

REGIONAL FOCUS & CONTROVERSIES

Remedying “Enforced Sexual Slavery”: Validating Victims’ Reparation Claims against Japan

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It has been over two decades since the Japanese practice of enforced sexual slavery began to receive widespread attention. Yet despite numerous international efforts to urge Japan to squarely acknowledge its moral and legal responsibility, there has been no meaningful progress to resolve this matter. This work revisits the issue of enforced sexual slavery as it stands today. The Japanese practice of enforced sexual slavery was a clear violation of international law at the time. Therefore, individual victims have valid legal claims for reparation against the Japanese government. The first half of this article reconfirms the illegality of the practice of enforced sexual slavery. The remainder summarizes and vindicates the claims of the victims once again. This research suggests how to remedy the victims’ rights and discusses how to implement reparation. It also contends that Japan owes reparations and legitimate remedial measures to the victims that go beyond monetary compensation in line with the rules of contemporary international law.

Keywords

Enforced Sexual Slaves, Crimes against Humanity, Reparation for Individual Victims, The 1965 Korea-Japan Agreement, The San Francisco Peace Treaty

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1. Introduction

The practice of “enforced sex slavery (“ESS”)¹ during World War II by the Japanese military left victims of crimes against humanity who, over the last 70 years, have been denied a remedy. Germany has acknowledged its role in committing atrocities, officially apologized, made restitution to the victims, and even tried to prevent the recurrence of such tragedies. However, nothing significant has been done by Japan.²

Despite repeated international efforts, including resolutions from the US Congress,³ the new Japanese Prime Minister Shinzo Abe, the maternal grandson of Nobusuke Kishi, ‘Class A’ war criminal and a former prime minister of Japan, is again moving to withdraw a 1993 admission of the historicity of ESS.⁴ Over time, the number of registered Korean victims has decreased from 234 to 58.⁵

The conventional position and arguments of the Japanese administration, and its judiciary⁶ are confusing and contradictory, with recurring ‘even-ifs.’⁷ Ever since

¹ Former US Secretary of State Hillary Clinton reportedly stated that the ‘comfort women’ should be referred to as “enforced sex slaves.” See Staff Writer, *Clinton says ‘Comfort Women’ Is Incorrect Term*, CHOSUN DAILY, Jul. 9, 2012, available at http://english.chosun.com/site/data/html_dir/2012/07/09/2012070900793.html (last visited on Apr. 19, 2013).

² Kyoko Kishimoto, *Apologies for Atrocities: Commemorating the 50th Anniversary of World War II’s End in the United States and Japan*, 42 AM. STUDIES INT’L 40 (2004). For a concise look at Japan’s ‘struggle,’ see Shuko Ogawa, *The Difficulty of Apology: Japan’s Struggle with Memory and Guilt*, 22 HARV. INT’L REV. 42-46 (2000). For the collective sentiment of resistance among the Japanese public, see Onuma Yasuaki, *Japanese War Guilt and Postwar Responsibilities of Japan*, 20 BERKELEY J. INT’L L. 604-606 (2002).

³ In 2007, the U.S. Congress adopted a resolution acknowledging Japan’s sexual enslavement of Asian women. Recently, the New York State Senate unanimously adopted a resolution condemning Japan’s wartime mobilization of Asian sex slaves for the Imperial Army. It was the second state legislature to adopt such a resolution after the California State Assembly in 1999. See Staff Writer, *New York Senate ‘Comfort Women’ Resolution*, CHOSUN DAILY, Jan. 31, 2013, available at http://english.chosun.com/site/data/html_dir/2013/01/31/2013013101197.html (last visited on May 8, 2013).

⁴ Staff Writer, *U.S. Warns Japan Over ‘Comfort Women,’* CHOSUN DAILY, Jan. 07, 2013, available at http://english.chosun.com/site/data/html_dir/2013/01/07/2013010700460.html (last visited on May 8, 2013). See also Staff Writer, *Scrap Japan’s Admissions of Guilt, Says Ex-PM*, CHOSUN DAILY, Aug. 29, 2012, available at http://english.chosun.com/site/data/html_dir/2012/08/29/2012082900659.html (last visited on May 8, 2013).

⁵ Dong Bin Yun, *Keum-Joo Hwang, a Korean victim of the enforced sexual slavery, passed by...the numbers of the remaining victims have decreased to 58* (일본군 성노예 피해자 황금주 할머니 별세...남은 생존자는 58명), CHOSUN DAILY, Jan. 3, 2013, available at http://news.chosun.com/site/data/html_dir/2013/01/03/2013010302466.html (last visited on May 8, 2013).

⁶ For a poignant criticism of the state-centric approach of the Japanese judiciary, see M. Levin, *Japan-China Joint Communiqué of 1972-San Francisco Peace Treaty Article 14(b)-individual victims Of Japanese wartime forced labor and sexual slavery-World War II restorative justice- denial of right to compensation in domestic litigation*, 102 AM. J. INT’L L. 148 (2008).

⁷ See Views of the Government of Japan on the addendum I to the report presented by the Special Rapporteur on violence against women. U.N. Doc. E/CN.4/1996/53/Add.1.

its belated and grudging acknowledgement of the existence of ESS in 1992, Japan has repeatedly made remorseful statements, but then followed these statements with denials that women were forced into sex service, as well as denying any legal responsibility. In sum, asserting that the practice of ESS was voluntary, Japan's argument goes as follows: 'Even if' force was employed, it was not a violation of international law effective at the time; 'even if' breaches of law are established, international law grants no legal rights to individuals; 'even if' individual claims exist, international agreements between States settled and nullified these claims, and statutes of limitations also bar the claims. As noted by Cherif Bassiouni, "Japan not only fail[ed] to provide material compensation, but also refuse[d] to give victims moral compensation."⁸

The primary purpose of this research is to make plain that the practice of ESS was in violation of international laws at the time and that individual victims have valid legal claims for reparation. This paper is composed of five parts, including Introduction and Conclusion. Part two will examine the grounds of illegitimacy under international law. Part three will suggest how to remedy the victims' rights. Part four will discuss how to implement reparations. In this paper, the author contends that Japan owes reparations, as well as legitimate remedial measures that go beyond compensation, to the victims in line with the rules of the contemporary international law.

2. Grounds of Illegitimacy

The practice of ESS was a clear violation of international law at the time of its commission.⁹ This atrocity was a breach in particular of humanitarian norms, as reflected in both treaties and the international customary norms of conduct proscribing crimes against humanity, slavery, and forced labor.

A. Humanitarian Norms, Treaties, and Customary Principles

Article 46 of the Regulations concerning the Laws and Customs of War on Land¹⁰

⁸ M. Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 233 (2007).

⁹ International Convention to Suppress Slave Trade and Slavery, adopted on Sept. 25, 1926, entered into force on Mar. 9, 1927, 60 L.N.T.S. 253 [hereinafter Slavery Convention].

¹⁰ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (hereinafter The Hague Convention of 1907), Oct. 18, 1907, available at <http://www.>

contains an umbrella provision that demands respect for family honor. It reads: “Family honor and rights, [and] the lives of persons... must be respected. ...” An integral part of the duty to respect ‘family honour’ constitutes a particular obligation to protect women from sexual abuses that would certainly undermine their family honor as a whole. It is undisputed that the practice of ESS contradicts this central norm.

The substance of Article 46 is to be complemented by the customary principles of international law that result from “the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”¹¹

The Hague Convention of 1907 is applicable to any belligerent conduct committed in all the lands, including the occupied territories. Manfred Lachs clarified that a war crime can take place anywhere without territorial limits.¹² Therefore, the place of commission does not bar a finding of war crimes, regardless of whether the practice of ESS took place in Korea, Japan, or unknown battlefields.

B. Anti-Slavery Norms and the Forced Labor Convention of 1930

The practice of ESS also violated the anti-slavery norms that have been elevated in international law to the status of *jus cogens*.¹³

Article 1 of the Slavery Convention of 1926¹⁴ defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised...” The phrase, “the powers attaching to the right of ownership,” covers any situation in which a person lacks autonomy over his or her existence, including the freedom of movement. Article 5 of the same Convention also obligates the signatory parties to take all necessary measures to prevent compulsory

icrc.org/ihl.nsf/WebList?ReadForm&id=195&t=art (last visited on Apr. 13, 2013).

¹¹ For an account of the views identifying the duty of protection of women as part of *jus cogens*, see K. Parker & L. Neylon, *Jus Cogens: Compelling the Laws of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411 (1989); K. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288 (2003).

¹² M. LACHS, WAR CRIMES: AN ATTEMPT TO DEFINE THE ISSUES 51 (1945).

¹³ Weissbrodt confirms:

The International Court of Justice has identified the protection from slavery as one of two examples of obligations *erga omnes* arising out of human rights law, or obligations owed by a state to the international community as a whole. The practice of slavery has thus been universally accepted as a crime against humanity, and the right to be free from enslavement is considered so fundamental that all nations have standing to bring offending states before the Court of Justice.

See D. Weissbrodt and Anti-Slavery International, *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-Up to the Conventions on Slavery*, U.N. Doc. E/CN.4/Sub.2/2000/3, May 26, 2000, at 5, ¶ 5.

¹⁴ Slavery Convention art. 1(1).

or forced labor from developing into “conditions analogous to slavery...” Article 2 of the Slavery Convention extends to the “High Contracting Parties ... each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage.....” The peremptory nature of the Convention would also nullify specific reservations and other limitations concerning its territorial reach.

The term “conditions analogous to slavery” was later elucidated in detail by the Convention concerning Forced or Compulsory Labor (“CFCL”),¹⁵ which was concluded six years later under the auspices of the International Labor Organization. ‘Forced’ or ‘compulsory’ labor means “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered for himself.”¹⁶ The member states must “suppress the use of forced or compulsory labor in all its forms within the shortest possible period.”¹⁷

The CFCL also provides as follows: “The illegal exaction of forced or compulsory labor shall be punishable as a penal offense and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.”¹⁸ By treating the illegal exaction of forced labor as an *international crime* punishable under the Convention, the CFCL explicitly and effectively reaffirmed a general principle of law proscribing the practice of slavery and forced labor, which existed prior to the making of this Convention.¹⁹ [Emphasis added]

Thus, the failure to fulfill the duty to ensure that the penalties are adequately and strictly imposed will incur State responsibility.²⁰ In the context of ESS, given that the war-time military leaders and Japan as a State were directly engaged in, and punished for, the commission of prohibited criminal conduct, a case of State responsibility is firmly established.

¹⁵ Convention concerning Forced or Compulsory Labor, entered into force on May 1, 1932 (ratified by Japan in 1932), 39 U.N.T.S. 55.

¹⁶ CFCL, art. 2.

¹⁷ *Id.* art. 1.

¹⁸ *Id.* art. 25.

¹⁹ G. McDougall, *Addressing State Responsibility for the Crimes of Military Sexual Slavery During the Second World War: Further Attempts for Justice for the Comfort Women*, paper presented at the 2012 Korean Society of International Law Conference: The Comfort Women Issue and Future-Oriented Relations between Korea and Japan, at 9&11.

²⁰ A breach of an international obligation gives rise to State responsibility, and a requirement for reparation. See M. SHAW, *INTERNATIONAL LAW* 778 (2008).

C. Crimes against Humanity

The principle of “crime against humanity” was applied specifically in the prosecution of the atrocities committed by Japanese war criminals and their German colleagues in the wake of World War II.

Focusing on Japan’s wartime behavior, Article 5 of the Charter of the International Military Tribunal for the Far East (“IMTFE”) defined crimes against humanity as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of, or in connection with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation of the foregoing crimes are responsible for all acts performed by any person in execution of such plan...²¹

The practice of ESS suffices to qualify as either enslavement, deportation, or other inhumane acts, thereby constituting the commission of crimes against humanity under the IMTFE.

The IMTFE actually convicted some Japanese wartime leaders for crimes of sexual violence by application of the principle of commander responsibility. These convictions involved systematic, widespread rapes and sexual attacks against women during the Nanking massacre. The convicted included Minister of War Shunroku Hata, Foreign Minister and Prime Minister Koki Hirota, and Iwane Matsui, commander in chief in the city of Nanking. All were found guilty for their failure to stop the atrocities in Nanking. In this vein, the Tokyo tribunal clearly established the precedent that military leaders should bear responsibility, and be punished, for failure to prevent the commission of sexual crimes as violations of the laws of war.

In the context of the US military commissions related to World War II, Tomoyuki Yamashita, the then commanding general of the Japanese armed forces in the Philippines, and Akira Muto, his chief of staff, were convicted by the wartime US military commission in the Philippines for their disregard of violations of the laws of war and failure to perform their duty by allowing their inferiors to perpetrate brutal

²¹ IMTFE Charter art. 5(c).

atrocities, including murders, rapes, and torture.²²

3. Validation of the Victims' Claims to Remedies

A. Legal Basis

1. Humanitarian Norms

The Hague Convention of 1907 is based on the fundamental notion that the claims of individual victims under the laws of war should be validated through a grant of reparation. Article 3 of the Hague Convention of 1907 provides as follows: "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."²³

The first part confirms the customary principle of state responsibility, with a specific focus on compensation. Article 3 emphasizes compensation, which by definition means "payment of a sum of money to make good the damage..."²⁴ Thus, "[t]he use of this term instead of the more general 'reparation' may be seen as yet another indication that the drafters of the Article had in mind the case of individual persons, victims of the laws of war, who wish to bring a claim for the injury or damage they suffered."²⁵ The preparatory works of Article 3 of the Convention also support the view that the purpose of the Convention was to provide compensation to individual victims.²⁶ The laws of war and armed conflict, in general, concern both States and *individuals*, as they intend to hold not only States, but also individuals responsible for their breaches of law. [Emphasis added] Given that the laws of war specifically intend to ensure compensation is offered to injured individuals, the right

²² See generally A. Prevost, *Race and War Crimes: The 1945 War Crimes of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303-338 (1992).

²³ The Hague Convention of 1907 art. 3.

²⁴ U.N. Doc. E/CN.4/Sub.2/1998/13, Jun. 22, 1998, at 49, ¶ 42, quoting F. Kalshoven, *Article 3 of the Convention (IV) concerning the Laws and Custom of War on Land, signed at The Hague, Oct. 18, 1907*, in REMEMBERING WHAT WE HAVE TRIED TO FORGET 9 (ASCENT, 1997).

²⁵ *Id.* at 50, ¶ 46.

²⁶ R. Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, 1 J. INT'L CRIM. J. 341 (2003), quoting F. Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces-From Article 3 of the Hague Convention IV to Article 91 of Additional Protocol I of 1977 and Beyond*, 40 INT'L & COMP. L. Q. 830 (1991).

to bring claims should be understood to extend to the victims themselves.²⁷

In the second sentence, a case of strict responsibility is established. The State responsibility expands to a situation where a single soldier acts as a private person, *e.g.*, raping a woman while on leave in occupied territory.²⁸ In the context of ESS, it was not a single soldier on a leave, but the government of Japan itself that authored and implemented the perpetration of the atrocity. In this framework, the evidence of Japan's illegal conduct extends far beyond the factual presumptions of the Hague Convention of 1907 and makes Japan's responsibility to provide reparation all the more evident.

2. *The Customary Principles on State Responsibility for Injuries to Aliens*

To take the *Janes* claim as an example, the US-Mexico Commission ruled that breach of the duty to prosecute forms a separate cause for compensation, apart from the responsibility resulting from the illegal acts themselves. The commission held that non-prosecution is as tantamount to non-prevention. The Commission eventually awarded compensation in the amount of USD 12,000 as satisfaction for personal damages.²⁹

The claim of *Letelier* is another example of State responsibility for injuries to aliens. In that case, a former Chilean foreign minister was murdered in a 1976 car bombing in Washington D.C., along with his assistant Ronni Moffitt, a US citizen. The US-Chilean Commission rendered awards totaling USD 2,611,892, including both material and moral damages and other collateral expenses incurred from the murder.³⁰ The recipients included Mr. Letelier's widow and four sons, as well as Ronni Moffitt's husband and parents.

The ESS situation is clearly a case of State-authored wrongs on a massive scale that evaded due criminal investigation and punishment, giving rise to the responsibility to offer reparation.

B. The San Francisco Peace Treaty

Japan insists that the San Francisco Peace Treaty of 1951³¹ (hereinafter The 1951

²⁷ *Id.* at 341.

²⁸ MacDougall, *supra* note 19.

²⁹ The *Janes Case* (U.S. v. Mex.), 1927 United States and Mexico General Claims Commission 114-119, in 4 R. INT'L ARB. AWARDS 82 (1926).

³⁰ For details, see *Letelier v. Chile*, available at http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39915 (last visited, Apr. 19, 2013).

³¹ Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 3180-81, 136 U.N.T.S. 45.

Treaty) and other bilateral treaties have completely absolved it from any wartime responsibilities. The so-called waiver clause of the 1951 Treaty provides as follows: “Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.”³²

The 1951 Treaty, however, should not form a bar in the settlement of the ESS claims. First, the waiver clause concerns claims by the Allied Powers and their nationals. The ESS claims by Korean women are not those of Allied Powers or their nationals. Rather, when these crimes were committed, Korea was considered an occupied territory, or even part of Japan. Therefore, in the context of individual compensation, the Korean ESS claims should be treated as claims incurred among the Japanese, not the Allied Powers and their nationals.

Second, while the breaches of law were made with a view to the law then, the remedy should be offered in line with the law now. Under current international practice, individual claims by victims of crimes against humanity should not be disposed of on the basis of agreements or treaties between States. The notion that violations of fundamental human rights cannot be waived by treaty agreements is in conformity with the contemporary practice of human rights norms. Therefore, the resulting claims are inalienable and cannot be disposed of by others, including states.³³

Professor Harry N. Scheiber has argued that: “Neither the specific language of the Treaty with regard to the waiver, nor the subsequent history of Japanese actions with respect to reparations, gives unqualified support to the US and Japanese positions ... that the waiver is comprehensive and in effect conclusive as to Japanese obligations under international law.”³⁴

C. The 1965 Korean-Japan Agreement

Article 1 of the Korea-Japan Bilateral Agreement of 1965³⁵ (hereinafter The 1965

³² *Id.* art. 14 (b).

³³ *Supra* note 19, at 31.

³⁴ H. Scheiber, *Taking Responsibility: Moral and Historical Perspectives on the Japanese War-Reparations Issues*, 20 *BERKELEY J. INT'L L.* 236-237 (2002).

³⁵ Agreement on the Settlement of Problems concerning Property and Claims and on the Economic Cooperation between Japan and the Republic of Korea, Jun. 22, 1965. For details, see English version of the 1965 Agreement, 10 *JAP. ANN. INT'L L.* 284-303 (1966).

Agreement) provides that:

... to the Republic of Korea, Japan shall supply the products of Japan and the services of the Japanese people, the total value of which will be so much in yen as shall be equivalent to three hundred million US dollars (USD 300,000,000), and shall extend long-term and low-interest credits up to such amount in yen as shall be equivalent to two hundred million US dollars (USD 200,000,000), under the consideration that, those supply and credits shall be such that will serve the *economic development* of the Republic of Korea. [Emphasis added]

Japan argues that Article 2 of the 1965 Agreement allegedly dealt with the claims of individuals arising from wartime activities:

The Contracting Parties confirm that problems concerning *property, rights and interests*³⁶ 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, are settled *completely and finally*. [Emphasis added]

Just as the 1951 Treaty should not bar ESS claims, the 1965 Agreement should not be construed to trump these claims. First, given that ESS is mentioned neither in the Agreement, nor in the statements of the contracting parties in the course of negotiation, it is reasonable to conclude that the Parties did not intend to resolve individual claims. As Japan at that time denied the historicity of ESS, this conclusion is also supported by its own actions.³⁷ A finding of independent experts also confirmed that, in view of the list of the claims, nothing in the negotiation history concerned “violation of individual rights resulting from war crimes, crimes against humanity, breaches of slavery convention, the convention against the traffic in women or customary norms of international law.”³⁸

Second, the principal purpose of the 1965 Agreement was ‘commercial.’ This

³⁶ Agreed Minutes regarding the Agreement on the Settlement of Problem concerning Property and Claims and on the Economic Cooperation between Japan and the Republic of Korea art. 2(a). It reads: “...property, rights and interests means all kinds of substantial rights which are recognized under law to be of property value.”

³⁷ In the same vein, MacDougall, the former UN rapporteur on the issue of systematic rape and sexual slavery practices in armed conflict, also stresses that “Japan’s direct involvement in the establishment of the rape camps was concealed when the treaties were negotiated, a crucial fact that must now prohibit on equity grounds any attempt by Japan to rely on these treaties to avoid liability...” *Supra* note 19, at 30.

³⁸ U. DOLGOPOL & S. PARANJAPE, COMFORT WOMEN: AN UNFINISHED ORDEAL 164 (1994).

supports the interpretation that the Parties did not intend to dispose of individual claims by the 1965 Agreement. Thus, this Agreement should not bar further claims for restitution.³⁹

Third, just as the 1951 Treaty could not dispose of individual claims concerning State-authored crimes against humanity, the 1965 bilateral agreement could not possibly nullify the claims of the ESS victims for breaches of the *ius cogens* norms in international law.⁴⁰

Fourth, completely apart from the above-mentioned treaties, the ESS victims are entitled to compensation resulting from Japan's continued failure to punish individual offenders. Such inaction constitutes a denial of justice and generates a distinct claim of responsibility to the victims.⁴¹

Fifth, with a view to the post-war settlements, it was the general practice of States to explicitly mention personal injury or death claims when they intended to include these claims in their agreements.⁴² Dina Shelton observes that: "Personal injury or death, which was at the origin of most pre-Second World War State responsibility claims...is not commonly covered by the post-war settlement agreement."⁴³

Citing earlier extensive empirical research, Shelton further notes the following:

Of the 155 agreements...only eight expressly authorized personal injury and death claims and one did so by implication. Five of these concerned injuries or deaths were caused by the Nazi actions. Article 1(1) of the Norwegian-German Agreement⁴⁴ is typical. It compensated: 'Norwegian nationals who were victimized by National Socialist persecution because of their race, beliefs or opinions and whose freedom or health was in consequence impaired, and also on behalf of the survivors of persons who died as a result of such persecution'. Two settlement agreements included remedies for private violence: the United States-Panama Agreement, Article 1(b) of which terminated 'claims ...for personal injuries sustained by six soldiers of the United States Army during disturbances which

³⁹ *Supra* note 19, at 32.

⁴⁰ *Id.* at 33-36.

⁴¹ See The Janes case, *supra* note 29. In the Janes claim, the arbitrator decreed that: "A nation condones a wrong committed by individuals when it fails to take action to punish the wrongdoing." *Id.* at 123.

⁴² Seong Phil Hong, *A Critical Analysis on the Japanese Responsibility regarding Its Atrocities Before and During World War II* (일본의 전후책임정책 분석과 비판), 17 YONSEI L. J. (법학연구) 20-22 (2007).

⁴³ D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 97-98 (1999), quoting R. LILlich & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 175 (1975).

⁴⁴ 358 U.N.T.S. 185, signed on Aug. 7, 1959, entered into force Apr. 23, 1960.

occurred in the city of Panama in the year 1915';⁴⁵ and the British Government and of British nationals "in respect of loss or damage suffered, directly or indirectly, during or as a consequence of the riots and public disorder in Indonesia between 10 and 30 September 1963."⁴⁶

Japan also stood in this tradition of treaty-making. In concluding treaties with the United Kingdom and Canada, Japan explicitly mentioned reparations to individual victims. On this point, MacDougall finds the following:

Agreements concluded by Japan with some of the Allied Powers specifically refer to individual redress, unlike those agreements concluded with Korea and the Philippines, which refer only to State claims for redress.⁴⁷ For example, the Greece-Japan Agreement, the United Kingdom-Japan Agreement, and the Canada-Japan Agreement all contain provisions for compensation 'for personal injury or death which arose before the existence of a state of war...for which the Government of Japan [is] responsible according to international law.'⁴⁸

In sum, Japan did not intend to resolve individual claims in the 1965 Agreement. Even if it had so intended, it is nevertheless still answerable to the victims for its breaches of humanitarian norms and its failure to punish those responsible.

D. Non-applicability of Statutes of Limitations

As the preceding part of this paper argues, Japan bears the responsibility to prosecute and punish individual offenders of crimes against humanity by particular application of the anti-slavery and forced labor norms in international law. The failure to perform these duties gives rise to a claim against the state under the laws of war and the customary principles of international law. The claims for criminal sanctions and civil remedies are also substantiated by the fact that Japan still even denies the illegality of ESS.

The next issue is whether perpetrators of crimes against humanity can be subject to criminal sanction despite the passage of time and whether victims' claims remain

⁴⁵ See United States-Panama Agreement, signed on Jan. 26, 1950, entered into force on Oct. 11, 1950, 1 U.S.T. 685, T.I.A.S. No. 2129, 132 U.N.T.S. 233.

⁴⁶ Great Britain-Indonesia, Dec. 1, 1966, G.B.T.S. No. 34 (Cmd. 3277) 606 U.N.T.S. 125, Lillich & Weston, *supra* note 43, at 336.

⁴⁷ *Supra* note 19, at 61 (n. 71).

⁴⁸ *Id.* at 50, ¶ 47.

valid in spite of statutes of limitation.

On the point of criminal sanction, there is a widely shared trend in international law that heinous international crimes should be punishable at all times.⁴⁹ The Convention on Non-applicability of Statutory Limitations (“CNSL”)⁵⁰ vindicates this common notion that war crimes and crimes against humanity must be punished without deference to statutory limitations. Article 29 of the Rome Statute succinctly presents the global consensus on this point by stating, “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”⁵¹ In the *Klaus Barbie* case, the French Court of Cassation found that the non-applicability of statutes of limitations to crimes against humanity is a rule of customary law.⁵² Likewise, in accordance with national laws that enable the prosecution and punishment of international crimes, such as crimes against humanity and genocide, Nazi-related criminals are being pursued to this day.⁵³ The 1998 indictment and arrest of Augusto Pinochet, the former Chilean dictator, for human rights violations vividly remind us that national political leaders are not immune from persecution.⁵⁴ So far, 18 cases in 8 different situations have been brought to the International Criminal Court for the prosecution and punishment of international crimes.⁵⁵ The International Covenant on Civil and Political Rights (“ICCPR”)⁵⁶ also suspends the *ex post facto*⁵⁷ prohibition where the act in question violates the general principles of international law.⁵⁸

As in other jurisdictions, Japanese criminal law has statutory limitations that

⁴⁹ See Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted on Nov. 26, 1968, available at <http://treaties.un.org/doc/publication/UNTS/Volume%20754/v754.pdf> (last visited on Apr. 13, 2013); The European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, opened for signature Jan. 25, 1974, reprinted in 13 I.L.M. 540 (1974).

⁵⁰ CNSL, *id.*

⁵¹ See ICC Statute, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> (last visited Apr. 19, 2013).

⁵² See *The Barbie case*, 78 I.L.R. 132, 135 (1988) (Judgment of Jan. 26, 1984, Cass. Crim., Fr.).

⁵³ *Id.*

⁵⁴ D. Connett, J. Hooper & P. Beaumont, *Pinochet arrested in London*, THE GUARDIAN, Oct. 18, 1998, available at <http://www.guardian.co.uk/world/1998/oct/18/pinochet.chile> (last visited on Apr. 19, 2013).

⁵⁵ ICC, Situations and Cases, available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited on Apr. 18, 2013).

⁵⁶ See ICCPR, adopted on Dec. 16, 1966; entered into force on Mar. 23, 1976, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (last visited on Apr. 13, 2013).

⁵⁷ ICCPR art. 15(2). It reads: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

⁵⁸ G. Rogers, *Argentina’s Obligation to Prosecute Military Officials for Torture*, 20 COLUM. HUM. RTS. L. REV. 259 (1989).

exonerate criminal responsibility by passage of time.⁵⁹ However, despite these statutes of limitation, Japan bears a continuing responsibility to prosecute and punish the ESS-related individual offenders. In general, international law and its obligations supersede municipal laws, and “it is no defense to a breach of an international obligation to argue that the State acted in such manner because it was following the dictates of its own municipal laws.”⁶⁰ As noted above, the principle of the non-applicability of statutory limitations relative to crimes against humanity has been developed into a customary norm. In this vein, statutes of limitations under domestic laws should not apply to international crimes, such as crimes against humanity.⁶¹ Moreover, the interests of justice also require that statutes of limitations, if any, should not commence before 1992, when Japan finally admitted the historicity of ESS.⁶²

The Japanese constitutional law clarifies Japan’s intent to give legal effect to applicable international agreements and customary principles. The 1947 Constitution of Japan provides as follows: “The treaties concluded by Japan and established laws of nations shall be faithfully observed.”⁶³ Japanese scholars and the Japanese government commonly view treaties as having the power of law under Japanese law.⁶⁴ It is also an established jurisprudence of the Japanese courts that Article 98 has incorporated customary international law into Japanese municipal law.⁶⁵

Under Japanese law, in general, treaties are self-executing and give rise to individual rights.⁶⁶ Customary principles are also generally considered to be ‘self-executing,’ and the government and its citizens are bound by them to the same extent that they are bound by national laws. Some treaties and customary principles enjoy even higher status under Japanese national laws.

⁵⁹ The Japanese Code of Criminal Procedure art. 250. It reads: “The statute of limitations shall be completed upon the lapse of: (i) 25 years for offenses punishable with death; (ii) 15 years for offenses punishable with life imprisonment with or without work; (iii) 10 years for offenses punishable with imprisonment with or without work for a long term of 15 years or more. (iv) 7 years for offenses punishable with imprisonment with or without work for a long term of less than 15 years; (v) 5 years for offenses punishable with imprisonment with or without work for a long term of less than 10 years; (vi) 3 years for offenses punishable with imprisonment with or without work for a long term of less than 5 years or with a fine; (vii) 1 year for offenses punishable with misdemeanor imprisonment without work.” See the English translation of the Japanese Code of Criminal Procedure, available at <http://www.oecd.org/site/abdoecdanti-corruptioninitiative/46814489.pdf> (last visited on Apr. 18, 2013).

⁶⁰ *Supra* note 20, at 133-134.

⁶¹ *Supra* note 19, at 24.

⁶² *Id.* at 25.

⁶³ Japanese Constitution art. 98.

⁶⁴ K. Port, *The Japanese International Law Revolution: International Human Rights Law and Its Impact in Japan*, 28 *STAN. J. INT’L L.* 152 (1991).

⁶⁵ *Id.* at 155.

⁶⁶ *Id.* at 152.

In sum, under the Constitution of Japan, such international norms as the obligation to prosecute those who commit crimes against humanity, including slavery and enforced labor, along with the principle of non-applicability of statutes of limitations to crimes against humanity have the power of law in Japan. It is equally true that domestic law cannot possibly exonerate Japan from a breach of its international obligations.

The same is true of Japan's responsibility to render reparation to the victims of ESS. Japan is obligated to provide the ESS victims with adequate reparation for their claims based upon international law, ranging from the laws of war to the rules of State responsibility, and these obligations continue to this day. Domestic statutes of limitation should not apply to the victims' claims arising from the perpetration of international crimes, such as crimes against humanity.⁶⁷ Just as in the case of criminal sanction, statutes of limitations, if any, should not commence earlier than the year 1992, when Japan finally acknowledged its part in the practice of ESS.⁶⁸

As a matter of legal construction, it is also worth noting that the passage of time does not harm or diminish the power of diplomatic protection.⁶⁹ It is also "left to the unfettered discretion of the international tribunal" to determine the existence of an 'undue delay.'⁷⁰ When Greece invoked a delay of more than 40 years as invalidating the French claims, the tribunal rejected the defense, especially in view of the troubled conditions caused by successive wars between 1912 and 1923.⁷¹ Likewise, it would be fair to construe that the international law-based reparation claims of the individual victims of crimes against humanity should also have the power to trump time-bars. In a similar vein, Van Boven, the former Special Rapporteur on the right to restitution, affirms that: "Statutes of limitations shall not apply in respect to periods during which no effective remedies exist for human rights violations. Claims relating to reparations for gross violations of human rights shall not subject to a statute of limitations."⁷²

More importantly, given that Japan, even after acknowledging the historicity of ESS, has continued to deny its international duty to punish the individual offenders and to provide legal remedies to the victims, it is illogical for Japan to argue

⁶⁷ *Supra* note 19, at 24.

⁶⁸ *Id.* at 37.

⁶⁹ In the case of George W. Cook of 1927, the General Claims Commission between the United States and Mexico decreed that there was "no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal." *See* 4 R. INT'L ARB. AWARDS 214 (1951)

⁷⁰ The *Ambatielos Case*, 12 R. INT'L ARB. AWARDS 103-104 (1963).

⁷¹ The *Lighthouses Case (France v. Greece)*, 12 R. INT'L ARB. AWARDS 186 (1963)

⁷² U.N. Doc. E/CN.4/Sub.2/1993/8, at 58, ¶ 15.

simultaneously that statutes of limitation should come into play.

4. The Architecture of Reparation

A. Base and Forms of Reparation

The general scheme of reparation under the rules of State responsibility certainly applies to the remedies for individual victims of crimes against humanity. The Permanent Court of International Justice adjudicated that: “Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁷³ Primarily, it calls for the cessation of the wrongful action, such as the continued conduct of denying international law obligations.⁷⁴ If restitution in kind is not possible, the payment of a sum corresponding to the value, which restitution in kind would bear, should be rendered.⁷⁵ ‘Satisfaction’ is appropriate for non-material damage or moral injury to the dignity or personality of the State.⁷⁶ ‘Satisfaction’ includes the presentation of official regrets and apologies, the punishment of the guilty minor officials and particularly the formal acknowledgment or judicial declaration of the unlawful character of the act.⁷⁷

Such a scheme of reparation should also be applied to the individual victims of ESS. In the same vein, the Inter-American Court of Human Rights, in the cases of *Velásquez Rodríguez v. Honduras* and *Godínez Cruz v. Honduras*,⁷⁸ referred precisely to the decisions of the PCIJ and ICJ, i.e., the Chorzow Factory and the advisory opinion on the Reparation for Injuries Suffered in the Service of the United Nations.⁷⁹

⁷³ Factory at Chorzow (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13)

⁷⁴ United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, 1980 I.C.J. 45 (May 24).

⁷⁵ Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3, at 47-48 (Aug. 30).

⁷⁶ E. de Aréchaga & A. Tanzi, *International State Responsibility*, in *INTERNATIONAL LAW: ACHIEVEMENTS and PROSPECTS* 356 (M. Bedjaoui ed., 1991).

⁷⁷ Corfu Channel (U.K. v. Albania), Judgment, 1949 I.C.J. 35 (Apr. 9).

⁷⁸ Velásquez Rodríguez Case, Inter-Am. Ct. H.R. 35, OAS/ser.L./V/III.19, doc. 13, 149-158 (1988), *reprinted in* 28 I.L.M. 291 (1989).

⁷⁹ Corfu Channel (U.K. v. Albania), Advisory Opinion, 1949 I.C.J. 184 (Apr. 9).

B. Execution of Reparation⁸⁰

The following statements are a summary of the essential components in a reparation program for individual victims.⁸¹

1. In the author's view, reparation is not a single exercise. Rather, it is a process and a program involving a series of actions and reactions between the perpetrator and the aggrieved. It is a process through which the victims might eventually feel remedied and reconciled. A successful program of reparation should accurately assess the interaction of the players, its present impacts, and future implications for the victims and the society as well so that it responds as adequately as possible to the needs and expectations of each victim with a view to rendering custom-tailored remedies.

In this context, Professor W. Michael Reisman noted that:

The outcomes of an enforcement program must be considered in three simultaneous senses. First, the degree to which the prescription in question was realized in terms of controlling value allocation. Second, the degree to which the enforcement program precipitated deterrent, restorative, corrective, or rehabilitative expectations *pro futuro*. Finally, the degree to which the enforcement program consolidated or failed to consolidate expectations of effectiveness in regard to enforcement on the constitutive level of world public order considered briefly.⁸²

2. Japan's responsibility arises from its past violations of international law effective at the time of commission. Yet, the victims continue to be victimized today and suffer losses. In the author's view, reparations should therefore be made in line with the contemporary norms of international law. Thus, reparations should reflect in full scale the modern jurisprudence of the human

⁸⁰ The following analysis is made in view of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 69/147, U.N. A/RES/69/147 (Dec. 16, 2005).

⁸¹ For an illustration of the possible scheme of reparation, see K. Ishikane, *Korean Sex Slaves' Unfinished Journey For Justice: Reparations From The Japanese Government For The Institutionalized Enslavement And Mass Military Rapes of Korean Women During World War II*, 29 U. HAW. L. REV. 123, (2006); J. Dyke, *Reconciliation between Korea and Japan*, 5 CHINESE J. INT'L L. 215 (2006).

⁸² W. Reisman, *Sanctions and Enforcement*, in INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 434 (M. McDougal & W. Reisman eds., 1981).

rights norms and their implementing bodies.⁸³

3. Japan should prosecute and punish individual offenders in accordance with the anti-slavery and the anti-enforced labor norms in international law. From the perspective of reparations, the imposition of criminal sanctions bears particular importance, as it directly relates to the revelation of the truth, the official acknowledgement of the illegality, and the prevention of the recurrence of the atrocity.
4. As a matter of policy, individual criminal offenders should be held personally liable for reparations to the victims. Because these criminals have personally profited from the ESS scheme, the Japanese government and the individual offenders should assume the responsibility to provide reparations to the victims, jointly and severally.⁸⁴
5. Compensation should reflect in full the need to reinstate the victims to their original status. It should include, but not limited to, the following: a) loss of life impairment of health leading to physical injury; b) pain, suffering and emotional distress; c) lost opportunities, including education; d) loss of earnings and earning capacity; e) medical and other expenses required for rehabilitation of the victims, assistance in child-care, counseling, health, and social services;⁸⁵ f) losses of property; g) intangible damage including harm to reputation or honor; h) the expenses for taking legal and administrative measures; and i) transportation and funeral expenses.
6. The measures to provide satisfaction to the victims should include, but not be limited to, the following: a) verification and the public proclamation; b) punishment of the criminals and a public apology in full acknowledgment of the responsibility; c) symbolic reparation designed to vindicate the victims by,

⁸³ For a succinct survey of the current development, and the availability of remedies for human rights violations in general, see S. Djajic, *Victims and Promise of Remedies: International Law Fairytale Gone Bad*, 9 SAN DIEGO INT'L L. J. 329 (2008) (stressing the four-fold classification of remedies: substantive and procedural, and international and domestic).

⁸⁴ See *Filártiga v. Peña-Irala* case, 577 F. Supp. 860 (E.D.N.Y.).

⁸⁵ Declaration on the Elimination of Violence against Women art. 4(g). It mentions the ensuring specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counseling, health and social services, facilities and programs, as well as support structures and all other measures to promote the safety and physical rehabilitation of the victimized women and their children. G.A. Res. 48/104, U.N. Doc. A/48/104 (Dec. 20, 1993), reprinted in 33 I.L.M. 1049 (1994).

e.g., setting up a commemorative monument, building a public park, and/or having a national day for the victims;⁸⁶ and d) inclusion of the accurate history in textbooks for future generations.⁸⁷

7. Remedies should not be limited to the direct victims themselves, but should also cover the family members or the direct dependents of the victims. Their non-material damages such as emotional suffering from humiliation, ostracization from society, loss of marriage and family life, and loss of education should all be compensated, along with monetary damages, including medical expenses.⁸⁸
8. As a matter of procedural justice, the victims should be awarded affirmative and preferential treatment in a court of law, especially with regard to the allocation of the burden of proof. Given that Japan has been denying the historical fact of ESS for a long time, most of the crucial evidence is presumably in its hands and the individual victims are at a critical disadvantage in a legal battle. Japan, as a State, should bear the burden of proof if it seeks to exonerate itself from the legal responsibility. In the same context, the victims should also be allowed to use circumstantial evidence that is sufficient to find a presumption of guilt on the part of Japan.
9. As noted above in detail, the victims' reparation claims should not be challenged by any application of statutes of limitation. It is now an established practice of the international community to pursue and punish the perpetrators of heinous international crimes, without regard to time and place. Japan's international responsibility to prosecute and punish the authors of the ESS practice remains valid and unfinished. Given that Japan, under international

⁸⁶ The Commission report recommends the adoption of such corrective measures as restoring the good name of people and making symbolic reparation aimed at "publicly repairing the dignity of the victims," i.e.: i) setting up a commemorative monument that would list all the victims of human rights abuses from both sides; ii) building a public park in memory of those who lost their lives, to serve as a place of commemoration and a lesson, as well as place for recreation and for bolstering a life-affirming culture; iii) having the "National Human Rights Day" to be observed throughout the country with public observances and ceremonies in the schools and other gestures aimed at symbolic reparation, and iv) organizing campaigns, cultural celebrations, and the like, so that the move toward creating a climate of national reconciliation can be continued." See 2 Report of the Chilean National Commission on Truth and Reconciliation 838-839 (P. Berryman trans., 1993).

⁸⁷ *Id.*

⁸⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, item no. 6, G.A. Res. 40/34, U.N. Doc. A/40/34 (Nov. 29, 1985), *reprinted in* 1 A Compilation of International Instruments (United Nations Center for Human Rights ed., 1993), at 383, ¶¶ 1-2.

law and its own constitution, has a duty to perform international obligations, statutes of limitations in domestic laws should not impede the enforcement of Japan's responsibility to impose criminal sanctions on the perpetrators. The same is also true of the victims' claims for reparation. Such factors as State-centric constructions of international law, inter-State agreements, and limitations in domestic laws should not undermine the continued validity of the victims' claims. Statutes of limitations in domestic legislation do not affect the right to a remedy for violations of fundamental rights.

5. Conclusion

The practice of enforced sexual slavery was not an accidental brutality done by individual soldiers who simply decided to take women as war trophies. Rather, it was the well-designed product of Japanese wartime military policy. It was planned, brought into law, institutionalized, and implemented, both forcefully and deceitfully, by the Japanese wartime government.

This atrocity was perpetrated in violation of the substantive international norms effective at the time of its commission. The entire body of relevant international laws, anti-slavery norms, and laws of war dating back to the 19th century points precisely to the level of illegality visited upon the victims without recourse.

Until 1992, Japan denied its association, use of force, and deceit. Even today, Japan does not recognize the illegality involved in ESS, let alone its responsibility to provide reparation. Yet, under international law, including the laws of war and the customary rules of State responsibility, the ESS victims continue to have valid claims for reparation against Japan. Prior inter-State agreements and the legal technicalities under Japanese domestic law cannot preclude the reparation claims of the victims in the face of international law. For the victims of the ESS practice, the passage of time has had no mitigating effect on their suffering. After five decades of denial and another two decades of assertions of innocence by Japan, the victims have perished one after another in despair, with their claims unheard and uncompensated. As always, it is now on the shoulders of Japan and Japanese society to bring an end to this historic atrocity. And time is not on the side of Japan. If Japan fails to act before the last of the victims perishes, reconciliation will become moot and futile.