

## The Fallacy of Contract in Sexual Slavery

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*Over seven decades have passed since the end of the Second World War, but the trauma from the cruelest war in human history continues today, perpetuated by denial of responsibility for the war crimes committed and unjust attempts to rewrite history at the expense of dignity, life, and justice for the victims of the most serious human rights violations. The latest such attempt is a troubling recharacterization of the sexual slavery enforced by Japan during the Second World War as a legitimate contractual arrangement. A recent paper authored by J. Mark Ramseyer, entitled "Contracting for Sex in the Pacific War," mischaracterizes forced sexual slavery as a contractual process by which the victims freely participated in prostitution in return for a substantial reward, denying the responsibility of the Japanese government and its military for the atrocious human rights violations committed. The argument of that paper is flawed and disregards a breath of evidence, including numerous testimonies of survivors, and the findings of scholars, NGOs, and intergovernmental organizations, including the United Nations Human Rights Commission, that the victims were coerced, deceived, or otherwise manipulated into sexual servitude with the direct or indirect involvement of the Japanese government or the military, as admitted by Japan in the 1993 Kono Statement. This article discusses the critical flaws in the arguments advanced by the paper, the traumatic impact of such arguments on survivors of these war crimes, and the broader implications of these (and other similar) justifications for sexual exploitation.*

Keywords: Sexual Slavery, Second World War, Japanese War Crimes, Human Rights, Kono Statement, Human Trafficking

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## INTRODUCTION

Over seven decades have passed since the Second World War but, despite the passage of time, the trauma from the most destructive war in history remains and controversies over the extent and even the existence of some of the cruelest war crimes, such as sexual slavery enforced by Japan, continue with attempts to rewrite history and to exonerate those who engaged in war crimes. The latest such attempt is a troubling recharacterization of the Japanese war crime of sexual slavery as a legitimate contractual arrangement. A recent paper authored by J. Mark Ramseyer (hereinafter “the author” or “Ramseyer”), entitled “Contracting for Sex in the Pacific War,” (hereinafter “the article” or “the Ramseyer article”)<sup>1</sup> mischaracterizes sexual slavery as a contractual process by which the victims freely participated in prostitution in return for a substantial reward, denying the responsibility of the Japanese government and its military for the atrocious human rights violations committed.

The argument of the Ramseyer article is flawed and lacks factual foundation. Its primary point is that the Japanese government or military was not responsible for the recruitment or management of “comfort women” (the term referring to women who provided sexual services on military bases), but rather that private parties made the arrangements through voluntary contracts with the recruits or their parents. As such, the author claims, problems with the recruitment or treatment, if any, should be attributed to cheating brothel

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<sup>1</sup> J. Mark Ramseyer, *Contracting for Sex in the Pacific War*, 65 INT’L REV L. ECON. 1 (2021), <https://doi.org/10.1016/j.irle.2020.105971> [<https://perma.cc/D78P-UG8W>].

owners, which the author contends occur in any industry,<sup>2</sup> or dishonest Korean recruiters who deployed deceitful recruitment tactics. The author adds,

Note, however, what this problem was not. It was not that the government, either the Korean or the Japanese government, forced women into prostitution. It was not that the Japanese army worked with fraudulent recruiters. It was not even that recruiters focused on the army's comfort stations. Instead, the problem involved domestic Korean recruiters who had been tricking young women into working at brothels for decades.<sup>3</sup>

This is flatly untrue; a breath of evidence, including numerous testimonies and the findings of scholars,<sup>4</sup> NGOs,<sup>5</sup> and intergovernmental organizations such as the United Nations Human Rights Commission,<sup>6</sup> affirms that the victims were coerced, deceived, or otherwise manipulated into sexual servitude under the direct or indirect involvement of the Japanese government or the military.<sup>7</sup> The Japanese government conducted its own

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<sup>2</sup> *Id.* at 6.

<sup>3</sup> *Id.* at 5.

<sup>4</sup> See, e.g., GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* (1995); YOSHIMI YOSHIKI, *COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II* 93 (Suzanne O'Brien trans., 2000); YUKI TANAKA, *JAPAN'S COMFORT WOMEN: SEXUAL SLAVERY AND PROSTITUTION DURING WORLD WAR II AND THE US OCCUPATION* (2002); C. SARAH SOH, *THE COMFORT WOMEN* (2008); CAROLINE NORMA, *THE JAPANESE COMFORT WOMEN AND SEXUAL SLAVERY DURING THE CHINA AND PACIFIC WARS* (2016).

<sup>5</sup> Ustina Dolgopol & Snehal Paranjape, *Comfort Women*, Report of a Mission, INT'L COMM. JURISTS (1994) (hereinafter "ICJ Report"; *Still Waiting After 60 Years, Justice for Survivors of Japan's Military Sexual Slavery System*, AMNESTY INT'L (2005) (hereinafter "Amnesty International Report").

<sup>6</sup> Radhika Coomaraswamy, *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, U.N. COMMISSION HUM. RTS., E/CN.4/1996/53/Add.1, 4 (Jan. 4, 1996) (hereinafter "Coomaraswamy Report"); Gay J. McDougall, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, U.N. COMMISSION HUM. RTS., E/CN.4/Sub.2/1998/13 (June 22, 1998) (hereinafter "McDougall Report"). There have been critiques about selected portions of the Coomaraswamy Report. See, e.g., Bob Tadashi Wakabayashi, *Comfort Women: Beyond Litigious Feminism*, 58 MONUMENTA NIPPONICA, 222, 232 (2003) (discussing the controversy around the story of Seiji Yoshida which was retracted). The Coomaraswamy Report also introduces critiques of the Yoshida story, such as one provided by a Japanese scholar (Dr. Ikuhiko Hata). Coomaraswamy Report, at 7. The Coomaraswamy Report is broadly accepted and cited by other studies, such as the 2005 Amnesty International Report. A prior report by the International Commission of Jurists, based in Geneva, Switzerland, also corroborates the account of the Coomaraswamy Report. ICJ Report, *supra* note 5. The U.S. Congress also supported the U.N. Report by urging the Japanese government to follow the recommendations of the United Nations and Amnesty International with respect to comfort women. H.R. 759, 109th Cong. (2006).

<sup>7</sup> The Coomaraswamy Report acknowledges that women and girls who were already prostitutes were also recruited. *Id.* at 5.

study and issued a statement (“Kono Statement”) through the Ministry of Foreign Affairs in 1993, acknowledging the following.

The then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women. The recruitment of the comfort women was conducted mainly by private recruiters *who acted in response to the request of the military*. The Government study has revealed that in many cases they were recruited against their own will, through coaxing, coercion, etc., and that, at times, administrative/military personnel directly took part in the recruitments. They lived in misery at comfort stations under a coercive atmosphere (emphasis added).<sup>8</sup>

The Ramseyer article never mentions the Kono statement. The Japanese government also established strict regulations for the so-called “comfort stations” (perhaps more appropriately, hereinafter referred to as “forced sex stations”) which, according to the United Nations Human Rights Commission, “reveal beyond doubt the extent to which the Japanese forces took direct responsibility for the comfort stations and were intimately connected with all aspects of their organization, but they also clearly indicate how legitimized and established an institution the stations had become.”<sup>9</sup>

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<sup>8</sup> *Statement by the Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of “Comfort Women,”* MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Aug. 4, 1993) (hereinafter “Kono Statement”). An English translation of the statement is archived online, <https://web.archive.org/web/20140709022903/http://www.mofa.go.jp/policy/women/fund/sate9308.html> (last visited Feb. 7, 2021). Prior to the Kono Statement, the Japanese government had issued a statement in August 1992 that admitted, for the first time, deception, coercion and official involvement in the recruitment of comfort women. HICKS, *supra* note 4, at 238. Coercion and deception in the recruitment of so-called comfort women by the Japanese government and military is a well-established historical fact. *See supra* note 5 (listing academic works affirming the fact). Reflecting this consensus, in 2016, fifteen associations of history scholars and educators in Japan issued a joint statement and clarified in relevant part, “Historical research has unequivocally established that the Japanese government and army proposed, established, managed, and regulated “comfort stations” at military facilities, and that the “comfort women” system was essentially a system of sexual slavery that violated existing domestic and international legal standards.” The Historical Science Society of Japan, *Joint Statement by Associations of History Scholars and Educators in Japan on Recent Developments in the Japanese Military’s “Comfort Women” Issue* (May 30, 2016), [http://rekiken.jp/english/appeals/appeal\\_20160530.html](http://rekiken.jp/english/appeals/appeal_20160530.html) [<https://perma.cc/88PQ-H586>]. A year before, in 2015, twenty U.S.- based history professors had also issued a statement and publicly objected to the attempts by the Japanese government to suppress statements in history textbooks both in Japan and elsewhere about “comfort women” which they referred to as “a brutal system of sexual exploitation in the service of the Japanese imperial army during World War II.” Alexis Dudden, “Standing with Historians of Japan,” PERSPECTIVES ON HISTORY, Mar 1, 2015.

<sup>9</sup> Coomaswamy Report, *supra* note 6, at 4.

The author never discusses any of this evidence and or other materials weighing against his argument.<sup>10</sup> As the Japanese government admitted in the Kono Statement,<sup>11</sup> sexual servitude was not the outcome of voluntary transactions under a private contractual process, but rather it proceeded under the direct or indirect involvement of the Japanese military in the recruitment and management of the victims who were kept under horrendous conditions that included the deprivation of their freedom, dignity, health, and life as human beings.<sup>12</sup> For all or most of the victims, there was never a legitimate contract but only coercion, deceit, torture, and killing<sup>13</sup> – hence justifying the use of term “sexual slavery”<sup>14</sup> – and there were no contractual dynamics for the forced or deceived victims, notwithstanding the contentions of the author.<sup>15</sup>

Reports of the United Nations Human Rights Commission,<sup>16</sup> investigative reports of the International Commission of Jurists and Amnesty International,<sup>17</sup> and a number of academic works<sup>18</sup> offer detailed accounts of the sexual slavery at issue. These reports and studies draw on numerous

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<sup>10</sup> For another significant example, in 1998 the Shimonoseki Branch of the Yamaguchi District Court ruled that the comfort women system was outright discrimination based upon gender and ethnicity and that the system violated fundamental human rights guaranteed by Article 13 of the Japanese Constitution. Chin Kim & Stanley S. Kim, *Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves*, 16 UCLA PAC. BASIN L.J. 263, 263-264 (1998). This ruling is significant because the Japanese court affirmed the illegal nature of military sexual slavery. The court’s compensation order, but not the cited finding of the court, was reversed by the higher courts on appeal.

<sup>11</sup> Kono Statement, *supra* note 8.

<sup>12</sup> Coomaraswamy Report, *supra* note 6; ICJ Report, *supra* note 5, at 48-50; Amnesty International Report, *supra* note 5, at 10-13; Christine Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT’L. L. 335 (2001).

<sup>13</sup> Coomaraswamy Report, *supra* note 6; ICJ Report, *supra* note 5; McDougall Report, *supra* note 6.

<sup>14</sup> See also Carmen M. Argibay, *Sexual Slavery and the Comfort Women of World*, 21 BERKELEY J. INT’L L. 375, 375 (2003) (discussing why the Japanese “comfort system” was a form of sexual slavery).

<sup>15</sup> Ramseyer, *supra* note 1, at 1. A group of scholars have issued a joint statement and pointed out that “Ramseyer produces no evidence of any signed contracts for work at ‘comfort stations.’” Amy Stanley, Hannah Shepherd, Sayaka Chatani, David Ambaras, and Chelsea Szendi Schieder, “Contracting for Sex in the Pacific War”: *The Case for Retraction on Grounds of Academic Misconduct* (Feb. 18, 2021),

<https://sites.google.com/view/concernedhistorians> (last visited Feb. 20, 2021). In addition, two Harvard history professors, Carter Eckert and Andrew Gordon, have also concluded that Ramseyer fails to cite any evidence for contracts that he claims existed. Ki-weon Cho, “Harvard History Professors Condemn Ramseyer’s Paper for Lacking “Scholarly Integrity,” Hankyoreh, Feb. 19, 2021, [http://english.hani.co.kr/arti/english\\_edition/e\\_international/983742.html](http://english.hani.co.kr/arti/english_edition/e_international/983742.html) [<https://perma.cc/3J2Z-UMEY>].

<sup>16</sup> Coomaraswamy Report, *supra* note 6; McDougall Report, *supra* note 6.

<sup>17</sup> ICJ Report, *supra* note 5; Amnesty International Report, *supra* note 5.

<sup>18</sup> See *supra* note 5

sources including testimonies of survivors and ex-soldiers,<sup>19</sup> accounts of various scholars, documentary evidence, and positions of the governments of South and North Korea as well as Japan.<sup>20</sup> Given the evidence, we believe that the author's attempt to apply the concept of a contract to justify inhumane and life-threatening sexual slavery (many of the victims lost their lives<sup>21</sup>) is grossly misplaced. A contract analysis has no place, not only in cases of sexual slavery but also in many instances of prewar recruitment of prostitutes where young girls were sent to brothels without having any chance to make the free, informed decision that constitutes a core element of contract formation.<sup>22</sup> There is no legitimate contract where a party is coerced, deceived, or otherwise manipulated into sexual servitude. There is only a crime against humanity.

With this understanding, this article discusses the critical flaws in the arguments advanced by Ramseyer, the traumatic impact of such arguments on survivors of these war crimes and many others who share their pain, and

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<sup>19</sup> The Coomaraswamy Report acknowledges that “[n]early all evidence concerning the recruitment of ‘comfort women’ comes from the oral testimony of the victims themselves.” The Report also observes that the absence of official documents concerning the actual recruitment process “made it easy for many to reject the testimonies of the victims as anecdotal or even created to implicate the Government in a matter which was essentially a private and, therefore, a privately run, system of prostitution.” *Id.* However, the consistency of the accounts of women from different parts of Asia of the manner in which they were recruited and the clear involvement of the military and government at different levels is indisputable. *Id.* In 2017, documentary evidence, which demonstrates the direct involvement of the Japanese military in the recruitment, was reported: a 1938 Japanese police report recorded the “kidnapping” of women to be sent to “comfort stations” in Shanghai, China. Government of Japan, *Compilation of Historical Materials on Military Comfort Women*, vol. 1 (March 24, 1997), at 27, cited in Seon Yoon Hwang, *Japanese Imperial Police Report Expresses the Recruitment of Comfort Women as Kidnapping* (Aug. 13, 2017), <https://news.joins.com/article/21839947> [<https://news.joins.com/article/21839947>].

<sup>20</sup> *Id.* Japan's demands that the United Nations amend the Report in 2014 were rejected. Ankit Panda, *Japan Denied Revision of UN Comfort Women Report*, DIPLOMAT (Oct. 7, 2014), <https://thediplomat.com/2014/10/japan-denied-revision-of-un-comfort-women-report/> [<https://perma.cc/QW5Z-2Y2D>].

<sup>21</sup> Many victims of sexual slavery were killed by the retreating Japanese troops. In Micronesia, for example, the Japanese army killed 70 of them in one night, because they felt the women would be an encumbrance or an embarrassment were they to be captured by the advancing American troops. Coomaraswamy Report, *supra* note 6, at 4. In another shameful episode during the last phase of the war, a Japanese military officer had a sergeant throw two hand-grenades into a dugout late at night, while comfort women slept, fearing that they might not commit suicide before capture by the Allied forces. *supra* note 4, at 135. See also ICJ Report, *supra* note 5, at 15. According to one estimate, 90 percent of “comfort women” did not survive the war. Erin Blakemore, *The Brutal History of Japan's Comfort Women*, HISTORY (updated Jul. 21, 2019), <https://www.history.com/news/comfort-women-japan-military-brothels-korea> [<https://perma.cc/W23J-4BJU>].

<sup>22</sup> For a discussion of contract formation, see E. ALLAN FARNSWORTH, *CONTRACTS* 3-41 (4th ed. 2004). In many jurisdictions, including Japan, one may not bind minors under a contract, and a contract is voidable at the election of the minor. *Id.*, at 222.

the broader implications of these (and other similar) justifications for sexual exploitation. Part I discusses the irrelevance of prewar prostitution and refutes the attempt to justify wartime sexual slavery as a continuation of a legitimate sex industry. Part II examines the brutality of the forced sex stations. The Ramseyer article describes these stations, located throughout the Japanese frontlines, as agreeable places for business where willing prostitutes earned high-level income.<sup>23</sup> On the contrary, the conditions of these stations were brutal and miserable, as aptly observed by the Kono Statement and many other reports and studies; mistreatment, rape, other forms of torture, and even killings routinely took place.<sup>24</sup> Part III discusses the fallacy of the contract arguments advanced by the author where a legitimate contract could not have been made due to coercion, deception, and the prohibitively high cost of compensating for the extreme dangers on the frontlines of the intensifying war. Part IV concludes by addressing the importance of correcting these inaccuracies, both to reaffirm the dignity of survivors of sexual servitude and to ensure broader accountability for human rights violations.

## I. IRRELEVANCE OF “PREWAR PROSTITUTION”

### A. *Flawed Presumptions*

Ramseyer contends that prostitution existed in prewar Japan and Korea, and that military sexual service was a continuation of the prevailing practices but required greater rewards due to the heightened danger and uncertainty of the war. The author notes,

Comfort stations operated as the overseas military analogue to the private brothels in Japan and Korea. Whether in Japan or in Korea, brothels hired, and women looked for work. The work at stake in these transactions involved sexual services, but the economic logic to the arrangements that the two parties – brothel and prostitute – negotiated reflected the resources and alternative opportunities that both sides understood each other to hold.<sup>25</sup>

Characterizing the “comfort stations” as a military analogue to private brothels, the author incorrectly presumes that the recruits were freely participating in negotiation of the terms of overseas sexual services for the military. It is doubtful that the process of recruitment for private brothels was an entirely legitimate contractual process, as we will further discuss in Part

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<sup>23</sup> Ramseyer, *supra* note 1, at 5-7.

<sup>24</sup> Kono Statement, *supra* note 8; Coomaraswamy Report, *supra* note 6, at 6-12; ICJ Report, *supra* note 5, at 15. See also Blakemore, *supra* note 21.

<sup>25</sup> Ramseyer, *supra* note 1, at 2.

III, but regardless of the practices in private brothels, the recruitment for military sexual servitude, rampant with coercion, deception, and manipulation directly or indirectly supported by public authorities, was not a legitimate contractual process where economic logic could prevail.

The Coomaraswamy Report recounts the widespread use of coercion and deceit in the process of recruitment.

As the war continued and the number of Japanese soldiers based in various parts of East Asia increased, the demand for military sexual slaves increased, so that new methods of recruitment were created. This involved the increased use of deception and force in many parts of East Asia, and especially in Korea. The testimonies of many Korean “comfort women” who have come forward reveals the frequency with which coercion or duplicity was employed: a considerable number of (mostly Korean) women victims speak in their testimonies of the deceit and pretence which were employed by the various agents or local collaborators who had been responsible for their recruitment.<sup>26</sup>

Ramseyer contends that the Japanese military did not require additional prostitutes as prostitutes had followed armies everywhere.<sup>27</sup> On the contrary, however, scholars have estimated that the Japanese military recruited 100,000 to 200,000 military sex slaves,<sup>28</sup> mostly from Korea.<sup>29</sup> Scholars disagree on the precise number,<sup>30</sup> but it is not difficult to see that the military’s demand for sexual servitude would have far exceeded what it could have recruited from willing individuals.

The Japanese military wanted to make sexual services available to its troops on frontlines where soldiers were experiencing extreme battle stress.<sup>31</sup>

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<sup>26</sup> Coomaraswamy Report, *supra* note 6, at 6-12. Other scholars also affirm that the women were for the most part duped, abducted or coerced into sexual slavery. *See, e.g.,* HICKS, *supra* note 4, at 18.

<sup>27</sup> Ramseyer, *supra* note 1, at 5. This is refuted by C. Sarah Soh, who states, “It is important to note at the outset that the majority of the former Korean ‘military comfort women’ (chonggun wianbu in Korean, jugun ianfu in Japanese) were systematically and often coercively recruited by the Japanese forces under the banner of Chongsindae (“Voluntary” Labor Service Corps). They were not camp-following prostitutes, as the euphemistic phrase ‘military comfort women’ might suggest.” C. Sarah Soh, *The Korean “Comfort Women”: Movement for Redress*, 36 ASIAN SURVEY 1226, 1227 (1996).

<sup>28</sup> BRUCE CUMINGS, *KOREA’S PLACE IN THE SUN: A MODERN HISTORY* 155 (1997); SOH, *supra* note 4, at 15; ICJ Report, *supra* note 5, at 7.

<sup>29</sup> SOH, *id.*; NORMA, *supra* note 4, at 131.

<sup>30</sup> For example, Yoshimi Yoshiaki estimates that from 50,000 to 200,000 women were enslaved. YOSHIKI, *supra* note 4, at 93. Yuki Tanaka suggests from 80,000 to 100,000, TANAKA, *supra* note 4 at 31. Zhiliang Su estimates from 360,000 to 410,000. ASIAN WOMEN’S FUND, *Number of Comfort Stations and Comfort Women*, <https://www.awf.or.jp/e1/facts-07.html> [<https://perma.cc/W38F-BP7W>].

<sup>31</sup> Reflecting these tensions, there had been a high incidence of rape by Japanese troops in China and, in response, a number of Korean women from a Korean community in Japan were

Field officers made special requests for the recruitment and transportation of comfort women.<sup>32</sup> Given the intensity of the war and the extreme danger evidenced by high levels of casualties, finding individuals willing to risk their lives to offer sexual services to frontline soldiers would have been an extreme challenge. As the survivor testimonies discussed below indicate, these women did not willingly agree to go to the frontlines. The recruitment process could not have been a contractual process freely entered into; coercion and deceit were necessary.<sup>33</sup> Japan turned to its colonies, such as Korea, for recruitment. In addition to the practical difficulties of recruitment, the Japanese government did not want to hurt morale within the Japanese military by forcing Japanese women into sexual slavery at comfort stations, as it would upset the soldiers to see “Japanese women, even relatives, conscripted into the comfort women system.”<sup>34</sup>

The level of force and deceit employed increased over time: recruitment occurred through large-scale coercion and violent abduction of women in what amounted to slave raids in countries under Japanese control.<sup>35</sup> As for deception, private operators working for the military would come to the villages and deceive girls with the promise of well-paid work, including in restaurants or as cooks or cleaners for the military.<sup>36</sup> According to a U.S. Office of War Interrogation Report, Korean women assumed that comfort service consisted of visiting wounded soldiers and making the soldiers happy, and many Korean women enlisted without knowing that they would be required to offer sexual services.<sup>37</sup> In this deceitful process, not only Korean recruiters but agents of the state, such as police and other local authorities, were also involved.<sup>38</sup> Deception often accompanied coercion: the police would arrive in a village recruiting for the “Women’s Voluntary Service Corps,” using the pretext of deploying the recruited women in “war efforts” but instead sending them for military sexual service.<sup>39</sup> If the girls

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sent by the Governor of Nagasaki Prefecture to assuage troops in the province. Coomaswamy Report, *supra* note 6, at 5.

<sup>32</sup> The United Nation Human Rights Commission acquired photocopies of original orders containing special requests made by field officers for the recruitment and transportation of comfort women. *Id.* at 15.

<sup>33</sup> See YOSHIKI, *supra* note 4, at 112-127.

<sup>34</sup> THOMAS J. WARD & WILLIAM D. LAY, PARK STATUE POLITICS: WORLD WAR II COMFORT WOMEN MEMORIALS IN THE UNITED STATES 23 (2019). See also NORMA, *supra* note 4, at 132.

<sup>35</sup> Coomaswamy Report, *supra* note 6, at 5. See also ICJ Report, *supra* note 5, at 135-137; Amnesty International Report, *supra* note 5, at 8-9; Argibay, *supra* note 14, at 377-399.

<sup>36</sup> *Id.* See also TANAKA, *supra* note 4, at 38.

<sup>37</sup> YOSHIKI, *supra* note 4, at 105-106.

<sup>38</sup> Coomaswamy Report, *supra* note 6, at 5. See also Amnesty International Report, *supra* note 5, at 8-9.

<sup>39</sup> *Id.*

recommended as “volunteers” failed to appear, the military police would interrogate their reasons for non-compliance.<sup>40</sup>

The outcome of this deception was particularly cruel to young Korean girls: many of them did not question the good employment opportunities offered to them with assurances from trusted figures such as village authorities, school teachers and police, and in many cases, due to their young age and innocence, they did not even have an understanding of prostitution or sex.<sup>41</sup> Ramseyer argues that such trickery would not have worked because the women and girls would have reported what happened. He states

... it makes implausible any notion that they had been tricked by duplicitous recruiters. Trickery works when the target audience does not know what is at stake. When young women (or girls) from small, closed communities leave for several years and then return, they report what happened. Word travels, and others in the community learn what the trip entails.<sup>42</sup>

We do not know how many of those women were able to return before the war ended, but even if some returned, the stigma caused by forced sex would have inhibited returning women from reporting their experiences and warning other girls of the danger. This was particularly true in Korean culture where losing one’s virginity meant a young woman would have substantial difficulty in marrying and having a family should her experiences become known. Thus, most of the survivors were concerned principally with hiding their experiences and reintegrating into society, although, the deception eventually became known to more people.

As the war intensified and suspicion grew among populations, the military resorted to undisguised violence, as families resisted calls to recruit young women for the military sex slavery. The level of violence and coercion became extreme; a large number of survivors offered testimonies on violence used on family members who tried to resist the abduction of their daughters.<sup>43</sup> Young women were, in some cases, raped by soldiers in front of their parents before being forcibly removed.<sup>44</sup> The following testimony, offered by So Gyun Hwang, recalls a cruel incident of deception and violence during and following her recruitment.

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Ramseyer, *supra* note 1, at 4. However, in 1932, 15 Japanese women were deceived about the terms of their employment by private entrepreneurs and trafficked from Nagasaki to a Japanese Naval “comfort station” in Shanghai, China. Alexis Dudden, *A Brief Response to J. Mark Ramseyer’s “Contracting for Sex,”* 65 INT’L REV L. ECON. (forthcoming, 2021).

<sup>43</sup> Coomaraswamy Report, *supra* note 6, at 3. See also Amnesty International Report, *supra* note 5, at 9.

<sup>44</sup> Coomaraswamy Report, *id.*

I was born on 28 November 1918 as the second daughter of a day labourer. We lived in the Taeri Workers' District, Kangdong County, Pyongyang City.

When I was 17 years old, in 1936, the head of our village came to our house and promised me to help me find a job in a factory. Because my family was so poor, I gladly accepted this offer of a well-paid job. I was taken to the railway station in a Japanese truck where 20 or so other Korean girls were already waiting. We were put on the train, then onto a truck and after a few days' travel we reached a big house at the River Mudinjian in China. I thought it was the factory, but I realized that there was no factory. Each girl was assigned one small room with a straw bag to sleep on, with a number on each door.

After two days of waiting, without knowing what was happening to me, a Japanese soldier in army uniform, wearing a sword, came to my room. He asked me 'will you obey my words or not?', then pulled my hair, put me on the floor and asked me to open my legs. He raped me. When he left, I saw there were 20 or 30 more men waiting outside. They all raped me that day. From then on, every night I was assaulted by 15 to 20 men.

We had to undergo medical examinations regularly. Those who were found disease-stricken were killed and buried in unknown places. One day, a new girl was put in the compartment next to me. She tried to resist the men and bit one of them in his arm. She was then taken to the courtyard and in front of all of us, her head was cut off with a sword and her body was cut into small pieces.<sup>45</sup>

The ICJ report introduces the following statement from the Philippines regarding another victim, Francisca Austari, aged 70 at the time of the investigation, demonstrating a similar pattern of coercion.

Ms. Austari was born in Santa Cruz, Laguna, on 2 December 1923. She was the eldest child in her family; her father was a tenant farmer and because of the family's economic circumstances she was only able to attend school from first to third grade.

Sometime in 1941, a Filipino approached Ms. Austari while she and some other girls were washing clothes by a river bank. She heard the other women scream out "the Japanese are coming"; they all began to run but she was too slow and a Filipino man grabbed her. He told her she was going to go and wash clothes for the Japanese soldiers who were camped in the nearby town. Japanese soldiers were present when this occurred. For the first three months that she was at the encampment. Ms. Austari did wash clothes and was told by the Filipino (referred to by Filipinos as a Makapili, which denotes someone who collaborated with the Japanese or is a supporter of the Japanese) that money was being given to her mother for her work. He said that the money being given to her mother came from the Japanese but was handed over by him.

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<sup>45</sup> *Id.* at 10.

After about three months she was told that no more money would be forthcoming; at this point she refused to wash clothes any longer. Following this the Japanese soldiers took her inside the barracks and raped her. That night five or six Japanese soldiers, one after the other, had forcible intercourse with her. She attempted to resist their attacks on her and was beaten by the soldiers. At various times in the month that followed she would try to close her legs and prevent the Japanese from having intercourse with her. Each time that this happened she was hit and the soldiers would pound on her, particularly her legs, and force her to have intercourse. When questioned about the manner in which intercourse occurred, Ms. Austari indicated that she was forced to have intercourse in different positions with the Japanese, although most commonly she was forced to have her legs raised in the air.

This occurred each night for the next two or three months. She was the only woman in the military camp and was kept inside a *room*; she was not allowed to go out and was accompanied by a guard when she went to the toilet. Each night soldiers, sometimes two, sometimes five, would come to her room already naked and have forcible intercourse....<sup>46</sup>

Both survivor testimonies and the other evidence of sexual slavery make clear that recharacterizing this systemic exploitation as contractual arrangements freely entered into is both deeply troubling and inconsistent with what actually occurred.

### ***B. Disconnect Between Brothels and the Forced Sex Stations***

The preceding discussion has shown that a contractual process is not relevant to the coercive and deceitful recruitment for military sexual servitude at issue here. There is a clear disconnect between prewar prostitution and forced sexual slavery because the victims of the sexual slavery did not have a choice to engage in contract negotiations. Moreover, as we detail below, it is possible that Japan may have strategically recruited a large number of young Korean women to weaken the morale of Koreans who did not welcome Japanese rule and to undermine its national and cultural identities.<sup>47</sup> Thus,

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<sup>46</sup> ICJ Report, *supra* note 5, at 56-57.

<sup>47</sup> *The Period of Wartime Mandatory Draft Through Elimination of Ethnicity* (in Korean), NATIONAL INSTITUTE OF KOREAN HISTORY, [http://contents.history.go.kr/mobile/nh/view.do?levelId=nh\\_047\\_0020\\_0030\\_0010\\_0030](http://contents.history.go.kr/mobile/nh/view.do?levelId=nh_047_0020_0030_0010_0030) [https://perma.cc/Rf5S-CYN9]. Rape has been used as political means of subjugation and even genocide. See, e.g., Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348 (1998); Jennifer L. Green, *Uncovering Collective Rape: A Comparative Study of Political Sexual Violence*, 34 INT'L J. SOC. 97 (2004); Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT'L L. 350 (2003); Rachel A. Sitkin et. al., *To Destroy a People: Sexual Violence as a Form of Genocide in the Conflicts of Bosnia*,

while it is possible that, as Ramseyer contends, some women at some stations, particularly in the early stages of the war, may have managed to avoid the atrocities described in the testimonies above,<sup>48</sup> for the vast majority, what occurred was sexual servitude through coercion or deceit.

The author's failure to acknowledge the presence of such sexual servitude is grossly inappropriate as it subsumes the large number of victims of sex slavery under the author's description of willing prostitutes who negotiated for money. The article makes this flawed connection between the practices of private brothels and the forced sex stations because it fails to acknowledge that the recruitment of the victims was carried out in a systematic and coordinated way involving private operators, members of the police, the military, schools, and local authorities to meet the increasing military demand for sexual services. The author contends that concern for venereal disease was the reason for setting up the forced sex stations (comfort stations).<sup>49</sup> Although there was such a concern, it was the increasing rapes by Japanese military personnel and the resulting loss of military discipline that led to the establishment of these stations throughout the frontlines.<sup>50</sup> This meant that the Japanese military required a large number of individuals providing sexual service for the military, a demand on a scale that could not be met by willing individuals, to suppress cases of rape that would undermine military discipline and increase resistance from local residents in occupied territories.

Another possible motive – weakening the Korean morale and undermining of its cultural and national identities – renders the practices of private brothels even more irrelevant to the forced sex stations, going beyond recruiting individuals who would offer sexual services as in brothels. By putting so many Korean women into sexual slavery, the Japanese military caused not only extreme mental trauma but also substantial reproductive issues among many victims to venereal diseases and the infliction of other physical violence.<sup>51</sup> The Japanese authorities, who had closely monitored the stations on frontlines, could not have been unaware of the critical effect that brutal sexual servitude had on the large group of Korean women victims. As a result, the organized, large-scale sexual slavery of Korean women can be construed as an act of oppression intended to subjugate Korean people,<sup>52</sup> who

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*Rwanda, and Chile*, 46 *AGGRESSION & VIOLENT BEHAV.* 219 (2019); Catherine A. Mackinnon, *Genocide's Sexuality*, 46 *POL. EXCL. & DOMIN.* 313 (2005); Shayna Rogers, *Sexual Violence or Rape as a Constituent Act of Genocide: Lessons from The Ad Hoc Tribunals and a Prescription for the International Criminal Court*, 48 *GEO. WASH. INT'L L. REV.* 265 (2016).

<sup>48</sup> Coomaraswamy Report, *supra* note 6, at 6.

<sup>49</sup> Ramseyer, *supra* note 1, at 4.

<sup>50</sup> Coomaraswamy Report, *supra* note 6, at 5; Argibay, *supra* note 14, at 376-377 (2003); TANAKA, *supra* note 4, at 10-11.

<sup>51</sup> Coomaraswamy Report, *id.* at 7. *See also* Amnesty International Report, *supra* note 5, at 13.

<sup>52</sup> *See supra* note 47 (discussing rapes used as a political means of subjugation and genocide).

did not welcome Japanese rule in the Korean peninsula,<sup>53</sup> especially when viewed in conjunction with other oppressive measures that the Japanese government had adopted to suppress the morale of Korean people and eliminate their national and cultural identities.<sup>54</sup>

The sexual slavery perpetrated by Japan was a crime against humanity.<sup>55</sup> The system of sexual slavery breached the 1921 International Convention for the Suppression of the Traffic in Women and Children (Japan ratified this treaty in 1925)<sup>56</sup> and the 1948 Convention of the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), which embodies norms of customary international law accepted before 1948.<sup>57</sup> The Coomaraswamy Report introduces a view that the sexual slavery enforced by Japan was “carried out with intent to destroy a particular national, ethnical, racial or religious group, causing bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life to bring about its physical destruction and imposing measures intended to prevent births within

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<sup>53</sup> Koreans initiated a nation-wide, peaceful protest for independence on March 1, 1919 (“March 1 Movement”) and continued their struggle to obtain independence from Japan. Koreans also set up a provisional government in Shanghai, China, in April of 1919. See HENRY CHUNG, *THE CASE OF KOREA; A COLLECTION OF EVIDENCE ON THE JAPANESE DOMINATION OF KOREA, AND ON THE DEVELOPMENT OF THE KOREAN INDEPENDENCE MOVEMENT* (2014).

<sup>54</sup> For example, the Japanese adopted policies to ban Korean language in schools, compelled the change of Korean names into Japanese, and mobilized Koreans for war efforts in the forms of forced labor, sexual slavery, and the military draft beginning in 1944. See Soh, *supra* note 27, at 1228. Ramseyer incorrectly states that Koreans were not drafted into the Japanese army, even though Korea was part of the Japanese nation (Ramseyer, *supra* note 1, at 7). Korea was never a legitimate part of the Japanese nation; Japan forcibly annexed Korea in 1910; thus, Korea was a Japanese colony, under Japanese occupation. Also, Koreans were subject to the military draft beginning in 1944. Brandon Palmer, *Imperial Japan's Preparations to Conscript Koreans as Soldiers, 1942—1945*, 31 *KOREAN STUD.* 63 (2007).

<sup>55</sup> Coomaraswamy Report, *supra* note 6, at 16; ICJ Report, *supra* note 5, at 155; McDougall Report, *supra* note 6, at 18-19; Amnesty International Report, *supra* note 5, at 21-22. Article 7 of the Rome Statute of the International Criminal Court defines crimes against humanity as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (entered into force July 1, 2002), art. 7.

<sup>56</sup> Coomaraswamy Report, *supra* note 6, at 12; ICJ Report, *supra* note 5, at 157; Amnesty International Report, *supra* note 5, at 19-20; Argibay, *supra* note 14, at 375.

<sup>57</sup> Coomaraswamy Report, *supra* note 6, at 12.

the group, constituting genocide in accordance with article II of the Genocide Convention.”<sup>58</sup>

Japan has objected to this argument, contending that these instruments of international humanitarian law did not exist during the Second World War.<sup>59</sup> However, it is widely acknowledged that these treaties, including the Genocide Convention and the Geneva Conventions for the Protection of War Victims codified existing norms of customary international law.<sup>60</sup> Similarly, it has been recognized that, prior to the war, sexual slavery was understood to be a violation of customary international law.<sup>61</sup>

The political and legal dimensions of sexual slavery indicate that the rationale that may exist for private brothels would have little or no relevance to the circumstances of the enforced sex stations, affirming the disconnect between prewar prostitution and sexual slavery. As such, the author’s examination of the contractual dynamics of private brothels does not offer any understanding or insight into the operation of military sexual service during the war.

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<sup>58</sup> *Id.*, at 13. See also *The Period of Wartime Mandatory Draft Through Elimination of Ethnicity*, *supra* note 47.

<sup>59</sup> Coomaraswamy Report, *supra* note 6, at 16.

<sup>60</sup> The Secretary-General of the United Nations affirmed this principle. He stated, “In the view of the Secretary-General, the application of the principle *nullum crime sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise [...] The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in the Geneva Conventions of 12 August 1949 for the Protection of War Victims: the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.” U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 34-35, U.N. Doc. S/25704 (May 3, 1993). In support of the position that Japan’s sexual slavery is a war crime, in December 1996, the United States Justice Department, without disclosing names, put sixteen Japanese involved with comfort women and Unit 731, which was linked to biological warfare in China, on a list of war criminals and barred them from entering the country. Wakabayashi, *supra* note 6, at 228.

<sup>61</sup> See also Coomaraswamy Report, *supra* note 6, at 16. International Committee of the Red Cross, *Rule 93. Rape and Other Forms of Sexual Violence Are Prohibited*, International Humanitarian Law Database: Customary International Humanitarian Law, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule93](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule93) [<https://perma.cc/66HS-49UL>].

## II. BRUTALITY IN THE FORCED SEX STATION (“COMFORT STATION”)

### A. *Mistreatment, Torture, and Killing*

The Ramseyer article describes the forced sex station as an agreeable workplace where sexual services were rendered for stipulated terms and promised pay.<sup>62</sup> It adds that the girls were able to save their pay, although some station owners may have “cheated” their prostitutes, and the author also introduces an episode of a “comfort woman” who became popular and was satisfied with earnings that had not been available to her at home.<sup>63</sup> As sources of these stories, the article appears to rely on controversial accounts of Koreans published in Japan advocating that military sexual servitude was a legitimate service.<sup>64</sup>

However, more comprehensive investigative reports detail horrendous conditions at the forced sex stations.<sup>65</sup> Based on the testimonies of the victims forced to work at the stations, the reports conclude that the conditions under which they served the soldiers were almost invariably appalling.<sup>66</sup> The quality of their accommodation and general treatment may have varied, but almost all survivors testified to harshness and cruelty.<sup>67</sup> The accommodations were generally poor, consisting of tents or temporary wooden shacks in frontline positions, often with only mattresses on the floor, exposed to unhealthy cold and damp conditions.<sup>68</sup> In relatively safer locations, the victims had rooms in one or two-story buildings, but these were no more than cramped, narrow cubicles, as small as 3 by 5 feet, space barely sufficient for a bed.<sup>69</sup>

The victims also faced severe restrictions on their freedom of movement. Ramseyer’s article states that “even overseas, women who disliked their jobs at a brothel could – and did – simply disappear.”<sup>70</sup> However, it could not be further from the truth about the forced sex stations. The sites were usually patrolled and guarded by barbed wire fences, and the women’s movements were closely monitored and restricted. It was the life of a prisoner – many survivors testified that they were never allowed to leave the camp or were

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<sup>62</sup> Ramseyer, *supra* note 1, at 6-7.

<sup>63</sup> *Id.* at 6.

<sup>64</sup> KILSUNG CHOE, *THE TRUTH ABOUT COMFORT WOMEN, AS SEEN BY A KOREAN RECEPTIONIST* (2017); YU-HA PARK, *COMFORT WOMEN OF THE EMPIRE* (2014).

<sup>65</sup> Coomaraswamy Report, *supra* note 6, at 6; ICJ Report, *supra* note 5, at 7, 48-50; Amnesty International Report, *supra* note 5, at 11-13.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Ramseyer, *supra* note 1, at 6-7.

only allowed to walk outside at set times.<sup>71</sup> Some of them could make occasional trips to have their hair cut or even to see a film, but the victims were under strict control and monitoring; escape, which would have resulted in severe punishment, was nearly impossible.<sup>72</sup>

These young women were subjected to inhumane treatment: they were required to submit to as many as 60 to 70 men per day<sup>73</sup> and were abused, tortured, and even killed by soldiers and officers who often ignored regulations.<sup>74</sup> Health checks were carried out regularly, primarily to prevent the spread of venereal diseases, but little notice or care was given to the frequent cigarette burns, bruises, bayonet stabs and even broken bones that soldiers inflicted on their victims.<sup>75</sup> Their cruel treatment, which would have surely deterred anyone else from applying for the job, is another indication that there was indeed no contractual process<sup>76</sup> but, instead, coercion and deception in recruitment.

The young women were supposed to be paid for their “services,” as the author contends,<sup>77</sup> but the vast majority never saw any of the money that they had been promised.<sup>78</sup> Such non-payment would obviously deter any future transactions with willing individuals, but the military would not have been concerned with that. Military officials did not rely on any contractual process, but rather on deception and coercion, compelling Korean women to comply to avoid a severe punishment or even death to themselves or their family members. The author asserts that women could be “unpleasant” to avoid demands on them,<sup>79</sup> but in a place where they were subject to rampant violence and savagery, such a response surely would have risked harsh punishment or even death,<sup>80</sup> as the following testimony by Ju Hwang Kim, a survivor who served at one of the stations, illustrates.

I thought I was drafted as a labour worker when, at the age of 17, the Japanese village leader's wife ordered all unmarried Korean girls to go to work at a Japanese military factory. I worked there for three years, until the day that I was asked to follow a Japanese soldier into his tent. He told me to take my clothes off. I resisted because I was so scared, I was still a virgin. But he just ripped my

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<sup>71</sup> Coomaraswamy Report, *supra* note 6, at 6. *See also* ICJ Report, *supra* note 5, at 50; Amnesty International Report, *supra* note 5, at 10-13.

<sup>72</sup> *Id.*

<sup>73</sup> Coomaraswamy Report, *supra* note 6, at 6.

<sup>74</sup> *Id.* *See also* ICJ Report, *supra* note 5, at 50; Amnesty International Report, *supra* note 5, at 10-13.

<sup>75</sup> *Id.*

<sup>76</sup> *See also* Stanley *et al.*, *supra* note 15; Cho, *supra* note 15.

<sup>77</sup> Ramseyer, *supra* note 1, at 6-7.

<sup>78</sup> Coomaraswamy Report, *supra* note 6, at 6.

<sup>79</sup> Ramseyer, *supra* note 1, at 1.

<sup>80</sup> “Yet some women still tried to refuse being made sexual slaves. Their resistance was met by force, often by torture, in order to get their consent, and some were maimed or killed.” TANAKA, *supra* note 4, at 50.

skirt and cut my underwear from my body with a gun which had a knife attached to it. At that point I fainted. And when I woke up again, I was covered with a blanket but there was blood everywhere.

From then on, I realized that during the first year I, like all the other Korean girls with me, was ordered to service high-ranking officials, and as time passed, and as we were more and more 'used', we served lower-ranking officers. If a woman got a disease, she usually vanished. We were also given '606-shots' so that we would not get pregnant or that any pregnancies would result in miscarriage.

We only received clothes two times per year and not enough food, only rice cakes and water. I was never paid for my 'services'. I worked for five years as a 'comfort woman', but all my life I suffered from it. My intestines are mostly removed because they were infected so many times, I have not been able to have intercourse because of the painful and shameful experiences. I cannot drink milk or fruit juices without feeling sick because it reminds me too much of those dirty things they made me do.<sup>81</sup>

A testimony of another survivor, Ok Sun Chung, vividly illustrates the point that nothing short of absolute obedience ensured their survival.

[...] I was taken to the Japanese army garrison barracks in Heysan City. There were around 400 other Korean young girls with me and we had to serve over 5,000 Japanese soldiers as sex slaves every day – up to 40 men per day. Each time I protested, they hit me or stuffed rags in my mouth. One held a matchstick to my private parts until I obeyed him. My private parts were oozing with blood.

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

One Korean girl caught a venereal disease from being raped so often and, as a result, over 50 Japanese soldiers were infected. In order to stop the disease from spreading and to 'sterilize' the Korean girl, they stuck a hot iron bar in her private parts.<sup>82</sup>

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<sup>81</sup> Coomaraswamy Report, *supra* note 6, at 6.

<sup>82</sup> *Id.* at 9.

## *B. Lasting Wounds*

The preceding discussion reveals the extent of cruelty and mistreatment that young women had to endure at the forced sex stations. It was the life of a slave in the worst possible form where the concepts that the author entertains, such as contract or contractual reward, had absolutely no relevance. The episode of a content Korean “comfort woman” introduced by the Ramseyer article, who enjoyed her popularity, savings, and shopping opportunities in town,<sup>83</sup> and the diametrically opposite testimonies of the horrific experiences introduced in this article might suggest that we are discussing wholly separate events. However, the testimonies offered by a large number of survivors are consistent in their descriptions of the brutality. The horrible suffering reported by the victims is also consistent with that reported by Allied soldiers captured by the Japanese army during the war.<sup>84</sup> In short, the mistreatment reported by the victims, as horrific as it may be, is consistent with the abusive conduct of the Japanese military during the war.<sup>85</sup>

It has been over 75 years since the end of the war, but the wounds inflicted by sexual enslavement on a massive scale continue with the few survivors of the tragedy still alive today and with many others who share their pain. Long after the war, survivors continued to suffer from extreme trauma and physical pain resulting from sexual abuse. For example, a survivor was exposed to numerous venereal diseases when serving as a military sexual slave, and as a result her son was born after the war with a mental disability.<sup>86</sup> In the conservative Korean culture where sexuality was not a subject of public discussion, survivors also endured a deeply entrenched sense of shame,<sup>87</sup> and this is one of the reasons that their testimonies were not made public until the 1990s, by which time Korean society had become more open and ready to acknowledge the wounds of the past.

Memories of the horrific past are not the only source of the wounds. Attempts to deny responsibility for the atrocities and to rewrite history, such as the one advanced by *Contracting for Sex in the Pacific War*, aggravate the wounds, and this is the reason that we felt compelled to write this article. The Japanese government offered the Kono Statement in 1993, in which it

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<sup>83</sup> Ramseyer, *supra* note 1, at 6.

<sup>84</sup> See, e.g., Liz Bestic, “The Japanese Torture of My Father Was Horrific — So Why Are They Considering Watering Down the Apology for Their Wartime Past?” INDEPENDENT, Feb. 27, 2015, <https://www.independent.co.uk/voices/comment/japanese-torture-my-father-was-horrific-so-why-are-they-considering-watering-down-apology-their-wartime-past-10074720.html> (last visited Feb. 6, 2021).

<sup>85</sup> *Id.*

<sup>86</sup> Coomaraswamy Report, *supra* note 6, at 7. Amnesty International also reports that nearly all Korean survivors that they met had been unable to have children due to internal injuries caused by mass rape, or as a result of contracting STDs which went untreated. Amnesty International Report, *supra* note 5, at 13.

<sup>87</sup> See also Soh, *supra* note 27, at 1230.

admitted the involvement of the Japanese military and administration in the recruitment and management of the forced sex stations and acknowledged that the victims “lived in misery at comfort stations under a coercive atmosphere.”<sup>88</sup> The Japanese acknowledgment was not complete, as it did not admit its legal responsibilities. Nevertheless, the Kono Statement, which the Ramseyer article never mentions, was a move in the right direction, one which could have opened a pathway to the healing of wounds and the beginning of reconciliation.

However, the Japanese government did not stay the course. As more conservative factions subsequently took power, the political environment in Japan favored the denunciation of war-related responsibilities. Thus, for example, in 2014, the Japanese government demanded that the United Nations amend the Human Rights Commission’s Report, but this demand was rejected.<sup>89</sup> Japan subsequently offered an official apology for the pain and suffering inflicted on the victims in the name of then Prime Minister Shinzo Abe as a part of a 2015 Korea-Japan Agreement on “Comfort Women.”<sup>90</sup> Opposition to this Agreement arose in Korea based on Japan’s failure to admit its legal liabilities.<sup>91</sup> Nonetheless, the Japanese government still has the opportunity to seek reconciliatory solutions to heal the wounds. The Coomaraswamy Report, over two decades ago, recommended that the Japanese government accept legal responsibility for violating its obligations under international law by establishing and managing the forced sex stations and make full disclosure of the documents and materials in its possession with regard to the stations and other related activities.<sup>92</sup> We believe that this is a necessary dimension of the healing process.

Lastly, we wish to point out that the denial of responsibility by the Japanese government is not the only source of these lasting wounds. Some members of the conservative factions in Japanese society, as well as their collaborators in Japan and overseas, have issued statements and published materials, mischaracterizing the victims, as the Ramseyer article has done, as willing sex workers.<sup>93</sup> Attacks on victims, personal and otherwise, have been

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<sup>88</sup> Kono Statement, *supra* note 8.

<sup>89</sup> Ankit Panda, *Japan Denied Revision of UN Comfort Women Report*, DIPLOMAT (Oct. 7, 2014), <https://thediplomat.com/2014/10/japan-denied-revision-of-un-comfort-women-report/> [<https://perma.cc/QW5Z-2Y2D>].

<sup>90</sup> Yuki Tatsumi, “Japan, South Korea Reach Agreement on ‘Comfort Women,’” DIPLOMAT (Dec. 28, 2015), <https://thediplomat.com/2015/12/japan-south-korea-reach-agreement-on-comfort-women/> [<https://perma.cc/5PBT-2G7V>].

<sup>91</sup> Misato Nagakawa & Trevor P. Kennedy, “Public Divided over ‘Comfort Women’ Agreement,” *E. ASIA F.* (Jan. 22, 2016), <https://www.eastasiaforum.org/2016/01/22/public-divided-over-comfort-women-agreement/> [<https://perma.cc/92L8-68AN>].

<sup>92</sup> Coomaraswamy Report, *supra* note 6, at 22.

<sup>93</sup> See *supra* note 64 (listing examples of such authors).

made<sup>94</sup> to discredit their testimonies. Episodes of women who were supposedly better treated at the stations have been introduced and emphasized, as the Ramseyer article has also done, without any qualification, as if such stories in fact represented the general state of the stations. Tragically, mischaracterizations, falsifications, and insults exacerbate the harm that has been done.<sup>95</sup>

### III. FALLACY OF CONTRACT ARGUMENTS

#### A. *Defects in Arguments*

1. *Flawed Application of Game Theory* — The Ramseyer article attempts to explain “the contract dynamics” of the transactions between prostitutes and brothel owners which, it claims, “reflected the straightforward logic of the credible commitments so basic to elementary game theory.”<sup>96</sup> According to the article, the unique features of these transactions that cannot be found in other industries – such as large advances made to prostitutes or their families (e.g., parents), higher incomes conditional upon compliance with the incentive structure (i.e., higher pay for a greater number of customers served), fixed duration (with an option to quit early upon generation of sufficient revenue) – are integral parts of the contractual dynamics that can be explained by game theory: the women demanded a large portion of their pay upfront with knowledge that the brothel owners had an incentive to exaggerate their future earnings, and the owners demanded a contractual

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<sup>94</sup> The Coomaraswamy Report observes that some rejected the testimonies of the victims as “anecdotal or *even created* to implicate the Government in a matter which was essentially a private and, therefore, a privately run, system of prostitution” (emphasis added). Coomaraswamy Report, *supra* note 6, at 4. Additionally, Japanese civil society groups, such as the Japanese Society for History Textbook Reform, have made public statements and submissions to the United Nations accusing the victims of lying and calling them “crooks.” Japanese Society for History Textbook Reform, *A Deceitful Korean Citizens’ Group (NGO) and the Comfort Women Issue*, U.N. HUM. RTS. COUNCIL, A/HRC/44/NGO/X (2020), <http://www.sdh-fact.com/CL/Deceitfule.pdf> [<https://perma.cc/6D4E-7RGX>].

<sup>95</sup> Thus, Ramseyer’s article has provoked intense protests and objections, not only in Korea, but across the United States and within his own school. Scholars such as Yuji Hosaka (Sejong University), Carter J. Eckert (Harvard University), Alexis Dudden (University of Connecticut), Pyong Gap Min (City University of New York), Noah R. Feldman (Harvard Law School), and Katharine H.S. Moon (Wellesley College) have raised objections to his arguments for being defective and incorrect. Ariel H. Kim & Simon J. Levien, “Harvard Professor’s Paper Claiming ‘Comfort Women’ in Imperial Japan Were Voluntarily Employed Stokes International Controversy,” HARV. CRIMSON (Feb. 6, 2021), <https://www.thecrimson.com/article/2021/2/7/hls-paper-international-controversy/> [<https://perma.cc/2AD6-2KYK>]. See also Dudden, *supra* note 42.

<sup>96</sup> Ramseyer, *supra* note 1, at 1.

structure that gave women incentives to work hard, knowing they would be inclined to shirk.<sup>97</sup>

This is a flawed application of game theory that fits the realities of neither prostitution “contracts” in Japan and elsewhere that the article references,<sup>98</sup> nor military sexual servitude during the war. Game theory is the study of the ways in which individual choices are made in expectation of the choices of others to produce an optimal outcome.<sup>99</sup> As such, the key presumption of game theory is that the actors have choices regarding their courses of action. Thus, game theory would not be applicable, and the contract dynamics the author purports to have existed would not stand, unless the women and brothel owners had agency concerning their own actions.

Such choice did not exist for women involved in a large number of so-called prostitution “contracts” in Japan and elsewhere or for the victims of sexual slavery who were either forced into sexual servitude or induced by deception (*e.g.*, on promises of non-sexual jobs). With respect to the prewar prostitution that the Ramseyer article describes, a number of young girls were “sold” by their families to brothels, without having a chance to review the terms of their “contracts” and understand them properly, if there was such a contract, not to mention having a chance to decide their courses of action in expectation of the actions to be taken by brothel owners.<sup>100</sup> An episode of a ten-year-old “deciding” to enter prostitution, which the author cites as an example of bargaining,<sup>101</sup> is tragic – if such episode were to be true – and it does not support the argument that women chose to work as prostitutes. In addition to the obvious moral issues involving a child consenting to prostitution, it is widely accepted that one may not bind minors under contract.<sup>102</sup>

Some young women may have acquiesced and even agreed to go to brothels in response to the lure of better food, clothing, the glammers of the city, or the opportunity to help their family, but they were hardly the active negotiators that game theory presupposes. The victims of sex slavery during the Second World War who were recruited by force or deception were obviously not in a position to negotiate anything regarding the terms of the

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<sup>97</sup> *Id.* For a more in-depth discussion of the economic considerations surrounding prostitution, see Peter G. Moffatt, *The Economics of Prostitution*, in *ECONOMICS UNCUT: A COMPLETE GUIDE TO LIFE, DEATH, AND MISADVENTURE* 202-11 (Simon W. Bowmaker ed., 2005).

<sup>98</sup> Ramseyer, *supra* note 1, at 2-5.

<sup>99</sup> John Nash first developed game theory in the 1950s. John Nash, *The Bargaining Problem*, 18 *ECONOMETRICA* 155 (1950), cited in Yong-Shik Lee, *Reconciling RTAs with the WTO Multilateral Trading System: Case for a New Sunset Requirement on RTAs and Development Facilitation*, 45 *J. WORLD TRADE*, no. 3, 625, 639 (2011).

<sup>100</sup> MIKISO HANE, *PEASANTS, REBELS, AND OUTCASTES: THE UNDERSIDE OF MODERN JAPAN* 207 (1982).

<sup>101</sup> Ramseyer, *supra* note 1, at 1.

<sup>102</sup> See *supra* note 22 (explaining the rule of contract law that one may not bind a minor under contract).

“contract”; thus, game theory does not explain such circumstances. At most, game theory is arguably applicable only to a relatively small number of cases in which adult individuals willing to provide sexual services were in a position to negotiate in expectation of the actions of the brothel owners. This simply was not the case for the victims of sex slavery or for a large number of prewar prostitutes.<sup>103</sup>

2. *Not a Fair Contract but One to Exploit* — Even if one were to accept that there were willing individuals who had the opportunity to negotiate, we doubt that the contract would have been fair. Harvard law professor Noah R. Feldman recounts that “[t]he economic relationship that was deployed, even according to Ramseyer’s own research, is very close to what we would ordinarily call debt slavery.”<sup>104</sup> Professor Feldman draws parallels between the Japanese context and sharecropping contracts in the Jim Crow American South, noting the extent to which such arrangements were designed to exploit and actually did exploit the vast power discrepancy between actors and institutions.<sup>105</sup>

At the conclusion of the Civil War, enslaved African Americans were freed, but very few were able to own land. Most freedmen had little choice but to enter into sharecropping contracts with landlords – former plantation owners – under which they agreed to raise cash crops and give a high portion of their harvests, usually 50 percent, to the landowners in exchange for use of the land (often 20- to 50-acre plots suitable for farming by a single family, into which landowners had divided plantations), as well as a cabin and supplies. These contracts created a system of economic dependency and poverty for sharecroppers: landowners extended credit to sharecroppers to buy goods and charged high interest rates, sometimes as high as 70 percent a year.<sup>106</sup> Sharecropping contracts were thus a device of exploitation – a form of debt slavery – across the American South.

The prostitution contracts discussed in the Ramseyer article have a similarly exploitative structure: women “choosing” to work in prostitution received a large sum up front, according to the author, but it was a loan, and the women were required to work off the loan in a form of indentured servitude. The author describes them as “a multi-year indenture agreement that bundled an up-front advance, additional cash compensation, a maximum term, and the right to quit working early if a woman generated enough revenue.”<sup>107</sup> In this arrangement, most of the revenue generated by the women would be taken by brothel owners, who claimed their own share (as

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<sup>103</sup> HANE, *supra* note 100.

<sup>104</sup> Kim & Levien, *supra* note 95.

<sup>105</sup> *Id.*

<sup>106</sup> Isham G. Bailey, *Sharecropper Contract, 1867*, <https://www.gilderlehrman.org/history-resources/spotlight-primary-source/sharecropper-contract-1867> [https://perma.cc/BS9N-YXF2]

<sup>107</sup> Ramseyer, *supra* note 1, at 1.

high as 2/3 to 3/4 of the revenue according to the author), their loan repayment (60 percent of the remainder), and the cost of food and accommodation.<sup>108</sup>

As Professor Feldman explains, it was a system of exploitation, rather than a fair contract.<sup>109</sup> He opines that game theory should account for the way “contracts” between people of vastly different power can increase power differentials and reduce people to the status of debt slavery,<sup>110</sup> but Ramseyer failed to show this outcome in his analysis. Loaning a family more money than it could ever pay back is an effective tool for forcing the family’s daughter to continue doing coerced sex work.<sup>111</sup> In other words, the form of the “contract” is itself a means of coercion. When an employment contract does not allow for the employee to stop working (until the employer is ready to let the employee go), that relationship is one of enslavement.

### ***B. Unfeasibility of Contractual Recruitment***

Ramseyer’s contractual approach fails to explain the conditions of military sexual servitude during the Second World War. It is unrealistic, as the author underestimates the massive risks and dangers that a woman would have had to accept to provide sexual services on the frontlines during the war and the size of the reward that would have had to be offered, should any women have been inclined to agree to such a contract. Yet he writes,

For these short but potentially dangerous assignments, the brothels paid (annual) wages much higher than those at the Tokyo brothels. Typically, for the two-year job they paid several hundred yen up-front. Sample contracts for Japanese women recruited to Shanghai comfort stations in 1937 provided advances of 500 to 1,000 yen (Naimusho, 1938). Similarly, Home Ministry documents from 1938 report Japanese women travelling to the Shanghai comfort stations on 600–700 yen advances, with one woman receiving an advance in the 700-800 yen range, and two in the 300-500 yen range (Naimusho, 1938).

Note what this means: in compensation for the much higher risks involved, prostitutes at the comfort stations earned much higher pay. Domestic prostitutes in Korea and Japan already earned considerably more than they would earn in other employment. Recall that those in Japan earned 1000 yen to 1200 yen on six year terms. At the comfort stations prostitutes from Japan earned 600-700 yen on two year terms.<sup>112</sup>

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<sup>108</sup> *Id.* at 2.

<sup>109</sup> Kim & Levien, *supra* note 95.

<sup>110</sup> Correspondence on file with the authors.

<sup>111</sup> *Id.*

<sup>112</sup> Ramseyer, *supra* note 1, at 6.

The amount of compensation offered in the early stages of the war may have been higher than the contemporary earnings available in Japan (which by no means affirms the existence of a contract for women who were forced or deceived), but one must consider whether it would have been possible to recruit on the same terms in the later stages of the war where hostilities intensified and the dangers on the frontlines were heightened. These dangers would have included not only injury or death from the typical conditions of battlefields, such as bombing, gunfire, physical assaults by enemies, disease, and food poisoning, but also the acts of Japanese soldiers. There were frequent instances of soldiers and officials ignoring regulations, trying to stay longer with the victims and often inflicting physical injury on them (*e.g.*, cigarette burns, bruises, bayonet stab wounds, and even broken bones, as described above).<sup>113</sup>

There were no assurances against the occurrence of such brutality for anyone serving at the frontline stations. Considering the extent of the danger, the cost of recruitment of willing individuals would have been prohibitively high as the war intensified: advances would have had to be high enough to be worth risking death in a treacherous place far away from home. In such circumstances, it simply would not have been feasible to recruit a sufficient number of individuals to offer sexual services on the frontlines by a contractual process. Prostitutes, according to the author's account, already making higher wages than those engaged other trades in their home countries, would have little incentive to take such enormous risks.

Thus, a non-contractual method was necessary: just as a draft was necessary to forcibly recruit men to fight on the frontlines, a "draft" was also necessary to meet the Japanese military's requirement for sexual services where very few, if any, would have willingly volunteered (even for purported strong compensation) due to the extreme dangers of the intensifying war. This explains why violent and atrocious methods were used to recruit victims from Korea and elsewhere. The author's contract approach is no more than a fallacy that relies on underestimating the dangers of the intensifying war and on the false presumption that the majority of those who offered sexual services on the frontline had an opportunity to negotiate the terms of their contracts.<sup>114</sup>

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<sup>113</sup> Coomaraswamy Report, *supra* note 6, at 6.

<sup>114</sup> Katharine H.S. Moon, a professor of Asian studies and political science at Wellesley College, also stated that Ramseyer's claim ignores the context in which women entered into contracts. She questions how we may "explain whether a 14- or 16-year-old girl knew what she was signing even if she signed it, especially in a Korean society at the time that was not accustomed to contracts and related legalism and didn't grant such agency to girls and women." Kim & Levien, *supra* note 95.

## IV. CONCLUSION

The sexual slavery perpetrated by the Japanese military during the Second World War is among the most atrocious wartime human rights violations of the twentieth century. As many as 200,000 women were exploited<sup>115</sup> and they suffered a breadth of harm including inhumane treatment, torture, and even death. The resulting wounds remained with the survivors, their families, and many others who share their pain even to this day. The victims were recruited by force or deception, with the involvement of the Japanese military or government. The Japanese military was directly involved with the management of the forced sex stations (“comfort stations”) and was responsible for the atrocities committed therein.

*Contracting for Sex in the Pacific War* mischaracterizes sexual slavery as a legitimate contractual arrangement whereby women freely participated in contract negotiations and received greater rewards for accepting the dangers of life on the frontline, completely ignoring voluminous evidence to the contrary. As discussed above, the victims did not have such a choice. When force was used to secure their recruitment, disobedience meant severe punishment, including death, to themselves or their family members, as testified to by a number of survivors. Once they arrived at the stations, they lived as slaves under harsh conditions, deprived of their freedom, dignity, and life as human beings. Many of the young women, most only 14-18 years of age, did not make it back home. (According to one study, 90 percent did not survive the war.<sup>116</sup>) Contracts were never a part of this cruel process.<sup>117</sup>

We believe that the mischaracterization of history in the Ramseyer article fits squarely within a long line of attempts to deny the existence of wartime atrocities and rewrite history. Realizing this danger, the Kono Statement made the following commitment:

We shall face squarely the historical facts as described above instead of evading them, and take them to heart as lessons of history. We hereby reiterate our firm determination never to repeat the same mistake by forever engraving such issues in our memories through the study and teaching of history.<sup>118</sup>

Had the Japanese government implemented this resolve, teaching history as it truly occurred and affirming its position domestically and overseas, there would have been an opportunity for these wounds to heal, at least to some extent. If such efforts had been made, perhaps we would not have to face ongoing efforts to recharacterize and erase exploitation – a process that

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<sup>115</sup> CUMINGS, *supra* note 28, at 155; SOH *supra* note 4, at 15; ICJ Report, *supra* note 6, at 7; YOSHIKI, *supra* note 4, at 93; H.R. 759, 109th Cong. (2006).

<sup>116</sup> Blakemore, *supra* note 21

<sup>117</sup> See Stanley *et al.*, *supra* note 15; Cho, *supra* note 15.

<sup>118</sup> Kono Statement, *supra* note 8.

inflicts additional injury on the victims and survivors and on all of us who share their pain.

Unfortunately, subsequent conservative Japanese administrations, such as that of former Prime Minister Shinzo Abe, retreated from this resolve, and reconciliation is now further away. We believe that we have a moral obligation to recognize truth in history and counter attempts to disrespect the most sacred aspects of human rights – freedom, dignity, and life – which are implicated in the question of sexual enslavement. We write this article in an effort to remedy the injustice caused by *Contracting for Sex in the Pacific War*'s distortion of history, to the modest extent possible in our capacity as academics.