

The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes

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I. INTRODUCTION

A compound of old, nondescript brick buildings looks out of place in the midst of the modern and busy urban center of Seoul, Korea.¹ These buildings constitute the Sodaemun Prison History Hall and offer a glimpse into the troubled history between Korea and Japan.² The Hall's vivid displays and exhibits graphically illustrate the oppression of the Korean people by the Japanese during the Japanese occupation of Korea from 1910 until 1945.³

1. Based on author's visit to Sodaemun Prison History Hall in December, 2000, while stationed with the U.S. Army in Seoul, Korea.

2. *Id.*

3. See Doug Struck, *Protests Greet Koizumi in S. Korea*, WASH. POST, Oct. 16, 2001, at A11.

During a state visit to Korea on October 15, 2001, Japan's Prime Minister, Juichiro Koizumi, made an official tour of the Sodaemun Prison History Hall.⁴ During this visit, Koizumi laid a wreath at the Korean National Cemetery,⁵ and made what would strike the uninitiated as an apology for Japan's past actions:

"I looked at various exhibitions, facilities and traces of torture with heartfelt remorse and apology for the tremendous damage and suffering Japan caused the South Korean people through its colonial rule," Koizumi told reporters. "I felt we should not forget the feelings of those who were forced to experience such suffering and sacrifice, not so much as the prime minister but rather as a politician and a human being," he said.⁶

Yet the "apology" was not well received by most Koreans.⁷ There were widespread protests, a National Assembly committee drafted a resolution demanding a more sincere apology from Koizumi (prepared during Koizumi's visit), and Koizumi's visit to the National Assembly was actually cancelled due to a viable threat from Assemblymen to prevent him from entering the Assembly building.⁸

In large part, this apparent anomaly stems from Japan's failure to fully come to grips with its history of World War II war crimes. The Korean reaction to Prime Minister Koizumi's visit was typical; lingering resentment of Japan's war crimes still burns in China, much of Asia, and among many war crimes survivors as well.⁹ This Article submits that a Japanese truth commission could potentially put an end to the continuing animosity between Japan and China and Korea, as well as dissipate growing international pressure on Japan to address its history. While a truth commission typically focuses on national reconciliation, it also provides a framework ideally suited to promote regional reconciliation.¹⁰

Part II of this Article provides the background for the continuing struggle over Japan's past by summarizing the magnitude and scope of Japanese war crimes during the World War II era. Part III discusses the failure of the Tokyo Tribunal and other national war crimes tribunals to

4. *See id.*

5. *Id.*

6. *Koizumi Offers Apology to S. Korean People*, JAPAN POL'Y & POL., Oct. 22, 2001, available at LEXIS, News, IAC Japan File.

7. *See Struck*, *supra* note 3, at A11.

8. *Id.*; *House Panel Adopts Resolution Calling for Japan's Apology*, KOREA TIMES, Oct. 16, 2001, available at LEXIS, News Library, Korea Times File.

9. *See Onuma Yasuaki, Japanese War Guilt and Postwar Responsibilities of Japan*, 20 BERKELEY J. INT'L L. 600, 600-02 (2002); *see also* discussion *infra* Part IV.D.

10. *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 23 (Routledge 2001).

fully resolve the controversy. Part IV reviews Japan's erratic post-Cold War response to its World War II war crimes (a recurring cycle of limited apologies, followed by some remark or event that regenerates the controversy), including Japan's vigorous defense against all war crimes-based civil litigation.¹¹ Additionally, Part IV demonstrates how Japan's unresolved wartime history presents a significant foreign policy challenge for Japan.

Part V introduces the truth commission as an option, discusses the truth commission's value as an accountability mechanism and focuses on the South African Truth and Reconciliation Commission as an available template for Japan. Moreover, Part V analyzes the potential composition of a Japanese truth commission and how it could serve the interests of both Japan and the remaining victims of Japan's wartime regime. Finally, Part VI concludes that the truth commission offers a viable solution for Japan's problems with addressing its past, while affording the victims of Japan's war crimes an honorable and dignified resolution to their grievances.

II. OVERVIEW OF WORLD WAR II JAPANESE WAR CRIMES

In 1931, Japan invaded Manchuria.¹² Although Japanese military action spread to Shanghai in 1932, military operations were largely dormant until the Marco Polo bridge incident in 1937.¹³ From that point, Japan initiated a major military drive throughout China.¹⁴ From 1941 to 1942, Japan attacked the United States, Malaya, Burma, Singapore, Borneo, Thailand, the Philippines, the Dutch East Indies, New Guinea, and numerous islands throughout the Pacific Ocean.¹⁵ Japan's initial attacks led to extensive territorial gains, but the Allied powers gradually

11. See discussion *infra* Part IV.

12. See IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* 29 (BasicBooks 1997).

13. See *id.* at 29-33.

In the summer of 1937 Japan finally succeeded in provoking a full-scale war with China. In July, a Japanese regiment, garrisoned by treaty in the Chinese city of Tientsin, had been conducting night maneuvers near the ancient Marco Polo Bridge. During a break several shots were fired at the Japanese in the darkness, and a Japanese soldier failed to appear during roll call. Using this incident as an excuse to exercise its power in the region, Japanese troops advanced upon the Chinese fort of Wanping near the bridge and demanded that its gates be opened so that they could search for the soldier. When the Chinese commander refused, the Japanese shelled the fort.

Id. at 33.

14. See *id.*

15. See MARIUS B. JANSEN, *THE MAKING OF MODERN JAPAN* 652-53 (Belknap Press of Harvard Univ. Press 2000).

reversed the Japanese advance and ultimately obtained Japan's unconditional surrender on August 10, 1945,¹⁶ following the use of atomic bombs against Hiroshima and Nagasaki on August 6 and 9, 1945.¹⁷

Although the law of war and war crimes would develop substantially in the decades to follow, in 1931 Japan was a party to several treaties that governed its wartime conduct.¹⁸ During the 1931-1945 war period, war crimes pervaded nearly all Japanese military operations.¹⁹ The atrocities started in the China campaign and spread throughout the entire Pacific theater.²⁰ Estimates of the death toll help convey the enormity of Japanese war crimes. Approximately 400,000 prisoners of war (POWs) and internees in China, as well as 139,000 POWs elsewhere, either were massacred by Japanese military forces or died from conditions imposed by the Japanese.²¹ For forced laborers, the numbers reach 142,000 in China and 868,000 outside of China.²² Massacres and other atrocities directed against civilians resulted in an estimated 2,850,000 Chinese civilian deaths and 758,000 civilian deaths throughout the rest of Asia and the Pacific regions.²³ Among these war crimes, several categories stand out: Japanese war crimes in the China theater of operations,²⁴ the infamous Unit 731 that engaged in nonconsensual medical and biological warfare experiments,²⁵ the widespread organized sexual slavery that accompanied Japanese forces

16. See *id.* On August 10, 1945, Emperor Hirohito agreed to subject Japan to the Supreme Commander of the Allied Powers. *Id.* at 659. The Emperor broadcast this message of surrender to the Japanese people on August 15, 1945. *Id.*

17. *Id.* at 658-59.

18. See DOCUMENTS ON THE LAWS OF WAR 39-146 (Adam Roberts & Richard Guelff eds., Oxford Univ. Press 2d ed. 1989). In particular, Japan ratified the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and its Annex of Regulations Respecting the Laws and Customs of War on Land. *Id.* at 58. Article 4 of the Regulations requires that prisoners of war "be humanely treated." *Id.* at 48. Article 46 provides: "Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected." *Id.* at 56. Japan also ratified the 1899 Hague Declarations and a series of 1907 Hague Conventions that addressed the rights of neutrals and different aspects of naval warfare. *Id.* at 41-42, 63-117. Finally, Japan signed the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare on June 17, 1925, although it did not actually ratify the Protocol until 1970. *Id.* at 139-42.

19. See R.J. RUMMEL, DEATH BY GOVERNMENT 143-56 (Transaction Publishers 1994).

20. See *id.* at 144-49.

21. *Id.* at 148.

22. *Id.*

23. *Id.*

24. *Id.* at 144-49.

25. See discussion *infra* Part II.B.

throughout their operations,²⁶ and the extensive war crimes against POWs.²⁷

A. *The Rape of Nanking*

Perhaps the most notorious aspect of Japanese military operations in China were the atrocities associated with the “Rape of Nanking” in December of 1937.²⁸ Japanese forces captured Nanking on December 13, 1937.²⁹ Almost immediately, a barbaric campaign of terror began against the Chinese soldiers and the noncombatant civilians of the city.³⁰ Japanese military orders directed that Chinese POWs be executed.³¹ In one instance, in a single mass execution, Japanese forces murdered over 57,000 POWs and civilians.³² Japanese soldiers even engaged in competitions to determine who could kill the most Chinese POWs in the shortest period of time.³³

Once the Chinese soldiers were killed, the Japanese forces proceeded to rape and kill Chinese civilians.³⁴ Somewhere between 20,000 and 80,000 Chinese women were raped.³⁵ Rape victims included elderly women, women in the later stages of pregnancy, and children.³⁶ Japanese soldiers murdered Chinese civilians through a variety of gruesome methods including burying people alive, extirpating body parts, freezing people to death, using attack dogs, and bayoneting babies.³⁷

Altogether, the Japanese forces killed an estimated 260,000 Chinese victims in Nanking.³⁸ While these examples may seem extraordinary, they were not out of the ordinary for Japanese military operations in China. Judge Hsiang of the Tokyo Tribunal later reflected:

[T]he conduct of the Japanese soldiers at Nanking was no isolated instance. It was typical. Of the numerous incidents of this character, the judicial agencies of China have officially reported more than 95,000 separate cases

26. See, e.g., RUMMEL, *supra* note 19, at 145.

27. See *id.* at 143-56.

28. CHANG, *supra* note 12, at 42.

29. See *id.*

30. See *id.*

31. *Id.* at 41.

32. *Id.* at 44.

33. *Id.* at 85.

34. *Id.* at 89.

35. *Id.*

36. *Id.* at 91.

37. *Id.* at 87-88.

38. *Id.* at 102.

perpetrated during the period from 1937 to 1945 and in every province in occupied China.³⁹

Moreover, from 1941 to 1942, Japanese forces deployed in the Communist-controlled areas of China adopted “the devastating ‘three-all’ policy (*sank seisaku*: ‘kill all, burn all, destroy all’).”⁴⁰ As a direct consequence of this policy, Japanese forces decreased the population in these Communist-controlled areas from forty-four million to twenty-five million persons.⁴¹

B. Unit 731

Unit 731 was a Japanese military unit that produced biological weapons, engaged in biological warfare, and conducted nonconsensual medical experiments.⁴² The unit was stationed in Harbin, in northeastern China, shortly after the Japanese invasion of Manchuria.⁴³ While other Japanese biological warfare units existed throughout China, Unit 731, as the centerpiece of Japan’s biological and chemical warfare program, remains one of the most well known.⁴⁴ To maintain its secrecy, the unit operated under the pretense that they were constructing a lumber mill within the military complex.⁴⁵ Unit members thus found it amusing to describe their experimental victims as *maruta*, or logs.⁴⁶

Unit 731 performed nonconsensual experiments on Chinese civilians and POWs.⁴⁷ Tests included: exposing victims to bitterly cold conditions for extended lengths of time and then subjecting the victims to experiments once frostbite took effect; testing “plague-infested flea bombs” on victims; and tying victims to posts before releasing anthrax bombs in the immediate area surrounding the victims.⁴⁸ If the *maruta* did not die from the experiments or were no longer fit for further experiments, they were often killed.⁴⁹

39. RUMMEL, *supra* note 19, at 145-46 (citation omitted).

40. JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 43 (Pantheon Books 1986).

41. *Id.*

42. See YUKI TANAKA, *HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II* 135-36 (Westview Press 1998).

43. *Id.* at 135.

44. See SHELDON H. HARRIS, *FACTORIES OF DEATH: JAPANESE BIOLOGICAL WARFARE 1932-1945 AND THE AMERICAN COVER-UP* 4, 36, 66 (Routledge 1994).

45. *Id.* at 39.

46. *Id.*

47. Patrick Fong, *Inter Arma Enim Silent Leges: The Impunity of Japan’s Secret Biological Warfare Unit*, 6 *NEW ENG. INT’L & COMP. L. ANN.* 79, 82 (2000).

48. HARRIS, *supra* note 44, at 68-70.

49. *Id.* at 63.

Besides these direct tests on individual subjects, Unit 731 conducted “field tests” by introducing biologically hazardous material into the civilian population and observing the consequences.⁵⁰ For example, the Japanese gave anthrax-filled chocolates to children in Nanking.⁵¹ Japanese soldiers left sweet cakes containing typhoid and paratyphoid bacteria for the hungry Chinese civilians to eat.⁵² Unit personnel also unleashed rats with plague-ridden fleas into crowded urban areas, dropped plague-contaminated bacteria into drinking water sources, and introduced plague-infested fleas into wheat and rice farm fields.⁵³ Moreover, Japanese units repeatedly attacked the Chinese civilian population with biological and chemical weapons.⁵⁴

Estimates of the death toll resulting from Unit 731’s activities range from 80,000 to 200,000.⁵⁵ These estimates include the *maruta* who died from the experiments, the Chinese workers at the Unit 731 camp who died due to ill-treatment by the Japanese (over one-third of the Chinese workers at the camp), at least 10,000 Chinese civilians in the areas surrounding Unit 731 massacred by Japanese military personnel immediately before the Japanese surrender, and the many thousands of Chinese civilians who died as a result of Japanese biological and chemical warfare and experiments.⁵⁶

C. *The Comfort Women*

A tragic legacy of the rape of Nanking was Japan’s adoption and widespread implementation of the “comfort women”⁵⁷ system.⁵⁸ To avoid unduly alienating civilian populations in Japanese-occupied territory, the Japanese military sought to prevent the recurrence of the mass rapes that occurred in Nanking.⁵⁹ The “comfort women” system involved the procurement of women to serve as sexual slaves for the Japanese military.⁶⁰ Although the military used actual prostitutes at first, the sheer

50. *See id.* at 77-78.

51. *Id.* at 77.

52. *Id.* at 78.

53. *Id.*

54. *Id.* at 73.

55. Fong, *supra* note 47, at 84-85.

56. *See* HARRIS, *supra* note 44, at 4, 37-38, 66.

57. “Comfort Women” is the euphemism for the women and girls subjected to the system of sexual servitude for the Japanese Imperial Army soldiers. DAVID ANDREW SCHMIDT, IANFU—THE COMFORT WOMEN OF THE JAPANESE IMPERIAL ARMY OF THE PACIFIC WAR: BROKEN SILENCE 12 (Edwin Mellen Press 2000).

58. TANAKA, *supra* note 42, at 92-100.

59. SCHMIDT, *supra* note 57, at 86-87.

60. TANAKA, *supra* note 42, at 94.

number of women required to meet the Japanese military's need necessitated the use of unwilling participants.⁶¹ Altogether, between 120,000 and 200,000 women served as sexual slaves for the Japanese military.⁶²

"Recruitment" of women for the "comfort women" program entailed deception, coercion, or outright forcible abduction.⁶³ Women from impoverished families were deceived by offers of employment in Japan.⁶⁴ Young girls were lured into the system by trickery.⁶⁵ Others were coerced by threats of violence against family members.⁶⁶ Finally, many were simply taken by force from their homes and families.⁶⁷

The system was as much of a military operation as the more conventional aspects of Japan's war efforts.⁶⁸ Japanese military documents literally described the women as "war supplies."⁶⁹ Numerous Japanese military regulations detailed the procedures involved in setting up and operating a "comfort women" facility.⁷⁰ The military constructed buildings for "comfort women" in the same manner as a barracks or dining facility.⁷¹ "Comfort women" were sent to consolidated staging areas before being shipped via military transport to nearly all the outposts of the vast Japanese military empire.⁷² The women were also subjected to the dangers of being stationed at the military front, and many died from air raids against Japanese military positions.⁷³

Once the "comfort women" arrived at their stations, they were subjected to sexual slavery.⁷⁴ The "comfort women" facilities were often "surrounded by a barbed wire fence, well guarded and patrolled."⁷⁵ The "comfort women" thus had little freedom as they were normally

61. GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 49 (W.W. Norton & Co. 1994).

62. SCHMIDT, *supra* note 57, at 13.

63. *Id.* at 12.

64. *Id.* at 118; HICKS, *supra* note 61, at 49.

65. SCHMIDT, *supra* note 57, at 134.

66. *Id.* at 132.

67. *Id.* at 133.

68. TANAKA, *supra* note 42, at 94-100.

69. *See, e.g.*, HICKS, *supra* note 61, at 17; TANAKA, *supra* note 42, at 99.

70. *See, e.g.*, HICKS, *supra* note 61, at 83-90; TANAKA, *supra* note 42, at 97-99.

71. *See* HICKS, *supra* note 61, at 112, 120; TANAKA, *supra* note 42, at 95.

72. *See* HICKS, *supra* note 61 at 107-13, 115-25, 129-35, 140-43; TANAKA, *supra* note 42, at 98.

73. *See* HICKS, *supra* note 61, at 154; SCHMIDT, *supra* note 57, at 149.

74. *See, e.g.*, SCHMIDT, *supra* note 57, at 149.

75. Radhika Coomaraswamy, *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, U.N. ESCOR, 52d Sess., Agenda Item 9(a), at 9, U.N. Doc. E/CN.4/1996/53/Add.1 (1996).

prevented from leaving the military base.⁷⁶ In addition, “comfort women” were repeatedly raped on a daily basis by a steady procession of Japanese soldiers, each of whom were allowed thirty minutes to an hour, for a total of at least nine hours a day.⁷⁷

At the end of the war, Japanese soldiers murdered many of the “comfort women.”⁷⁸ More frequently, however, “comfort women” were simply left behind to fend for themselves.⁷⁹ For those lucky enough to survive and make it safely home, they often faced a bleak future without marriage.⁸⁰ Those who married often were unable to have children due to medical complications attributed to their brutal experience.⁸¹

D. Prisoners of War

POWs held by Japan, like the “comfort women,” were often viewed as “equivalent to military supplies.”⁸² The Japanese treatment of POWs is perhaps best illustrated by comparing the mortality rate of Allied POWs held in POW camps in Germany and Italy against the mortality rate of Allied POWs held in Japan.⁸³ In Germany and Italy, only four percent (9348 out of 235,473) of the POWs died while in captivity, compared to twenty-seven percent of the Allied POWs held in Japan (35,756 out of 132,134), including a death rate of thirty-six percent for Australian POWs.⁸⁴ In fact, one study suggests that “very few or none” of the POWs in Japan would have survived at all had World War II extended into one more winter.⁸⁵

Although Japan had not ratified the 1929 Geneva Convention on the treatment of POWs, it had nonetheless told the Allied powers in 1942 that it would comply with the provisions of the Convention *mutatis mutandis*.⁸⁶ However, despite this assurance, Japan routinely and

76. See *id.*

77. See Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 498 (1994), reprinted in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 95, 96 (Roy L. Brooks ed., NYU Press 1999).

78. HICKS, *supra* note 61, at 154-55.

79. *Id.* at 157.

80. See Parker & Chew, *supra* note 77, at 97.

81. See *id.*

82. TANAKA, *supra* note 42, at 71.

83. See *id.* at 70-71.

84. *Id.*

85. JANSEN, *supra* note 15, at 655.

86. Clifford Kinvig, *Allied POWs and the Burma-Thailand Railway*, in JAPANESE PRISONERS OF WAR 37, 42 (Philip Towle et al. eds., Hambledon & London 2000). Japan had signed the 1929 Geneva Convention, but had not ratified it. *Id.* Japan had, however, ratified the Hague Convention of 1907. *Id.* That convention espoused the general principles upon which the

egregiously violated the Convention's basic guarantees of humane treatment for POWs throughout the war.⁸⁷ Death marches of POWs led to thousands of deaths.⁸⁸ In the Bataan Death March alone, 17,200 captives from the United States and the Philippines died.⁸⁹ The Sandaken Death Marches in Borneo were regarded as a means to eradicate POWs by forcing "malnourished and sick POWs to walk 260 kilometers in harsh terrain."⁹⁰ POWs died as a result of both implicit orders ("[n]o POWs were to be left behind along the way, for whatever reason") and explicit orders to shoot POWs that could not continue the arduous journey.⁹¹

Throughout the war, the Japanese often murdered POWs as a group or maltreated them through lethal labor.⁹² Contrary to the Geneva Convention, Japanese forces forcibly put POWs to work on Japanese military projects such as the Burma-Thailand Railroad.⁹³ During that massive project, it has been suggested that the Japanese violated nearly all of the ninety-seven articles of the Convention.⁹⁴ One officer expressed the Japanese command attitude that "so long as the railway was completed 'it [did] not matter if all the prisoners collapse[d] in the process.'"⁹⁵ Japanese administrative personnel in the Burma-Thailand camps further conveyed their philosophy through arm bands, which stated: "One captured in battle is to be beheaded and castrated at the will of the Emperor."⁹⁶

III. THE TOKYO TRIBUNAL AND OTHER JAPANESE WAR CRIMES TRIBUNALS

A. *Introduction*

Following the war, two separate structures operated to prosecute Japanese war criminals.⁹⁷ On January 19, 1946, General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP), through a "special proclamation," directed the creation of the

1929 Geneva Convention elaborated. *Id.* The 1929 Geneva Convention may be found at <http://www.icrc.org/ihl.nsf> (last visited Apr. 2, 2003).

87. See Kinvig, *supra* note 86, at 43-45.

88. See, e.g., RUMMEL, *supra* note 19, at 150.

89. *Id.*

90. See TANAKA, *supra* note 42, at 59.

91. *Id.* at 48-54.

92. RUMMEL, *supra* note 19, at 150.

93. See Kinvig, *supra* note 86, at 42-43.

94. *Id.* at 43-45.

95. *Id.* at 49.

96. *Id.* at 43.

97. See PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951*, at 10-12 (Univ. of Tex. Press 1979).

International Military Tribunal for the Far East (IMTFE), commonly referred to as the Tokyo Tribunal.⁹⁸ The special proclamation issued the Charter for the IMTFE as well.⁹⁹ The Charter provided jurisdiction for prosecution of Japanese war crimes, including “crimes against peace,” defined as the “planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”¹⁰⁰ As this prosecutorial authority derived from article 5(a) of the Charter, suspects prosecuted for crimes against peace became known as class “A” defendants.¹⁰¹

The Charter also provided authority for prosecution of what became known as class “B” and “C” violations for “violations of the laws or customs of war” and “crimes against humanity” under articles 5(b) and 5(c) respectively.¹⁰² However, the Charter enabled the IMTFE to prosecute only those defendants “charged with offenses which include[d] crimes against peace.”¹⁰³ For those defendants charged solely with class “B” or “C” violations, or class “A” violations not prosecuted by the IMTFE, the Charter required that national courts or commissions prosecute the cases.¹⁰⁴ The Allied Powers conducted these separate trials individually throughout Asia.¹⁰⁵ From 1945 until 1951, these national commissions issued 920 death sentences and approximately 3000 prison sentences for Japanese defendants.¹⁰⁶

The IMTFE selected twenty-eight class “A” defendants for prosecution at the Tokyo Tribunal.¹⁰⁷ The majority of these defendants had “occupied the highest government and military posts” in Japan during World War II.¹⁰⁸ The trial took place from May 3, 1946, until April 16, 1948.¹⁰⁹ After several months of deliberation, the eleven judges of the

98. *Id.* at 10-11.

99. *Id.* at 11.

100. JOHN W. DOWER, *EMBRACING DEFEAT, JAPAN IN THE WAKE OF WORLD WAR II* 456 (W.W. Norton & Co. 1999).

101. *See id.* at 456, 464; PICCIGALLO, *supra* note 97, at 11.

102. *See* PICCIGALLO, *supra* note 97, at 12.

103. *Id.* at 12 (citations omitted).

104. *Id.*

105. *See id.* at xi.

106. *Id.* Piccigallo’s book provides a thorough overview of the military commissions conducted in the Far East by the United States, Britain, Australia, Canada, New Zealand, Russia, China, the Netherlands, the Philippines, and France. *See generally id.*

107. *Id.* at 14.

108. *Id.*

109. *Id.* at 18, 23.

IMTFE returned their verdict on November 4, 1948.¹¹⁰ The IMTFE found “that the existence of the criminal conspiracy to wage wars of aggression . . . has been proved.”¹¹¹ All of the defendants were found guilty, although the sentences varied between death sentences (seven), life imprisonment (sixteen), and confinement for less than life (two).¹¹²

B. Why the War Crimes Trials Were Ineffective

Besides prosecuting war crimes suspects, an effective war crimes tribunal should serve other functions as well. In particular, to enhance its efficacy, a tribunal should provide victims with a “sense of justice and closure” and should advance “national reconciliation” by initiating a “public dialogue” concerning past events and the course for the future.¹¹³ The educational component of a war crimes tribunal is especially critical.¹¹⁴ Ideally, a war crimes tribunal should capture the lessons of the past: “The record could become the backbone of a call for national healing and a warning to potential perpetrators. School textbooks could be rewritten to educate future generations about the evils of the past and prepare them for a better future.”¹¹⁵

110. *Id.* at 23.

111. *Id.* at 27.

112. *Id.* at 23.

113. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 155 (Oxford Univ. Press 2d ed. 2001).

114. Gerry J. Simpson, *War Crimes: A Critical Introduction*, in THE LAW OF WAR CRIMES 19-20 (T.L.H. McCormack & G.J. Simpson eds., Kluwer L. Int'l 1997).

Robert G. Storey, executive trial counsel at Nuremberg, spoke of the need to make “a record of the Hitler regime which would withstand the test of history.” Before the Eichmann trial began, Israeli Prime Minister Ben-Gurion reminded Israelis that “it is necessary that our youth remember what happened to the Jewish people. We want them to know the most tragic facts of our history.” The District Court, itself, acknowledged, “the great educational values implicit in the very holding of a trial.” The Australian war crimes legislation came into force with Senators speaking of the need to tell the story of the holocaust to future generations. Most recently in advocating a war crimes trial in the Persian Gulf Anthony D’Amato warned the Congressional Committee on Foreign Relations that “a war crimes trial should not be today’s news forgotten tomorrow. Rather, it should be one of the most fundamental lessons in civics that can be taught to the people of the world, especially the young people.”

The purpose of the typical war crimes trial is as much to enlighten the present-day innocents as it is to punish the historical criminals.

Id. at 20 (citations omitted).

115. Julie Mertus, *Only a War Crimes Tribunal: Triumph of the “International Community,” Pain of the Survivors*, in WAR CRIMES: THE LEGACY OF NUREMBERG 229, 239 (Belinda Cooper ed., TV Books 1999).

For a variety of reasons, however, the Tokyo Tribunal and the separate individual Allied trials did not adequately educate Japan regarding its responsibility nor did it bring closure to the many victims of the Japanese regime.¹¹⁶ Consequently, accountability for Japanese war crimes remains a significant problem even though World War II ended over fifty-five years ago. The main reasons for this are the failure to prosecute Emperor Hirohito,¹¹⁷ the controversy over the crimes against peace charges,¹¹⁸ the failure to prosecute entire categories of crimes or offenders,¹¹⁹ and the failure to effectively use the trials as a vehicle to educate the Japanese people about Japanese war crimes.¹²⁰ Moreover, the “victors’ justice” label was almost immediately affixed to the Tokyo Tribunal and tainted its legacy.¹²¹

1. The Failure to Prosecute Emperor Hirohito

The U.S. decision not to prosecute Emperor Hirohito was made as a “calculated political decision” in an attempt to aid the post-war occupation of Japan.¹²² General MacArthur explained that “destroying” the Emperor would cause Japan to “disintegrate.”¹²³ Specifically, General MacArthur believed that, given the Japanese public support of the Emperor, prosecution of Hirohito would result in “a condition of underground chaos and guerilla warfare in mountainous and outlying regions,” thus necessitating an additional one million soldiers for occupational duty in a more hostile Japan.¹²⁴

Significant unintended consequences resulted from this decision. The failure to prosecute Hirohito greatly reduced “any sense of national shame or guilt over the atrocities committed by Japanese forces.”¹²⁵ Many Japanese citizens continue to believe that if their emperor was not accountable for the war, they should not be blameworthy either:

[T]he main reason why Japanese war crimes were so quickly forgotten had to do with Hirohito himself. The legitimacy of Japan’s wars of aggression—the belief that it had invaded various Asian and Pacific

116. See discussion *infra* Parts III.B.4, III.C.

117. See discussion *infra* Part III.B.1.

118. See discussion *infra* Part III.B.2.

119. See discussion *infra* Part III.B.3.

120. See discussion *infra* Part III.B.4.

121. See discussion *infra* Part III.C.

122. See PICCIGALLO, *supra* note 97, at 16.

123. *Id.*

124. JANSEN, *supra* note 15, at 669.

125. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 191 (Penguin Press 1999).

countries in order to liberate them—could not be fully discredited unless he was subjected to trial and interrogation in some forum for his role in the wars, especially his inability or disinclination to hold Japan's armed forces to any standard of behavior morally higher than loyalty and success. Many Japanese, after all, had been complicit with him in waging war, and the nation as a whole came to feel that because the emperor had not been held responsible, neither should they.¹²⁶

In addition to Hirohito not being prosecuted, U.S. prosecutors were ordered to avoid mention of Hirohito's name during the Tokyo Tribunal trials, thus further minimizing Hirohito's wartime role in the testimony and trial records.¹²⁷

2. Crimes Against Peace

The decision to make crimes against peace the centerpiece of the charges against the class "A" defendants in the Tokyo Tribunal proved equally controversial.¹²⁸ Essentially, the charge of crimes against peace was based on the defendants' roles in making and executing Japan's war plans.¹²⁹ Japan was a party to the Kellogg-Briand Peace Pact of 1928 that "condemn[ed] recourse to war for the solution of international controversies" and "renounce[d] it as an instrument of national policy," but the Kellogg-Briand Pact did not impose individual criminal liability.¹³⁰ Therefore, Japan, as a state, clearly violated the Kellogg-Briand Pact by its aggressive wars; however, authority for prosecuting individuals for their participation in a state's act of war could not be based solely on the text of the treaty.¹³¹

126. HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 617-18 (Harper Collins Publishers 2000).

127. JANSEN, *supra* note 15, at 673.

128. *See* DOWER, *supra* note 100, at 456-57.

129. *Id.* The case against the class "A" defendants was made as a conspiracy charge extending from 1928 until 1945. *Id.* This proved to be controversial as well:

[T]he IMTFE prosecution and majority notion of an all-inclusive seventeen-year criminal conspiracy involving all the accused strained credibility. Their contention that "from 1928-1941 each change in [the Japanese] government was brought about either to further the common plan or to meet a situation caused by some act furthering the plan" betrayed an underlying inability to grasp the dynamics of Japanese politics or a misplaced determination to force, after the fact, unrelated and fortuitous events into a preconceived thesis. The conspiracy charge should have been excluded from the indictment.

PICCIGALLO, *supra* note 97, at 211-12.

130. JOHN NORTON MOORE ET AL., *NATIONAL SECURITY LAW DOCUMENTS* 139-40 (Carolina Acad. Press 1995).

131. *See id.* at 140. The key provisions of the Kellogg-Briand Pact provide:

Although article 5(a) of the Tokyo Charter criminalized aggression, the class "A" defendants argued that this violated the principle of *nullum crimen sine lege, nulla poena sine lege*, or "no crime without law, no punishment without law" because the Tokyo Charter was enacted after the defendants' acts.¹³² In response, the prosecution asserted that the article 5(a) charge of crimes against peace was based on customary international law, including the Kellogg-Briand Pact, as part of a "body of international criminal law which existed before the acts of the defendants."¹³³ The prosecution's argument proved successful.¹³⁴ The legal dispute over this issue, however, strongly detracted from each class "A" defendant's individual responsibility for Japan's wartime atrocities reflected in the crimes against humanity and conventional war crimes charges.¹³⁵

3. Crimes Not Prosecuted

Furthermore, the Tokyo Tribunal and the national commissions failed to include several significant categories of crimes and individuals. Apart from one national trial regarding the rape of Dutch "comfort women" during Japan's wartime occupation of the Netherlands' Indonesian colony, no other cases involving crimes against "comfort women" were prosecuted in either the Tokyo Tribunal or the national tribunals.¹³⁶ Moreover, the U.S. prosecutors decided to grant immunity to those involved with Unit 731 in return for information obtained from the medical experiments.¹³⁷ Possibly due to political considerations, although the decision-making process remains unclear, prosecution for Japanese

Article 1. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Id.

132. See PICCIGALLO, *supra* note 97, at 21. The *nullum crimen* maxim is a fundamental precept of international criminal law and received much attention during and after the Nuremberg trials. RATNER & ABRAMS, *supra* note 113, at 21-22.

133. See PICCIGALLO, *supra* note 97, at 19-20 (citations omitted).

134. See *id.* at 23-25.

135. See *id.* at 210-12.

136. See HICKS, *supra* note 61, at 57-61. "The only cases of forcible seizure for rape and prostitution which led to war crime trials involved Dutch women internees in central Java, in Indonesia. The Batavia Military Tribunal was held in 1948." *Id.* at 57.

137. DOWER, *supra* note 100, at 465.

use of chemical weapons was not pursued either.¹³⁸ Charges for the massive involuntary mobilization of citizens from Japan's colonies of Korea and Taiwan were not initiated.¹³⁹ Additionally, certain classes of offenders were excluded from prosecution: "No heads of the dreaded Kempeitai (the military police) were indicted; no leaders of ultranationalistic secret societies; no industrialists who had profited from aggression and had been intimately involved in paving the 'road to war.'"¹⁴⁰ The end result was that the trial records from the Tokyo Tribunal and national tribunals did not reflect the full extent, magnitude, or scope of the Japanese atrocities and thus could not serve as a complete historical record.¹⁴¹

4. Failure of the Trials to Educate the Japanese Public

The Tokyo Tribunal and the national tribunals did not effectively educate the Japanese public regarding the Japanese war crimes. During the war, Japanese censors prevented the Japanese public from learning about many of the Japanese atrocities.¹⁴² Therefore, while educating the Japanese public was recognized as an important goal of the Tribunal, several factors hindered the educational objectives of both the Tokyo Tribunal and the national tribunals.¹⁴³ The thirty-one-month duration of the Tokyo Tribunal caused "increasing public ennui on the issue of war crimes and war responsibility."¹⁴⁴ Additionally, the national tribunals concerning the thousands of "accused war criminals in faraway places did not initially attract great attention within Japan."¹⁴⁵ In an effort to reverse this trend, the lead prosecutor of the Tokyo Tribunal, Joseph Keenan, proposed the publication of a book, written in Japanese and describing the Japanese war crimes and the trials, which would be distributed at no cost to hundreds of thousands of Japanese citizens.¹⁴⁶

138. *Id.*; see also BIX, *supra* note 126, at 616-17.

139. DOWER, *supra* note 100, at 465.

140. *Id.* at 464-65 (citations omitted).

141. *See id.*

142. DOWER, *supra* note 40, at 61. "Accounts of massacres such as the Rape of Nanking, the Bataan Death March, and the sack of Manila, however, appear to have been successfully censored, and even withheld from relatively well-placed individuals." *Id.*

143. PICCIGALLO, *supra* note 97, at 15.

144. DOWER, *supra* note 100, at 449-50. "'To be honest,' one Japanese newspaper observed in November 1948, when the judgment was about to be handed down, 'the general public's interest focused not on the proceedings but on the single point of what the verdicts would be.'" *Id.* at 450.

145. *Id.* at 449.

146. TIM MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS 77-78 (Univ. Press of Ky. 2001).

Unfortunately, Keenan's plan was disapproved, ostensibly for budget reasons.¹⁴⁷ While this decision may have reflected a desire to move forward given the changing postwar political structure, the consequence was that the trial records were never made available to the Japanese public.¹⁴⁸ These factors combined to eliminate the Japanese public's collective sense of responsibility for the war.¹⁴⁹

C. Overall Assessment of the Japanese War Crimes Trials

Perhaps due to these many factors, as well as the inability of the Japanese defendants to raise any issues regarding Allied conduct during the war (in particular the use of atomic bombs against Japan), the Tokyo Tribunal trials are often maligned as "victors' justice."¹⁵⁰ On the other hand, one person's "victors' justice" is another person's honest effort to develop international law and achieve justice.¹⁵¹ Similarly, some commentators viewed the Tokyo trials as a necessary first step in the growth of the prohibition in international law of the aggressive use of force and that while the process was rudimentary, it was more palatable than any other alternative.¹⁵² With the hindsight of over fifty years, one

147. *Id.*

148. See DOWER, *supra* note 100, at 453-54.

Whereas the entire Nuremberg proceedings had been made available in a forty-two-volume bilingual (English and French) publication, no official publication ever emanated from Tokyo. Even the majority judgment, which summarized the prosecution argument in great detail, was not made readily accessible. Transcripts of the entire proceedings were distributed so haphazardly that no Allied government ever obtained a definitive set. . . . For all practical purposes, the record of the proceedings was buried.

Id.

149. See ROBERTSON, *supra* note 125, at 191.

150. See DOWER, *supra* note 100, at 472-75; see also INGRID DETTER, *THE LAW OF WAR* 413 (Cambridge Univ. Press 2d ed. 2000); JANSEN, *supra* note 15, at 673; KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 19 (Oxford Univ. Press 2001). Onuma Yasuaki, Professor of International Law at the University of Tokyo Graduate School of Law and Politics, summarizes the effect of the Tokyo Tribunals on the Japanese people:

Ordinary Japanese did not regard the trial and punishment of Tojo Hideki and other leaders as a condemnation of all Japanese people. They were just bystanders, regarding themselves as victims rather than perpetrators of war. They were also somewhat cynical of the trials. The unfair composition of the tribunal, the neglect of the violation of the Japan-Soviet Neutrality Pact by the Soviet Union, the atomic bombings by the U.S., and many other unfair factors, strengthened the perception that the trials were victors' justice. In short, the Tokyo Trial was not perceived as legitimate among many ordinary Japanese people.

Yasuaki, *supra* note 9, at 604.

151. PICCIGALLO, *supra* note 97, at 210-11.

152. See, e.g., DETTER, *supra* note 150, at 413-14; KITTICHAISAREE, *supra* note 150, at 20. "The choice was between, on the one hand, having a fair trial to deter future generations, and, on

should not be too critical of a process that had little historical precedent to draw upon. Nonetheless, one must still recognize that the Tokyo Tribunal did not achieve “substantial closure” for the Japanese society.¹⁵³ It “failed to solve Japan’s many-sided problem of war responsibility” and “in some ways [it] made the problem more intractable.”¹⁵⁴

IV. POSTWAR ACTIVITY

The Cold War largely froze the issue of Japan’s accountability for its World War II war crimes.¹⁵⁵ With the end of the Cold War, though, many of the war crimes responsibility issues resurfaced.¹⁵⁶ Japan has essentially responded with a two-pronged strategy: limited apologies to foreign governments and war crimes victims groups coupled with a vigorous defense of all war crimes litigation brought against Japan by war crimes survivors.¹⁵⁷ This strategy has proved ineffective. Apologies have been contradicted by Japanese government officials’ remarks,¹⁵⁸ incidents involving Japanese history textbooks, and Japanese government officials paying homage to deceased war criminals.¹⁵⁹ Additionally, although Japan’s legal defense has been predominantly successful, its litigation efforts have had the effect of demonstrating that a solution to the problem may not be found in the courts.¹⁶⁰ This, in turn, has led to increased international pressure on Japan to resolve the issue.¹⁶¹ The war crimes responsibility issue as a whole has developed into a significant foreign policy problem for Japan.¹⁶²

A. *Apology Diplomacy*

Developments during the Cold War, primarily the Communist takeover of mainland China and the North Korean invasion of Korea, “gave Japan, now throwing in its lot with the West, a very convenient excuse to forget its accountability for its past conduct” thus allowing

the other, a summary execution of those who deserved to be avenged for their roles in the unprecedented atrocities committed by one human-being against another.” KITTICHAISAREE, *supra* note 150, at 20 (citations omitted).

153. See RATNER & ABRAMS, *supra* note 113, at 190.

154. BIX, *supra* note 126, at 618.

155. See discussion *infra* Part IV.A.

156. See *id.*

157. See discussion *infra* Parts IV.A, IV.C.

158. See discussion *infra* Part IV.A.

159. See discussion *infra* Part IV.B.

160. See discussion *infra* Part IV.C.

161. See discussion *infra* Part IV.D.

162. See *id.*

Japan to virtually ignore the issue of its accountability in Asia.¹⁶³ As the Cold War ended, however, the regional dynamics changed dramatically and Japan has had to directly address its history.¹⁶⁴ In particular, Koreans and Chinese started to insist that Japan deal with its wartime past.¹⁶⁵

These developments led to a policy of “apology diplomacy.”¹⁶⁶ Over the last decade or so, Japan has repeatedly apologized to nation states and individual groups of war crimes victims for its conduct in World War II.¹⁶⁷ The policy has been inconsistent and ineffective. For example, Prime Minister Murayama marked the fiftieth anniversary of World War II’s end by apologizing for “Japan’s colonial rule and aggression” which “inflicted immense harm and suffering upon people in many countries, especially in other Asian countries.”¹⁶⁸ This seemingly strong statement was contrasted with the Japanese Diet’s “watered down” resolution on the same topic that was a “rather ambivalent, far-from-straightforward expression of regret.”¹⁶⁹ The Japanese Constitution makes the Diet the “highest organ of state power,”¹⁷⁰ so the limited Diet statement served to undermine the effect of the Prime Minister’s remarks. Similarly, Prime Minister Murayama also made an apology in which he referred directly to the “comfort women.”¹⁷¹ Yet the lack of a Diet endorsement of the

163. WAKAMIYA YOSHIBUMI, *THE POSTWAR CONSERVATIVE VIEW OF ASIA: HOW THE POLITICAL RIGHT HAS DELAYED JAPAN’S COMING TO TERMS WITH ITS HISTORY OF AGGRESSION IN ASIA* 22-24 (LTCB Int’l Libr. Found. 1998).

164. *Id.*

165. See NICHOLAS D. KRISTOF & SHERYL WUDUNN, *THUNDER FROM THE EAST: PORTRAIT OF A RISING ASIA* 246 (Alfred A. Knopf 2000).

166. YOSHIBUMI, *supra* note 163, at 235.

167. *Id.* at 245-55; see also HICKS, *supra* note 61, at 198; Parker & Chew, *supra* note 77, 535-37 (regarding apologies directed to the comfort women).

168. YOSHIBUMI, *supra* note 163, at 255. Prime Minister Murayama’s full remarks were:

During a certain period in the not-too-distant past, Japan, after adopting a mistaken national policy, marched down the path to war and provoked a crisis jeopardizing the very survival of our people. Japan’s colonial rule and aggression inflicted immense harm and suffering upon people in many countries, especially in other Asian countries. I humbly acknowledge these irrefutable facts of history, express my deep remorse once again, and offer an apology from the bottom of my heart, in the hope that no such mistake will ever be made in the future. I also offer my sincere condolences to all the victims of this period of history in Japan and abroad.

Prime Minister Tomiichi Murayama, Statement Issued on the Fiftieth Anniversary of the end of World War II (Aug. 15, 1995), *reprinted in* YOSHIBUMI, *supra* note 163, at 255.

169. *Id.* at 10.

170. KENPŌ, art. 41, *available at* http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html (“The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.”) (last visited Apr. 17, 2003).

171. See Statement by Prime Minister Tomiichi Murayama on the Occasion of the Establishment of the “Asian Women’s Fund” (July 1995), *available at* <http://www.mofa>.

apology rendered it “not sincere enough” for most “comfort women” survivors.¹⁷² Overall, quite a few of the apologies made by the Japanese government have “had an element of double-dealing; sometimes, they were mere attempts to pass off ambiguous phrases as apologies.”¹⁷³ To this day, some still question whether the Japanese government has ever apologized directly to any group of POWs.¹⁷⁴

Whatever positive effect these apologies have had, though, has been repeatedly diluted by “Japanese politicians’ verbal and behavioral displays of insensitivity, nullifying the effects of any apology.”¹⁷⁵ For example, a string of Japanese Liberal Democratic Party cabinet ministers had to resign from their positions due to remarks such as “I think the Rape of Nanking is a fabrication” and “I do not think Japan intended to wage a war of aggression.”¹⁷⁶

B. Actions Speak Louder than Words

Additionally, the Japanese government’s policies regarding Japanese history textbooks and honoring class “A” war crime perpetrators at the Yasukuni Shrine have weakened the impact of the official apologies. Japanese textbooks have downplayed both Japan’s role in World War II and the atrocities committed by Japan during the war.¹⁷⁷ On several

go.jp/policy/women/fund/state9507.html (last visited Oct. 12, 2002). In 1995, Prime Minister Murayama stated:

This year marks the 50th anniversary of the end of the War, an event that caused many people, both in Japan and abroad, great suffering and sorrow. During these past 50 years we have worked hard to cultivate, step by step, friendly relations with our neighbouring Asian countries and others. However, the scars of war still run deep in these countries to this day.

The problem of the so-called wartime comfort women is one such scar, which, with the involvement of the Japanese military forces of the time, seriously stained the honor and dignity of many women. This is entirely inexcusable. I offer my profound apology to all those who, as wartime comfort women, suffered emotional and physical wounds that can never be closed.

Id.

172. Coomaraswamy, *supra* note 75, ¶ 61. The Special Rapporteur observed that, “In addition, most victims felt that the apologies made at the time of the mission of Prime Minister Murayama were not sincere enough, especially because his statement had not been endorsed by the Japanese Diet.” *Id.*

173. YOSHIBUMI, *supra* note 163, at 255.

174. See Maria L. LaGanga, *Japan Falls Short on War Apology*, L.A. TIMES, Sept. 9, 2001, at B6 (“In the tortured history of Japanese apologies for wartime aggression, scholars and historians said, they do not believe that the government has ever singled out prisoners of war as a subject of regret.”).

175. YOSHIBUMI, *supra* note 163, at 255.

176. *Id.* at 12 (citation omitted).

177. See KRISTOF & WUDUNN, *supra* note 165, at 238.

occasions, proposed new editions of the textbooks have outraged Korean and Chinese citizens and government officials.¹⁷⁸ For a long period after the war, the Japanese government compelled textbook publishers to remove all references to wartime atrocities and, for example, required the term “aggression” to be replaced by “military advance.”¹⁷⁹ In 1982 and 1986, pressure from the Korean and Chinese governments led Japan to edit its history textbooks to change the offensive language.¹⁸⁰ More recently, the issue flared up again over another Japanese textbook.¹⁸¹ Both China and Korea demanded changes to a proposed 2001 Japanese junior high textbook; once again, there were contentions that Japan was glossing over its wartime past.¹⁸²

The Yasukuni Shrine has also been a source of controversy. In 1978, the Japanese government enshrined the executed class “A” war criminals at the Yasukuni Shrine.¹⁸³ Thereafter, any visit to the Shrine by a Japanese Prime Minister inevitably stirred up further allegations that Japan was not facing up to its wartime history. In particular, Prime Minister Koizumi’s visit to the Shrine on August 13, 2001, unleashed a torrent of protests in Korea and a stern response from the Chinese Government.¹⁸⁴ A *Korea Herald* editorial following Koizumi’s Shrine visit argued that the Yasukuni Shrine and history textbook issues are closely tied to Japan’s inability to come to grips with its past:

Japan still is not willing to recognize its imperial aggression and exploitation of other Asians when it comes to such sensitive issues as the military sexual slavery system and forced labor in army factories. Aside from the recent resurgence in nationalism and nostalgia to imperial past in the Japanese society, this is why the economic superpower is viewed with suspecting eyes as difficult neighbors by other Asians.

In this context, the latest disputes over Japan’s nationalist history textbooks and the prime minister’s paying homage to war dead, including convicted Class A war criminals, are mutually related and unavoidable in a

178. See Peter McGill, *South Korea Denounces Japan’s Refusal to Revise History Texts*, BLOOMBERG NEWS, July 9, 2001, available at LEXIS, News Library, Bloomberg File.

179. KRISTOF & WUDUNN, *supra* note 165, at 238.

180. YOSHIBUMI, *supra* note 163, at 19, 177-78.

181. See McGill, *supra* note 178.

182. *Id.*

183. YOSHIBUMI, *supra* note 163, at 170.

184. *Koreans Celebrate Liberation Day, Condemn Revival of Japanese Militarism*, KOREA TIMES, Aug. 16, 2001, available at LEXIS, News Library, Korea Times File; Shin Yong-bae, *Korea-Japan Relations at Crucial Crossroads*, KOREA HERALD, Aug. 15, 2001, available at LEXIS, News Library, Korea Herald File; *Koizumi’s Visit to Yasukuni Shrine Outrages Asian Neighbors*, JAPAN POL’Y & POL., Aug. 20, 2001, available at http://www.findarticles.com/cf_0/m0XPQ/2001_August_20/78375065/print.jhtml (last visited Nov. 7, 2002).

sense. Neither can be considered Japan's domestic problem and both are crucial to Japan's relations with other Asians and their future relations.¹⁸⁵

Consequently, whenever a Japanese government official presents an apology, there is a palpable sense that Japan's conduct ultimately will not match its words.¹⁸⁶ An academic expert on Korea explained this in the context of Prime Minister Koizumi's apology of October 2001: "People have heard other prime ministers say the exact same words. They hear it and say, 'Here we go one more time,' but the next day there's another textbook issue."¹⁸⁷

C. Japan's Vigorous Legal Defense

1. Litigation in Japan

The many law suits brought by Japanese war crimes survivors against Japan is a reflection of the insufficiency of Japan's attempted apologies.¹⁸⁸ Japan has been very successful in its legal defense against

185. *A Damaged Partnership*, KOREAN HERALD, Aug. 15, 2001, available at LEXIS, News Library, Korea Herald File.

186. *See id.*

187. Struck, *supra* note 3. Similarly, an editorial in the *Korea Times* stated, "[a]ll in all, what is truly required is for the Japanese leader's expression of remorseful repentance and heartfelt apology for the past to be translated into practice, and not end up as nothing but lip service. It is disappointingly recalled that Koizumi's predecessors made similar remarks that were not followed up with corresponding deeds." *Koizumi's Brief Trip to Seoul*, KOREA TIMES, Oct. 16, 2001, available at <http://search.hankooki.com/search/search.api?Koizumi's%20Brief%20trip%20to%20seoul> (last visited Nov. 7, 2002).

188. *See* Barry A. Fisher, *Japan's Postwar Compensation Litigation*, 22 WHITTIER L. REV. 35, 36 (2000). Some may cynically view the lawsuits as simply a means to extract money from the Japanese government. This was certainly an undercurrent of the commentary concerning Holocaust survivor reparation litigation. *See* Gabriel Schoenfeld, *Holocaust Reparations—A Growing Scandal*, in THE AMERICAN ENTERPRISE, Jan./Feb. 2001, at 59 (book review). "American trial lawyers see Holocaust victims as a new source of wealth. From 1945 to 1995, fewer than 10 class-action lawsuits were filed by Holocaust survivors; in the past five years, the number has tripled." *Id.* "Moreover, if there is a grubby feel to the exercise, this is in part due to the insistence of those American lawyers and politicians who seek to profit from it." *Putting a Price on the Holocaust*, ECONOMIST, Nov. 27, 1999, at 54.

Class-action lawyers currently are requesting 1.8 percent, or \$25 million, of the total, which some critics have called excessive given the degree to which this settlement was arrived at not by lawyers but by public officials and international pressure. Though strictly speaking a class-action suit, this settlement, like Holocaust reparations generally, cannot really be compared to the kinds of medical or product liability cases that routinely generate such lawyers' fees. No one can seriously dispute the proposition that Holocaust reparations, however inadequate a proxy for history, should go as much as possible to actual Holocaust victims.

Justice and Reparations, WASH. POST., Sept. 11, 1999, at A20, available at LEXIS, News Library, U.S. Newspapers File. However, as discussed below, the plaintiffs in the Japanese cases seek a relatively limited amount of monetary damages and they place much greater emphasis on an

the claims of war crimes survivors.¹⁸⁹ In Japan, the cases filed thus far demonstrate the full scope of Japan's major war crimes, including:

[C]laims for labor; claims of "Comfort Women"; claims of POWs who suffered unspeakable mistreatment; claims by victims of the Nanjing Massacre, and other mass killings by Japanese forces; claims for injuries from abandoned explosives and chemical weapons; claims by victims of the infamous biological weapons force, Unit 731; claims by people subjected to forced relocation; and claims brought by victims of mass rape. The plaintiffs' countries of origin include Taiwan, Korea, the Philippines, Hong Kong, the Netherlands, the United Kingdom, the United States, Australia, New Zealand, and China.¹⁹⁰

However, to date Japan has been successful in obtaining dismissal of all but one of the lawsuits.¹⁹¹

The only case not summarily dismissed was a 1998 local prefecture case that provided a partially promising result for "comfort women" survivors.¹⁹² The case did not find a legal duty based on international law for Japan to provide compensation for the "comfort women."¹⁹³ Instead, it found that Japan violated a Japanese governmental tort statute by failing to take some action following a 1993 governmental report that acknowledged the Japanese government's role involving the "comfort women."¹⁹⁴ By failing to act to correct the human rights violations, the Diet violated their constitutional duty.¹⁹⁵ The court awarded the plaintiffs

official apology. See discussion *infra* Part V.B.6. Consequently, the influence of any potential monetary gain seems to play a much smaller role.

189. See Fisher, *supra* note 188, at 35-36; see also *Australian WWII Vets to Keep Fighting for Japanese Compensation*, ASIA PULSE, Mar. 28, 2002, available at LEXIS, News Library, Asia Pulse File (regarding the most recent court room defeat for Japanese war crimes survivors).

Tokyo's high court overnight rejected an appeal for government compensation for 150,000 civilians and military personnel, including Australians, detained in Asia during World War II.

An elderly seven-member group of plaintiffs, representing larger organisations of former detainees in Britain, New Zealand, the US and Australia, are demanding compensation of S22,000 (42,105) for being held in Japanese camps across Asia during World War II.

The Tokyo High Court upheld a lower court decision handed down in 1999 to reject the case. The plaintiffs were also ordered to pay court costs.

Id.

190. Fisher, *supra* note 188, at 36 (citations omitted).

191. *Id.*

192. See *The "Comfort Women" Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan*, 8 PAC. RIM L. & POL'Y J. 63, 63-100 (Taihei Okada trans., 1999).

193. See *id.* at 90-91.

194. See *id.* at 98, 102-03.

195. See *id.*

a nominal sum that reflected the Diet's failure but did not compensate the plaintiffs for their actual wrongs.¹⁹⁶

Although the Japanese Supreme Court ultimately agreed with the Hiroshima High Court's decision to overturn the lower court's interpretation, the lower court decision at least represented a symbolic victory.¹⁹⁷ In order to reach its decision, the lower court first had to find the "comfort women's" claims credible, whereas other Japanese courts had dismissed similar claims without making such findings.¹⁹⁸ Consequently, the case has been viewed as a "landmark" in that it may be useful for "comfort women" supporters to cite the case in their efforts to reach a political solution to the issue.¹⁹⁹

In a case representing perhaps another symbolic victory, a local Tokyo court made a factual finding that Japan employed biological weapons against Chinese civilians during World War II.²⁰⁰ Specifically, Presiding Judge Koji Iwata found that, "The evidence shows that the Japanese troops, including Unit 731, used bacteriological weapons under the order of the Imperial Japanese Army's headquarters and that many local residents died."²⁰¹ The court rejected the claims of the Chinese plaintiffs for damages, however, because "no international law that enables individuals to sue for war damages had been established at the time or has been now."²⁰²

196. See *id.* at 103.

197. See *Japan's Supreme Court Rejects South Korean Sex Slave Suit*, AGENCE FR. PRESSE, Mar. 25, 2003, available at LEXIS, News Library, Combined Sources File.

Japan's Supreme Court on Tuesday rejected compensation claims by 10 South Korean women who were forced to serve as sex slaves for Japanese soldiers or worked at factories in Japan during World War II.

The decision nullified the first and only court ruling which had ordered the Tokyo government to compensate Asian women for being forced to prostitute themselves as so-called "comfort women" for front line Japanese troops.

More than 50 damage suits have been filed against Japan over its wartime sexual enslavement of women, mainly from South Korea and China. Those suits have been rejected by Japanese courts on the grounds that the 20-year period for demanding compensation has expired, or that internationally recognised treaties only provide for reparations to be made to states, not individuals.

Id. See also *High Court Reverses Ruling Favoring "Comfort Women"*, DAILY YOMIURI, Mar. 30, 2001, available at LEXIS, News Library, Daily Yomiuri File.

198. See Etsuro Totsuka, *Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery*, 8 PAC. RIM L. & POL'Y J. 47, 57-59 (1999).

199. *Id.* at 59-61.

200. See Doug Struck, *Tokyo Court Confirms Japan Used Germ Warfare in China; Compensation Denied for Deaths Caused by Diseases Spread in WWII*, WASH. POST, Aug. 28, 2002, at A15, available at LEXIS, News Library, Wash. Post file.

201. *Id.*

202. *Id.* Despite the court's denial of damages, Keiichiro Ichinose, a Japanese attorney for the Chinese plaintiffs, expressed hope that the case may still have long term significance:

2. Litigation in the United States

In the United States, cases filed by Japanese war crimes survivors have not been successful either. Several recent opinions outline the legal obstacles that Japanese war crimes survivors face. In *Hwang Geum Joo v. Japan*, the District of Columbia District Court dismissed a “comfort women” plaintiffs’ suit on the basis that Japan possesses sovereign immunity under the Foreign Sovereign Immunity Act (FSIA).²⁰³ The court held that even if Japan’s conduct during the war may have violated *jus cogens* norms of international law, there was no waiver of sovereign immunity by Japan under the FSIA.²⁰⁴ Even apart from the FSIA immunity, the claim presented a nonjusticiable political question as it asked the court to review the 1951 U.S.-Japan peace treaty that expressly waived all post-war claims between the two countries.²⁰⁵ In this regard, the court concurred with the statement of interest filed by the United States in the case finding: “The 1951 Treaty of Peace with Japan resolved all ‘claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war.’”²⁰⁶ Consequently, the court urged the plaintiffs to seek to have the treaty reassessed on a government-to-government basis.²⁰⁷

There is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions nearly a half century later. Just as the agreements and treaties made with Japan after World War II were negotiated at the government-to-government level, so too should the current claims of the “comfort women” be addressed directly between governments.²⁰⁸

In a recent series of POW cases for damages, which had been consolidated under one court for disposition, the District Court for the Northern District of California also dismissed all of the plaintiffs’

“The fact that the court confirmed it [Japanese use of biological weapons] is revolutionary,” he said. “But the court did not have the courage to admit responsibilities on the part of the Japanese government. I think there will be a time when (the government) will have to admit it. In that sense, this is the first step.”

Id.

203. See *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 64 (D.D.C. 2001).

204. See *id.* at 60-64.

205. *Id.* at 64-67.

206. *Id.* at 67 (citing Treaty of Peace with Japan, Sept. 8, 1951, U.S.-Japan, art. 14(b), 3 U.S.T. 3169).

207. *Id.*

208. *Id.*

claims.²⁰⁹ In *In re WWII Era Japanese Forced Labor Litigation*, the court concluded that the 1951 peace treaty preempted a California state statute allowing POWs to make claims against Japanese industries that used POWs for forced labor.²¹⁰ Just as in *Hwang*, the court placed great emphasis on the U.S.-Japan peace treaty's waiver of all claims.²¹¹ The court found the treaty's language waiving all claims to be "strikingly broad."²¹² Moreover, the court found this interpretation entirely consistent with the "history of the treaty, the negotiations, and the practical constructions adopted by the parties."²¹³

209. *In re World War II Era Japanese Forced Labor Litig.* (I), 114 F. Supp. 2d 939, 948-49 (N.D. Cal. 2000).

210. *Id.* at 942. In this case, the court specifically addressed "actions against Japanese corporations for forced labor in World War II" in "consolidated pretrial proceedings." *Id.* The opinion did not "address the pending motions to dismiss in cases brought by plaintiffs who were not members of the armed forces of the United States or its allies." *Id.*

211. *See id.* at 945; *see also Hwang*, 172 F. Supp. 2d at 67.

212. *In re World War II Era Japanese Forced Labor Litig.* (I), 114 F. Supp. 2d at 945. The court analyzed the treaty's waiver clause:

On its face, the treaty waives "all" reparations and "other claims" of the "nationals" of Allied powers "arising out of any actions taken by Japan and its nationals during the course of the prosecution of the war." The language of this waiver is strikingly broad, and contains no conditional language or limitations, save for the opening clause referring to the provisions of the treaty.

Id. In its entirety, the treaty provision reads:

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims [o]f the Allied Powers for direct military costs of occupation.

Id. (citing Treaty of Peace with Japan, Sept. 8, 1951, U.S.-Japan, art. 14(b), 3 U.S.T. 3169).

213. *Id.* at 945-46. Specifically, the court emphasized:

The official record of treaty negotiations establishes that a fundamental goal of the agreement was to settle the reparations issue once and for all. As the statement of the chief United States negotiator, John Foster Dulles, makes clear, it was well understood that leaving open the possibility of future claims would be an unacceptable impediment to a lasting peace:

Reparation is usually the most controversial aspect of peacemaking. The present peace is no exception.

On the one hand, there are claims both vast and just. Japan's aggression caused tremendous cost, losses and suffering.

On the other hand, to meet these claims, there stands a Japan presently reduced to four home islands which are unable to produce the food its people need to live, or the raw materials they need to work.

Under these circumstances, if the treaty validated, or kept contingently alive, monetary reparations claims against Japan, her ordinary commercial credit would vanish, the incentive of her people would be destroyed and they would sink into a misery of body and spirit that would make them easy prey to exploitation.

There would be bitter competition [among the Allies] for the largest possible percentage of an illusory pot of gold.

In a related companion case involving Filipino plaintiffs, the court found that because the U.S.-Japan peace treaty included the Philippines as both an “Allied power” and as an official signatory, it barred the Filipino plaintiffs claims in the same manner it barred U.S. nationals’ claims.²¹⁴ In another companion case, the court addressed the remaining class action law suits brought by Korean and Chinese plaintiffs.²¹⁵ The court held that, while the U.S.-Japan treaty did not preempt the claims of Korean and Chinese plaintiffs, the California statute allowing these claims was “unconstitutional as applied to defendants in the case at bar because it infringes on the federal government’s exclusive power over foreign affairs.”²¹⁶ Additionally, the Korean and Chinese plaintiffs could not succeed under ATCA as the claims were barred by the statute of limitations.²¹⁷ The United States Court of Appeals for the Ninth Circuit eventually consolidated all of the various Japanese forced labor cases with a German Holocaust forced labor case and affirmed the lower court’s rulings.²¹⁸

D. Growing International Pressure on Japan

1. The United States’ Response

Japan’s ability to successfully defend war crimes litigation lawsuits has not resolved the problems surrounding Japan’s war crimes

Id. at 946 (citing U.S. Dept. of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951)).

214. *In re* World War II Era Japanese Forced Labor Litig. (II), 164 F. Supp. 2d 1153, 1156-57 (N.D. Cal. 2001).

215. *In re* World War II Era Japanese Forced Labor Litig. (III), 164 F. Supp. 2d 1160, 1164 (N.D. Cal. 2001).

216. *Id.* at 1165. In applying the doctrine set forth in *Zschernig v. Miller*, 389 U.S. 429 (1968),

the court cited various reasons why the California statute should be considered as having more than an incidental or indirect effect in foreign countries: (1) the terms of the statute and its legislative history demonstrated a purpose to influence foreign affairs directly; (2) the statute targeted particular countries; (3) the statute did not regulate an area that Congress had expressly delegated to the states to regulate; (4) the statute established a judicial forum for negative commentary about the Japanese government and Japanese companies; (5) the Japanese government asserted that litigation of the claims in question could complicate and impede the diplomatic relationships of the countries involved; and (6) the United States, through the Department of State, contended that the statute impermissibly intruded upon the foreign affairs power of the federal government.

Contemporary Practice of the United States Relating to International Law, 96 AM. J. INT’L. L. 237, 261-62 (Sean D. Murphy ed., 2002) (citation omitted).

217. *In re* World War II Era Japanese Forced Labor Litig. (III), 164 F. Supp. 2d. at 1179-82.

218. *See* *Deutsch v. Turner Corp.*, 317 F.3d 1005, 1015 (9th Cir. 2003).

responsibility.²¹⁹ Instead, international pressure has increased, perhaps due to a growing recognition that the courts will not settle the issues.²²⁰ In the United States, for example, there has recently been considerable activity in Congress regarding Japan's wartime accountability. On June 28, 2000, the Senate Judiciary Committee convened a hearing which featured testimony by U.S. POWs who expressed their outrage that Japan had not taken any steps to apologize or to compensate them since World War II ended.²²¹ On July 24, 2001, Representative Lane Evans spoke in Congress regarding the plight of Soon Dok Kim, a "comfort woman" survivor.²²² Representative Evans then introduced a resolution criticizing Japan for its response to the "comfort women" issue.²²³ The resolution intended to express "the sense of Congress that the Government of Japan should formally issue a clear and unambiguous apology for the sexual enslavement of young women during the colonial occupation of Asia and World War II, known to the world as 'comfort women.'"²²⁴ Moreover, Congress recently passed legislation authorizing the expeditious declassi-

219. See discussion *infra* Part IV.C.

220. See *id.*

221. *Former U.S. World War II POW's: A Struggle for Justice: Hearing Before the Comm. on the Judiciary on Determining Whether Those Who Profited from the Forced Labor of American World War II Prisoners of War Once Held and Forced into Labor for Private Japanese Companies Have an Obligation to Remedy Their Wrongs and Whether the United States Can Help Facilitate an Appropriate Resolution*, 106th Cong. (2000) [hereinafter *Former U.S. World War II POW's Hearing Before the Senate Judiciary Comm.*]. The hearing specifically focused on POW lawsuits against Japanese corporations and the issues raised in *In re WWII Era Japanese Forced Labor Litigation (I)*, 114 F. Supp. 2d 939 (N.D. Cal. 2000), that barred the plaintiffs from recovering against the Japanese government or Japanese corporations. *Id.* In its 107th session, Congress passed the Justice for United States Prisoners of War Act of 2001. See H.R. 1198, 107th Cong. (2001). This legislation would have allowed U.S. courts to rule on these cases. See *id.* § 3. However, after strong executive pressure, the legislation was removed from a spending bill while it was in the conference committee. See Iris Chang, *Betrayed by the White House*, N.Y. TIMES, Dec. 24, 2001, at A15, available at <http://www.nytimes.com>; see also Charles Burrell, *3 Former Envoys Blast Bill on POW Reparations, Critics Say Measure Could Weaken U.S.-Japan Ties*, S.F. CHRON., Oct. 1, 2001, at A5, available at <http://sfgate.com/cgo-bin-article.cgi?file=/chronicle/archive/2001/10/01/MN230578.DTL>.

222. 147 CONG. REC. E 1412 (daily ed. July 24, 2001) (statement of Rep. Evans).

223. H.R. Con. Res. 195, 107th Cong. (2001).

224. *Id.* Although the resolution was never formally adopted, it had eighteen co-sponsors. See *id.* The resolution also provided that Japan

- (2) should immediately pay reparations to the victims of these crimes;
- (3) should educate future generations about this horrible crime against humanity; and
- (4) should publicly refute claims that the subjugation and enslavement of comfort women never occurred.

Id.

fication of Japanese war records in the possession of the U.S. government, particularly focusing on records concerning Japanese war crimes.²²⁵

2. The United Nations' Response

The United Nations has also pressured Japan to address its wartime responsibilities.²²⁶ The United Nations Commission on Human Rights (UNCHR) appointed a Special Rapporteur, Radhika Coomaraswamy, to investigate the "comfort women" issue.²²⁷ Special Rapporteur Coomaraswamy prepared a report extremely critical of the lack of an adequate Japanese response to the "comfort women."²²⁸ The UNCHR Subcommission on the Prevention of Discrimination and Protection of Minorities subsequently appointed another Special Rapporteur, Gay McDougall, who investigated the subject of "systematic rape, sexual slavery and slavery-like practices during armed conflict."²²⁹ This report was also critical of Japan's treatment of the "comfort women" issue.²³⁰ In

225. Japanese Imperial Government Disclosure Act of 2000, 5 U.S.C. § 552 (2000). *See also* Implementation of the Japanese Imperial Government Disclosure Act and the Japanese War Crimes Provisions of the Nazi War Crimes Disclosure Act an Interim Report to Congress, *available at* http://www.archives.gov/iwg/declassified_records/japanese_war_crimes_disclosure.html. To identify relevant records, Congress directed agencies to focus on materials specifically relating to Japanese war crimes, including:

any records related to certain topics of high interest to the public and to historians.

These topics are:

- (1) Any materials related to Japanese treatment of prisoners of war and civilian internees, including any materials related to forced or slave labor;
- (2) Any materials related to development and use of chemical and biological warfare agents;
- (3) Any materials related to General Ishii, medical experimentation on humans, and Unit 731;
- (4) Any materials related to the U.S. Government decision after the War not to prosecute the Emperor and certain war criminals; and
- (5) Any materials related to the so-called "Comfort Women" program, the Japanese systematic enslavement of women of subject populations for sexual purposes.

Id.

226. Coomaraswamy, *supra* note 75.

227. *Id.*

228. *Id.* ¶¶ 137-40.

229. *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, U.N. ESCOR, 50th Sess., Item 6 of the Provisional Agenda, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) [hereinafter *McDougall U.N. Report*].

230. *See id.* app. ¶ 69.

The Government of Japan has taken some steps to apologize and atone for the rape and enslavement of over 200,000 women and girls who were brutalized in "comfort stations" during the Second World War. However, anything less than full and unqualified acceptance by the Government of Japan of legal liability and the

particular, the report criticized Japan for not taking more steps to a full and unqualified acceptance by the Japanese government of its legal liability for the enslavement of over 200,000 “comfort women” during World War II and the consequences arising from such liability.²³¹ The report implored the Japanese government to take the necessary final steps to provide adequate redress.²³² In a recent update to this report, McDougall concluded that the “atrocities committed against the so-called ‘comfort women’ remain largely unremedied.”²³³

3. The Need for Japan to Resolve the Problem

Given this backdrop of international pressure upon Japan, a strong consensus is building that Japan must address its past in a way that allows Japan and its neighbors to move on.²³⁴ Japan’s failure to apologize for its brutality during World War II has spawned significant tension in Asia.²³⁵ Japan’s relations with China remain troubled by the “conflict between [the countries’] cultures and peoples and their respective understandings of history.”²³⁶ In order to overcome these problems, Japan

consequences that flow from such liability is wholly inadequate. It must now fall to the Government of Japan to take the necessary final steps to provide adequate redress.

Id.

231. *Id.*

232. *Id.*

233. Gay J. McDougall, *Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Update to the Final Report Submitted by Ms. Gay J. McDougal, Special Rapporteur*, U.N. ESCOR, 52d Sess., Item 6 of the Provisional Agenda, ¶ 72, U.N. Doc. E/CN.4/Sub.2/2000/21 (2000).

There has been no reparation to the victims: no official compensation, no official acknowledgement of legal liability, and no prosecutions. While the Government of Japan has taken some steps to apologize for its system of military sexual slavery during the Second World War, it has not admitted or accepted legal liability and has failed to pay legal compensation to the victims. Thus, the Government of Japan has not discharged fully its obligations under international law.

Id.

234. See Nicholas D. Kristof, *The Problem of Memory*, FOREIGN AFF., Nov./Dec. 1998, at 37.

235. *Id.* at 38.

236. DAVID M. LAMPTON, MAJOR POWER RELATIONS IN NORTHEAST ASIA: WIN-WIN OR ZERO-SUM GAME 15 (Japan Ctr. for Int’l Exch. 2001). China’s Foreign Ministry spokesman, Kong Quan, in discussing the Japanese Unit 731 court decision, stated: “The facts are undeniable The Japanese side should take a responsible attitude towards its history and towards reality and correctly acknowledge and deal with history.” Guo Nei, *Japan Told to Face up to Atrocities*, CHINA DAILY, Aug. 29, 2002, available at LEXIS, News, Combined Sources File. Premier Wen Jiabao has said that the “development of Sino-Japanese ties should be based on how Japan deals with its past invasion of China ‘How to correctly approach and deal with that period of history when Japan invaded China is ultimately the political basis of developing Sino-

must “unambiguously renounce its imperial past in Asia.”²³⁷ Moreover, for Japan to become a “normal” country, it must establish “mutually acceptable interpretations of memory and history with its neighbors so those neighbors do not object to that country’s engaging in a full range of international activities and capabilities.”²³⁸

Japan has recently sought to expand its international powers through a campaign to gain a permanent seat on the United Nations Security Council and by increased participation in international peacekeeping operations.²³⁹ Yet Japan’s war accountability has become a major foreign policy problem that has distracted, if not frustrated, Japan from obtaining its goals.²⁴⁰ Nowhere is the intersection between Japan’s past and future more vividly displayed than in East Timor where Japan has sent military personnel to assist with the U.N. peacekeeping efforts.²⁴¹ Japan’s presence was subject to strong protest resulting from its harsh treatment of the East Timorese, particularly with regard to East Timorese “comfort women.”²⁴² Similarly, protests often mar Japanese official appearances abroad, such as Prime Minister Koizumi’s visit to Manila in 2002, his visit to Seoul in 2001, and the anniversary celebration of the U.S.-Japan peace treaty.²⁴³

Japanese ties.” *Japan Should Reflect on Wartime History: China’s New Premier*, ASIAN POL. NEWS, Mar. 25, 2003, available at LEXIS, News Library, News Group File.

237. *Id.*

238. See Gerrit W. Gong, *The Beginning of History: Remembering and Forgetting as Strategic Issues*, WASH. Q., Spring 2001, at 45, 56.

239. LAMPTON, *supra* note 236, at 76-77; see also Gong, *supra* note 238, at 47.

240. See Kristof, *supra* note 234, at 43.

241. See *Protest Planned Against Japan in East Timor*, AAP NEWSFEED, Mar. 4, 2002, available at LEXIS, News, Wire Service Stories File.

242. *Id.*

Australians for a Free East Timor spokesman Rob Wesley-Smith said Japan must apologise for its violent occupation of Portuguese Timor from 1942, during which an estimated 40,000-60,000 East Timorese died. “The Japanese government must make a formal apology to the East Timorese for the suffering Japanese troops caused, particularly to the 3,000 comfort women who were made sex slaves,” he said.

Id.; see also Morag MacKinnon, *Japan’s First Peacekeepers Arrive in East Timor to Protests*, BLOOMBERG NEWS, Mar. 4, 2002, available at LEXIS, News Library, Bloomberg News File.

Protesters carrying placards saying: “40,000 Timorese died during 1942-45” and “Go home Japanese Self-Defense Force,” greeted the arrival of three cargo planes used to fly in the advance team, the BBC said. Among the protesters were elderly women forced by the Japanese military to act as so-called “comfort women” or prostitutes after the invasion, the BBC said.

Id.

243. *Ex-Comfort Women, Workers Stage Protests over Japanese Visit*, BBC MONITORING INT’L REP., Jan. 9, 2002 (describing protests in Manila during Prime Minister Koizumi’s visit); see also Struck, *supra* note 3 (regarding protests surrounding Koizumi’s visit to Seoul); Charles Burrell et al., *War Memories Mar Peace Observance; Treaty with Japan Is 50 Years Old, but*

While Japan may hope the war accountability problem will gradually fade away over time, the passage of time may actually aggravate the problem.²⁴⁴ One commentator theorizes that advances in modern information and communications technology make the brutalities of the past more accessible by enabling the “playing and replaying [of] our worst nightmares through cyberspace, with an expanding global and personal reach.”²⁴⁵ This produces a contradictory effect as people who did not live through the tragic events of the past may view them even more bleakly than those who actually lived through the tragedies.²⁴⁶ (An example may be the 20 young Korean men who chopped off the tips of their pinkie fingers in a “morbid gesture of fury” to protest Prime Minister Koizumi’s visit to the Yasukuni Shrine.)²⁴⁷ This development poses significant problems for Japan, as “history will become the vocabulary and linchpin in Northeast Asia[n]” strategic alignments.²⁴⁸

Two commentators have analyzed and diagnosed Japan’s problems as requiring either the “clarifying” or “sharing” of Japan’s history in order to resolve its dilemma. John Dower, a noted expert on Japan, suggests that “clarification” is the key.

Koizumi has a rare opportunity now to try to clarify what Japan should do in the future. At the same time, however, he said Japan has to clarify its position on such issues as “comfort women,” who were sent as sex slaves to military brothels of the Imperial Japanese Army, prisoners of war forced by Japan to perform hard labor, and the issue of visits to the Yasukuni Shrine.

“Before Japan can define its future mission, the first thing it has to do is to clarify war responsibility problems . . . to move without this kind of clarification will cause great confusion and misunderstanding, I think, in Japan and in the world.”²⁴⁹

Victims Can't Forget, S.F. CHRON., Sept. 9, 2001, at A1, available at LEXIS, News, U.S. Newspapers File (regarding protests at the anniversary of the U.S.–Japan peace treaty respectively).

244. See Gong, *supra* note 238, at 45-48.

245. *Id.* at 45.

246. *Id.* at 56.

247. Nisid Hajari et al., *At War with History*, NEWSWEEK, Atlantic Edition, Aug. 27, 2001, available at LEXIS, Magazine Stories, Newsweek File.

248. Gong, *supra* note 238, at 53.

249. *War Legacy Remains Under San Francisco Treaty*, JAPAN POL'Y & POL., Sept. 3, 2001, available at http://www.findarticles.com/cf_dls/m0XPQ/2001_Sept_3/78783664/print.html (last visited Nov. 7, 2002).

Similarly, a Japanese commentator believes that Japan must find a way to “share” its history:²⁵⁰

It is crucial for Japan to act as a member of the Asian team with as much humility as possible, conscious of its militaristic stigma. In recent history, Japan brought untold misery to people throughout Asia (and brought ruin on itself). That is why it must teach its history as it is, without convenient excuses or omissions, to coming generations. To strive to “share history” with the people of Asia—that is the most fundamental of the obligations that Japanese statesmen and leaders must assume today.²⁵¹

The truth commission is an ideal mechanism for addressing the many problems associated with Japan’s war crimes accountability.

V. THE TRUTH COMMISSION

“Truth commission” is usually the name given to “an *official* investigation into a *past pattern of abuses*.”²⁵² One definition of the truth commission describes four critical elements of such a commission:

First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report.²⁵³

Generally, truth commissions deal with nations at a point of transition and “demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and/or to obtain or sustain political legitimacy.”²⁵⁴ The truth commission is now considered a “firmly entrenched mechanism of accountability.”²⁵⁵ Historically, truth commissions have taken place predominantly in African and Latin American nations.²⁵⁶

By focusing on reconciliation, the truth commission provides an opportunity for a nation to achieve “closure” over a troubled period of its

250. YOSHIBUMI, *supra* note 163, at 326.

251. *Id.*

252. HAYNER, *supra* note 10, at 23.

253. Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 604 (1994).

254. *Id.*

255. RATNER & ABRAMS, *supra* note 113, at 238.

256. *See* Hayner, *supra* note 253, at 601-03.

history.²⁵⁷ A truth commission also offers victims a sense of catharsis by allowing victims to tell their story and have it sanctioned by the “commission’s official imprimatur.”²⁵⁸ Through its ability to gather testimony and evidence, a truth commission can construct a historical account of an entire regime by virtue of the commission’s “sheer narrative project.”²⁵⁹ In this regard, a truth commission is able to “paint a more complete picture of abuses—a more useful truth, as it were—than a trial court focusing on the guilt or innocence of a limited set of defendants.”²⁶⁰

The truth commission has been viewed as a “protean organ,” as its purposes and mechanics may vary considerably.²⁶¹ A nation adopting a truth commission must build the commission’s structure in the manner that best suits the nation’s situation.²⁶² Nonetheless, one truth commission—the South African Truth and Reconciliation Commission (TRC)—provides several attractive features that could be used as a working template for a Japanese truth commission.²⁶³ Therefore, the South African TRC, because of its exploration into the circumstances leading to the creation of the TRC, its subsequent history and effect, would serve as a useful model to compare and contrast with a proposed Japanese truth commission.²⁶⁴

A. *A Potential Model: The South African Truth and Reconciliation Commission*

1. Background

The South African TRC was adopted to confront the numerous human rights violations stemming from South Africa’s apartheid regime and, to a lesser degree, the armed response to that regime by the African National Congress and others.²⁶⁵ For nearly 350 years, the ruling white minority in South Africa subjected the black majority to a pervasive, official discrimination that prevented the black majority from taking part

257. See TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT 11 (Harv. L. Sch. Hum. Rts. Prog. 1997).

258. See *id.* at 24-25.

259. Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in TRUTH V. JUSTICE, THE MORALITY OF TRUTH COMMISSIONS 239 (Robert Rotberg & Dennis Thompson eds., Princeton Univ. Press 2000).

260. RATNER & ABRAMS, *supra* note 113, at 238.

261. TRUTH COMMISSIONS, *supra* note 257, at 8.

262. See RATNER & ABRAMS, *supra* note 113, at 158-59.

263. See discussion *infra* Part V.A.

264. See *id.*

265. HAYNER, *supra* note 10, at 40-41.

in the nation's politics and economics.²⁶⁶ This discriminatory form of government was formalized in 1948 as the apartheid system.²⁶⁷ Notwithstanding this long history, the TRC focused exclusively on the period from 1960 to 1994.²⁶⁸

The TRC's scope began with 1960 because that was the year of the Sharpsville massacre, during which South African police personnel killed many peaceful protesters through "an unjustifiable use of deadly force."²⁶⁹ During the 1960s and through the mid-1970s, the South African government gradually deteriorated into an essentially criminal state that went beyond mere discrimination to adopt a policy of removing opposition to the government by murdering those who opposed apartheid.²⁷⁰ This process grew stronger during the administration of President P.W. Botha from 1978 to 1989.²⁷¹

During the first part of Botha's rule, the South African military concentrated on engaging anti-apartheid forces outside of South Africa in "counter revolutionary warfare."²⁷² In the mid-1980s, though, opposition to apartheid within South Africa greatly increased.²⁷³ In order to address this perceived threat, the Botha administration applied military tactics to ruthlessly crush domestic protesters.²⁷⁴ As summarized in the TRC's primary finding:

[T]he South African state in the period from the late 1970s to early 1990s became involved in activities of a criminal nature when, amongst other things, it knowingly planned, undertook, condoned and covered up the commission of unlawful acts, including the extra-judicial killings of political opponents and others, inside and outside South Africa.²⁷⁵

In 1990, Botha's successor, President F.W. de Klerk, ordered the legalization of apartheid protest groups, including the African National Congress (ANC).²⁷⁶ He also freed political prisoners such as Nelson

266. See CHARLES VILLA-VICENCIO & WILHELM VERWOERD, LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 16 (Univ. of Cape Town Press 2000).

267. 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT ¶¶ 22-24 (Macmillan Reference Ltd. 1998) [hereinafter TRC REPORT].

268. *Id.* ¶¶ 2, 5.

269. *Id.* ¶ 81.

270. *Id.* ¶ 80.

271. *Id.* ¶¶ 79, 102.

272. *Id.* ¶ 85.

273. *Id.*

274. *Id.* ¶ 88.

275. *Id.* ¶ 77.

276. ALEX BORAINÉ, A COUNTRY UNMASKED 29-30 (Oxford Univ. Press 2000).

Mandela.²⁷⁷ In so doing, de Klerk helped create some of the conditions that set the stage for a negotiated transition to majority rule.²⁷⁸ With the election of Nelson Mandela as President of post-apartheid South Africa in 1994, momentum for a truth commission grew.²⁷⁹

2. Creation of the TRC

The TRC was created in a deliberate, thoughtful, and participatory manner.²⁸⁰ Serious discussions took place about what form the TRC would take and whether amnesty would be granted to wrongdoers.²⁸¹ After much debate, the South African Parliament drafted the Promotion of National Unity and Reconciliation Act, which authorized and funded the TRC.²⁸² In the course of the legislative process, the South African government sought input from individual citizens and nongovernmental organizations (NGOs).²⁸³ The government provided copies of the draft bill to many NGOs throughout South Africa for review and allowed the NGOs to submit their comments for consideration.²⁸⁴ The Parliament conducted over 150 hours of public hearings regarding the proposed TRC.²⁸⁵ Parliament finally passed the legislation in July 1995.²⁸⁶

The next step was the appointment of commissioners by President Mandela.²⁸⁷ Mandela used an open process that paralleled the creation of the TRC.²⁸⁸ He appointed a special Parliamentary committee to prepare a list of nominees from which Mandela, in consultation with his Cabinet, would select the commissioners.²⁸⁹ The committee held public hearings to increase awareness about the potential commissioners.²⁹⁰ From these nominees, President Mandela selected seventeen commissioners, including “seven women, ten men, seven Africans, two ‘coloureds,’ two Indians, and six whites.”²⁹¹ Archbishop Desmond Tutu was the

277. *Id.*

278. *See id.* at 30.

279. HAYNER, *supra* note 10, at 41.

280. *See id.*

281. *See id.*

282. *See id.*

283. BORAINÉ, *supra* note 276, at 49-50.

284. *Id.*; *see also* HAYNER, *supra* note 10, at 221.

285. HAYNER, *supra* note 10, at 221.

286. BORAINÉ, *supra* note 276, at 71.

287. *Id.*

288. *See id.* at 71-72.

289. *Id.*

290. *Id.* at 72.

291. *Id.* at 73, 75.

Chairperson and Dr. Alex Boraine was the Deputy Chairperson.²⁹² Altogether, it took over eighteen months from the formal proposal of the TRC until the appointment of the commission.²⁹³ This considerable investment of time and the engagement of the populace were critical, though, in gaining public and political support for the TRC.²⁹⁴

The Promotion of National Unity and Reconciliation Act limited the TRC's mandate to inquiring into "gross violations of human rights" stemming from apartheid, including the acts of "killing, abduction, torture or severe ill-treatment of any person," and crimes such as planning, conspiring to commit, or ordering "gross violations of human rights."²⁹⁵ This mandate has been criticized as being too narrow in scope.²⁹⁶ For example, the mandate did not include the widespread "forced removals" of black South Africans.²⁹⁷ However, the TRC's limited timeframe of two and a half years, made it exceedingly difficult to explore every aspect of the all-pervading nature of apartheid.²⁹⁸ Therefore, the TRC committed "to focus on the more extreme human rights violations."²⁹⁹

3. Powers of the TRC

The South African government endowed the TRC with significant powers. The TRC received sufficient personnel and an ample budget; the seventeen commissioners managed a staff of 300 persons with an \$18 million annual budget.³⁰⁰ Additionally, the South African government granted the TRC authority to perform search and seizure, the ability to subpoena witnesses, and the power to grant individualized amnesty to human rights violators and other politically motivated criminals from the

292. *Id.* at 73. Dr. Boraine, a white Afrikaner, was a prominent "former church leader" at the time of appointment. Johnathan D. Tepperman, *Truth and Consequences*, FOREIGN AFF., Mar./Apr. 2002, at 128, 133.

The TRC also profited from the support of two much-beloved figures—then President Nelson Mandela, a secular saint, and the TRC chairman, Archbishop Desmond Tutu, a religious one. Mandela and Tutu's importance cannot be overestimated: if they, who had both suffered so much and led the fight against the old regime, were ready to forgive, surely the nation could follow.

Id. at 132-33.

293. HAYNER, *supra* note 10, at 221.

294. *Id.*

295. BORAINÉ, *supra* note 276, at 106-07.

296. HAYNER, *supra* note 10, at 73.

297. *Id.*

298. *Id.* at 41.

299. BORAINÉ, *supra* note 276, at 107.

300. HAYNER, *supra* note 10, at 40-41.

era.³⁰¹ The TRC used its search and seizure powers to procure official documents from otherwise reluctant government departments.³⁰² As Dr. Boraine, the Deputy Chairperson, stated, “We also appreciated that many civil servants would do their best to obstruct the Commission’s work. The powers of search and seizure were therefore extremely useful and were used on a number of occasions, particularly with regard to the former South African Defence Force.”³⁰³ The TRC did not utilize the subpoena power as extensively as the search and seizure authority, but it nonetheless remained valuable as a threat, and it proved of “vital importance” in prosecuting the contempt charge against former President Botha for his failure to comply with the TRC’s subpoena ordering him to testify.³⁰⁴

The TRC’s amnesty powers were controversial but essential to the functioning of the TRC.³⁰⁵ The government authorized the TRC to grant both civil and criminal amnesty.³⁰⁶ The provision of amnesty to those that had committed gross human rights violations was not a broad, unconditional grant of amnesty.³⁰⁷ Instead, this amnesty depended upon the perpetrators’ cooperation with the TRC.³⁰⁸ Amnesty seekers submitted a formal application to the TRC.³⁰⁹ In the application, the perpetrator had to demonstrate his or her criminal involvement with, and political connection to, apartheid.³¹⁰ If approved, the applicant was required to admit his or her gross human rights violations in public hearings and submit to questions from “the commission, from legal counsel representing victims or their families, and directly from victims themselves.”³¹¹ Altogether, over 7000 people applied for amnesty.³¹²

The TRC’s amnesty mechanism resulted from a necessary political compromise between blanket amnesty and a full-scale criminal prosecution of the old regime.³¹³ The delicate negotiations between the outgoing administration and the apartheid opponents regarding the transition to a post-apartheid South Africa required an intermediate

301. *Id.* at 40-41, 43.

302. *See* BORAINÉ, *supra* note 276, at 272-73.

303. *Id.* at 273.

304. *Id.*

305. HAYNER, *supra* note 10, at 43.

306. TRC REPORT, *supra* note 267, at 171.

307. *See* HAYNER, *supra* note 10, at 43.

308. *Id.*

309. *See id.*

310. *See id.*

311. *Id.* (citations omitted).

312. *Id.*

313. *See* BORAINÉ, *supra* note 276, at 283.

solution to help induce the administration to peacefully turn over power.³¹⁴ Additionally, conditional amnesty provided a needed incentive for perpetrators to come forward and testify before the TRC.³¹⁵ A South African Constitutional Court case upholding the TRC expressly recognized this built-in incentive factor:

[The] truth, which the victims of repression seek so desperately to know, is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order.³¹⁶

4. Victim Focus

While the search and seizure and subpoena powers, coupled with the conditional amnesty provisions, provided the TRC the means to obtain evidence and testimony on perpetrators of gross violations of human rights, the TRC also had a strong victim focus.³¹⁷ In describing the public hearings featuring the victims' testimony, Dr. Boraine captures exactly how the victims were the focal point of the TRC's proceedings:

The ritual, which was what the public hearings were, which promised truth, healing, and reconciliation to a deeply divided and traumatised people, began with a story. This was the secret of the Commission—no stern-faced officials sitting in a private chamber, but a stage, a handful of black and white men and women listening to stories of horror, of deep sorrow, amazing fortitude, and heroism. The audience was there too, and a much wider audience watched and listened through television and radio. It was a ritual, deeply needed to cleanse a nation. It was a drama. The actors were in the main ordinary people with a powerful story. But this was no brilliantly written play; it was the unvarnished truth in all its starkness.³¹⁸

314. *See id.* As Dr. Boraine stated, “[T]he transition from oppression to democracy was achieved not through a violent overthrowing of the state but through negotiations between the state and the liberation movements. Therefore a compromise was inevitable, and one of those compromises was the provision for amnesty.” *Id.*

315. *Id.* at 287.

316. *Id.* at 286-87 (citation omitted).

317. *See HAYNER, supra* note 10, at 28.

318. BORAINÉ, *supra* note 276, at 99.

Roughly 21,000 victims provided statements to the TRC.³¹⁹ The TRC trained statement takers to assist victims with their statements and how to respond to signs of trauma.³²⁰ The TRC viewed statement takers as the “front rank of those who gathered the memories of the pain and suffering of the past.”³²¹ Given the large number of victims, not all of them could testify publicly. Therefore, criteria were developed to choose victims for the hearings.³²² In selecting victims, the TRC adopted a “window” approach, concentrating on “specific ‘window’ cases—representative of a far larger number of violations of a similar type and involving the same perpetrator groupings.”³²³ In all cases, though, victims were “always asked whether they would be willing, if invited, to testify in public.”³²⁴ Furthermore, the TRC demonstrated its willingness to accommodate female victims by allowing testimony outside the camera’s range in order to protect their privacy and confidentiality and composing special hearings in front of solely female commissioners.³²⁵

5. The Issue of Reparations

The Promotion of National Unity and Reconciliation Act required the TRC to develop recommendations concerning reparations for the victims of gross human rights violations.³²⁶ Accordingly, the TRC gathered input from the victims on the amount and type of reparation desired.³²⁷ Most of the victims that appeared before the Commission did not speak of monetary reparation, but rather of their concern for the truth.³²⁸

In debating the actual amount of money to be awarded the victims, the Commission found it difficult to make monetary distinctions between levels of suffering.³²⁹ Consequently, victims received the same amount because, as one TRC Staff member put it, “[a]fter eighteen months, the

319. *Id.* at 115.

320. HAYNER, *supra* note 10, at 145.

321. TRC REPORT, *supra* note 267, ¶ 20.

322. *Id.* ¶ 23.

323. *Id.* ¶ 58.

324. *Id.* ¶ 24.

325. HAYNER, *supra* note 10, at 78.

326. TRC REPORT, *supra* note 267, at 170.

327. *Id.*

328. BORAINÉ, *supra* note 276, at 334. Dr. Borainé spoke for the Commissioners when he stated, “In most instances we were overwhelmed by the modesty of the requests. Very few of those who appeared before the Commission even talked in monetary terms. Their first concern was to know the truth. That was the greatest reparation we could give to them, to break the silence.” *Id.*

329. DOROTHY C. SHEA, *THE SOUTH AFRICAN TRUTH COMMISSION: THE POLITICS OF RECONCILIATION* 35 (U.S. Inst. of Peace Press 2000).

[C]ommission decided that there was tremendous wisdom in equality because this is, after all, a symbolic payment.³³⁰ Nonetheless, the TRC viewed the symbolic payment as highly significant. The Commission stated in its final report that “[t]he granting of reparation awards to victims of gross violations of human rights adds value to the ‘truth seeking’ phase by: enabling the survivors to experience in a concrete way the state’s acknowledgement of wrongs done to the victims and survivors, family members, communities and the nation at large.”³³¹

6. The Importance of the Media and Transparency

The TRC encouraged and promoted significant media presence through hearings that were open to the public and the media which resulted in widespread television and radio coverage.³³² The TRC’s policy of “maximum publicity” was effective in establishing public recognition of the proceedings and made denial increasingly less plausible, particularly among white South Africans.³³³ Moreover, this process promoted transparency, which in turn made the necessary healing and reconciliation available to the general public.³³⁴

Upon completion of its mission, the TRC released a five-volume report.³³⁵ The TRC’s Chair, Archbishop Tutu, formally handed the report to President Mandela in an official public ceremony.³³⁶ The TRC made this report available to all and recommended the further dissemination of the report through “paraphrasing, editing, . . . video and audio cassettes, to schools and tertiary institutions, non-governmental organisations and churches, workshops and conferences.”³³⁷ The TRC viewed the

330. *Id.*

331. BORAINÉ, *supra* note 276, at 338.

332. HAYNER, *supra* note 10, at 42.

Media coverage of the commission was intense: most newspapers ran a number of stories on the commission every day, and radio and television news often led with a story on the most recent revelations from the commission’s hearings. Four hours of hearings were broadcast live over national radio each day, and a *Truth Commission Special Report* television show on Sunday evenings quickly became the most-watched news show in the country.

Id.

333. Minow, *supra* note 259, at 238.

334. Dr. Alexander Borainé, *Alternatives and Adjuncts to Criminal Prosecutions*, in *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE*, *supra* note 77, at 469, 472.

335. HAYNER, *supra* note 10, at 44; *see also* Truth and Reconciliation Commission, Final Report: Summary and Guide to Contents, *available at* <http://www.doj.gov.za/trc/report/execsum.htm> (last visited Oct. 13, 2002) (online executive summary of the TRC’s report).

336. *See* BORAINÉ, *supra* note 276, at 305.

337. *Id.* at 294.

educational component of their report as a critical, central feature of the TRC: “[b]uilt into the South African model is a process of education which far exceeds that of a war crimes tribunal or a normal trial. The life and legacy of the Commission are geared towards education of the general populace.”³³⁸

7. The Effect of the TRC

The TRC has received criticism, but any process that confers amnesty on gross human rights violators will not be without its share of critics. A recurring and rather glib critique charged the TRC with producing “horrifying truths and not much reconciliation.”³³⁹ Certainly, the TRC, as with all truth commissions, is not a panacea capable of curing all of a society’s ills.

On the other hand, “reconciliation” may be defined in different ways and achieving reconciliation may be viewed as a process.³⁴⁰ From this perspective, the TRC represents an essential first step toward greater reconciliation.³⁴¹ As one editorial put it, “[n]o society can be restored to health by papering over as much pain as South Africans have suffered. A noisy and informed debate about the complicity and the crimes of the apartheid era is necessary if uncomfortable.”³⁴² Others point to the general lack of interracial violence in South Africa since the TRC as an indicator of its success and view South Africa as “a much healthier country than it was several years ago, and part of this is unquestionably due to the efforts of the commission.”³⁴³ Overall, the TRC can take considerable pride in compiling an invaluable historical record of the abuses of the apartheid era through an open and transparent process that focused on victims while requiring human rights violators to confess to their crimes in order to receive amnesty. When one compares the situation in South Africa today to similar African nations that have also undergone a transition from minority rule to majority rule, such as Zimbabwe, the positive impact of the TRC becomes clearer.³⁴⁴

338. *Id.*

339. *Id.* at 340.

340. *See, e.g., id.* at 342.

341. *See id.*

342. *Id.*

343. Tepperman, *supra* note 292, at 135-36.

344. *See* Simon Robinson, *A Tale of Two Countries; Zimbabwe Gets Ready to Vote Between Two Different Versions of Reality in a Presidential Election Already Marred by Violence*, TIME INT’L, Feb. 25, 2002, at 30, available at LEXIS, News, Magazine Stories Combined File. Since Zimbabwe gained independence in 1980 and ended the political dominance of its white minority population, President Robert Mugabe has “stamped out dissent, exiled opponents . . . and violently suppressed the Ndebele, the smaller of Zimbabwe’s two main

8. Applying the South African TRC to Japan

Japan can draw upon lessons from the South African TRC. Dr. Boraine repeatedly stresses the importance of recognizing “that it is neither possible nor desirable to impose the South African model on any other society.”³⁴⁵ Nonetheless, he also recognizes that other nations can learn from the South African experience.³⁴⁶ In particular, he submits:

[T]here are some mature democracies which are facing challenges to their own incomplete transitions and which find it difficult to come to terms with their past. Japan, for example, is facing challenges over its use of Korean ‘sex slaves,’ and China is demanding an unqualified apology for atrocities committed by Japanese soldiers before and during World War II.³⁴⁷

Although the truth commission has typically been used to promote national reconciliation, there is no reason why it cannot be used to promote regional reconciliation.³⁴⁸ A Japanese truth commission could serve as a potential end to the recurring cycle of limited apologies, followed by some blunder or misdeed that leads to further recriminations, that has marred Japanese relations with China and Korea and its other Asian neighbors.³⁴⁹ The commission could build an educational and definitive historical narrative that might terminate the seemingly endless dispute over Japan’s wartime past.³⁵⁰ Such a commission could also provide a dignified and fitting apology to the many victims of Japan’s war crimes.³⁵¹ The South African model will not fit Japan’s situation in every circumstance, but it does offer a successful and proven example that can serve as a framework from which Japan can draw in designing its own truth commission.³⁵²

ethnic groups.” *Id.* Moreover, while other African states engage in domestic and political reform, “the situation in Zimbabwe has only regressed. Mugabe’s policies defy democratic principles and incite local ethnic tension. . . . Mugabe’s anti-democratic policies have also undermined the foundations of political legitimacy in Zimbabwe.” Leah Litman, *Mugabe’s Malaise*, 24 HARV. INT’L REV. 10, 10-11 (2003).

345. BORAINÉ, *supra* note 276, at 379.

346. *Id.* at 379-80.

347. *Id.*

348. *See, e.g.*, Hayner, *supra* note 253.

349. *See* Struck, *supra* note 3; *see also supra* notes 184-185.

350. *See* YOSHIBUMI, *supra* note 163, at 326; RATNER & ABRAMS, *supra* note 113, at 238; Minow, *supra* note 259, at 239.

351. *See* Coomaraswamy, *supra* note 75, ¶ 61; BORAINÉ, *supra* note 276, at 380.

352. *See* BORAINÉ, *supra* note 276, at 380.

B. A Proposed Japanese Truth Commission

A Japanese truth commission should resemble the South African TRC in several critical aspects: it should be authorized by both the Japanese Diet and the Prime Minister; it should limit its mandate to “gross violations of human rights”;³⁵³ the commission should have extensive powers and a substantial budget;³⁵⁴ both civil and criminal amnesty should be granted to encourage testimony from perpetrators;³⁵⁵ the commission should have a strong victim focus;³⁵⁶ transparency and publicity in the commission’s proceedings should be emphasized;³⁵⁷ it should compile an authoritative report and historical narrative;³⁵⁸ the commission should recommend a monetary sum to be awarded to the surviving victims;³⁵⁹ and the government should officially and formally release the final report, along with a strong apology to the victims.³⁶⁰

However, a Japanese commission should differ from the South African TRC in at least one important respect. The South African TRC was the product of a thorough and far-reaching debate that took over eighteen months.³⁶¹ Given the advanced age of the war crimes victims, Japan simply cannot afford the luxury of a lengthy deliberative process in creating a truth commission. Moreover, an extended preparatory period may lead critics to believe that Japan is simply stalling for time and does not intend to follow through with its proposal. Consequently, once the decision to create a truth commission is reached, action must take place in an expeditious manner. Moreover, the commission’s timeframe should be limited in order to ensure the process is completed within a reasonable period.

1. The Mandate for the Commission

The commission’s mandate should cover all World War II era Japanese “gross human rights violations” from 1931 to 1945.³⁶² Since complete amnesty will be provided, and there will thus be no concerns about *ex post facto* laws, the commission should use international law as it stands today, rather than as it did before World War II, to define “gross

353. *See id.* at 106-07.

354. *See* HAYNER, *supra* note 10, at 41.

355. *See* BORAINÉ, *supra* note 276, at 283.

356. *See* discussion *supra* Part V.A.4.

357. *See* Minow, *supra* note 259, at 238; Borainé, *supra* note 334, at 472.

358. *See* discussion *infra* Part V.A.6.

359. *See* BORAINÉ, *supra* note 276, at 338.

360. *See* discussion *infra* Part V.A.6.

361. SHEA, *supra* note 329, at 35.

362. *See* PICCIGALLO, *supra* note 97, at 11-12; CHANG, *supra* note 12, at 29.

human rights violations.” The commission should also adopt a “window approach” similar to that of the South African TRC.³⁶³ While the commission cannot conceivably document and cover every single wartime atrocity, it can focus on the critical and representative incidents in order to establish an authoritative historical narrative.³⁶⁴

A Japanese commission will need to place greater importance on the historical narrative resulting from the commission than the South African TRC did for several reasons. As previously discussed, Japan’s failure to fully acknowledge its wartime past, reflected in the recurring debates over Japanese history textbooks, is a significant problem in Asia.³⁶⁵ Moreover, while a strong victim focus is absolutely essential in order to have a legitimate truth commission,³⁶⁶ the dwindling number of victims and perpetrators makes it difficult to rely upon their testimony alone to create a comprehensive and complete historical record. Therefore, a strong historical narrative or record that supplements the remaining victims’ testimony is necessary for Japan to demonstrate that it fully understands the scope of its wartime past. A government-endorsed historical account, disseminated in a widespread manner, will help educate the many Japanese citizens who were not alive during the war, as well as prove to the rest of the world that Japan is taking concrete steps to deal with its history.³⁶⁷

2. Composition of the Commission

The composition of the truth commission should include a sufficient sample of prominent Japanese historians who can oversee the creation of the commission’s historical record. Apart from this difference, though, Japan would do well to follow South Africa’s example of selecting a strong panel of commissioners.³⁶⁸ As with South Africa’s panel, diversity is imperative; the commission should be comprised of influential and prominent Japanese citizens.³⁶⁹ Given that the “comfort women” issue will play a major role in the proceedings, the commission should have a significant percentage of women commissioners.³⁷⁰

Additionally, the commission should have international representation. It should include Korean and Chinese representatives, at

363. See TRC REPORT, *supra* note 267, ¶ 58.

364. See *id.*

365. See discussion *supra* Part IV.B.

366. See discussion *supra* Part V.A.4.

367. See BORAINÉ, *supra* note 276, at 294.

368. See *id.* at 71-75.

369. See *id.* at 74-75.

370. See HAYNER, *supra* note 10, at 78.

a minimum, and perhaps representatives from other Asian countries, the United States, United Kingdom, and Australia. International representation may prove to be a delicate matter, since the commission will be required to make recommendations that ultimately must be endorsed and approved by the Japanese government. Nonetheless, in order to gain the support of the international community, Japan must remain open to contributions from representatives of the groups and countries most affected by Japan's wartime policies. A compromise may be necessary to ensure Japanese support for the commission. One idea would allow non-Japanese representatives to provide input and participate in all of the proceedings, but without full voting powers.

3. Powers of the Commission

The commission should have the same independent subpoena and search and seizure powers that the South African TRC possessed.³⁷¹ This will be most helpful in attempting to gather all of the necessary government documents needed to create the historical record.³⁷² However, in contrast to the South African TRC,³⁷³ a Japanese truth commission would necessarily have an international flavor. In this regard, Japanese subpoenas would provide little assistance in compelling Korean, Chinese, or other victims to testify or in procuring key documents outside of Japan. Given the widespread desire of the victims outside of Japan to be acknowledged and heard by the Japanese government, though, this should not pose a serious problem. Additionally, it seems probable that the United States would cooperate with Japan by providing access to the many Japanese war records retained by the United States following the postwar occupation of Japan, especially in light of the recent U.S. declassification legislation.³⁷⁴

A Japanese truth commission should have provisions for complete civil and criminal amnesty for all Japanese witnesses,³⁷⁵ even though such amnesty may prove to be controversial in human rights circles. In *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and*

371. See BORAINÉ, *supra* note 276, at 272-73.

372. See Coomaraswamy, *supra* note 75, ¶ 43. The Special Rapporteur found in the course of her investigation that "documenting the details of recruitment was very difficult as not all official documents had been disclosed by the Government of Japan and might still exist in official archives of the Defence Agency and the Ministries of Justice, Labour, Social Welfare and Finance." *Id.*

373. BORAINÉ, *supra* note 276, at 71-75; HAYNER, *supra* note 10, at 41.

374. See Japanese Imperial Government Disclosure Act of 2000, 5 U.S.C. § 552 (2000).

375. See HAYNER, *supra* note 10, at 43 (noting that in South Africa, amnesty was conditional, not absolute).

Slavery-Like Practices During Armed Conflict, the Special Rapporteur's final report to the UNCHR Subcommission on the Prevention of Discrimination and Protection of Minorities, Special Rapporteur Gay J. McDougall formally recommended prosecuting those responsible for the "comfort women."³⁷⁶ This recommendation is in line with those international law scholars who believe that states are legally required to prosecute human rights offenders for crimes against humanity.³⁷⁷ However, this argument has not been borne out by state practice as evidenced by South Africa,³⁷⁸ as well as many other states.³⁷⁹

Additionally, amnesty in this case is less problematic than in an emerging democracy or a transitional state recovering from a recent history of atrocities.³⁸⁰ Here, the amount of time that has elapsed—over sixty years—makes it extremely difficult to identify perpetrators and successfully prosecute them. There is a strong possibility that there may not be that many surviving offenders and those remaining are most likely to be minor players in terms of the criminal responsibility for the violations (especially given that a twenty-five-year-old in 1941, for

376. See McDougall *U.N. Report*, *supra* note 229, app. ¶ 63.

The United Nations High Commissioner for Human Rights should work for the prosecution in Japan, and in other jurisdictions, of those responsible for the atrocities that have now been clearly linked to the actions of the Japanese military in establishing the Japanese rape camps. It is incumbent upon the United Nations to ensure that Japan fully satisfies its obligation to seek out and prosecute all those responsible for the "comfort stations" who remain alive today and that other States similarly do all they can to assist in the capture and prosecution of offenders in other jurisdictions. Accordingly, the High Commissioner, together with Japanese officials, should work to: (a) gather evidence on individual military and civilian personnel who may have established, supported or frequented Japanese rape centres during the Second World War; (b) interview victims; (c) forward the preparation of cases for trial to Japanese prosecutors; (d) work with other States and survivors' organizations to identify, arrest and prosecute offenders within their jurisdictions; and (e) assist States in any way in the development of legislation to allow such prosecutions in their jurisdictions.

Id.

377. See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540 (1991).

378. See HAYNER, *supra* note 10, at 43.

379. RATNER & ABRAMS, *supra* note 113, at 153-54.

[T]he practice of states and international organizations suggests any general duty to prosecute human rights abusers under the ICCPR, the American Convention on Human Rights, or customary law has not yet solidified. Numerous states—including Argentina, Uruguay, Chile, Brazil, Peru, Guatemala, El Salvador, Honduras, Nicaragua, Haiti, Ivory Coast, Angola, and Togo—have passed broad amnesty laws governing past abuses or honored amnesties of prior governments. Others have simply chosen not to prosecute . . . [G]overnments . . . have generally tolerated this practice.

Id. (citations omitted).

380. See HAYNER, *supra* note 10, at 43.

example, would be eighty-six or eighty-seven today). The marginal benefit of selectively prosecuting these few individuals is greatly outweighed by the benefits of having those who abused the “comfort women,” POWs, and Chinese civilians come forward and admit to their wrongdoings after all of these years.³⁸¹ Encouraging testimony by those who conducted Japan’s war crimes will help balance the historical record and provide solace to the victims to see the perpetrators finally come forward.³⁸² The guarantee of amnesty may help facilitate this process, just as it did in South Africa.³⁸³ Perhaps more importantly, as a practical matter, *realpolitik* principles dictate that Japan will be exceedingly unwilling to pursue a truth commission if it involves prosecution of elderly Japanese veterans, regardless of their culpability. Obtaining passage of the truth commission in the Diet would therefore be highly unlikely without an amnesty provision.

4. Starting the Proceedings, the Role of the Media, and the Need for Transparency

Just as with the South African TRC, the proceedings of a Japanese truth commission should be started with an appropriately formal official proceeding.³⁸⁴ The opening ceremony, and as much of the hearings as possible, should be televised in Japan (and Korea and China as well, if possible, and perhaps other nations in Asia if the interest is strong enough).³⁸⁵ The Internet should be leveraged to provide ongoing coverage of the commission’s proceedings. Radio coverage can be preserved on the Internet, along with video clips, for maximum accessibility. Transparency is critical in all aspects of the truth commission.³⁸⁶

The final report should have an executive summary accessible for the average reader.³⁸⁷ Both the executive summary and the fully documented final record and transcripts of hearings should be readily available on the Internet in Japanese, Chinese, Korean, and English.³⁸⁸

381. See Tepperman, *supra* note 292, at 130.

382. See BORAINÉ, *supra* note 276, at 334 (discussing reparations, “very few of those who appeared before the Commission even talked in monetary terms. Their first concern was to know the truth”).

383. See *id.* at 287.

384. See HAYNER, *supra* note 10, at 41.

385. See *id.* at 42.

386. See Boraine, *supra* note 334, at 472.

387. See HAYNER, *supra* note 10, at 44.

388. See BORAINÉ, *supra* note 276, at 294 (stating that a commission’s final report should be made available to all and disseminated through a variety of forms).

Following the commission's final report, the Diet and the Prime Minister should have a nationally televised session to officially sanction the commission's report and announce the approval of the commission's advisory recommendations.³⁸⁹ Much thought should be given to the manner in which formal apologies are presented. Perhaps formal presentations by Japanese government officials at Japan embassies in Asia and elsewhere should be considered.

5. Victim Focus

A Japanese truth commission must have a strong victim focus. Public hearings of victim testimony, coupled with some form of reparation for individual victims, can help address the core grievances of the war crime victims.³⁹⁰ As discussed previously, Japanese apologies for its wartime past have generally been disregarded as insufficient.³⁹¹ The lack of a proper, formal apology from the government of Japan has thus been a major concern of numerous war crimes survivors.³⁹² Public hearings, wherein representatives of the government of Japan attentively listen to the testimony of victims, can play an integral role in providing a proper and effective apology. Therefore, commissioners should state their regrets on behalf of the government of Japan to the victims at the outset of their testimony. In this respect, the hearings will represent an official acknowledgement and validation of the victims' stories.³⁹³ In South Africa, and also in Chile's truth commission, this process proved to be very beneficial for the victims who testified.³⁹⁴ Victim-focused public hearings could have the same powerful impact in Japan as well.³⁹⁵

389. *See id.* at 305.

390. *See* HAYNER, *supra* note 10, at 28.

391. *See* Struck, *supra* note 3.

392. *See* discussion *supra* Parts IV.A-B.

393. *See* HAYNER, *supra* note 10, at 137.

394. *Id.* In South Africa

"[p]roviding space for victims to tell their stories, particularly in public forums has been of use to many. It is indisputable that many survivors and relatives of the victims have found the public hearing process psychologically beneficial."

"In Chile, going to the truth commission was like entering into a family: there was a sense of security, a national flag standing on the table, a mandate from the president, and there was the commission saying, 'We want to hear what you have to say.' For over fifteen years, the state had cast them aside Suddenly, a state commission was ready to listen to their accounts and publicly acknowledge that disappearances had indeed taken place."

Id. (citations omitted).

395. *See id.* (citing Elizabeth Lira, a Chilean psychologist who works with victims of political violence).

Accordingly, the commission should reach out to groups representing the victims to assess the victims' desire to testify.³⁹⁶ Just as in South Africa, accommodations can be made for those victims who would prefer to remain private.³⁹⁷ It is very probable, however, that the vast majority of victims will want to have their stories and testimony concerning their plight made public before other forums. For example, representatives of American POWs in Japan testified before the U.S. Senate Judiciary Committee.³⁹⁸ Similarly, the Woman's International War Crimes Tribunal, a nongovernmental organization (NGO) led hearing, simulated a trial against Japanese wartime political and military leadership for the crimes against the "comfort women."³⁹⁹ In this hearing, over seventy-five "comfort women" survivors attended and many of them testified.⁴⁰⁰ Similarly, in Korea, "comfort women" recently marked their 500th weekly protest against the Japanese government at the Japanese Embassy in Seoul.⁴⁰¹

6. Reparations

As part of its mandate, a Japanese truth commission should be required to make a recommendation on a proper monetary sum to award the victims in conjunction with an official government apology. This may prove controversial within Japan. Through its robust defense against war crimes civil suits thus far, the Japanese government has steadfastly

396. *See id.* at 78.

397. *See id.* (citing measures taken to protect women's privacy in the South African TRC).

398. *Former U.S. World War II POW's Hearing Before the Senate Judiciary Comm., supra* note 221.

399. Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335, 335 (2001).

400. *Id.* at 337.

401. *The Past Still Hurts: 500th Anti-Japan Weekly Protest Marked by Rage of "Comfort Women"*, KOREA NOW, Mar. 23, 2002, at 28.

"It is truly pathetic that we have had to stage this peaceful rally 500 times," said Ji Eun-hee, a representative of the Korean Council for Women Drafted for Military Sexual Slavery by Japan in an opening statement. The council, comprised of 22 women's civic groups, has been organizing the regular, non-violent weekly demonstrations since Jan. 8, 1992.

"Over the past 10 years, we've been gathering here every Wednesday at noon to make the same demands, but the Japanese government has not even made the slightest gesture in response," she said.

The former sex victims have been demanding the Japanese government formally launch an open investigation of the issue, admit the wartime sex crimes, and based on that, make an official apology and take legal responsibility for compensating the victims.

Id.

asserted that it does not have a legal duty to compensate the victims.⁴⁰² However, Japan has previously recognized its general moral obligation toward the “comfort women.”⁴⁰³ It took steps to establish the Asian Peace and Friendship Fund for Women to provide monetary grants to “comfort women”; however, since the fund was subsidized entirely by private nongovernment sources, it has been viewed by many as simply an unsatisfactory attempt by Japan to escape accountability.⁴⁰⁴

Since this effort to “privatize” the costs of its “moral obligation” has failed to gain the support of victim groups that will be crucial in establishing a Japanese truth commission’s legitimacy, Japan must be willing to provide some compensation to war crimes victims.⁴⁰⁵ Japan does not have to compensate the victims for the incalculable injuries they have sustained over the last fifty-five-plus years, but it needs to award an appropriate amount to accompany an official Japanese government apology.⁴⁰⁶ This may not satisfy all concerned, but, once again, it is important to realize the proposal must be one that the Japanese government will approve.

Japan may find, as South Africa did, that most victims are more concerned with an apology or simply the granting of some compensation by Japan, rather than the actual amount of the monetary award.⁴⁰⁷ For example, United Nations Special Rapporteur Coomaraswamy found in her interviews with “comfort women” that, “[i]n connection with payment of compensation, many women emphasized that the amount of compensation would not be as important as its symbolic meaning. No mention of a particular amount of compensation was made to the Special

402. See discussion *supra* Part IV.C.

403. Coomaraswamy, *supra* note 75, ¶ 92.

During the Special Rapporteur’s visit to Japan, the Government of Japan supplied the Special Rapporteur with documents which contain arguments against certain demands made by former “comfort women” and by the international community on their behalf. The Government felt itself to be under no legal compulsion towards the victims, but only a moral obligation.

Id.

404. *Id.* ¶ 63:

Furthermore, many women requested that the Asian Peace and Friendship Fund for Women, established by the Government of Japan, *inter alia* to compensate former “comfort women” victims with contributions from civilian sources, be withdrawn. The Fund is seen by most of the women concerned to constitute a way for the Japanese Government to evade its legal State responsibility for the acts carried out.

Id.

405. See *id.*

406. See *id.*

407. See BORAINE, *supra* note 276, at 334.

Rapporteur.”⁴⁰⁸ Moreover, many “comfort women” plaintiffs in Japanese cases have “specified that an official apology from the government was their primary demand, over and above monetary compensations.”⁴⁰⁹ As one Korean “comfort woman” stated, “It’s not the money. We want our bodies and our souls back. For a person 68 years old, what compensation is money. The entire world has changed. I want to tell the world about Japan’s atrocity.”⁴¹⁰ American POWs express similar sentiments. As Lester I. Tenney, a POW survivor, testified before the U.S. Senate Judiciary Committee:

[B]y getting this justice I think we will also have an opportunity to let the citizens of Japan know once and for all what really happened. They are ignorant of what happened because the Japanese Government refuses to tell them, the Japanese Government refuses to put it in their textbooks, and the people there do not know what happened.

And so by seeking justice, by getting this apology that can be a national issue—remember that in 55 years they have done nothing, no apology, and the Japanese companies have done absolutely nothing. But by issuing a formal apology, I think that will not only help our own country, but will educate the Japanese people to what really happened. And it is through education that we can stop this from ever happening again.

It is not a case of money. It is a case of what is right, it is a case of having what is right given to us. And if that means an apology, that is fine. If it means money, then let the courts decide on that. But I don’t want that. I want the apology and I want the Japanese people to all know what happened.⁴¹¹

Consequently, a Japanese truth commission should carefully weigh the input it receives from war crimes victims and come up with a recommendation for compensation.⁴¹² The compensation amount should not be nominal or insignificant. For example, the American Legion demands that, in addition to “an official and unequivocal apology for the pain, suffering and death inflicted upon American POWs,” the Japanese government award \$20,000 to each American POW involved in the

408. Coomaraswamy, *supra* note 75, ¶ 62.

409. Kyeyoung Park, *The Unspeakable Experiences of Korean Women Under Japanese Rule*, 21 WHITTIER L. REV. 567, 589 (2000).

410. SCHMIDT, *supra* note 57, at 131. Sim Mi Ja was sixteen years old when denounced as anti-Japanese and removed to a comfthouse for embroidering morning glories around a map of Japan instead of cherry blossoms (the national flower of Japan). *Id.* at 130. “For the next six years, I was forced to have sex with soldiers 20 to 30 times a day on weekdays and 40 to 50 times a day on weekends.” *Id.*

411. *Former U.S. World War II POW’s Hearing Before the Senate Judiciary Comm.*, *supra* note 221, at 42-43.

412. See SHEA, *supra* note 329, at 35.

Bataan Death March and to nonsurviving POWs families.⁴¹³ Just as in South Africa, the POWs seek a uniform amount.⁴¹⁴ This amount clearly is more of a symbolic amount rather than a fully compensatory amount.⁴¹⁵ Whatever amount the commission decides, to the extent the compensation is not insignificant, it will reinforce the sincerity of the apology. A Japanese commission will most likely find, as did the TRC, that awarding some amount of compensation to the victims “adds value to the ‘truth seeking’ phase by: enabling the survivors to experience in a concrete way the state’s acknowledgement of wrongs done to victims and survivors, family members, communities and the nation at large.”⁴¹⁶

7. Why a Japanese Truth Commission Is in the Interests of Both Japan and the War Crimes Victims

One might think that from Japan’s perspective, little is to be gained from a truth commission. However, Japanese politicians are weary of their counterparts in China, Korea, and elsewhere continually playing the “Japan card.”⁴¹⁷ The “Japan card” is a phrase that conveys the notion that other aggrieved Asian nations will repeatedly blame Japan over and over for its past, regardless of what apologies or actions Japan takes to rectify the situation.⁴¹⁸ To be sure, there is some validity to this concern. Simply

413. *Former U.S. World War II POW’s Hearing Before the Senate Judiciary Comm., supra* note 221, at 79 (citing a letter written by American Legion to Sen. Orrin Hatch).

414. *See SHEA, supra* note 329, at 35.

415. *See id.*

416. BORAINÉ, *supra* note 276, at 338.

417. *See LAMPTON, supra* note 236, at 15.

[A]mong Japanese there seems to be a growing belief within the current generation that it is time to stop apologizing for events that occurred long before they were born. Furthermore, there is a Japanese sense that even were Japan to definitively apologize . . . China would never permanently forgo the short-term gains of playing on residual Japanese guilt.

Id.; *see also* YOSHIBUMI, *supra* note 163, at 27 (“Both China and South Korea undeniably enjoy playing Japan’s past as their trump card in diplomatic talks. Yet regrettably, Japanese politicians have none but themselves to blame for their vulnerability.”); Mark O’Neill, *We Will Not Forgive, but We Will Take Your Money; Japan’s Past Aggressions Mean Zhu Rongji’s Visit Will Be Frosty, but Such Coldness Masks a Healthy Relationship*, S. CHINA MORNING POST, Oct. 6, 2000, at 16, available at LEXIS, News Library, Asia/Pacific Rim Archive News File.

“Beijing’s strategy is to repeat again and again the issue of the war, which keeps Tokyo in the position of the guilty party that can never make amends for its war crimes,” said one Asian diplomat. “However much it apologises and however much money it gives is never enough. For most of the post-war period, North and South Korea followed the same policy. For all three countries, Japan provided an easy target to divert public attention from failures at home.”

Id.

418. *See* O’Neill, *supra* note 417, at 16.

maintaining the status quo, however, will not resolve the problem. History has demonstrated that any number of incidents can trigger the playing of the “Japan card.” Therefore, Japan must take bold steps to put all of its cards on the table, in order to try to finally trump the “Japan card.”

A truth commission is the perfect instrument for performing this task. It can explore all aspects of Japan’s multifaceted problem with its past. A truth commission can also address the education issues that persistently recur with new history textbooks.⁴¹⁹ If done in a public manner with strong media coverage and publicity, a truth commission can serve a societal educative purpose in and of itself.⁴²⁰ The “window” approach can be used to delve into all of the critical facets of Japan’s wartime history, such as the China campaign.⁴²¹ By writing and compiling a brutally honest historical report, a Japanese truth commission can provide strong evidence of Japan’s comprehension of the full scope of its history.⁴²² By formally endorsing the commission’s work and its report, the Japanese government can show its neighbors that it has learned the lessons of World War II and assure them it will not repeat its previous behavior. Through this process, Japan can seek regional reconciliation with its neighbors by finally coming to terms with its past.

However, a critical component of Japan’s achieving reconciliation with its neighbors will be how effectively Japan can satisfy the grievances of the remaining war crimes victims. In this regard, it is absolutely vital that Japan provide some measure of compensation to the victims in conjunction with its apologies.⁴²³ Japan can save face by continuing to maintain that it is not acting under any legal obligation to the victims. But Japan has publicly stated that it has a moral responsibility.⁴²⁴ In Japan, while the apology is a central form of resolving disputes, an apology without accompanying reparation is often considered to be an empty gesture.⁴²⁵ Therefore, apologies alone will not change the equation.

For Japan, the truth commission affords an opportunity to put its history aside so it can successfully pursue its foreign policy goals of

419. See discussion *supra* Part IV.B.

420. See Boraine, *supra* note 334, at 472.

421. See TRC REPORT, *supra* note 267, ¶ 58.

422. See HAYNER, *supra* note 10, at 230.

423. See discussion *supra* Part V.B.6.

424. Coomaraswamy, *supra* note 75, ¶ 92.

425. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC’Y REV. 461, 462, 486 (1986).

reasserting itself with a more robust military and striving to gain a permanent seat on the U.N. Security Council.⁴²⁶ Without a truth commission, the issues will continually resurface and perplex Japan well into the future. For Japan's war crimes victims, a truth commission that offers the promise of an official government apology coupled with some measure of compensation is an opportunity to finally attain closure. While some may insist that Japan prosecute those responsible for the "comfort women" or other war crimes not previously prosecuted, or that Japan should pay the victims full compensation as a legal obligation, these concerns should not be allowed to preclude the establishment of a Japanese truth commission.⁴²⁷ Creating a Japanese truth commission will be a daunting domestic political endeavor for Japan's leaders and the perception that Japan is capitulating to requirements imposed from outside of Japan may doom any chance for a Japanese truth commission. This would be unfortunate as the number of victims is rapidly declining.⁴²⁸ The parameters suggested for a Japanese truth commission set forth in this Article meet the vast majority of the core demands of most victims and victims' groups. Therefore, while there is still time, Japan's victims should openly welcome a Japanese truth commission.

VI. CONCLUSION

People always ask, 'Why reopen wounds that have closed?', Horacio Verbitshky, a prominent Argentine journalist, said . . . 'Because they were badly closed. First you have to cure the infection, or they will reopen themselves.'⁴²⁹

From the perspective of over fifty years after the end of World War II, the "wounds" resulting from Japan's wartime regime were "badly closed" and have not healed.⁴³⁰ As discussed above, the IMFTE war crimes trials failed to accomplish several major objectives of war crimes tribunals: providing victims "a sense of justice and closure," promoting

426. See LAMPTON, *supra* note 236.

427. See discussion *supra* Part V.B.3.

428. LaGanga, *supra* note 174 (estimating that 5400 U.S. POWs are still alive); *The Past Still Hurts, 500th Anti-Japan Weekly Protest Marked by Rage of the "Comfort Women," supra* note 401, at 28.

According to the council, more than 200,000 Korean women, including teenagers and married women, were dragged to frontline brothels of the Japanese army during WWII, where they were forced to serve as sex slaves for the Japanese soldiers. Only about 300 of them were reported to be alive in 1992. The number is now down to about 140.

Id.

429. HAYNER, *supra* note 10, at 133 (citations omitted).

430. See *id.*

“reconciliation,” and creating “a historical record.”⁴³¹ With the advancing age of the few surviving victims, this may be the last opportunity for Japan to resolve the serious problem of its past in a favorable manner. In this regard, Japan’s leaders should heed the words of Archbishop Desmond Tutu, South Africa’s TRC chairman. While his remarks are taken from the debate over South Africa’s TRC, they apply equally to Japan’s current predicament:

There is no instrument in the country with the same potential as this process for ending the accusations and the counter-accusations about the past, the recriminations and the political bickering which will plague this country’s life for generations to come if you do not seize the opportunity of using properly the Commission.⁴³²

431. See RATNER & ABRAMS, *supra* note 113, at 155.

432. Emily H. McCarthy, *Will the Amnesty Process Foster Reconciliation Among South Africans?*, in WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE, *supra* note 77, at 487.