

Steps Toward Redress for Comfort Women

Written by Thomas J. Ward and William D. Lay

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THOMAS J. WARD AND WILLIAM D. LAY, DEC 30 2018

**This is an excerpt from *Park Statue Politics: World War II Comfort Women Memorials in the United States*.
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As Japan edged toward surrender, the Japanese government undertook a systematic destruction of documents to conceal war crimes including the creation and implementation of the repressive comfort women system.[1] In addition to destroying documents, the Japanese military disguised comfort women as Red Cross workers at the time of surrender so that they would not be identified as sex slaves.[2] The cover-up explains one of the key reasons why this matter remained hidden from the public's attention for almost half a century. After Japan signed the Instrument of Surrender on September 2, 1945, ending WWII, the United States became the sole occupying power in Japan and took steps to prosecute Japanese war criminals. General Douglas MacArthur issued a decree on January 19, 1946, known as the Tokyo Charter, which set down the rules by which the Tokyo War Crimes Tribunal was to be conducted.

Although it was a unilateral decree rather than a treaty among the Allies, the Tokyo Charter was substantially the same as the Nuremberg Charter. Chief Prosecutor Joseph Keenan proposed a list of defendants to MacArthur. By MacArthur's decision, Emperor Hirohito was not subjected to prosecution. The focus of the prosecution was on "Class-A" crimes, which referred to a conspiracy to wage aggressive war. Class-B crimes involved the mistreatment of prisoners, and Class-C constituted crimes against humanity. Nothing was done at that time by the United States to investigate the comfort women system or to hold anyone accountable for it.[3]

In 1948, however, the Batavia Military Tribunal did try 13 Japanese officers and comfort station operators for the forcible seizure for rape and prostitution of Dutch women living in Dutch Indonesia. The Dutch military court found seven officers and four civilian comfort station operators guilty.[4] The names of both the victims and the accused were sealed but were acquired in 1992 by the Japanese newspaper *Asahi Shimbun* and published in detail.[5] In sum, in the context of the intensifying Cold War, the Allied powers were most concerned with avenging the deaths of Allied soldiers, prisoners of war, and Dutch women, and did not investigate or prosecute the mistreatment of thousands of Asian women in the comfort women system.

The comfort women themselves remained in the shadows because of the deep shame and guilt that they felt as a result of their experiences. They did not wish to be further stigmatized but rather to live their lives quietly and as best as they could. It was only in 1991 that the first woman, Kim Hak Sun, came forward and publicly identified herself as a former comfort woman.

Korean Reaction to the Allies' Post-World War II Decision Not to Try the System's Perpetrators

Following annexation and throughout WWII, there is no evidence that the Korean independence movement ever raised concerns about the comfort women system and may very well have been unaware of its existence. Supporters of independence decried Japan's seizure of Koreans' food and property as well as the imposition of Shinto culture and the Japanese language. They also denounced Japan for subjecting Koreans to forced labor and the repression of the Korean independence movement. However, one does not find mention of the comfort women in the communications archives available in the Franklin Delano Roosevelt Presidential Library. Following the Japanese

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surrender in 1945 and the San Francisco Treaty of Peace in 1951, anti-Japan sentiment heightened in Korea. Korea's first president, Syngman Rhee, was staunchly anti-Japanese and opposed any easy path for restoring Korea-Japan relations that did not address Japan's deliberate intention and policy of annihilating the Korean culture and national identity. Only in 1965, four years after the former Japanese army officer General Park Chung-hee seized power in Korea, did Japan and Korea establish formal diplomatic relations with each other.

Late in 1991, members of the Association of Korean Victims brought a claim to the Tokyo District Court. They alleged human rights violations during WWII against the Japanese government. The plaintiffs included three comfort women, including Kim Hak Sun. Other plaintiffs included 13 Korean men who contended that they had been forced to serve in the Japanese Imperial Army. The lawsuit alleged a sweeping range of abuses that Koreans had suffered during the period of Japan's "protection" without focusing on the comfort women. The comfort women co-plaintiffs sought "1) an official apology; 2) compensatory payment to survivors in lieu of full reparation – each plaintiff asked for ¥20 million (\$154,000); 3) a thorough investigation of their cases; 4) the revision of Japanese school textbooks identifying this issue as part of the colonial oppression of the Korean people; and 5) the building of a memorial museum."^[6]

The lawsuit was the first occasion on which Korean comfort women sought redress through the courts.^[7] Their stories resonated broadly among Koreans, the international community, and women's rights organizations. Notably, they characterized the comfort women system as a "crime against humanity." They pointed to Japan's unconditional acceptance of the Potsdam and Cairo Declarations, which demanded, among other things, Korea's deliverance from a "condition of enslavement." The plaintiffs argued that this implied full restitution, and until that was made, the state of "enslavement" would still persist.^[8] The Tokyo District Court dismissed the case in March 2001. Presiding Judge Shoichi Maruyama acknowledged the suffering of the plaintiffs but found that individual victims' claims for damages against the victimizer country were not cognizable under international law. Judge Maruyama further ruled that claims by individual South Koreans seeking compensation for wartime damages were precluded by the 1965 Treaty on Basic Relations between Japan and the Republic of Korea, which established basic domestic relations between the two countries,^[9] and through the supplementary "Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation," (the "1965 Economic Agreement") which specified that, through the indemnities paid at that time by Japan, all national and Korean citizen claims by Korea against Japan were "settled completely and finally."^[10]

The plaintiffs appealed to the Tokyo High Court which rejected their appeal in July 2003. Presiding Judge Sueo Kito stated that the Japanese government at the time had an obligation to protect the comfort women from danger, but the right to demand compensation had expired.^[11] In November 2004, the Supreme Court upheld the Tokyo High Court's rule.^[12]

In December 1992, former comfort women and other plaintiffs filed suit seeking a formal apology from Japan, to be made in the Japanese Diet and before the General Assembly of the United Nations, and damages totaling ¥286 million. This case gained traction when the Prefectural Court in Shiminoseki in April 1998 ruled in favor of the plaintiffs, finding that the Japanese Diet was legally obligated to enact a compensation law after the 1993 Kono Statement had accepted blame for the comfort women system.^[13]

The Shimonoseki Court made extensive findings of fact with respect to the comfort women system. The Court found that,

although private agents ran most of the comfort stations, in some regions, the Imperial Japanese forces directly managed the comfort stations. Even if private agents ran the comfort stations, the Japanese Imperial Forces influenced the management by setting the hours of operation, service fees, and regulations for the comfort station management. . . All of the 'Comfort Women' Plaintiffs were brought to the comfort stations through deception and forcefully turned into 'comfort women' by rape. The comfort stations had deep relations with the Imperial Japanese Forces.^[14]

The Court ordered the Japanese government to pay ¥300,000 (\$2,800) to each of three plaintiffs. The plaintiffs appealed to the Hiroshima High Court demanding a "proper apology and compensation" and claiming that the

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amount awarded them was an insult to their suffering.[15] In March 2001 the Hiroshima High Court rejected the appeal and reversed the lower court decision, saying that decisions regarding post-war compensation were the responsibility of the legislative branch, not the courts. The Supreme Court dismissed the subsequent appeal.^[16]

By 1998 eight lawsuits had been filed in Japan but not one resulted in a final judgment in favor of the plaintiffs. The courts repeatedly found that the matter of wartime compensation settlements had been addressed through the San Francisco Peace Treaty of 1951 as well as the 1965 bilateral treaty and the associated Agreement between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation.^[17] Japan, the courts ruled, could thus not be held liable for additional compensation for these victims.

The American Legal System and the Comfort Women's Extension of Litigation to the United States

In September 2000, a group of 15 former comfort women (six Koreans, four Chinese, four Filipinos, and one Taiwanese) filed a class action lawsuit in the United States District Court for the District of Columbia under the Alien Tort Claims Act, a statute that permits foreigners to sue in U.S. courts for abuses of international law.^[18] The U.S. government filed a statement of interest against the plaintiffs in the case, agreeing with Japan that the claims were barred by sovereign immunity and presented a non-justiciable political question. The District Court agreed on both grounds and dismissed the case in October 2001, adding that "this court is not the appropriate forum in which plaintiffs may seek to reopen . . . discussions [of war claims against Japan] nearly a half century later."^[19]

On June 27, 2003, the D.C. Circuit court affirmed the District Court's decision. The case was appealed to the U.S. Supreme Court, which vacated the judgment and remanded it to the Circuit Court for further consideration. The Circuit Court again dismissed the lawsuit in 2005, this time finding that it lacked jurisdiction under the political question doctrine. [20]

Although the court determined that it lacked jurisdiction, Chief Judge Douglas Ginsburg's opinion considered in some depth the legal effect of the 1951 Treaty of Peace between Japan and the Allied Powers and the subsequent 1965 Agreement between the Republic of Korea and Japan. The court noted that "it is pellucidly clear that the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits."^[21] The court further observed that it is apparent and not contested by the plaintiffs that the "governments of the appellants' countries [had] the authority . . . to bargain away their private claims" and that this would be consistent with international law.^[22] But ultimately, the Court ruled that adjudicating the plaintiffs' claims would require determining whether the post-war treaties signed by Japan foreclosed the private claims of wartime victims and that that question was a matter for the executive branch of the U.S. government to decide. The U.S. Supreme Court denied further review.^[23]

In 2015, He Nam You and Kyung Soon Kim brought another class action suit against the government of Japan, Emperors Hirohito and Akihito, Prime Ministers Kishi and Abe, and multiple Japanese corporations and their U.S. subsidiaries for personal injuries sustained as comfort women during WWII. The case was ultimately dismissed on June 21, 2016 (without service on Japan, the Japanese corporations, or the individual defendants having been effectuated) on the grounds that the case, like the *Hwang* case, presented a non-justiciable political question; the court also ruled that the claims were time-barred and that plaintiffs had not demonstrated any basis to toll the running of the limitations period.^[24]

The United Nations' Response to the Comfort Women Controversy

On March 4, 1994, the United Nations Commission on Human Rights adopted resolution 1994/45 in which it decided to appoint a special rapporteur on violence against women. Radhika Coomaraswamy, a Sri Lankan educated in the United States, was selected as the special rapporteur. As part of her mandate, Ms. Coomaraswamy visited South Korea and Japan gathering materials related to the comfort women issue and received additional materials from North Korea. She issued a report titled "Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences" on February 5, 1996. She also issued an addendum to the report titled "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

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in Wartime” on January 4, 1996.[25]

The Coomaraswamy Report concluded that Japan had made widespread use of “sexual slavery” in the comfort women system and called on the government of Japan to acknowledge violations of international law and take legal responsibility, pay compensation to individual victims, make a public written apology, amend educational curricula, and identify and punish perpetrators.[26] The report also suggested that North Korea and South Korea might seek the involvement of the International Court of Justice.

The Coomaraswamy Report heavily invoked the now-debunked confessions of Seiji Yoshida. Ms. Coomaraswamy later found it necessary to clarify to H.E. Kuni Sato, Japan’s Ambassador for Human Rights, that she stood by the report’s findings because Seiji Yoshida’s testimony constituted only one part of a far broader body of evidence, and she maintained that the report’s findings against Japan remained valid.[27]

In December 2000 the Violence Against Women in War-Network Japan organized a “People’s Tribunal,” the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, to conduct a mock criminal trial of Emperor Hirohito and other persons in connection with the comfort women system. The tribunal found the emperor guilty of rape and that the government of Japan had incurred state responsibility.[28]

Notes

[1] Lai et al., *Silent Scars*, 49.

[2] Tanaka, *Japan’s Comfort Women*, 81.

[3] See Kathryn J. Witt, “Comfort Women: The 1946–1948 Tokyo War Crimes Trials and Historical Blindness,” *Great Lakes Journal. Of Undergraduate History* 4, no. 1 (September 2016): 28–29.

[4] Sue R. Lee, “Comforting the Comfort Women: Who Can Make Japan Pay?,” *University of Pennsylvania Journal of International Economic Law* 24, no. 2 (Summer 2003): 532.

[5] Lee, “Comforting the Comfort Women: Who Can Make Japan Pay?,” 533.

[6] “Memory and Reconciliation in the Asia-Pacific,” George Washington University, <http://www.gwu.edu/~memory/data/judic>.

[7] Hicks, *The Comfort Women*, 11.

[8] Hicks, *The Comfort Women*, 200.

[9] “Memory and Reconciliation in the Asia-Pacific,” George Washington University.

[10] *Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation (with Protocols, Exchanges of Notes and Agreed Minutes)*, Tokyo, June 22, 1965, *United Nations Treaty Series* 583, no. 8473, <https://treaties.un.org/doc/Publication/UNTS/Volume%20583/volume-583-I-8473-English.pdf>.

[11] “Korean Comfort Women v. Japan,” Memory Reconciliation,

<https://memoryreconciliation.org/topics/comfort-women/comfort-women-korea/>.

[12] “Lawsuits Brought against Japan by Former Korean ‘Comfort Women,’” Columbia Law School, <http://www.law.columbia.edu/korean-legal-studies/sexual-slavery-during-wwi-comfort-women-issue/legal-documents-and-lawsuits/lawsuits-brought-former-korean-comfort-women>.

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[13] See Tahei Okada, trans., "The 'Comfort Women' Case: Judgment of April 27, 1998 Shimonseki Branch, Yamaguchi Prefectural Court, Japan," *Pacific Rim Law & Policy Journal* 8, no. 1 (January 1999): 63–108.

[14] Okada, trans., "The 'Comfort Women' Case: Judgment of April 27, 1998 Shimonseki Branch, Yamaguchi Prefectural Court, Japan," 5–8. At least one commentator noted that the Shimonseki Court's findings of fact would aid political lobbying for resolution of the issue. See Etsuro Totsuka, trans., "Commentary on a Victory for 'Comfort Women': Japan's Judicial Recognition of Military Sexual Slavery," *Pacific Rim Law & Policy Journal* 8, no. 1 (January 1999): 47–61.

[15] "Lawsuits Brought against Japan," Columbia Law School.

[16] Miki Ishikida, "Lawsuits," sec. 3-2-4 in "The Comfort Women," chap. 3 in *Toward Peace: War Responsibility, Postwar Compensation, and Peace Movements and Education in Japan* (Bloomington: iUniverse, Inc., 2005; Center for US-Japan Comparative Social Studies, 2005), http://www.usjp.org/towardpeace_en/tpComfort_en.html#mozTocId298479.

[17] *Agreement on the Settlement of Problems, United Nations Treaty Series*.

[18] Hwang Geum Joo v. Japan, No. 00CV02233 (D.D.C. Sept. 18, 2000).

[19] Hwang Geum Joo v. Japan, No. 00CV02233 (D.D.C. Sept. 18, 2000), and see Slip Op. at 23.

[20] Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005).

[21] Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005), 50.

[22] Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005), citing Louis Henkin, *Foreign Affairs and the Constitution* 300 (2nd edition 1996) for the proposition that "governments have dealt with . . . private claims as their own, treating them as national assets, and as counters, 'chips', in international bargaining. Settlement agreements have lumped, or linked, claims deriving from private debts with others that were intergovernmental in origin, and concessions in regard to one category of claims might be set off against concessions in the other, or against larger political considerations unrelated to debts."

[23] See denial of certiorari in Hwang Geum Joo v. Japan, 546 U.S. 1208 (2006). See also "The Comfort Women Case: Supporting the Claims of WWII-Era Victims of Sexual Violence," The Center for Justice & Accountability, <http://www.cja.org/article.php?id=328>.

[24] You v. Japan, 2015 U.S. Dist. LEXIS 167129 (N.D. Cal. Dec. 14, 2015). See also You v. Japan, 2016 U.S. Dist. LEXIS 80699 (N.D. Cal. June 21, 2016).

[25] United Nations, Economic and Social Council, *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*, E/CN.4/1996/53/Add.1 (January 4, 1996), <http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/1996/53/Add.1>. Commonly referred to as the *Coomaraswamy Report*.

[26] Notably, Ms. Coomaraswamy relied in part on the now-discredited confessions of Yoshida Seiji and the George Hicks book *Comfort Women: Sex Slaves of the Japanese Empire*, which also relied on Yoshida's confessions. See *Coomaraswamy Report* at 32–33, n. 1–11.

[27] Mindy Kotler, "The Comfort Women and Japan's War on the Truth," *New York Times*, November 14, 2014, <https://www.nytimes.com/2014/11/15/opinion/comfort-women-and-japans-war-on-truth.html?mcubz=1>.

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[28] See “Women’s International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery,” December 12, 2000, <http://home.att.ne.jp/star/tribunal/jedgement-e.html>.

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Thomas J. Ward serves as Dean of the University of Bridgeport’s College of Public and International Affairs. An honors graduate of the Sorbonne and a Phi Beta Kappa graduate of Notre Dame, he did his doctoral studies in Political Economy and International Education at the Catholic Institute of Paris and De La Salle University in the Philippines. He teaches graduate courses in International Conflict and Negotiation and Political and Economic Integration. A former Fulbright scholar, he has lectured at the Chinese Academy of Social Sciences in Beijing, and has been a Visiting Research Fellow at Academic Sinica in Taipei. His research on the comfort women issue has been published in *East Asia* and *Asia Pacific Journal: Japan Focus*.

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