies to the war-rape victims, some during diplomatic dealings with specific countries and others during the U.N. human rights sessions in Geneva. Former Prime Ministers Koshiki Kaifu and Kiichi Miyazawa formally apologized to South and North Korea during diplomatic visits to these countries.²²⁵ Recently, Prime Minister Morihiro Hosokawa issued another apology during talks with Korean President Kim Young-Sam.²²⁶ Then Prime Minister Kiichi Miyazawa was also forced to apologize to Philippine President Fidel Ramos during the latter's state visit to Japan in March 1993.

Apologies have also been presented to the international community as a whole. For example, at the August 1992 session of the U.N. Sub-Commission, the Japanese government stated, "The government of Japan has expressed its sincere apology and remorse to all those,

222. When the three Korean women filed their lawsuit in December 1991, Japan's Chief Cabinet Minister, Koichi Kato, said the government had no responsibility for brothels. David E. Sanger, *History Scholar in Japan Exposes a Brutal Chapter*, N.Y. TIMES, Jan. 27, 1992, at A4. However, only one month later and just prior to a state visit to South Korea, then Prime Minister Kiichi Miyazawa was forced to concede the government's involvement due to Professor Yoshimi's discovery of the documents. Yoshiaki Yoshimi, *Japan Battles its Memories*, N.Y. TIMES, Mar. 11, 1992, at A23.

223. *A Year Later, Gov't Still Mulling Plans to Redress 'Comfort Women'*, MAINICHI DAILY NEWS, Dec. 8, 1992, at C14.

224. JAPAN, FACTS ON THE ISSUE OF WARTIME "COMFORT WOMEN" (1993) (summary in English distributed by Japanese delegation to U.N. Sub-Commission 1993 session, on file with author).

225. Reference to this apology was made by Japan at the 1992 session of the U.N. Working Group on Slavery. See REPORT OF THE WORKING GROUP ON CONTEMPORARY FORMS OF SLAVERY at 17, U.N. Doc. E/CN.4/Sub.2/34 (1992).

226. See *S. Koreans Say Japanese Apology Falls Short*, REUTER LIBRARY REPORT, Nov. 7, 1993, available in LEXIS, Nexis Library, Lbyrpt File.

irrespective of nationality or origin, who underwent indescribable pains and sufferings as so-called 'comfort women.'"²²⁷ On August 4, 1993, following the government's statement that the sex slaves were violently coerced,²²⁸ the government issued an official apology subsequently presented at the 1993 session of the U.N. Sub-Commission:

Through . . . intensive and extensive investigation, it has been made abundantly clear that many women's honor and dignity were severely injured, and that this was done by an act with the involvement of the military authorities of the day.

The government of Japan is unequivocally extending its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women.

Japan is squarely facing the historical facts, instead of evading them. She is taking [them] to heart as lessons of history. She is firmly determined never to repeat the same mistake by forever engraving such issues in her memories through the study and teaching of history.²²⁹

Despite these admissions and apologies, when pressed for monetary compensation, Japan asserts it settled all claims arising from World War II in its treaties with the Allied Powers and the Republic of Korea.²³⁰ In addition, one Japanese representative has stated that these acts took place too long ago, that wars are always bad, and that with so many victims, the process of compensation would be endless

227. SUB-COMM'N ON PREVENTION OF DISCRIMINATION; STATEMENT OF JAPAN (RIGHT OF REPLY), U.N. Doc. E/CN.4/Sub.2/SR.31, at 17 (1992). This apology occurred at a time when Japan did not yet acknowledge either the full participation of the Japanese government or the violent coercion of the sex slaves. Japan at that point conceded a government role, but considered the sex slaves "voluntary." Interviews with Keiichi Aizawa and Ipsuko Makai, Japanese delegates to the United Nations, in Geneva, Switzerland (Aug. 22, 1992).

228. James Sterngold, *Japan Admits Army Forced Women Into War Brothels*, N.Y. TIMES, Aug. 5, 1993, at A2.

229. SUB-COMM'N ON PREVENTION OF DISCRIMINATION; STATEMENT OF JAPAN (RIGHT OF REPLY), U.N. Doc. E/CN.4/Sub.2/SR.23 (1993). Regarding this apology, the government of the Democratic People's Republic of Korea stated: "Such an 'apology' . . . 'is too little too late' and far from bringing to light the true facts about the issue of the 'comfort women for the army.' . . . After all, the Japanese government has not put forward a final solution to the issue of 'comfort women for the army' including a convincing apology acceptable to all, a full investigation and its publication and due compensation." SUB-COMM'N ON PREVENTION OF DISCRIMINATION; STATEMENT OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA, U.N. Doc. E/CN.4/Sub.2/SR.10 (1993).

230. *Id.*

and the amounts necessary to pay all the victims would be too high.²³¹ None of these explanations are compelling.

A. *Allied and Korean Treaties With Japan*

The Democratic People's Republic of Korea, China, the Philippines and Taiwan are not parties to either treaty, so claimants from these and other countries not a party to the treaties are unaffected by any treaty-based argument for denying compensation. A number of claimants who reside in Japan are similarly unaffected by the treaties.²³² Regarding the treaties themselves, the Allied Treaty²³³ and the Korean Treaty²³⁴ both address reparations. The Allied Treaty states "[i]t is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war,"²³⁵ and it sets out specific provisions for the return of property, rights, and interests by Japan.²³⁶ In the section presumably relied on by Japan to show settlement of all claims, the treaty states:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparation 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 cost of occupation.²³⁷

The Korean Treaty resolves claims "concerning property of the two countries and their nationals and claims between the two countries and their nation,"²³⁸ and specifies products and services of the

231. Interview with Masataka Okano, Japanese Ministry of Foreign Affairs, Asian Affairs Bureau, in Tokyo, Japan (Dec. 8, 1992). Japan has also claimed that prostitution was legal in Japan until 1957 and so the wartime program did not violate its own laws. See, e.g., Shinji Ito, *Wartime Brothels Called "Natural,"* JAPAN TIMES, Aug. 5, 1992, at 3. Presumably Japan will no longer present this argument, as the government has clearly conceded that the *jugun ianfu* scheme was involuntary and condemned in Japanese law at that time. Then Prime Minister Kiichi Miyazawa also claimed that compensation should be decided by the courts. *Kim Tells Japan to Apologize For and Fully Reveal War Abuse*, AGENCE FR. PRESSE, Sept. 2, 1993, available in LEXIS, World Library, AFP File.

232. Some war-rape victims belong to the Korean minority in Japan who, although denied full citizenship rights, cannot claim citizenship from either North or South Korea.

233. Allied Treaty, *supra* note 16, 136 U.N.T.S. 45.

234. Korean Treaty, *supra* note 17, 583 U.N.T.S. 173.

235. Allied Treaty, *supra* note 16, art. 14(a), 136 U.N.T.S. at 60.

236. *Id.* at 62.

237. *Id.* art. 14(V)(b), 136 U.N.T.S. at 64.

238. Korean Treaty, *supra* note 17, pmb., 583 U.N.T.S. at 258.

Japanese people and loans to be given to the Republic of Korea.²³⁹ The Korean Treaty provides:

The Contracting Parties confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally.²⁴⁰

Japan presumably relies on this provision to show settlement of all claims.

Neither treaty provides for or mentions war-rape victims.²⁴¹ Neither treaty addresses private claims but only claims in which states are the parties. According to these treaties, the parties have agreed not to take up additional state claims against the other parties. In the cases raised by the war-rape victims, no party to the treaty has brought a legal action on its behalf—these victims seek private remedies on their own.

Even if language in the treaties could be found that purported to extinguish private claims, the parties to these treaties had no legal authority to do so. First of all, the underlying claims arise from violations of *jus cogens* norms and *erga omnes* obligations which require an appropriate remedy—compensation. The right to seek that remedy is itself a *jus cogens* right. If any provision of either the Allied Treaty or the Korean Treaty effectively nullifies these *jus cogens* rights or allows violations of *jus cogens* to go uncompensated, then that provision would be void.²⁴² As Oppenheim stated in his 1905 treatise:

It is a unanimously recognized customary rule of International Law that obligations which are at variance with universally recognized principles of International Law cannot be the object of a treaty. If, for instance a State entered into a convention with another State not to interfere in case the latter should appropriate a certain part of the Open Sea, or should command its vessels to commit piratical acts on the Open Sea, such treaty would be null and void, because it is a principle of International Law that no part of the Open Sea may

239. *Id.* art. 1, 583 U.N.T.S. at 258.

240. *Id.* art. II(1), 583 U.N.T.S. at 260.

241. According to Professor Yoshimi, the issue of war-rape victims was not even discussed in any reparation or treaty negotiations, including those leading to the Korean Treaty. Yoshimi, *supra* note 5, at 87.

242. *S.S. Wimbledon (Kiel Canal)*, 1923 P.C.I.J. (ser. A) No. 15, at 43, 47 (Aug. 17) (Schucking, J. dissenting).

be appropriated, and that it is the duty of every State to interdict to its vessels the commission of piracy on the High Seas.²⁴³

Other leading scholars of the prewar period concur with Oppenheim's finding that recognition of this rule is unanimous. For example, Hall states: "A treaty becomes [void] . . . [b]y incompatibility with the general obligations of states, when a change has taken place in undisputed law or in views universally held with respect to morals."²⁴⁴ This principle is also incorporated into the postwar codification of treaty law.²⁴⁵ Accordingly, Japan may not rely on its treaties with the allied powers or the Republic of Korea to circumvent its liability or its duty to remedy individual claimants for acts governed by *jus cogens*.

This result is the only possible one given the nature of violations of *jus cogens*; the result of governments entering into treaties purporting to terminate private claims of victims to avoid liability for war crimes and crimes against humanity would be a legal catastrophe. Because of the gravity of these violations, if all the other signatories to these treaties failed to seek adequate remedy for their own citizens, neither they nor Japan could prevent individuals and groups of victims from obtaining remedies on their own.

B. Time Bar

Time should not be a bar to recovery for the war-rape victims. The policy reasons supporting a time bar such as a statute of limitations or laches are absent. The victims seeking remedy are still alive. The evidence is not stale, but compelling, and Japan has admitted to the existence of the overall scheme. The evidence has only come forth

243. LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 528 (1905).

244. WILLIAM E. HALL, 1 *A TREATISE IN INTERNATIONAL LAW* 319 (7th ed. 1917); accord Alfred von Verdross, *Forbidden Treaties in International Law*, 31 *AM. J. INT'L L.* 571 (1937); see also Oscar Chinn Case (Belg. v. U.K.), 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Dec. 12) (separate opinion by Judge Schucking) (Court not applying treaty contrary to *jus cogens*). In *United States v. Krupp*, the Nuremberg Tribunal claimed any agreement between Germany and the Vichy government to employ prisoners of war in war operations was "void under the law of nations . . . it was manifestly *contra bonos mores*." *United States v. Krupp*, Int'l Military Trib. (July 31, 1948), reprinted in 9 *U.S. GOVERNMENT PRINTING OFFICE, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS* (1952).

245. Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331. Article 53 sets out the rule that treaties are void if they conflict with *jus cogens* norms. Article 64 provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* art. 64, 1155 U.N.T.S. at 347. Although the Vienna Convention only applies to subsequent treaties, *id.* art. 4, 1155 U.N.T.S. at 334, the *jus cogens* provisions must be considered retroactive because under no circumstances may governments enforce acts violating *jus cogens*.

recently, and the victims have not unduly delayed in seeking compensation. Japan itself has been in custody of most of the documentary evidence. It would be unfair to allow Japan to claim a time bar when it controlled much of the evidence. Moreover, the violations the war-rape victims suffered are serious, and redress should not be limited because of time.²⁴⁶

A strong reason for precluding a time bar is that soon after the war, Japan was not in a financial position to provide compensation. While other forms of compensation may be possible, adequate monetary compensation may not be possible immediately after a war of this magnitude. In these circumstances, a recovery period is needed before a state may have sufficient resources to settle claims.²⁴⁷ When the state is in a financial position to provide meaningful financial compensation, the state should pay. However, even in these circumstances emergency funds should be provided the victims before full compensation is awarded.

C. *Number of Victims and Claims*

No government can excuse *jus cogens* violations and their monetary consequences by claiming difficulties, especially financial ones, arising from too many victims. It is unreasonable for Japan to claim that because it injured too many victims it cannot compensate anyone. The German compensation scheme for Holocaust survivors exemplifies an attempt to provide remedy for multitudes of people injured by a particular event. No less can be expected of the Japanese government. Although wars cause many deaths, international law distinguishes casualties resulting from legitimate military activities and those arising from senseless brutality. The atrocities the Japanese government inflicted on the war-rape victims fall under the latter category.

Japan should undertake immediate action to redress all serious wrongs committed in the course of Japan's military operations in the

246. See, e.g., Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 151, 754 U.N.T.S. 73.

247. The Allied Treaty recognizes that Japan had insufficient resources to pay reparations and sets out a scheme for long-term payment. Allied Treaty, *supra* note 16, art. 14, 136 U.N.T.S. at 50. Ferencz notes that despite the physical and economic ruin of Germany after World War II, the payment of billions of dollars in compensation to Germany's war victims "was accompanied without any noticeable hardship to the average German citizen. The wise German leaders . . . considered the restitution to Nazi victims to be an essential moral prerequisite for Germany's readmission to the family of civilized nations." Ferencz, *supra* note 155, at 353.

World War II period. While individual and group judicial actions undertaken in Japanese courts are needed, many claimants will be unable to avail themselves of such judicial action. The government of Japan should institute a comprehensive compensation plan such as the one provided in this Article.²⁴⁸

VII. INTERNATIONAL ACTION

Because of the principle of *erga omnes*, other governments should refrain from any changes in the Security Council composition or any other changes in the Charter or operations of the United Nations involving Japan until Japan has fully redressed these violations in all aspects. Governments acting alone and in concert should urge Japan to redress fully all violations. While governments representing the nationalities of the victims should ideally take the lead in any actions, any and all governments should respond. Governments whose citizens are claimants should assist claimants, their associations, and their representatives. If Japan fails to establish a compensation plan in a timely fashion, governments should consider freezing Japanese assets and making them available to claimants who undertake legal action in the respective states, in the United Nations, and in any body authorized by the United Nations to hear the claims.

Whatever steps are taken to secure adequate compensation for Japan's war-rape victims, it is important to keep in mind the serious nature of these violations. There is no return to normal relations, either domestically or internationally, until victims are compensated to their satisfaction. As the U.N. General Assembly has stated:

[A] thorough investigation of war crimes and crimes against humanity, as well as the arrest, extradition and punishment of persons guilty of such crimes—wherever they may have been committed—and the establishment of criteria for compensation to the victims of such crimes, are important elements in the prevention of similar crimes now and in the future, and in the protection of human rights and fundamental freedoms, the strengthening of confidence and de-

248. A number of Japanese legislators have pressed for some form of compensation through legislation. Representative Sumiko Shimizu stated that she would "devote herself to adopting a resolution to the comfort women issue, including concrete measures for compensation." *Japan Asked to Compensate Asians*, JAPAN TIMES, Aug. 14, 1993. On August 30, 1993, a group of Japanese women members of the Diet announced efforts to compensate these victims, claiming urgency because of the advanced age of most of the survivors. *Japanese Women MPs Urge Compensation for "Comfort Women,"* XINHUA (NEW CHINA) NEWS AGENCY, Aug. 30, 1993, available in LEXIS, Asiatic Library, Xinhua File.

velopment of co-operation between peoples and the safeguarding of international peace and security.²⁴⁹

VIII. CONCLUSION

Japan has a legal and moral duty to come to terms with its war-time atrocities by redressing the wrongs of its *jugun ianfu* scheme. The war-rape victims forced into the *jugun ianfu* scheme suffered from rape, slavery, and other violations of then-existing customary laws recognized as norms of *jus cogens* and *erga omnes* obligations. International law mandates that these victims receive adequate redress consisting of at least a full disclosure of facts, a sincere and meaningful apology, social rehabilitation, and monetary compensation. Treaties, time, and impracticality are not persuasive defenses against providing these war-rape victims with monetary compensation. The international community and states individually have an interest in assuring complete redress for these victims, including monetary compensation. Finally, it is in Japan's interest legally, morally, and politically to resolve this issue to help both former war-rape victims and veterans close a painful period of their past—as one war-rape victim said, “So I can die in peace.”²⁵⁰

249. G.A. Res. 2712, 25 U.N. GAOR, Supp. 28, at 79, U.N. Doc. A/8233 (1970). This author believes that one factor in the ongoing violations in the former Yugoslavia, especially organized rape of Bosnian women by Serbian soldiers, is the failure to date of Japan and the international community to address adequately these types of violations by Japan during World War II.

250. Wan Ai-Hua, Statement at International Public Hearing Concerning Post-War Compensation in Tokyo, Japan (Dec. 9, 1992).

ANNEX: PROPOSAL FOR REPARATION AND COMPENSATION FOR WORLD WAR II WAR- RAPE VICTIMS

I. BASIC CONCEPTS

A. There should be full and complete compensation for violations, including at least three types of remedy.

1. Financial compensation.

Actual victims of grave violations should receive full and adequate financial compensation. Financial compensation should be awarded through an impartial claims tribunal.

2. Full disclosure of all facts.

The victims, their families, the Japanese people, and the people of the world are entitled to know all the facts obtainable from due diligence on the part of the Japanese government and close collaboration and cooperation with national and international researchers. The government of Japan should seek to facilitate all inquiry into facts and should make available each and every document relevant to the issue. The government should also request other governments having access to or custody of relevant documents to produce them in a timely fashion to researchers and the Japanese government.

3. Acknowledgement and apology.

The government of Japan should make meaningful, sincere, and timely acknowledgement of the facts and make such public and personal apologies to victims as dictated by the gravity of the violations and the wishes of the victims.

B. Compensation should be carried out with dignity and respect for the victims, Japan, and the principles of international law.

1. The dignity of the victims.

All processes to compensate victims should respect victim's past sufferings and should avoid present humiliation. Victims should not have to recount publicly or privately their ordeals except to the degree necessary to validate their claims. Victims should not be made to compete with each other regarding the level of suffering. It is to be assumed that respect for victims includes a good faith effort to honor all reasonably credible claims.

2. The dignity of Japan.

Compensation plans should be carried out with honor and dignity for the government of Japan and the Japanese people.

3. The dignity of international law.

All activities undertaken to compensate past victims should reflect respect for and compliance with the principles of international law.

C. All victims should be compensated.

All victims, living or dead, should receive compensation in an appropriate form and amount. The government of Japan should make a serious effort to locate potential claimants. The government of Japan should support efforts of nongovernmental organizations, bar associations, and other citizens groups to locate living victims. Similar efforts should be made to identify victims who have died.

D. All procedures, including the claims tribunal, should seek to avoid diplomatic entanglements.

The government of Japan should make all compensation plans for individual claimants a private matter between it and the claimants. To that end, the government of Japan will not invoke treaties or other diplomatic agreements in any way so as to deny liability or to create diplomatic problems between it and the governments of claimants.

Contact between the government of Japan and other governments should be limited, to the degree possible, to requests for assistance in compiling the facts and for permission to set up compensation programs for claimants outside of Japan.

The government of Japan should seek the good offices of the U.N. Secretary-General or the assistance of U.N. bodies if needed to resolve diplomatic difficulties arising out of Japan's compensation schemes.

E. There should be provision for personal donations for victims.

The total compensation arrangement should include some mechanism for private persons and corporations in Japan to make donations for the war victims. This provision is necessary because many actual perpetrators and their families need to atone for these acts and have had no way to do so.

F. Monetary compensation should be fair to all.

1. Monetary compensation amounts.

Monetary compensation should reflect the level of gravity of the violations, the value of human life, the value of fifty years of profound suffering, and the impossibility of a normal life for the victims. The amounts should be neither trivial nor token, but should by themselves reflect an understanding of the gravity of the violations and the sin-

cere remorse of the Japanese government. The amount should "hurt" the government and the people of Japan.

2. Established amounts for claims.

To better promote and protect the dignity of claimants, the government of Japan should agree to set amounts per claim prior to any claims procedure.

3. Equal payment for equal violations.

The compensation plans should, whenever possible, pay the same amount to actual victims for violations constituting war crimes or crimes against humanity regardless of the type of victim. For violations not considered war crimes or crimes against humanity but which are nonetheless serious violations, compensation can be on an established sliding scale, depending on the individual case.

Compensation amounts to relatives of non-surviving victims should be set prior to the establishment of the claims tribunals.

4. Arbitration to establish monetary claim amounts.

If there is disagreement between the government of Japan and the victims or representatives of victims regarding amounts for compensation, the government of Japan should agree to a binding arbitration process to establish suitable amounts. The U.N. Secretary-General could be asked to appoint the arbitration body. The arbitration body could also be established under the auspices of a relevant body such as the International Court of Justice, the U.N. Commission on Human Rights, its Sub-Commission, or the Working Group on Contemporary Forms of Slavery.

5. Style of payments.

Payments may be made as a lump sum award or in periodic (*i.e.*, monthly or annual) payments, depending on wishes of claimants and recommendations of, *inter alia*, any arbitration process or the claims tribunal.

H. Claimants.

To the degree possible, monetary compensation should be paid to surviving victims. Monetary compensation to relatives of non-surviving victims should be limited to spouses, parents, or children (*i.e.*, direct lineage). In exceptional circumstances, monetary compensation may be awarded to other family members.

Non-monetary compensation should be directed at all victims and family members as well as to the international community as a whole.

II. THE CLAIMS TRIBUNAL

A. Mandate.

The claims tribunal should verify claimants. The claims tribunal should also determine the gravity of the violations against each claimant and award the predetermined amount accordingly. The claims tribunal should be granted authority to make exception awards, either in addition to or instead of the predetermined awards, in certain circumstances. The claims tribunal should also be granted authority to recommend lump sum or periodic payments, depending on their evaluation of the individual circumstances.

The claims tribunal should notify the government of Japan on a periodic basis of the approximate number of claimants under review and the estimated financial compensation.

B. Composition.

The claims tribunal should be composed of individuals acting in their individual capacity. The Tribunal may be composed of a pre-existing international or national forum.

The members should be chosen for their expertise (judicial or legal experience) and impartiality.

Members could be Japanese or non-Japanese as long as the criteria of experience and impartiality are met.

If the tribunal is to be composed of only Japanese, appointment could come from several branches of government as well as from the private sector. For example, an all-Japanese panel of five could be composed of persons appointed by (one each):

- (1) House of Representatives;
- (2) Senate;
- (3) Executive;
- (4) Supreme Court;
- (5) Japan Federation of Bar Associations.

An expanded tribunal could include appointments made by other appropriate groups.

The nominators should seek proposals from as wide a range of sources as possible, including historians, law professors, citizens groups (including victims groups and victims themselves), or human rights attorneys.

If the tribunal is to be composed of non-Japanese, the appointments could be made by the bodies indicated above or could be made by the U.N. Secretary-General, the International Court of Justice, the

U.N. Commission of Human Rights, the Working Group on Contemporary Forms of Slavery of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, or other relevant bodies. The tribunal could also be made up of an existing body, such as the International Court of Justice, a panel of that Court, or the Working Group on Contemporary Forms of Slavery.

C. Procedure of the Claims Tribunal.

The Tribunal should formulate its own procedures, keeping in mind the age and situation of the surviving victims. The Tribunal should be granted authority to establish claims centers in countries known to have victims.

D. Funds for the Claims Tribunal.

The Japanese government should provide all funds for the Tribunal. The appropriation should be flexible enough to allow for mechanisms to hear claims in other countries, if desired by the Tribunal. The Japanese government will provide provisional funds to enable the Tribunal to begin its work. The Tribunal will present an operating budget for one year (renewable as needed) within one month of its seating.

The government of Japan may request the assistance of the United Nations, through the Secretary-General, to oversee the budget, whether the Tribunal is Japanese or non-Japanese. Funds for this assistance will also be provided by Japan.

In addition to or instead of U.N. assistance with the budget, the Diet of Japan should establish a special committee to oversee the budget of the Tribunal and to make the necessary fiscal appropriations based on the information provided by the Tribunal in its periodic reports to Japan.

III. CLASSIFICATION OF VIOLATIONS

A. Survivors.

War-rape victims should be considered per se victims of war crimes and crimes against humanity in conformity with then-existing and present international standards.

B. Family of deceased victims.

The spouses, parents, or children of deceased victims of war crimes or crimes against humanity should receive a family compensation.

IV. PROPOSED MECHANISM FOR PERSONAL DONATIONS TO THE FUND FOR VICTIMS OF JAPAN IN WORLD WAR II

A. The Fund should be a Japanese private, not-for-profit fund.

B. The Fund should be governed by a board composed of victims, victims-rights advocates, historians and researchers familiar with the issues, members of the Japan Federation of Bar Associations, members of the Diet, and a representative of the Prime Minister. The non-governmental members of the Fund should be in the majority. The board should appoint an executive director and a fiscal manager. The executive director should appoint other staff as needed.

C. The Fund should have a multiple mandate:

1. Research and study.

In fulfilling this aspect of its mandate, the Fund will assist and support recognized scholars in the field and will sponsor educational missions as needed to obtain as complete a record as possible of all facts. The Fund may enter into cooperative relationships with educational institutions.

2. Emergency monies for victims, pending settlement of individual claims.

In fulfilling this aspect of its mandate, the Fund will not provide substitute monies to those who will be provided for by Japan as a result of Japan's own compensation scheme, but will provide financial assistance to victims and victims rights groups based on individual and urgent need of persons reasonably appearing to meet compensation criteria as well as to organizations working with victims.

3. Support for the claims process, including assisting victims file claims and prove their cases.

In fulfilling this aspect of its mandate, the Fund will contract with lawyers with expertise in the area, as well as other lawyers and organizations, to provide direct aid to victims for the claims process.

4. Service in an advisory capacity to the Claims Tribunal.

In fulfilling this aspect of its mandate, the Fund will provide the Claims Tribunal with information as requested, provide expert witnesses and testimony as requested, and carry out to the best of its abilities any requests for assistance from the Tribunal.

5. Service in an advisory capacity to any arbitration body.

In fulfilling this aspect of its mandate, the Fund will provide an arbitration body with any information and recommendations re-

quested regarding amounts that should be offered to individual claimants or to claimant groups.

6. Service in an advisory capacity to the Japan's Diet and Prime Minister.

In fulfilling this aspect of its mandate, the Fund will consult regularly with any Diet committee set up in this regard, or with any office under the Prime Minister.

D. The Fund should seek donations from the general public for its work. The government of Japan should make an initial \$20,000,000 donation to establish the Fund and should continue to support the Fund in a substantial fashion for the life of the Fund. The government of Japan should itself make an appeal to the Japanese public, including corporations, for donations. The government of Japan should create mechanisms for tax deductions for persons and corporations making donations to this Fund.

