

WOMEN WITHOUT A VOICE:  
*Japan's silencing of its "comfort women" and the redemptive  
future the Tokyo Women's Tribunal offers to the gendered and  
colonial history of international law*

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*The absence of women from the history of international law is glaringly obvious when examining women's ability to defend their fundamental human rights. This is especially the case when it comes to conflict-related sexual violence. The Jugun Ianfu, or "comfort women", system, which Japan implemented during World War II, is a prime example. It was a system of sexual slavery that degraded and humiliated women. The failure of the Allies' International Military Tribunal for the Far East (IMTFE) to provide justice for these women exemplifies the colonial and gendered nature of international law. Women, especially non-Western women, are not only excluded from the international arena, but are also made anonymous objects of the discipline. The creation of the Tokyo Women's Tribunal (TWT) was a step forward for the women in gaining some access to justice. However, since the TWT was a people's tribunal, it could not impose legal sanctions on Japan, only moral condemnation. In establishing itself as an extension of the IMTFE, there are clear legitimacy-based criticisms to be raised over the TWT's operational basis. This article argues that, despite these concerns, the TWT and other people's tribunals provide a means of reconstructing the history of international law and providing a less colonial and gendered composition of the discipline. The overall outcome is a more restorative vision of international law, in which people's justice can be achieved.*

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## I INTRODUCTION

World War II (1939–1945) was a period in which numerous populations, ethnic groups and individuals experienced untold terror and suffering at the hands of states. The Asia-Pacific War (1931–1945) occurred within this wider conflict and also involved heinous state crimes. In Europe, Nazi Germany sought to dominate, while in the Asia-Pacific, Japan was the colonial power in control of the region. For many historians and international lawyers, this period is one of the most traumatic to fill our history books, and continues, more than 70 years on, to occupy our collective conscience. However, it is the victims’ testimony and the stories of those who experienced this conflict that are the most powerful and important. Their stories open the door to the past and allow us to experience a truer understanding of conflict.<sup>1</sup>

The testimonies of Japan’s women, forced to serve as sex slaves within the Jugun Ianfu system, have been inaccessible until relatively recently. The Jugun Ianfu system involved the systematic taking of women as sex slaves, primarily from Asian countries such as Korea, to work in military-style camps known as ‘comfort stations’. Many women were deceived as to the nature of these camps, while others were taken by force. The term ‘ianfu’ is a euphemism for those women who were forced into these ‘sexual service’ stations.<sup>2</sup> During the war, many Japanese citizens were aware of these stations and the State had “ubiquitous knowledge” of their existence.<sup>3</sup> However, the idea that women worked as sex slaves is an interpretation of history that Japan has actively suppressed.<sup>4</sup> Instead, popular culture portrayed women as consenting sex workers of Japan’s Imperial State Army — a component of the wartime effort to liberate Japan from the colonial oppression of the West.

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1 In applying our own perspectives to the past, it is debatable whether one can gain a ‘true’ understanding of history. ‘Truer’ thereby recognises the limits of studying history, because while it may not be possible to gain a completely ‘true’ understanding of the past, it is certainly possible to gain a better understanding of that timeframe.

2 See Christine Lévy “The Women’s International War Crimes Tribunal, Tokyo 2000: A feminist response to revisionism?” (2014) 39 *Clio* 125 at 126.

3 Yoshiko Nozaki “The ‘Comfort Women’ Controversy: History and Testimony” (2005) 3(7) *The Asia-Pacific Journal* 1 at 2.

4 The Governor-General’s office initially denied the existence of the camps but now acknowledges them. See Etsuro Totsuka “Commentary on a Victory for ‘Comfort Women’: Japan’s Judicial Recognition of Military Sexual Slavery” (1999) 8(1) *Pac Rim L & Pol’y J* 47 at 49.

With the Allies' establishment of the International Military Tribunal for the Far East (IMTFE) to deliver justice in the aftermath of World War II and Japan's surrender, one would expect this censored history to emerge.<sup>5</sup> Instead, it was buried further, with Japanese officials escaping prosecution.

This history of non-accountability changed in 1991, when Korean woman Kim Hak-soon shared her experience.<sup>6</sup> Motivated by her testimony, historian Yoshiaki Yoshimi investigated and discovered archived material in the Self-Defence Agency proving Japanese military and government leaders had organised these sex camps.<sup>7</sup> With other women coming forward and increasing pressure from groups such as Violence Against Women in War-Network Japan (VAWW-NET Japan), this censored history could no longer be ignored. The Tokyo Women's Tribunal (TWT) was the result of their efforts. The TWT was a people's tribunal that asserted itself to be an extension of the IMTFE by acting "as if it were a reopening or a continuation' of the official IMTFE and its subsidiary trials".<sup>8</sup> The TWT therefore sought to draw its legitimacy from the IMTFE on the basis that it was undertaking the work the IMTFE ought to have done.<sup>9</sup>

The TWT's overarching focus was to hold the State and its officials accountable for the atrocities committed.<sup>10</sup> While it could not apply legal sanctions against Japan and its officials, because it was not a state-based tribunal, the TWT issued a judgment, which found the State, and its officials guilty of breaches of international law flowing from the sex camps.<sup>11</sup> The TWT thereby challenged the normative application of international law in which women, especially non-Western women, are excluded.

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5 The IMTFE (otherwise known as the Tokyo Tribunal) was convened on 29 April 1946. Its principal aim was to prosecute the military leaders involved in planning and executing war in the Asia-Pacific. It was largely influenced by the Nuremberg Tribunal. See Yuma Totani *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Asia Center, Cambridge (Mass), 2008) at 1 and 7.

6 Nozaki, above n 3, at 3.

7 At 3–4.

8 Karen Knop "The Tokyo Women's Tribunal and the turn to fiction" in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds) *Events: the Force of International Law* (Routledge, Abingdon, 2011) 145 at 146.

9 At 157–160.

10 See Lévy, above n 2, at 126–127.

11 In finding the State accountable, the TWT applied the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* [2001] vol 2, pt 2 YILC 31 [Draft Articles on State Responsibility]: *Prosecutors and People's of Asia-Pacific Region v Emperor Hirohito (Judgment)* Women's International War Crimes Tribunal For the Trial of Japan's Military Sexual Slavery PT-2000-1-T, 4 December 2001 [TWT Judgment] at 160–180, 182–253.

The significance of the TWT is heightened when one considers the situation in Japan today. Many revisionists assert that the Jugun Ianfu system was a justified component of Japan's "glorious history" and its reassertion against the West, especially the United States, which drew Japan into the War.<sup>12</sup> Many youth are also tired of apologising for this past.<sup>13</sup> Current Prime Minister, Shinzō Abe, has previously refused to acknowledge the non-consensual nature of the sex camps,<sup>14</sup> and has also rejected, earlier this year, new calls for an apology on the issue.<sup>15</sup>

Indeed, the Jugun Ianfu issue continues to be a contentious one. Although the Japanese government recognises the women's suffering, it does not acknowledge that the women were forcibly taken.<sup>16</sup> The official position remains — the women are still seen as prostitutes, and not as victims of Japan's system of sexual slavery.<sup>17</sup> This position is reflected in Japan's criticism of the government of the Philippines for authorising a memorial to the women in close proximity to the Japanese Embassy in Manila.<sup>18</sup> Additionally, Japan protested South Korea holding its first memorial in August of this year, known as "Memorial Day for Japanese Forces' Comfort Women Victims".<sup>19</sup> This is a significant step, on South Korea's part, in remembering the women, and continuing to hold Japan accountable for its atrocities.

Finally, South Korean President Moon Jae-in's recent condemnation of Japan's enslavement of the women, as a "crime against humanity," is significant.<sup>20</sup> These strong remarks highlight that the "long-standing disagreement between

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12 See, for example, the comments of Gen Tamogami referred to in "Japanese general claims Japan was not an aggressor in Second World War" *The Telegraph* (online ed, London, 31 October 2008).

13 Kristine Kwok "Enough of all this second world war apology talk, young Japanese say" *South China Morning Post* (online ed, Hong Kong, 28 August 2015).

14 Rupert Wingfield-Hayes "Japan revisionists deny WW2 sex slave atrocities" (3 August 2015) BBC News <www.bbc.com>.

15 Tomohiro Osaki "Abe rejects Seoul's new call for apology on 'comfort women' issue" *The Japan Times* (online ed, 12 January 2018).

16 Nicole Percy "In the #MeToo era, women used as sex slaves by Japanese in WWII are still seen as prostitutes, not victims" *CBC News* (online ed, 7 July 2018).

17 Percy, above n 16.

18 Percy, above n 16.

19 Rebecca Tan "Despite protests from Japan, South Korea holds first memorial day for 'comfort women' enslaved in World War II brothels" *The Washington Post* (online ed, 14 August 2018).

20 Sofia Persio "South Korea and Japan Clash Over 'Comfort Women' Forced Into Sexual Slavery During World War II" *Newsweek* (online ed, 1 March 2018).

the two countries"<sup>21</sup> is far from over. Indeed, problematic aspects of Japan's attitude towards the issue, and the women, arose in 2015 negotiations with Korea, its former colony. These negotiations were held in order to provide one billion yen in compensation to the Foundation for Reconciliation and Healing, and an apology to the victims.<sup>22</sup> The agreement, however, appears to be concerned with furthering state economic interests, in which Japan could benefit from "future-orientated cooperation" from South Korea.<sup>23</sup> At the time, Japan also called for South Korea to remove a bronze statue, situated before the Japanese diplomatic embassy in Seoul, which was established in memory of the women.<sup>24</sup> While that request was subsequently dropped, concerns remain that the deal is flawed, as it "excludes [the] victims and the public".<sup>25</sup> The greater concern is that Japan's true history of sexual and colonial oppression, along with the lived experiences of the women, could once again be buried.

With this context in mind, this article explores the significance of the TWT in countering the gendered and colonial assumptions of international law and providing a means of holding Japan accountable for its system of sexual slavery. I begin with a historical analysis of Japan's rise as a colonial power and the systematic implementation of its *Jugun Ianfu* scheme during the Asia-Pacific War. I also canvass the international response of state-based tribunals to this history of conflict-related sexual violence, including the relevant law that was applicable at the time of the IMTFE judgment (part II). The following section examines the women's call for accountability of the Japanese State, and implicated officials, along with an analysis of the TWT's formation (part III). In the final section I explore the significance of the TWT's judgment to international law (part IV).

The focus of this article is to explore whether the TWT, a people's tribunal, provides a redemptive future in which the survivors of conflict-related sexual violence can be heard. Through studying this history we may arrive at a better

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21 Persio, above n 20.

22 Benjamin Lee "South Korea-Japan Comfort Women Agreement: Where Do We Go From Here?" *The Diplomat* (online ed, Toyko, 6 September 2016).

23 Joyce Lee and Hyonhee Shin "South Korea says 'comfort women' deal flawed, but Japan warns against change" *Reuters* (online ed, Seoul, 28 December 2017).

24 Mike Firn "'Comfort women' statue threatens to derail Japan-South Korea accord" *The Telegraph* (online ed, London, 31 December 2015).

25 Lee and Shin, above n 23.

understanding of it,<sup>26</sup> and particularly, we reveal the inadequacies of international law in delivering justice to the victims of conflict-related sexual violence.

## II UNCENSORING HISTORY: JAPAN'S JUGUN IANFU SYSTEM & THE FAILED RESPONSE OF THE STATE-BASED INTERNATIONAL TRIBUNALS

This section sets out the history that led to Japan's establishment of the Jugun Ianfu system during the Asia-Pacific War. It also examines the problematic history of international law, in which state-based tribunals failed to prosecute, and hold Japan accountable for its system of sexual slavery perpetrated against the women.

### *A Establishment of the Jugun Ianfu System*

#### *1 Japan's Rise as an Imperial Power*

Japan's influence as an imperial power was evident throughout the Asia-Pacific War, which coincided with World War II, but was separate. This parallelism is evident in the antagonistic nature of Western and non-Western discourses in international law. Non-European countries have to both counter European power, and struggle to have their histories included within European-dominated international society. As Bull notes:<sup>27</sup>

A *society of states* (or international society) exists when a group of states, conscious of certain common interests and common values, form a society [whereby] ... they conceive themselves to be bound by a common set of rules and share in the working of common institutions.

Implicit in this common set of rules is the idea that associations would be between civilised Christian European states.<sup>28</sup> Japan therefore did not fit naturally within international society, even though it was initially a permanent member of the League of Nations.<sup>29</sup> Instead, its time in the League was characterised by inequality in power, where other member states, such as Great

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26 Paul Cohen *History in Three Keys: The Boxers as Event, Experience and Myth* (Columbia University Press, New York, 1997) at xi.

27 Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (2nd ed, Columbia University Press, New York, 1995) at 13.

28 At 15–16.

29 Marilyn Lake and Henry Reynolds *Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality* (Cambridge University Press, Cambridge, 2008) at 284.

Britain and France, had control of the League's agenda.<sup>30</sup> Japan's later invasion of Manchuria in 1931, and its Jugun Ianfu system, thereby exemplified its desire to become a power capable of challenging European hegemony and normative understandings of international society.<sup>31</sup>

## 2 *Japan's Long History of Conflict-Related Sexual Violence*

In 1910, only 21 years before Japan invaded Manchuria, Japan annexed Korea.<sup>32</sup> In 1938, the National Mobilization Law (NML) was enacted, which was essential to Japan's colonial rule because it gave Japan control of Korea's raw materials and labour.<sup>33</sup> It also allowed the forcible removal of Korean citizens to Japan, thereby facilitating the movement of Korean women into the Jugun Ianfu system.<sup>34</sup>

The NML was enacted after Japan's invasion of the Chinese city of Nanking. During the invasion in late 1937, Japan's Imperial Army murdered hundreds of thousands of people and committed approximately 20,000 rapes.<sup>35</sup> This example, and others, show that sexual violence against women was an accepted method of warfare. This remains true today. Rape has been used as a weapon of war in many modern conflicts such as those in Yugoslavia, Rwanda, Iraq and Syria.<sup>36</sup>

## 3 *The Jugun Ianfu System: A Continuing Issue of Consent and Buried Shame*

The Jugun Ianfu system is associated with the subjugation of Korean women. However, other Asian countries suffered from this colonial blight on their soil.

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30 At 284–285.

31 Susan Townsend "Japan's Quest for Empire 1931-1945" BBC (online ed, 30 March 2011); Youli Sun "China's International Approach to the Manchurian Crisis, 1931-1933" (1992) 26 *Journal of Asian History* 42 at 45.

32 Max Fisher "'Comfort women': Japan's 70-year sex slavery controversy, explained" (28 December 2015) Vox <[www.vox.com](http://www.vox.com)>.

33 John Benson and Takao Matsumura *Japan 1868-1945: From Isolation to Occupation* (Pearson Education Limited, Harlow (Essex), 2001) at 42.

34 Yvonne Hsu "'Comfort Women' From Korea: Japan's World War II Sex Slaves and the Legitimacy of Their Claims For Reparations" (1993) 2(1) *Pac Rim L & Pol'y J* 97 at 97–98.

35 Takashi Yoshida "A Battle over History: The Nanjing Massacre in Japan" in Joshua Fogel (ed) *The Nanking Massacre in History and Historiography* (University of California Press, Berkeley, 2000) 70 at 71.

36 Nicola Henry "Theorizing Wartime Rape: Deconstructing Gender, Sexuality and Violence" (2016) 30(1) *Gender & Society* 44 at 44.

The programme commenced in the early 1930s in Shanghai and became prolific after the Sino-Japanese War.<sup>37</sup> By 1942, it covered vast regions of the Asia-Pacific including the Philippines, Malaysia, Indonesia, Singapore, Hong Kong, Taiwan and the Dutch East Indies.<sup>38</sup> According to documents discovered in Japan and corroborating documents in United States and Australian archives, the purpose of the stations was to prevent Japanese soldiers from continuing to rape the civilian population.<sup>39</sup> More specifically, it is believed that the Jugun Ianfu system was created in response to the Nanking massacre, and the mass rapes committed there.<sup>40</sup> Indeed, Japan appeared to be concerned with how countries like the United States, Europe and China would respond to these previous instances of extensive rape.<sup>41</sup> The irony is that, in responding to these fears, Japan created a system that in itself constituted a continued episode of mass rape and sexual slavery.

Japan's initial reference to the women as "auxiliary nurses" reinforces this.<sup>42</sup> Such terminology suggests that the women worked voluntarily at the stations to further the war effort. However, many women were forced into sexual slavery through deceitful recruitment processes or were taken from their villages. Women from poor, rural areas believed they would work as hospital assistants or file clerks.<sup>43</sup> Instead, they were forced to work as sex slaves, often far from family and friends.<sup>44</sup> Further, they could not return home. Japan's labelling of the women as auxiliary nurses<sup>45</sup> disguised the true nature of the stations.

The later reference to these camps as comfort stations and to the women as comfort women suggested that these camps were consensual sex facilities. With as many as 80,000–200,000 Asian women and a number of European

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37 James Hoare and Susan Pares *A Political and Economic Dictionary of East Asia* (Routledge, London, 2005) at 79.

38 Karen Parker and Jennifer Chew "Compensation for Japan's World War II War-Rape Victims" (1993) 17 *Hastings Int'l & Comp L Rev* 497 at 503–504.

39 At 503.

40 At 503.

41 At 503.

42 Hoare and Pares, above n 37, at 79.

43 Parker and Chew, above n 38, at 505.

44 Chunghee Soh "From Imperial Gifts to Sex Slaves: Theorizing Symbolic Representations of the 'Comfort Women'" (2000) 3 *Social Science Japan Journal* 59 at 64.

45 Hoare and Pares, above n 37, at 79.



women forcibly taken to the facilities, these stations were obviously not consensual in nature.<sup>46</sup>

While Japan now acknowledges these camps existed, it denies that women were forcibly taken to them.<sup>47</sup> Its censorship of the issue means the victimisation of surviving women continues today. These denials are concerning because many women who survived the system returned to family and friends who both rejected and blamed them for their experiences.<sup>48</sup> Indeed, many surviving women buried the abuse they experienced.<sup>49</sup> Until Japan acknowledges the Jugun Ianfu system was a system of sexual slavery, complete justice will not be achieved.

## ***B The International Response of the State-Based Tribunals***

### *I The Establishment of the International Military Tribunal at Nuremberg*

In the aftermath of World War II, the Allies established the International Military Tribunal (IMT) at Nuremberg.<sup>50</sup> Its Charter was significant because arts 6(a) and 6(c) created two new crimes, respectively referred to as crimes against peace and crimes against humanity.<sup>51</sup> These crimes meant that high-ranking German officials could be held accountable for their wartime actions.<sup>52</sup> The broad definition of what constituted a crime against humanity meant that a state could be liable for crimes perpetrated against its own citizens and those in its occupied territories.<sup>53</sup> However, since the IMT Charter did not

46 Kelly Askin *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Kluwer Law International, The Hague, 1997) at 74. It is suggested the European women were taken to the sex stations as a means of reducing venereal disease amongst the Japanese soldiers. In contrast to their Asian counterparts, the Dutch comfort women were able to access some form of justice prior to the TWT proceedings. For instance, in 1948 the Batavia Military Tribunal carried out a war crimes trial, which prosecuted on the basis of sexual servitude. There were also other secret trials held four years after the defeat of the Japanese, which prosecuted those who had forced Dutch women into sexual slavery: at 86–87.

47 See Wingfield-Hayes, above n 14.

48 Fisher, above n 32.

49 Fisher, above n 32.

50 Totani, above n 5, at 1.

51 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal 82 UNTS 279 (8 August 1945) [IMT Charter].

52 Jocelyn Campanaro "Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes" (2001) 89 Geo LJ 2557 at 2561.

53 At 2561.

refer explicitly to rape or sexual assault, many gender-based crimes were not prosecuted despite evidence of these abuses.<sup>54</sup> This position is concerning because the broad language of art 6(b) (crimes against peace) and art 6(c) (crimes against humanity) meant that rape could have been prosecuted under these provisions.<sup>55</sup>

## 2 *The Creation of the International Military Tribunal for the Far East in Tokyo*

The failure to prosecute rape and other forms of conflict-related sexual violence was also evident in the prosecution of war crimes in Tokyo. The IMTFE was established on 19 January 1946, under an order of General Douglas MacArthur, the Supreme Commander of the Allied Powers,<sup>56</sup> as the Asia-Pacific counterpart to the IMT. With its Charter based upon the IMT Charter, the IMTFE had the jurisdiction to try crimes against peace and crimes against humanity, alongside traditional war crimes.<sup>57</sup> It therefore had the capacity to prosecute wartime rape and did successfully charge a number of Japanese officials, but only in accordance with other crimes such as inhumane treatment and failure to respect family honour and rights.<sup>58</sup> Prosecution of the mass rapes committed under the Jugun Ianfu system was excluded.

During the trials, 28 Japanese military and political leaders, including Prime Minister Hideki, were called upon to face charges.<sup>59</sup> Since they were “Class A” defendants, in that they had been involved in the planning and directing of the war, the focus was on charges for crimes against peace.<sup>60</sup> Notably, Emperor Hirohito was not tried for his involvement in the war. The United States wanted Japan to successfully demilitarise and transition to a democracy.<sup>61</sup> American interests therefore heavily influenced the IMTFE,

54 IMT Charter, above n 51.

55 IMT Charter, above n 51.

56 Charter of the International Military Tribunal for the Far East TIAS 1589 (19 January 1946) at 20–21 [IMTFE Charter].

57 Campanaro, above n 52, at 2563.

58 See Patricia Sellers “Rape Under International Law” in Belinda Cooper (ed) *War Crimes: The Legacy of Nuremberg* (TV Books, New York, 1999) 159 at 1590–162.

59 BVA Röling and Antonia Cassese *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Polity Press, Cambridge (Mass), 1993) at 3.

60 Kayoko Takeda *Interpreting the Tokyo War Crimes Tribunal: A Sociopolitical Analysis* (University of Ottawa Press, Ottawa, 2010) at 12.

61 Madoka Futamura *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg*

leading many Japanese nationalists to label the trial a form of victor's justice.<sup>62</sup> Indeed, with the Chief Prosecutor Joseph Keenan being an American, the IMTFE operated through the lens of American and/or Allied interests. While the IMTFE strove to deliver "stern justice",<sup>63</sup> the principal goal was to hold Japanese officials accountable for waging war in the Asia-Pacific.<sup>64</sup> Breaches of fundamental human rights upon civilians from non-European states were not a primary concern. The IMTFE's work thereby furthered the normative understanding that the prosecution of conflict-related sexual violence perpetrated against women was beyond the agenda of international law.

### 3 *The IMTFE Trial: A Colonial Platter of Continued Oppression and Unfulfilled Justice*

This failure to provide justice to the women is heightened upon an analysis of the IMTFE proceedings. The IMTFE trial was conducted from 29 April 1946 to 12 November 1948.<sup>65</sup> Its eleven panel members represented the eleven nations that comprised the prosecution team: Australia, Canada, China, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States.<sup>66</sup>

Taking together the transcripts of its open session, and in chambers, the IMTFE produced approximately 53,000 pages of written record,<sup>67</sup> with a judgment 1,781 pages in length. The record contains detailed evidence, presented by the Allies, of the establishment and enforcement of the stations.<sup>68</sup> Nevertheless, the crimes committed against the women were not prosecuted at the IMTFE.

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*legacy* (Routledge, Abingdon, 2008) at 56.

62 Totani, above n 5, at 2.

63 Harry Truman, Winston Churchill and Chiang Kai-Shek "Potsdam Declaration: Proclamation Defining Terms for Japanese Surrender" (26 July 1945) at [10].

64 Totani, above n 5, at 1.

65 University of Virginia School of Law "The International Military Tribunal For the Far East" (The International Military Tribunal For The Far East: Digital Collection) <[www.imtfe.law.virginia.edu](http://www.imtfe.law.virginia.edu)>.

66 R J Pritchard "The International Military Tribunal for the Far East and Its Contemporary Resonances" (1995) 149 *Mil L Rev* 25 at 27.

67 At 27.

68 Nicola Henry "Memory of an Injustice: The 'Comfort Women' and the Legacy of the Tokyo Trial" (2013) 37(3) *Asian Studies Review* 362 at 367–389.

This is strange considering that, under the 1907 Hague Convention IV<sup>69</sup> and the 1929 Geneva Convention,<sup>70</sup> charges were brought against defendants for rapes committed during the Nanking Invasion.<sup>71</sup> The United Nations War Crimes Commission had also “compiled a list of 32 violations of laws and customs that warranted criminal punishment at the Nuremberg and Tokyo Trials”, including rape and the “abduction of girls and women for the purpose of enforced prostitution”.<sup>72</sup>

It seems that several factors prevented sexual enslavement from being addressed — the fixation on the charge of aggressive war crimes committed against victor nations, and the belief that wartime rape and prostitution during armed conflict were unspeakable issues that were to be determined in the private sphere.<sup>73</sup> The heavy emphasis on particular race, gender and national identities<sup>74</sup> meant that the women, especially those of non-European descent, were denied a voice in the proceedings. Through focusing on Japan’s aggression against the United States, and other allied nations, Japan’s history of colonial oppression was effectively ignored.

#### 4 *The IMTFE Trial: Forgotten Crimes and Justice Pal’s Dissent*

The IMTFE had a slew of forgotten World War II crimes.<sup>75</sup> For instance, the IMTFE did not hold Japanese scientists accountable for biological experimentation,<sup>76</sup> or their torture and vivisection of civilians and prisoners of war.<sup>77</sup> Instead, the scientists were granted immunity on the basis that their research would be provided to American authorities.<sup>78</sup> The Allied powers also excluded both Korean and Taiwanese prosecutors from the prosecutorial

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69 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910).

70 Convention relative to the Treatment of Prisoners of War (signed 27 July 1929, entered into force 19 June 1931).

71 Henry, above n 68, at 367.

72 At 366.

73 At 368.

74 At 368.

75 At 367.

76 Tsuneishi Keiichi “Unit 731 and the Japanese Imperial Army’s Biological Warfare Program” (2005) 3(11) *The Asia-Pacific Journal* 1 at 8.

77 Henry, above n 68, at 362.

78 Keiichi, above n 76, at 8.

effort.<sup>79</sup> The decision was made on the basis that, these countries were not only victims of Japanese colonialism, but had also been victimizers, and had assisted Japan in its war-time aggression and associated atrocities.<sup>80</sup> Consequently, the exclusion of prosecutors from countries such as Korea and Taiwan likely contributed to the failure to pursue atrocities committed within the Jugun Ianfu system.<sup>81</sup>

Indeed, with all defendants bar two being found guilty of "conspiracy to wage aggressive war",<sup>82</sup> the IMTFE did not acknowledge the human rights violations experienced by the women. The Allies' later release of the same war criminals to govern Japan against communist threats highlighted their indifference to the women's plight.<sup>83</sup>

The IMTFE's inadequacies are reflected in its inability to reach a unanimous decision. The dissent of Justice Radhabinod Pal of India is significant. Due to the difficulties in defining "aggressive war" and the illegitimacy of the charges brought, his Honour thought all the accused should be acquitted, and said:<sup>84</sup>

I believe this is really an appeal to the political power of the victor nations with a pretense of legal justice. ...

... It has been said that a victor can dispense to the vanquished everything from mercy to vindictiveness; but the one thing the victor cannot give to the vanquished is justice. ...

The Allies' assertion of power upon the vanquished nations meant the trial was a "pretense [at] legal justice" conceived through a very narrow victor's lens.<sup>85</sup> Further, the inability of victims of state abuse to access justice and have their testimonies heard meant that:<sup>86</sup>

The tribunal essentially resolved the contradiction between the world of colonialism and imperialism and the righteous ideals of crimes against peace

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79 Totani, above n 5, at 13.

80 At 13.

81 At 14.

82 Röling and Cassese, above n 59, at 4.

83 See Futamura, above n 61, at 144–151.

84 Neil Boister and Robert Cryer *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford University Press, Oxford, 2008) at 1422–1424.

85 At 1422.

86 John Dower *Embracing Defeat: Japan in the Aftermath of World War II* (Penguin Books Ltd, London, 1999) at 470–471.

and humanity by ignoring it. Japan's aggression was presented as a criminal act without provocation, without parallel, and almost entirely without context.

The tribunal's ignorance of reality is displayed by the fact that it could have prosecuted gender-based crimes committed within the stations as constituting crimes against humanity.<sup>87</sup> Alternatively, prosecution on the basis of the connection between waging war and sexual enslavement was possible.<sup>88</sup> The judgment found that Japan had planned to "secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian oceans, and of all countries and islands therein or bordering thereon".<sup>89</sup> The institutionalisation of the stations was part of this process of wartime domination.<sup>90</sup>

The failure to prosecute meant justice was not delivered to the women of Japan's Jugun Ianfu system. Although Japan's signing of the San Francisco Peace Treaty on 8 September 1951 meant that it accepted responsibility for its wartime aggression, Japan has not been held legally accountable for its other wartime crimes, including the abuse perpetrated against the women.<sup>91</sup>

### 5 *Relevant Law at the Time of the IMTFE Judgment*

The protection of women from sexual violence occupies a precarious position within international humanitarian law.<sup>92</sup> International law has generally failed to prosecute gender-based crimes committed during wartime.<sup>93</sup> This is because such crimes are not considered part of the actual conflict, and are often outside the scope of inquiry.

By the start of World War II and the Asia-Pacific War, Japan had ratified the Hague Convention of 1907.<sup>94</sup> That convention provided that "[f]amily

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87 IMTFE Charter, above n 56, art 5(c).

88 Henry, above n 68, at 367.

89 At 367.

90 At 367–368.

91 Treaty of Peace with Japan (with two declarations) 136 UNTS 46 (signed 8 September 1951, entered into force 28 April 1952) [the San Francisco Peace Treaty], art 11, which required Japan to accept the judgment of the IMTFE and "other Allied War Crimes Courts".

92 See generally Kelly Askin "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21(t) Berkeley J Int L 288.

93 Sellers, above n 58, at 160–161; while the Lieber Instructions of 1863 prohibited Union soldiers from committing rape during the Civil War, the 1929 Geneva Convention provides less explicit protection.

94 Laws and Customs of War on Land (Hague IV) 36 Stat 2277, TIAS 539 (opened for signature 18 October 1907, entered into force 26 January 1910) [1907 Hague Convention].

honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected".<sup>95</sup> While this provision does not refer to rape, torture or prostitution, a woman's right to be free from such abuse is caught under the phrase "[f]amily honour and rights".<sup>96</sup> Preservation of a woman's bodily integrity therefore relies on patriarchal understandings of 'family honour'.<sup>97</sup> The 1907 Hague Convention, along with the 1899 Hague Convention, formed the code on the laws of war.<sup>98</sup> The Martens Clause of the 1907 Convention protects fundamental human rights:<sup>99</sup>

Until a more complete code of the laws of war is issued, the High Contracting Parties ... declare that, in cases not included in the Regulations adopted by them, the inhabitants and ... belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Following World War I, the Commission on the Responsibility of the Authors of War and the Enforcement of Penalties, of which Japan was a member, recognised rape and enforced prostitution as prosecutable war crimes.<sup>100</sup> However, the Commission's list was not codified in the Treaty of Versailles<sup>101</sup> as constituting crimes against humanity.<sup>102</sup> This position is problematic for women from Japan's colonies. As a matter of law Japan could not commit war crimes against these women because a 'war crime' was defined as being directed against persons from other states.<sup>103</sup>

However, customary international law, general principles of international law, and the concept of crimes against humanity, as articulated in art 5(c) of the

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95 Article 46.

96 Article 46.

97 Article 46.

98 Convention With Respect To The Laws And Customs Of War On Land (Hague II) 32 Stat 1803 (opened for signature 29 July 1899, entered into force 4 September 1900).

99 1907 Hague Convention, above n 94, Martens Clause.

100 "Commission on the Responsibilities of the Authors of War and the Enforcement of Penalties" (1920) 14(i) AJIL 95 at 114.

101 Treaty of Peace with Germany 225 CTS 188 (signed 28 June 1919, entered into force 10 January 1920).

102 Hsu, above n 34, at 108–109. However, the UN War Crimes Commission adopted the Commission's list.

103 Tina Dolgopol "The Judgment of the Tokyo Women's Tribunal" (2003) 28(5) Alt LJ 242 at 243.

IMTFE Charter, demanded protection of and vindication for the women.<sup>104</sup> Crimes against humanity are “widespread” or “systematic” acts of the state perpetrated in connection with other war crimes or crimes against peace, “against a civilian population” or stateless persons before or during war.<sup>105</sup> The mass rape of the women, including those from Japan’s colonies, meets these requirements. Had the IMTFE prosecuted on this basis, it would have furthered the understanding that wartime rape falls within “the laws of humanity” and is a *jus cogens* or *erga omnes* norm.<sup>106</sup> While the women were civilian internees, it would have reinforced art 3 of the 1929 Geneva Convention, which provides women “all the regard due to their sex”.<sup>107</sup>

Similarly, the IMTFE could have recognised sexual slavery as a crime against humanity. While slavery was prohibited before World War II, the closest concept to sexual slavery was “enforced prostitution”.<sup>108</sup> Further, a number of international instruments, including the 1815 Declaration Relative to the Universal Abolition of the Slave Trade,<sup>109</sup> the Treaty of London,<sup>110</sup> the General Act of Berlin of 1885,<sup>111</sup> the General Act of Brussels,<sup>112</sup> and the 1926 Slavery Convention,<sup>113</sup> condemned slavery practices.<sup>114</sup> Japan has not ratified the 1926 Slavery Convention, which is universally relied upon as providing the definition of slavery,<sup>115</sup> and which is further refined in the 1956 Supplementary Convention.<sup>116</sup> However, it had ratified the International

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104 IMTFE Charter, above n 56. Article 5(c) captures “other inhumane acts committed against any civilian population, before or during the war”.

105 Dolgopol, above n 103, at 243.

106 1907 Hague Convention, above n 94, Martens Clause.

107 Convention Relative to the Treatment of Prisoners of War 47 Stat 2021 (signed 27 July 1929, entered into force 19 June 1931) [1929 Geneva Convention].

108 “Commission on the Responsibilities of the Authors of War”, above n 100, at 114.

109 Declaration Relative to the Universal Abolition of the Slave Trade 63 CTS 473 (signed 8 February 1815).

110 Treaty for the Suppression of the African Slave Trade 92 CTS 437 (signed 20 December 1841).

111 General Act of the Conference of Berlin Concerning the Congo 10 Martens Nouveau Recueil (series 2) 414 (signed 26 February 1885).

112 Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, Spirituous Liquor 27 Stat 886 (signed 2 July 1890, entered into force 31 August 1891).

113 Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 60 LNTS 253 (signed 25 September 1926, entered into force 9 March 1927) [1926 Slavery Convention].

114 Parker and Chew, above n 38, at 517.

115 1926 Slavery Convention, above n 113.

116 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 266 UNTS 40 (signed 7 September 1956, entered into force 30 April 1957).



Labour Organization Convention (No 29) Concerning Forced Labour.<sup>117</sup> It was also a signatory to the 1904 International Agreement for the Suppression of the White Slave Traffic,<sup>118</sup> the 1910 International Convention for the Suppression of White Slave Traffic,<sup>119</sup> and the 1921 International Convention for the Suppression of the Traffic in Women and Children, which prohibited the trafficking of women.<sup>120</sup> The latter two treaties had carve-outs that allowed countries to exclude their colonies from their scope.<sup>121</sup> Under art 14 of the 1921 treaty, Japan announced that the Convention did not apply to its colonial territories.<sup>122</sup> However, the IMTFE could have condemned the operation of Japan's *Jugun Ianfu* system within its colonial territories, and other territories, on the basis that Japan had international obligations to prevent such abuse from occurring, or because crimes against humanity had been committed. Had the IMTFE taken this approach, the women could have accessed a non-colonial and non-patriarchal form of justice. Its failure to do so, or to even prosecute the crimes, meant these injustices were left unaddressed.

### III THE WOMEN'S RESPONSE: A COLLECTIVE CALL FOR ACCOUNTABILITY

The failure of international state-based tribunals to properly hold Japan, and its officials accountable, compounded the suffering that the women had experienced in Japan's *Jugun Ianfu* system. This section details the women's response to this history, and their demand for the Japanese State, and implicated officials to be held accountable. Indeed, through sharing their lived accounts, the women began to garner the impetus to challenge Japan's position in denying its history of conflict-related sexual violence. The call for

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117 International Labour Organization Convention Concerning Forced or Compulsory Labour (No 29) 39 UNTS 55 (adopted 28 June 1930, entered into force for Japan 1 May 1932) [1930 ILO Convention].

118 International Convention for the Suppression of the "White Slave Traffic" 1 LNTS 83 (signed 18 March 1904, entered into force 18 July 1905).

119 International Convention for the Suppression of White Slave Traffic 3 LNTS 278 (adopted 4 May 1910, entered into force 5 July 1920).

120 International Convention for the Suppression of the Traffic in Women and Children 9 LNTS 416 (opened for signature 30 September 1921, entered into force for Japan 15 December 1925).

121 Sue Lee "Comforting the Comfort Women: Who Can Make Japan Pay?" (2003) 24(2) *U Pa J Int'l Econ L* 509 at 526.

122 At 526.

accountability was most evident in the creation of the TWT, a people's-based tribunal, which provided a forum for the expression of the women's lived experiences.

### *A The Quest for Justice and Acknowledgment of the Truth*

The 1990s was a turning point for the women. With the democratisation of the Republic of Korea in 1987 and the discovery of archived material linking Japan to the stations, the issue gained traction.<sup>123</sup> In 1991, one of the women, Kim Hak-soon, issued proceedings against Japan, which came to be known as the Asia-Pacific War Korean Victims Compensation Claim Case.<sup>124</sup> Her testimony inspired other women to come forward. Their aim was "to restore collective memory and compel the rewriting of history",<sup>125</sup> through seeking compensation and an apology from Japan. They hoped to bring Japan's crimes to light and dispel the idea that the women were consenting participants in the Jugun Ianfu system. Organisations such as the Korean Council for Women drafted into Military Sexual Slavery, Asia Centre for Women's Human Rights (ASCENT-Philippines) and VAWW-NET Japan pushed for this history to be known.<sup>126</sup>

A year after VAWW-NET Japan was created, following the International Conference on Violence Against Women in War and Armed Conflict Situations, the group proposed the creation of the TWT.<sup>127</sup> The proposal, made at the 1998 Asian Women's Solidarity Conference, held in Seoul, was accepted.<sup>128</sup> Preparatory conferences were held in Tokyo and Seoul in December 1998 and February 1999.<sup>129</sup> At these conferences, the TWT's International Organizing Committee was formed.<sup>130</sup> It was comprised of three groups: organisations representing the victimised countries, VAWW-NET Japan representing the

123 Nozaki, above n 3, at 2–4.

124 George Hicks "The Comfort Women Redress Movement" in Roy Brooks (ed) *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* (New York University Press, New York, 1999) 113 at 117–119. Other comfort women joined the original case bringing a total of thirty reparation cases against Japan.

125 Dolgopol, above n 103, at 244–245.

126 At 243.

127 Christine Chinkin "Women's International Tribunal on Japanese Military Sexual Slavery" (2001) 95(2) *AJIL* 335 at 336.

128 At 336.

129 At 336.

130 At 336.

offending country, and the International Advisory Committee, which was comprised of members from Africa, Asia, Australia, Europe, and North and South America.<sup>131</sup> These groups were led by female representatives, reflecting that this movement for justice was an example of the women's collective solidarity.<sup>132</sup> Indeed, the justice sought was one that would uphold the truth — the validity of the women's lived experiences, and recognition of Japan's history of colonial oppression.

### ***B Reparation: A Right Denied to Japan's Comfort Women***

The *Chorzow Factory* decision confirmed that a state that breaches international law must make reparation.<sup>133</sup> Post-World War II, human rights instruments such as the Universal Declaration of Human Rights (UDHR)<sup>134</sup> and the International Covenant on Civil and Political Rights reflected this position.<sup>135</sup> However, despite growing recognition internationally in the 1990s of the abuses faced by the women, Japan failed to respond adequately. On 6 July 1992, Chief Cabinet Secretary Koichi Kato issued the following apology:<sup>136</sup>

The Government again would like to express its sincere apology and remorse to all those who have suffered indescribable hardship as so-called 'wartime comfort women', irrespective of their nationality or place of birth.

The apology is questionable. Indeed, it does not dispel the idea that the women were non-consenting participants in the Jugun Ianfu system, and ultimately adheres to Japan's traditional version of its history.<sup>137</sup> Kato was also vague on the point of forcible recruitment, only mentioning that Tokyo "had been involved in ... the control of those who recruited comfort women", showing

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131 At 336.

132 At 336. Yun Chung-Ok represented the victimised countries, while Yayori Matsui represented VAWW-NET Japan. Indai Lourdes (Asia Centre for Women's Human Rights) was the representative for the International Advisory Committee.

133 *Case Concerning the Factory At Chorzów (Germany v Poland) (Jurisdiction)* (1928) PCIJ (series A) No 17.

134 *Universal Declaration of Human Rights* GA Res 217AA/RES/3/217A (1948) [UDHR].

135 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

136 Ministry of Foreign Affairs of Japan "Statement by Chief Cabinet Secretary Koichi Kato on the Issue of the so-called 'Wartime Comfort Women' from the Korean Peninsula" (press release, 6 July 1992).

137 Alexis Dudden "'We Came to Tell the Truth': Reflections On The Tokyo Women's Tribunal" (2001) 33(4) *Critical Asian Studies* 591 at 593.

a continued reluctance by Japan to accept legal responsibility for its system of sexual slavery.<sup>138</sup> Furthermore, no compensation was offered alongside the apology.<sup>139</sup>

In a statement issued on 4 August 1993, the Government recognised that the women were forced “generally against their will” into the stations.<sup>140</sup> While the Japanese Government recognised its military authorities were involved in this recruitment process, they deflected responsibility by saying that recruitment “was conducted mainly by private recruiters who acted in response to the request of the military”.<sup>141</sup> However, following this government statement, an official apology was also released, in which Japan appeared more willing to address its past:<sup>142</sup>

Through ... extensive investigation, it [is] ... clear ... many women's honor and dignity were severely injured, and that this was done by an act with the involvement of the military authorities of the day.

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

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

Despite this, Japan later denied compensation to the women on the basis that the San Francisco Peace Treaty,<sup>143</sup> along with bilateral treaties with countries such as South Korea and the Netherlands, had fully and finally resolved

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138 Jennifer Lind *Sorry States: Apologies in International Politics* (Cornell University Press, New York, 2008) at 65.

139 At 65.

140 Ministry of Foreign Affairs of Japan “Statement by the Chief Cabinet Secretary Yohei Kono on the result of the study on the issue of ‘comfort women’” (press release, 4 August 1993) [the Kono statement].

141 The Kono statement.

142 *Sub-Commission on Prevention of Discrimination: Statement of Japan (Right of Reply)* E/CN.4/Sub.2/SR.23 (1993) as cited in Parker and Chew, above n 38, at 536.

143 San Francisco Peace Treaty, above n 91.

the issue.<sup>144</sup> Kim Hak-soon and other surviving women had also generally failed in their claims before the Japanese courts.<sup>145</sup> Therefore, Japan was only willing to go so far in acknowledging its past.<sup>146</sup> The Japanese Parliament's ambivalent response to a campaign by Japanese lawyers and non-governmental organisations for war compensation further exemplified this position.<sup>147</sup> While the Asian Women's Fund, established in 1995, accepted moral responsibility for the situation, it was privately funded, with no support from the State.<sup>148</sup> In failing to provide funding, Japan was again denying responsibility, and, more than forty years after the IMTFE's judgment, "forever engraving"<sup>149</sup> its approach of ignoring the past.<sup>150</sup>

### C *The Tokyo Women's Tribunal*

The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, otherwise known as the TWT, was a people's tribunal that convened from 8–12 December 2000. It was modelled on people's tribunals including the Vietnam War Crimes Tribunal and the Italian Permanent Peoples' Tribunal.<sup>151</sup>

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144 Chinkin, above n 127, at 335.

145 Most of the lawsuits brought by comfort women were dismissed on the basis that customary international law prevents an individual from claiming compensation from the State. Other reasons were: a claim could not be brought outside the statutory limitation period, and Japanese law at the end of World War II did not allow for compensation on an approach of no state liability. See Yayori Matsui "Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: Memory, Identity, and Society" (2001) 19(4) *East Asia* 119 at 129.

146 In April of 1998 the Shimonoseki component of the Yamaguchi Prefectural Court found the Japanese Government in breach of the State Liability Act because it had failed to enact legislation to compensate the comfort women. See Totsuka, above n 4, at 47–48.

147 Matsui, above n 145, at 129.

148 At 130.

149 *Statement of Japan*, above n 142.

150 Japan's failure to provide reparation contrasts Germany's efforts to address its past. Following the Nuremberg trials, Germany implemented a number of programs to acknowledge suffering inflicted on persons by the Third Reich. The Federal Indemnification Law (BEG) was passed, which provided compensation for victims of wartime abuse. Under the BEG and other compensation schemes, the Federal Republic of Germany had paid in 2012, \$89 billion in compensation to the Israeli State and victims of World War II. See David Rising "Germany increases reparations for Holocaust survivors" *The Times of Israel* (online ed, 16 November 2012) and Melissa Eddy "For 60th Year, Germany Honors Duty to Pay Holocaust Victims" *The New York Times* (online ed, 17 November 2012).

151 *Prosecutors and People's of Asia-Pacific Region v Emperor Hirohito (Judgment)* Women's International War Crimes Tribunal For the Trial of Japan's Military Sexual Slavery PT-2000-1-T, 4 December 2001 at [63]–[64] [TWT Judgment].

Its Summary of Findings was issued on 12 December 2000,<sup>152</sup> while its full judgment was delivered at The Hague on 4 December 2001.<sup>153</sup>

*I The TWT's Creation and its Overarching Focus on Truth-Finding*

The successful proposal to establish the TWT, made at the Asian Women's Solidarity Conference in April 1998, is significant because it was part of, and reflected the growing role of, the global women's movement in ending state impunity.<sup>154</sup> Indeed, the TWT's International Organizing Committee, led by female representatives, was tasked with preparing a charter that would provide for individual criminal responsibility as well as state responsibility for the crimes of military sexual slavery and rape.<sup>155</sup> These crimes were considered to be war crimes and crimes against humanity.<sup>156</sup>

Leading up to the trial, groups were formed in participating countries to develop the TWT's legal framework.<sup>157</sup> Researchers focused on obtaining documentary evidence of the specific actions Japanese military and government officials had taken in establishing and running the stations,<sup>158</sup> whereas the three core organisational groups (The Korean Council for Women Drafted into Military Sexual Slavery, ASCENT-Philippines, and VAW-NET Japan) made contact with individuals and groups in the region. Their aim was to ensure that representatives from each country where the women were affected would participate in its proceedings.<sup>159</sup>

During these preparations, it became evident that the women wanted a component of the TWT's proceedings to be focused on the criminal responsibility of the Japanese government and its military officials.<sup>160</sup> Indeed, none of the officials had been prosecuted for the crimes committed against

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152 *Prosecutors and People's of Asia-Pacific Region v Emperor Hirohito (Summary of Findings)* Women's International War Crimes Tribunal for the Trial of Japanese Military Sexual Slavery, 12 December 2000 [TWT Summary of Findings].

153 TWT Judgment, above n 151.

154 Matsui, above n 145, at 133–135.

155 At 120.

156 At 120.

157 Dolgopol, above n 103, at 243.

158 At 243.

159 At 243.

160 At 243.

the women.<sup>161</sup> However, even if found guilty, the deceased defendants could not be punished. The focus thereby turned on a public finding of criminal responsibility and documenting the truth.<sup>162</sup>

## 2 *The TWT's Legal Approach — The Prosecution's Indictment and its Rationale*

Chief Prosecutors Patricia Viseurs-Sellers and Ustinia Dolgopol charged high-ranking Japanese officials, along with Emperor Hirohito, for rape and sexual slavery as crimes against humanity.<sup>163</sup> An application for restitution and reparations was made on the basis that the Japanese State had incurred ongoing state responsibility.<sup>164</sup> The rationale for this combined claim came from the procedures of the International Criminal Court (ICC), which allowed victims of war crimes and crimes against humanity to bring a reparation claim.<sup>165</sup>

Concerning the criminal indictment, the focus was on crimes against humanity due to the pre-war status of Korea and Taiwan as colonies of Japan.<sup>166</sup> The prosecution also framed charges on the basis that the TWT was an extension of the IMTFE. This approach meant "the law applicable to the criminal aspects of the Tribunal would be that as applied or that which could have been applied if the Comfort System had been adjudicated by the IMTFE".<sup>167</sup> This position seemingly protected the TWT's decision from attack because it had applied and developed modern concepts of international law that were not available at the time of the IMTFE proceedings. It thereby allowed the TWT to analyse the principles of law that Japan had accepted when it signed the San Francisco Treaty.<sup>168</sup>

Regarding the reparation claim, it also meant that the prosecutors could argue that Japan was in breach of its obligations under international treaty and customary law during the war, while highlighting its ongoing violations

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161 Dolgopol, above n 103, at 243.

162 At 243.

163 Knop, above 8, at 151.

164 At 150.

165 Dolgopol, above n 103, at 243.

166 At 243.

167 At 243.

168 At 243.

in failing to provide reparation to the women.<sup>169</sup> The Judges also used the opportunity to develop international law, particularly the Draft Articles on State Responsibility.<sup>170</sup>

### 3 *The TWT's Proceedings and Japan's Amicus Curiae*

The TWT's proceedings took place in Tokyo from 8–10 December 2000. Approximately 1,500 people attended,<sup>171</sup> including 64 of the women who were victims, a number of whom gave evidence.<sup>172</sup> While witnesses could take the stand, they could also present evidence via pre-recorded video statements.<sup>173</sup> Those who chose this option were present at the trial and affirmed the statements made.<sup>174</sup>

During the proceedings, the women detailed the ongoing physical and psychological effects attributable to the time spent in the stations.<sup>175</sup> This collective sharing extended to women from modern-day conflicts, who detailed their stories during the trial's recesses.

While the Japanese Government was invited to participate, no response was given.<sup>176</sup> The TWT therefore appointed a Japanese lawyer acting as amicus curiae, in order to present the legal arguments Japan could have raised. The arguments included that the trial violated due process as “it put the deceased on trial”, with the individual perpetrators to be indicted by name.<sup>177</sup> Furthermore, criminal state responsibility was to apply, and the proceedings sought to indict Emperor Hirohito.<sup>178</sup> Finally, in terms of the Japanese Government's position regarding post-war reparation, the statutory limitations acted as a bar; individuals had no right to sue the State and the peace treaties had concluded the reparation issue.<sup>179</sup>

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169 Dolgopol, above n 103, at 243.

170 At 243.

171 At 243.

172 Knop, above n 8, at 150.

173 See Dolgopol, above n 103, at 243; and Matsui, above n 145, at 120 and 123.

174 Dolgopol, above n 103, at 243.

175 At 244–245.

176 At 243.

177 Matsui, above n 145, at 124–125.

178 At 125.

179 At 125.



#### 4 *The Tribunal's Reasoning — its Factual Findings and Judgment*

The TWT considered the issue of continuing harm under six categories: enduring health damage and physical suffering; reproductive harm; ongoing psychological harm; impediments to intimate relationships and social/community life; silence; and poverty and social/economic hardship.<sup>180</sup> The TWT thereby reinforced that the hardship experienced did not end with the women's liberation from the stations. Instead, for many, it continued in the form of drinking problems, nervous breakdowns and the inability to enjoy marital sex.

Regarding the criminal charges brought against Emperor Hirohito and Japanese officials, the TWT found the defendants guilty of rape and sexual slavery as crimes against humanity.<sup>181</sup> The Judges ruled that, as the Supreme Commander of the Army and Navy, Emperor Hirohito had "the responsibility and power to ensure that his subordinates obeyed international law and stopped engaging in sexual violence".<sup>182</sup>

Japan also incurred state responsibility for the harm experienced by the women, on the basis it had established and maintained the comfort system,<sup>183</sup> and on the basis that the "omissions of the state of Japan [...] constitute continuing violations and obligations flowing from the original wrongful acts".<sup>184</sup> The State was therefore required to provide remedial measures, including a full apology and compensation.<sup>185</sup>

The judgment was met with rapturous applause.<sup>186</sup> In tears, the women expressed their gratitude to the Judges, who were also overcome with emotion.<sup>187</sup> While the prosecutors embraced, the standing ovation continued for several minutes.<sup>188</sup> This response indicates that the women felt their quest for justice had been answered.

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180 Dolgopol, above n 103, at 244–245.

181 Knop, above n 8, at 151.

182 Matsui, above n 145, at 126.

183 Knop, above n 8, at 151.

184 TWT Judgment, above n 151, at [940]–[941].

185 At [1066]–[1068], and [1076]–[1079].

186 Matsui, above n 145, at 126.

187 At 126.

188 At 126.

5 *Important Features — Prioritising Women’s Voices and Redefining History*

The TWT’s most important feature was that it prioritised the voices of the women. The TWT was formed to allow their collective voice to be heard and to address the failures of the IMTFE in providing justice:<sup>189</sup>

[T]hese failures must not be allowed to silence the voice of survivors, nor obscure accountability for such crimes against humanity. [This tribunal] was established to redress the historic tendency to trivialize, excuse, marginalize and obfuscate crimes against women, particularly sexual crimes, and even more so when they are committed against non-white women.

Prioritising the voice of the survivors gave the women agency in condemning Japan for its wrongdoing and moored their otherwise anonymous experiences. The TWT’s goal of bringing to life “the voice of the survivors”<sup>190</sup> was bolstered by the women being heard in other public fora, including the 1993 World Conference on Human Rights held in Vienna.<sup>191</sup>

A related feature of the TWT was its focus on redefining history, as evidenced in the Summary of Findings:<sup>192</sup>

In the early 1990s, Asian women began to break almost five decades of painful silence to demand apology and compensation for the atrocities they and others suffered under Japanese military sexual slavery during the War in the 1930s and 1940s in the Asia Pacific region. The courageous revelations of the victimized survivors, euphemistically called “comfort women”, inspired hundreds more survivors, throughout the Asia Pacific region, to speak out. Together, they have awakened the world to the horror of the Japanese military’s institutionalization of rape, sexual slavery, trafficking, torture and other forms of sexual violence inflicted upon an estimated minimum of 200,000 girls and women. Robbed of their youth and their future, they were conscripted and trafficked through force, coercion, and deception and confined to “comfort stations” or, more accurately, sexual slavery facilities, where Japanese troops were situated, including on the front lines.

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189 TWT Summary of Findings, above n 152, at [5].

190 At [5].

191 Matsui, above n 145, at 133.

192 TWT Summary of Findings, above n 152, at [1].

This introductory paragraph highlights that the women, their experiences, and their stories were to be at the front line in bringing the truth of Japan's history of sexual violence to light.<sup>193</sup> The title "breaking the history of silence" foreshadows a judgment that will focus on the international realm's traditional mind set of silence towards conflict-related sexual violence.<sup>194</sup> This break from the past is seen in the following paragraph of the Summary of Findings, which asks the reader to "listen to the voices of these ... survivors":<sup>195</sup>

I don't want to die as the ghost of a virgin.

— Mun Pil-gi, Korea

We want Japan to ask for forgiveness.

— Yuan Zhulin, China

We want justice. We want the Japanese government to take responsibility ...  
We didn't come here to see Japan. We came here to tell the truth.

— Esmeralda Boe, East Timor

The invitation to listen is compelling because the reader is invited to engage with the women, challenge her own understandings of the past, and thereby listen to, in Esmeralda's words, "the truth".<sup>196</sup>

Indeed, the TWT provided the forum for women who were victims of other conflicts to share their stories.<sup>197</sup> It was therefore a true people's tribunal. In finding Japan accountable for the comfort women system, and in emphasising the need for a "meaningful apology", the TWT had, for the first time, provided the women with a dignified response.<sup>198</sup> It therefore offered real justice, and signalled a new direction for international law. In listening to the women's lived experiences, the TWT emphasised that, where a state breaches fundamental human rights, it must be held accountable.

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193 TWT Summary of Findings, above n 152, at [1].

194 At [1].

195 At [1]–[2].

196 At [2].

197 "Public Hearing on Crimes against Women in Recent Wars and Conflicts" (11 December 2000) <[www.iccwomen.org](http://www.iccwomen.org)>.

198 TWT Judgment, above n 151, at [1066]–[1068].

## IV THE VALUE OF THE TWT JUDGMENT: ADVANCING THE POSITION OF WOMEN IN INTERNATIONAL LAW

While the TWT allowed for the voice of the women to be heard, it acted on the fictional basis that it was an extension of the IMTFE. There is thereby a related concern, which is that this could create a distorted understanding of how international law should operate and uphold the rights of women subject to conflict-related sexual violence.<sup>199</sup> This section argues that the TWT was able to overcome these concerns and advance the position of women in international law.

### *A TWT Judgment: A Valid Mix of Fact and Fiction*

The invitation to “[l]isten to the voices” of the surviving women is powerful because it asks us to reconstruct our understandings of the past.<sup>200</sup> Through listening to their stories, we are confronted with the reality of how this system of sexual slavery took place, and that the IMTFE and international law failed to provide justice to these women. In listening, we better see how our understandings of the past are formed according to the dominant narrative.<sup>201</sup> The TWT’s judgment thus challenges how history has been written, and how international law has since progressed.<sup>202</sup>

In allowing the women to be heard, the TWT holds the discipline of international law accountable by questioning why it has ignored them, and the plight of women in general. This is particularly important because, while the prosecution of conflict-related sexual violence is on the rise, many women in modern-day conflicts still experience rape and other forms of gender-based violence. Further, although UN Security Resolution 1325 reaffirms the role of women in preventing and resolving conflicts,<sup>203</sup> and calls for states to prosecute conflict-related sexual violence,<sup>204</sup> many women and children are exploited, sometimes by those appointed to protect them.<sup>205</sup> As Major General Patrick

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199 Knop, above n 8.

200 TWT Summary of Findings, above n 152, at [2].

201 Cohen, above n 26, at xi-xii.

202 See TWT Summary of Findings, above n 152, at [2].

203 “Landmark resolution on Women, Peace and Security” Office of the Special Adviser on Gender Issues and Advancement of Women <[www.un.org](http://www.un.org)>.

204 *On Women and Peace and Security* SC Res 1325, S/Res/1325 (adopted 31 October 2000) at [11].

205 Instances of recent abuse include United Nations peacekeepers having sexually abused women and

Cammaert notes in respect of conflict in the Democratic Republic of Congo, it "is more dangerous to be a woman than to be a soldier right now [in armed conflict]".<sup>206</sup>

Consequently, while the TWT highlights that women's voices must be heard, its return to the past appears to engage in a form of mythmaking, which mixes, elements of fact and fiction. Indeed, the TWT establishes itself as an extension of the IMTFE, capable of reversing the failings of both the IMTFE and international law itself. Further, in attempting to hold deceased State officials accountable for their crimes,<sup>207</sup> the idea that the TWT is a "fiction" has weight.<sup>208</sup> While Japanese State officials should be held responsible for the crimes committed, it is a fiction to assert that the deceased officials have actually been held accountable.<sup>209</sup> In mixing fact with fiction, the TWT's analysis of the past is one that engages in "what is sometimes called 'fact-ion'",<sup>210</sup> an important process for re-educating the Japanese people about Japan's history.

Further, in associating itself with the legitimacy of the IMTFE, an official state-based tribunal, in order to overcome limitation issues, the TWT prosecuted the accused on the basis of what the IMTFE could, and should, have done.<sup>211</sup> The TWT effectively creates "an imaginary past in which the IMTFE tried the case".<sup>212</sup> Its judgment also creates a legal prequel, where later developments associated with rape and sexual slavery are no longer radical shifts in international jurisprudence, but rather developments stemming from the judgment of the IMTFE, which should have characterised the law

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minors in Haiti. It is also alleged French peacekeepers were involved in the sexual abuse of African children in the Central African Republic from December 2013 to mid-2014. An independent UN Panel was announced to investigate these allegations further. See Aftab Ali "UN peacekeepers sexually abuse hundreds of women and minors in Haiti in exchange for food and medicine, new report will reveal" *Independent* (online ed, London, 10 June 2015) and Rick Gladstone "U.N. Creating Panel to Review Handling of African Children Sex Abuse Inquiry" *The New York Times* (online ed, 3 June 2015).

206 United Nations Development Fund for Women *Women Targeted or Afflicted by Armed Conflict: What Role for Military Peacekeepers?* (Report on Wilton Park Conference WP914, Sussex, May 2008) at 1.

207 See generally Knop, above n 8.

208 At 149. Knop uses the term 'fact-ion' to refer to the mixing of fact with fiction. While 'pre-quel' is utilised in the opposite context of sequel.

209 Knop, above n 8.

210 At 149.

211 At 158–160.

212 At 157.

in this manner.<sup>213</sup> This overlooks the hard work conducted by women who were active in the anti-trafficking movements during the IMTFE's actual proceedings.<sup>214</sup>

However, while the TWT judgment acts on certain fictions, its overarching intention is to show, through "technical legal demonstration that a different, more desirable past was possible and even plausible".<sup>215</sup> Where such mythmaking allows for a truer understanding of history and how society should operate, this approach should not be called "mythmaking"<sup>216</sup> at all. Rather, it unveils our collective past, so that the future can be seen clearly. Still, if the TWT reconstructs the IMTFE judgment where its outcome better provides justice to the women, but in the process applies the laws that were utilised in a manner contrary to their interests, one may question whether this approach allows the distortions of the past to be overcome.<sup>217</sup>

Despite these concerns, the TWT does, on the whole, offer a better means of addressing this history. In enforcing the understanding that rape and sexual slavery are crimes against humanity, the TWT countered, among other things, the gendered and colonial assumptions of international law. Indeed, its narrative is powerful in holding perpetrators, regardless of their position, to account.<sup>218</sup> It is also powerful in recognising the women as visible persons within the sphere of international law, with enforceable rights.

## ***B The TWT Judgment and its Significance to International Law***

### *1 Challenging the Gendered and Colonial Assumptions of International Law*

The TWT was a people's tribunal, which means it could not impose legal sanctions on Japan and those responsible for the Jufu system. However, it was established on three core principles: it was established in Japan, the accused state; it was a women's tribunal; and it was established through the efforts of grassroots organisers.<sup>219</sup>

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213 Knop, above n 8, at 158.

214 At 159.

215 At 158.

216 Cohen, above n 26.

217 See generally Ronald Dworkin "Hard Cases" (1975) 88 Harv L Rev 1057.

218 Knop, above n 8.

219 TWT Judgment, above n 151, at [71].

The TWT arose within the global women's movement, and the wider context in which the United Nations (UN) was starting to address conflict-related sexual violence perpetrated against women.<sup>220</sup> A predominant focus of the UN World Conference on Human Rights was on preventing further human rights violations around the world, including those experienced by women.<sup>221</sup> This position was furthered when the UN General Assembly adopted the Declaration on the Elimination of All Forms of Violence,<sup>222</sup> and the Fourth World Conference on Women adopted a Platform for Action, which recognised rape and sexual slavery as crimes against humanity.<sup>223</sup> The International Commission of Jurists' report on comfort women,<sup>224</sup> and the reports of Special Rapporteurs Radhika Coomaraswamy on Violence Against Women<sup>225</sup> and Gay McDougall on Systematic Rape and Sexual Slavery, also reinforced the impetus to end violence against women.<sup>226</sup> Further, the creation of *ad hoc* tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) sought to enhance the position of women in international law, especially those who had experienced conflict-related sexual violence. For instance, the ICTY made it mandatory to prosecute sexual assaults committed during wartime conflicts.<sup>227</sup> Its statute explicitly lists rape as a crime against humanity under art 5(g),<sup>228</sup> which was a first for criminal tribunals.<sup>229</sup> The ICTR statute also provides for four types of sexual assault.<sup>230</sup> Under art 3(g) rape is

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220 Matsui, above n 145, at 133.

221 World Conference on Human Rights (Vienna, Austria, 14–25 June 1993). In adopting the Vienna Declaration and Programme of Action, there was the call for “the full and equal enjoyment by women of all human rights”, and the development of mechanisms to eliminate gender-based violence and sexual exploitation. See *Vienna Declaration and Programme of Action* A/CONF157/23 (1993) at [36]–[44].

222 *Declaration on the Elimination of Violence against Women* GA Res 104, A/RES/48/104 (1993).

223 Matsui, above n 145, at 134.

224 Ustinia Dolgopol and Snehal Paranjape *Report Of A Mission: Comfort Women — An Unfinished Ordeal* (International Commission of Jurists, Geneva, 1994).

225 *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences* E/CN4/1996/53/Add2 (1996).

226 *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict* E/CN4/Sub2/1998/13 (1998).

227 Campanaro, above n 52, at 2572.

228 *Statute of the International Tribunal for the Former Yugoslavia* SC Res 827, S/Res/827 (1993).

229 Campanaro, above n 52, at 2572.

230 Sellers, above n 58, at 165.

a prosecutable offence categorised as a crime against humanity.<sup>231</sup> Similarly, under art 4 (violations of art 3), rape is listed as “an outrage upon personal dignity”, as are enforced prostitution and indecent assault. The Rome Statute of the ICC, under art 7(1)(g), also lists rape and sexual slavery as crimes against humanity.<sup>232</sup>

The TWT therefore operated at a time where ending gender-based and sexual violence was an overarching concern of the international community. The President of the TWT, Gabrielle McDonald, was formerly the President of the ICTY and had extensive knowledge of conflict-related sexual violence claims. The panel also comprised Justices Carmen Argibay, Christine Chinkin and Willy Mutunga. Justice Argibay had worked as a criminal judge in Argentina, Justice Chinkin was the President of the International Association of Women Judges,<sup>233</sup> and Justice Mutunga’s experience included being the President of the Kenya Human Rights Commission and a professor at the University of Kenya.<sup>234</sup> While the TWT had a relatively gender-balanced and diverse ethnic composition, it was a women’s tribunal focused on conflict-related sexual violence perpetrated against women. One of the Chief Prosecutors, Patricia Sellers, who wrote the indictment with Ustinia Dolgop, had prosecuted gender-related crimes in the ICTY and ICTR.<sup>235</sup> One commentator’s perspective is that the TWT’s focus on gender prevented it from adequately addressing the colonial underpinnings of international law.<sup>236</sup> However, another commentator has noted:<sup>237</sup>

[T]he Tribunal used international law to prosecute crimes committed against women of Asian countries under Western and Japanese colonial rule and military occupation. International law, which has hardly ever been applied to people of colonized and occupied countries, is now being used positively to prosecute the perpetrators at this Tribunal.

Through prosecuting Japan, Emperor Hirohito and other responsible officials, the TWT reinforced that those who commit gender-based crimes during wartime conflict must be held accountable. As surviving women could bring

231 *Statute of the International Tribunal for Rwanda* SC Res 955, S/Res/955 (1994).

232 *Rome Statute of the International Criminal Court* A/CONF183/9 (1998) [Rome Statute].

233 Matsui, above n 145, at 121.

234 At 121.

235 At 121.

236 Knop, above n 8, at 155–157.

237 Matsui, above n 145, at 132–133.



their claims to the TWT, this accountability extended to all women, regardless of their background or race. Consequently, while the TWT was part of a process that began with the ICTY and ICTR, it continued the momentum of enforcing women's rights, especially for those who experienced conflict-related sexual violence.

## 2 *Enforcing the Idea that Rape and Sexual Slavery Are Crimes Against Humanity*

The TWT judgment is significant because it operates on the basis that rape and sexual slavery are crimes against humanity.<sup>238</sup> The TWT's judgment recognises the Jugun Ianfu system allowed for "the rape and sexual slavery of tens of thousands of young girls and women from occupied or conquered territories in the Asia Pacific region".<sup>239</sup> It also recognises that the term "enforced prostitution" does not adequately describe the women's situation.<sup>240</sup> The TWT applies international instruments such as the 1907 Hague Convention,<sup>241</sup> the 1921 International Convention for the Suppression of the Traffic in Women and Children,<sup>242</sup> the 1929 Geneva Convention,<sup>243</sup> and the 1930 ILO Convention Concerning Forced Labour.<sup>244</sup> That approach clearly evidenced that sexual slavery constituted a crime against humanity at the time of the IMTFE judgment — even if not understood in those precise terms:<sup>245</sup>

It is beyond dispute that acts constituting crimes against humanity listed in the Nuremberg and Tokyo Tribunal Charters – murder, extermination, enslavement, deportation, and other inhumane acts – were established crimes during the Asia-Pacific Wars. ... [Thus, the] concept of crimes against humanity did not create crimes, but rather applied to conduct, which was already unquestionably criminal, a term which underscored its egregiousness.

This was obviously not the position of the IMTFE. Instead, the discourse around sexual slavery emerged in the 1990s as part of the women's movement.

238 See TWT Judgment, above n 151, at [509]–[672].

239 At [794].

240 At [781]–[807].

241 1907 Hague Convention, above n 94.

242 1921 International Convention for the Suppression of the Traffic in Women and Children, above n 120.

243 1929 Geneva Convention, above n 107.

244 1930 ILO Convention, above n 117.

245 TWT Judgment, above n 151, at [514]; see also Dolgopool, above n 103, at 245.

While the IMTFE had the capacity to develop international law and recognise sexual slavery as a crime against humanity, it seems a stretch to contend that sexual slavery was a crime against humanity at that time. This reconstructs the past to better fit the desired outcome.<sup>246</sup> Reworking the past is, from a historiographical perspective, problematic because it does not recognise the impetus for change that followed, and in fact occurred, with the women's rights movement, the work of international tribunals such as the ICTY and ICTR, and the efforts of the surviving women themselves. The 1998 Rome Statute was the first to recognise rape and sexual slavery as crimes against humanity,<sup>247</sup> so in reality, such recognition is a recent development in international law.<sup>248</sup>

Although sexual slavery was not a new concept when the TWT commenced proceedings, its definition was relatively constrained. For instance, the ICC's elements of crime for sexual slavery focused on the "purchasing, selling, lending or bartering such a person or persons".<sup>249</sup> The ICTY's *Kunarac* decision,<sup>250</sup> which came out a few months before the TWT convened, provided a broader definition of enslavement in the 1926 Slavery Convention to cover "the status or condition of the person being enslaved".<sup>251</sup> The TWT uses both approaches in its definition of sexual slavery:<sup>252</sup>

We find that the *actus reus* of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy. Thus, we consider that control over a person's sexuality or sexual autonomy may ... constitute a power attaching to the right of ownership. The *mens rea* is the intentional exercise of such powers.

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<sup>246</sup> Dworkin, above n 217.

<sup>247</sup> Rome Statute, above n 232, article 7(i)(g). It also recognises they are war crimes under art 8.

<sup>248</sup> The ICTR judgment of *Nyiramasuhuko* charged Nyiramashuko and her son for rapes committed during the Rwandan conflict on the basis that they were crimes against humanity and in breach of the Geneva Conventions. The judgment reflects growing recognition that rape and other gender-based crimes constitute crimes against humanity. See *Prosecutor v Nyiramasuhuko (Judgment)* ICTR Trial Chamber II ICTR-97-21-I, 26 May 1997.

<sup>249</sup> *Report of the Preparatory Commission for the International Criminal Court: Addendum Part II Finalised draft text of the Elements of Crimes* PCNICC/200/Add 2 (2000), art 7(i)(g)–2.

<sup>250</sup> *Prosecutor v Kunarac (Trial Judgment)* ICTY Trial Chamber IT-96-23-T & IT-96-23/1-T, 22 February 2001.

<sup>251</sup> Dolgopol, above n 103, at 245.

<sup>252</sup> TWT Judgment, above n 151, at [620].

This definition of sexual slavery paves the way for female victims of such abuse to have their bodily integrity protected. The TWT thereby provides a better understanding of how international law should uphold women's rights.

### 3 *Holding Japan's Deceased Officials Accountable and Countering the Rising Tide of Revisionist History*

For the surviving women, the TWT judgment was significant because both the State and its responsible officials were found guilty of the abuses committed against the women. It was the first time that Emperor Hirohito had been charged and prosecuted, along with eight other deceased military and government leaders, for the Jugun Ianfu system of sexual slavery and the rapes committed within it (counts one and two of the indictment).<sup>253</sup> Emperor Hirohito and Tomoyuki Yamashita were also charged for mass rape at Mananiqu in the Philippines (count three).<sup>254</sup> The charges were brought as crimes against humanity.

The TWT rejected the argument that Head of State immunity was absolute and that it applied in the context of crimes against humanity.<sup>255</sup> This finding underscores the modern position that state officials cannot invoke immunity to escape culpability for breaches of fundamental human rights. Indeed, Emperor Hirohito and the eight other officials were found guilty. Under art 3(2) of the TWT's Charter, superior or command responsibility was invoked<sup>256</sup> because they "knew or had reason to know" their subordinates were involved in criminal activity within the camps, and had failed to take necessary and/or reasonable measures in preventing and punishing such perpetrators.<sup>257</sup> Pursuant to art 3(1), they also incurred individual responsibility<sup>258</sup> for allowing the crimes to be committed.<sup>259</sup>

The TWT's judgment is therefore significant in breaking the taboo against prosecuting war criminals and bringing an end to the impunity of wartime

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253 The nine other leaders were Rikichi Andō, Shunroku Hata, Seishirō Itagaki, Seizō Kobayashi, Iwane Matsui, Yoshijiro Umezu, Hisaichi Terauchi, Hideki Tojo and Yoshijirō Umezu: see TWT Judgment, above n 151.

254 At [769].

255 At [56].

256 At [874].

257 At [677]–[738].

258 At [874].

259 At [739]–[767].

sexual violence these military and government leaders had indulged in.<sup>260</sup> The beginning of the post-war period saw the Japanese Emperor exempt from punishment for his wartime actions.<sup>261</sup> Military officials and other politicians argued they should not be punished<sup>262</sup> — if the Emperor was immune, they were too because they had been following the Emperor's orders.<sup>263</sup> The prosecution of war criminals has thereby been relatively unsuccessful in Japan.<sup>264</sup> With the Allied States also failing to hold Emperor Hirohito and leading Japanese officials accountable in the IMTFE, State representatives were able to continue indulging in the fiction that their crimes were justifiable. Indeed, many revisionists are seeking to rewrite a past where Japan was the liberator of the nation.<sup>265</sup> The visits made by Japanese ministers to Yasukuni shrine, which houses war criminals, highlight the danger that the glorification of war criminals will continue, and that Japan's unwillingness to confront its past as a colonial aggressor persists.<sup>266</sup> The TWT's judgment, which holds Japan responsible for its past, is therefore significant in countering this rising tide of revisionist history.

#### 4 *Allowing Comfort Women to Hold the Japanese State Responsible and Achieve a True Form of Justice*

A true form of justice occurs when the survivors of state abuse hold the perpetrators of such abuse to account, and where the state and its people acknowledge the wrongdoing that has taken place.<sup>267</sup> This is true justice because history is redefined to collectively remember and uphold the truth of the survivors' testimonies.<sup>268</sup>

Indeed, the TWT judgment is significant because it challenges the premise that victims of state abuse cannot hold the perpetrating state and/or its officials accountable in international law. Applying the Draft Articles

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<sup>260</sup> See Matsui, above n 145, at 128–130.

<sup>261</sup> At 128–130.

<sup>262</sup> At 128–130.

<sup>263</sup> At 128–130.

<sup>264</sup> At 128–130.

<sup>265</sup> Wingfield-Hayes, above n 14.

<sup>266</sup> “Japanese politicians upset South Korea with visit to Yasukuni shrine” *The Guardian* (online ed, London, 18 October 2016).

<sup>267</sup> Dolgopol, above n 103, at 244 citing psychologist Lepa Mladjenovic.

<sup>268</sup> At 244–245.

on State Responsibility, the TWT found that Japan was in continuing breach of its obligations under international law.<sup>269</sup> While the TWT recognised that Allied States failed to prosecute Japanese officials and provide justice to the women, it also recognised:<sup>270</sup>

... primary responsibility lies ... with the state of Japan for its continuing failure over the last 56 years to prosecute ... to officially and fully apologize, and to provide reparations and other meaningful remedies ...

The TWT clarified that, in discussing primary responsibility, it was not the Japanese people who were on trial — excluding the “ascription of collective guilt” was not something that the TWT was prepared to deviate from in finding the State responsible for breaching international law.<sup>271</sup>

However, while the TWT did not put the “Japanese people on trial”,<sup>272</sup> judgment against Japan renders a form of collective guilt, which forces those who deny Japan’s responsibility to address the past.<sup>273</sup> As one commentator notes:<sup>274</sup>

Social justice [is] an important part of recovery for survivors of sexual violence in armed conflict ... [T]rauma is not the private matter of a woman, but a political issue. When the state takes responsibility for sexual violence, it can contribute to the survivor’s recovery, and conversely, when it refuses to take responsibility for the crimes, it can impede the survivor’s recovery.

The power of the TWT as a people’s tribunal is that it furthers the goals of social justice.<sup>275</sup> In furthering the understanding that a state is also accountable to its citizens, and not just other states, the TWT judgment creates true justice, which counters normative understandings of international law. This outcome also counters the failures of traditional state-based tribunals to adequately protect human rights.<sup>276</sup> As the TWT notes:<sup>277</sup>

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269 Draft Articles on State Responsibility, above n 11, at [931].

270 TWT Judgment, above n 151, at [5].

271 At [7].

272 At [7].

273 See generally Cohen, above n 26, at 7.

274 Dolgopol, above n 103, at 244 citing psychologist Lepa Mladjenovic.

275 At 244.

276 Knop, above n 8, at 146–147.

277 TWT Judgment, above n 151, at [8].

... this Tribunal steps into the lacuna left by states and does not purport to replace their role in the legal process. The power of the Tribunal, like so many human rights initiatives, lies in its capacity to ... develop an accurate historical record, and apply principles of international law to the facts as found. The Tribunal calls upon the government of Japan to realize ... its greatest shame lies not in uncovering the truth about these crimes, but in its failure to accept full legal and moral responsibility for the crimes.

Indeed, true justice involves the state taking meaningful steps to address its wrongdoing. This understanding is evoked by one of the women and is noted under the reparations section of the TWT's summary of findings: "I shiver at the memory of the soldiers; they have to kneel in front of us and beg us to forgive them ... They should apologize and apologize".<sup>278</sup> Perhaps the strongest form of justice occurs when the state, and its responsible officials, provide a conciliatory response. This response could, as the TWT recommends in its judgment, involve establishing a truth and reconciliation commission, and creating a public historical record and memorial sites.<sup>279</sup> Such steps could allow for the victims to be remembered and to help to restore their dignity.

The TWT appears to understand that true justice is required. The judgment deals initially with the responsibility of Emperor Hirohito and the nine other officials,<sup>280</sup> before dealing with the responsibility of the State.<sup>281</sup> From a moral perspective, it is those officials who perpetrated, and failed to acknowledge, the acts who must bear primary responsibility. In applying the Draft Articles on State Responsibility, the TWT also strongly criticised the failure of subsequent Japanese officials to recognise the wrongdoing of their predecessors.<sup>282</sup> The TWT's judgment thereby leaves a powerful mark where both the State and individual officials are held accountable for breaches of the women's fundamental human rights.<sup>283</sup>

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278 TWT Summary of Findings, above n 152, at 6.

279 TWT Judgment, above n 151, at [1086]–[1088].

280 At [673]–[876].

281 At [877]–[1053].

282 Draft Articles on State Responsibility, above n 11, at [938].

283 Knop, above n 8, at 146–147.

5 *Furthering the Growing Momentum of People's Tribunals in International Law*

Many see the ability of the TWT to promote the goals of international law as a fiction, because it is not a state-based tribunal with legal authority.<sup>284</sup> Its authority does not come from any positive source of international law. Instead, it has moral authority, which in this case stemmed from "the voices of global society ... the peoples of the Asia Pacific region and ... the peoples of the world".<sup>285</sup>

Consequently, to assert that the TWT is illegitimate because it is a people's tribunal overlooks the fact that international law is inherently political. By allowing people to assert themselves, perhaps the TWT and other people's tribunals provide a more redemptive future for international law.<sup>286</sup>

It is vitally important to realize that a people's tribunal does not merely play a supplementary role in filling the gaps in the order of states. Rather, it can participate in the formation of a new order of states. Thus, the Tribunal showed that international law is not an order created and implemented only by states; the people can and do play an increasingly important role in forcing states to abide by international law.

Moving forward, perhaps this is the defining claim of people's tribunals. The people and their associated communities have the right to be included in shaping the law.<sup>287</sup> This inclusion may be viewed as calling for accountability.<sup>288</sup> This is particularly so, where the people have no standing in state-mandated international fora to have their claims heard.<sup>289</sup> Still, the process is a legitimate one, because while such tribunals may not be authorised by states, they do meet other suggested elements of international legitimacy — "rationale, credibility, and recognition" by the people, and victims.<sup>290</sup>

While the traditional position is that such fora play a supplementary role in international law, in terms of their official procedures and validation of

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284 At 146–147.

285 TWT Judgment, above n 151, at [8].

286 Matsui, above n 145, at 133.

287 Andrew Byrnes and Gabrielle Simm "Peoples' Tribunals, International Law and the Use of Force" (2013) 36(2) UNSWLJ 711 at 741.

288 See generally Craig Borowiak "The World Tribunal on Iraq: Citizens' Tribunals and the Struggle for Accountability" (2008) 30(2) *New Political Science* 161.

289 Byrnes and Simm, above n 287, at 741.

290 Borowiak, above n 288, at 181.

claims, these tribunals have a more extensive role than this.<sup>291</sup> They lay bare criminal responsibility for grievous breaches of human rights and provide a forum for those who have suffered abuse to share their testimonies.

These tribunals therefore have an important role to play in establishing the truth that lies behind the dominant narrative, preserving a more accurate record of history, and a reconciliation process that focuses on memory and justice for the people.<sup>292</sup> Further, in actively being able to participate in the proceedings, there could be a transformative process for the people, and for international law itself, which helps to remove some of the gendered and colonial aspects of the discipline.

Indeed, people's tribunals such as the Russell Tribunals on Vietnam (1966–1967) and Latin America (1973–1976), as well as the Permanent Tribunal of the Peoples (TPP) in Bologna (1979), have heard claims related to the human rights violations suffered by marginalised peoples. These people's tribunals have thereby reinforced the premise that the “dictates of public conscience can become a recognized source of law”.<sup>293</sup> Indeed, with the TPP's operating system and principles being based on the Universal Declaration of the Rights of Peoples, the Tribunal has focused on a wide range of issues: self-determination, economic neo-colonialism, globalisation, the re-emergence of war, and declarations from the ICC of non-competency for economic-related crimes.<sup>294</sup> The scope of analysis for people's tribunals is wide-ranging. They also debunk the understanding that international law is to work in “the interests of the public and private holders of political and economic powers”.<sup>295</sup>

The TWT has reinforced “a new order of states”, where the women could hold Japan and its representatives accountable for their breaches of fundamental human rights.<sup>296</sup> As human rights protection takes greater hold, more of these non-state tribunals and organisations will likely gain prominence in the international arena. It is therefore possible that women's voices will be louder, and will be heard, in the future. The hope is that similar

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291 Byrnes and Simm, above n 287, at 741.

292 At 741–742.

293 “Permanent Peoples' Tribunal” Lelio Basso <[www.permanentpeopletribunal.org](http://www.permanentpeopletribunal.org)>.

294 Above n 293.

295 Above n 293.

296 Matsui, above n 145, at 133.



tribunals could also contribute to a century in which there is less violence perpetrated against women.<sup>297</sup>

## V CONCLUSION

The TWT was more than a process of allowing the voices of the survivors of the Jugun Ianfu system to be heard. It was a collective event whereby, in hearing the testimonies of the women, the Judges could engage with the women and with a truer version of history. While the TWT could be criticised because it bases its legitimacy on the IMTFE, a "fiction" that in certain respects distorts our understanding of international law,<sup>298</sup> it would be wrong to completely dismiss its significance. Perhaps the key benefit to be derived from its judgment is that a true history of international law may be achieved when social justice is provided to survivors of state abuse.<sup>299</sup> In order to realise such an end, it is necessary for their testimonies to be heard and re-lived. Inevitably, such a process requires a return to the past to create a more redemptive vision for the future. While one cannot revisit the past without fictionalising it, where there is a genuine attempt to understand the past there is always the hope that a more constructive future will ensue.<sup>300</sup>

Indeed, the TWT's return to the past provides a more redemptive, albeit reconstructed, future in which individual victims, including female victims of state abuse, are no longer anonymous objects of international law. While the TWT's rewriting of the past may be of concern, perhaps the greater danger occurs when there is no attempt to confront such history. For instance, where a state and its people fail to address their collective history there is the inherent danger that their understandings of the future will bear the distorted understandings of the past. Consequently, the TWT, in finding Japan and a number of its officials, including Emperor Hirohito, accountable to the women, Japan is forced to confront its history.

The power of the TWT is its ability to transcend time itself. In allowing the surviving women to be heard, the TWT provided some justice and a sense of dignity to the women. It also opened the door for other women subjected to conflict-related sexual violence to have their testimonies heard. In doing

297 Matsui, above n 145, at 139–141.

298 Knop, above n 8, at 146–147.

299 Dolgopol, above n 103, at 244–245.

300 Knop, above n 8, at 146–147.

so, the TWT's enduring judgment will likely be one of history as a collective experience. Indeed, the transcendental nature of the history of international law is reflected in the song the women sang during the TWT's opening ceremonies:<sup>301</sup>

We are not afraid

We are not afraid

We are not afraid today

Oh, deep in my heart

I do believe

We shall overcome someday

As these lyrics suggest, it is only when people come together that the individual voices of the traditionally repressed — including the anonymous voice of the female victim of state violence — will be heard. People's tribunals are a space in which the gendered and colonial assumptions of international law can be overcome and in which people's justice can be achieved.<sup>302</sup>

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<sup>301</sup> See Dudden, above n 137, at 594.

<sup>302</sup> At 594.