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DISSERTATION TITLE

**Does International Law Require States to Tackle Historical Injustice? Reconsidering Temporal Limitations by Applying Transitional Justice Initiative**

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Temporal Limitations by Applying Transitional Justice Initiative**

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# **Does International Law Require States to Tackle Historical Injustice? Reconsidering Temporal Limitations by Applying Transitional Justice Initiative**

## **Introduction**

Traditionally, international law recognises a state responsibility for its acts or omissions if these acts and/or omissions are not in conformity with the international obligations imposed on that state concerned at the time that they were committed. Although this is a remarkable development of human rights protection system, in a legal framework of existing international law, not all human rights abuse can be addressed. The problems of 'historical injustice' derives from the temporal limitation of application of international law since treaty obligations are non-retroactive and the limitation of statute can prevent victims from receiving remedies before the judicial bodies. In many cases, historical injustice continues to suffer victims keeping them silent, which continue until death of the victims. Even if all victims passed away, the historical injustice may have a gross impact on society since the society's attitude which escape from accountability for the historical injustice is an evidence that the society hold a root cause of injustice. Combating impunity is not a just looking-backward approach for victims of the legacy of violence, however also looking-forward approach enabling the society not to repeat same mistake and heal the society.

In order to combat impunity, international and regional human rights mechanisms played an important role. The concept of continuing violation of human rights is a good example that human rights mechanisms attempt to extend its jurisdiction taking consideration in account the spirit of human rights treaties in existing formula of international law. However, looking at increasing attention of international community towards the historical injustice and method-oriented approach to seek a remedy for the victims of international crimes such as the crimes of genocide, the war crimes, the crimes against humanity, the crimes of aggression and grave violations of international humanitarian law evolving in the initiative of transitional justice, a hypothesis came to my mind. Does international law respond to the historical injustice through retroactive application of existing human rights treaties? Or does international law 'directly' create a customary international law to redress the historical injustice? If practices of the latter approach, a radical one emerges, is it effective to the historical injustice, which is totally neglected more than 80 years of the post-world war history?

This paper investigates how and what extent the development of human rights protection for victims of international crimes such as genocide, war crimes, crimes against humanity, and serious violations of human rights in the context of the transitional justice initiative impacts on the state's international responsibility governing the historical injustice. In this

examination, I will apply my discussion to a case study of 'Comfort women survivors' in Japan, who are victims of sexual slavery by the Japanese Imperial military during the World War II (WWII). Thus, the research questions of the paper can be formulated as follows: who is Comfort women and what is a legal status of them; how international human rights system respond to temporal limitation under international law; how subsequent developments in the transitional justice initiative impact on formulation of a new rule to force states to account for the legacy of the historical injustice? To sum up, the article will evaluate my discussion in a context of international law's current position in international governance and a possible transformation in the future.

## **1. 'Comfort women' as the Legal Term**

Firstly, this chapter will define the scope of 'Comfort women' in this paper for clarifying a legal framework to examine human rights obligations of state because different nature and context of human rights violations cause different international obligations.

### **1.1 Scope of Comfort Women**

'Comfort women' is a well-known term all over the world. In many cases, it is understood as Korean sexual slaveries since Japan often has a conflict with Republic of Korea (ROK) on the historical facts and understanding which determine the legal status of comfort women survivors.<sup>1</sup> In principle, comfort women survivors include women and girls from Japan, China, Korea, the Philippines, Indonesia and the Netherlands (at the time of the WWII, the Netherlands colonised Indonesia and there are some cases which Netherland's nationals brought a compensation claim to the Dutch domestic court). After the 1894-1895 Sino-Japanese War and annexation of South Korea in 1910, Japan controlled a part of China and South Korea and sets up the first comfort stations in Shanghai (1932) and Nanking (1937).<sup>2</sup> With starting the

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<sup>1</sup> On December 2016, comfort women survivors and their relatives submitted a case to the Seoul Regional Court for asking a compensation against the government of Japan. Although the Japanese government refused to accept complaints claiming a state immunity to exclude a court jurisdiction, the regional court can start a proceeding based on a legal assumption that the opposite party accepted the complaint. The case is pending. See, The Ministry of Foreign Affairs of Japan, Diplomatic Blue Book 2019: Comfort Women Issue. Available at <https://www.mofa.go.jp/files/000473133.pdf> .

<sup>2</sup> International Commission of Jurists, 'Report of A Mission: Comfort Women by Ustinia Dolgopol and Snehal Paranjape' (Geneva, November 1994) 11.

Asian and Pacific War in 1937, Japan further expanded its colonisation to the Philippines in 1942.<sup>3</sup> The Japanese Imperial military set up a series of comfort stations where it sends its troops including China, South Korea, Philippines and Indonesia since the aim of comfort stations is 'relaxation and recreation for soldiers'.<sup>4</sup> On 2 September 1945, Japan signed the Potsdam Declaration for ending the WWII. The Cairo, Moscow and Potsdam Declarations condemn Japan and Germany for their war of aggression, war crimes, crimes against humanity.<sup>5</sup> The Allied Powers established the International Military Tribunal for the Far East (Tokyo Trial) in 1946 to prosecute Japanese war criminals (Class A) and also created 'satellite' tribunals in Asian and the Pacific countries to prosecute Japanese war criminals (Classes B and C) in 1946-1948.<sup>6</sup> However, they did not cover incidents related to the comfort stations.<sup>7</sup> Although the sexual slavery is out of the category of international crimes prosecuted in the International Military Tribunal for the Far East (Tokyo Trial), series of violence are recognised by the Allied Powers. The Supreme Commander of the Allied Forces submitted his report entitled *Amenities in the Japanese Armed Forces*, which contains detailed documentation on comfort stations of the Japanese Imperial military.<sup>8</sup> A sole exception is the Batavia Trial held in Indonesia. It includes a trial of Japanese military personnel who forced about 35 Dutch women to work in comfort stations.<sup>9</sup>

The important aspect of comfort women survivors' situations is lack of public inquiry and information open to public. On June 1990, Motooka Shoji, Senator in Socialist Party of Japan, demands in the Budget Committee of the Japanese Diet

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<sup>3</sup> Ibid, at 29.

<sup>4</sup> Brooke Say, Ripe for Justice: A New UN Tool to Strengthen the Position of the Comfort Women and to Corner Japan into Its Reparation Responsibility, 23 Penn St. Int'l L. Rev. 931 (2005) 935.

<sup>5</sup> The Cairo Declaration (Cairo, 27 November 1943); the Moscow Declaration (Moscow, 30 October 1943); the Potsdam Declaration (Potsdam, 26 July 1945)

<sup>6</sup> The Charter of International Military Tribunal for the Far East (adopted 26 April 1946 entry into force 19 January 1946) TOIAS 1589.

<sup>7</sup> International Commission of Jurists, supra note 2, at 17.

<sup>8</sup> R. K. Sutherland, Amnesties in the Japanese Armed Forces (General Headquarters at Japan, 15 November 1945).

<sup>9</sup> Bart van Poelgeest, Report of a Study of Dutch Government Documents on the Forced Prostitution of Dutch Women in the Dutch East Indies during the Japanese Occupation (24 January 1994) available at

<http://www.awf.or.jp/pdf/0205.pdf>.

that the government, that the government should look into the matter of military comfort women.<sup>10</sup> So far, the government conducted investigations twice. It is 1992 that the Japanese government conducted a fact-finding study and released a report.<sup>11</sup> Since the report which only includes 174 sources from the ministries, it is criticised by the public. In the following year, the second report was published adding more documents from National Archives and Records Administration of the United States, and several interviews with the former soldiers and the survivors.<sup>12</sup> Until 2019, the government did not update information with its official investigations. Moreover, the history of comfort women is not covered by text book, which kept young generations away from this issue.<sup>13</sup>

In the second report of 1993, the Japanese government classified sexual violence during the WWII into two categories: sexual works in the comfort stations and rapes outside of the comfort stations.<sup>14</sup> In their explanation, the comfort stations was running for preventing the military from raping local women and girls in colonised areas and the comfort stations offered 'a genuine job without forcibility'.<sup>15</sup> The government recognises 'an relationship' with ill-treatments in the comfort stations and argues that (i) there are some comfort stations established in a request of the Japanese Imperial military; (ii) the military directly ran some of them; (iii) in case of the private-running comfort stations, the military could determine prices, regulations, and medical treatment of sexually transmitted diseases; (iv) the recruitment process of women and girls often involves forcible elements, and in some cases done with the support of the Japanese local authority where it was difficult to keep enough number of women due to expansion of conflict areas; and (v) the military supported a

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<sup>10</sup> Etsuro Totsuka, Commentary on A Victory for Comfort Women: Japan's Judicial Recognition of Military Sexual Slavery, Pacific Rim Law & Policy Association (1999) 49-50.

<sup>11</sup> Naikaku kanbo naikaku gaisei shingi shitsu [Cabinet Foreign Policy Room, Cabinet Secretariat], Iwayuru Jūgun ianfu mondai nit suite [Regarding So-called Comfort Women] (June, 1992), *available at* [https://wam-peace.org/ianfu-koubunsho/file/file\\_1.pdf](https://wam-peace.org/ianfu-koubunsho/file/file_1.pdf)

<sup>12</sup> Naikaku kanbo naikaku gaisei shingi shitsu [Cabinet Foreign Policy Room, Cabinet Secretariat], Iwayuru Jūgun ianfu mondai nit suite [Regarding So-called Comfort Women] (August, 1993), *available at* [https://www.mofa.go.jp/mofaj/area/taisen/pdfs/im\\_050804.pdf](https://www.mofa.go.jp/mofaj/area/taisen/pdfs/im_050804.pdf)

<sup>13</sup> OHCHR, An NGO Shadow Report to CEDAW: Japan The "Comfort Women" (New York, 2009) 6, *available at* [https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/comfortwomen\\_japan\\_cedaw44.pdf](https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/comfortwomen_japan_cedaw44.pdf)

<sup>14</sup> Cabinet Foreign Policy Room, Cabinet Secretariat, *supra* 12, at 3.

<sup>15</sup> *Ibid.*

transport of recruited people.<sup>16</sup> Since the report did not aim at identifying the survivors, the report mainly discussed a relationship of the comfort stations with the military.

In this regard, the report showed that the Japanese government more focused on the nature of slaves, since sexual violence is not prohibited at that time of the WWII and Japanese domestic legal system prohibited trafficking in women and girls. According to the Official Order No. 295 of 1872, it confirmed the ban on traffic in people and released prostitutes from their debt bondage.<sup>17</sup> The Penal Code of 1907 criminalised confinement and transborder transportation of persons against their will, be it by force or threat, or by deception.<sup>18</sup> In addition, the Supreme Court of Japan found guilty certain procurers for collecting women in Japan proper with a fake job, forcing them working at comfort stations in Shanghai.<sup>19</sup>

In reality, the nature of comfort women system is difficult to determine since it overlapped with a broad concept of sexual violence during the WWII. Myongsuk Yun classified victims of sexual violence by the Japanese Imperial military during the WWII into three categories: comfort women; repeated rape victims in certain places; and random rape victims.<sup>20</sup> Haruyuki Yamate criticised that the popular name of the case *Philippine comfort women case*, for asking state compensation before Japanese domestic court is inappropriate because the applicants identified themselves as confined rape victims, not so-called comfort women who were forced to engage in sexual slavery in exchange for money.<sup>21</sup> Radhika Coomaraswamy, the former Special Rapporteur on violence against women, its causes and consequences, criticised the use of this term since it possibly shapes a wrong understanding, which impact on legal consequence of claims for survivors. She argued that *so-called* comfort women are ‘the case of women forced to render

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<sup>16</sup> Ibid.

<sup>17</sup> Stephanie Wolfe, *The Politics of Reparations and Apologies* (Springer Science & Business Media, 2013) 239.

<sup>18</sup> Ibid.

<sup>19</sup> OHCHR, *supra* 13, 8; Mainichi Shimbun, 6 August 1997.

<sup>20</sup> Myongsuk Yun, *NIHON NO GUNTAI IANJO SEIDO TO CHŌSENJIN GUNTAI IANFU* [Japanese Comfort Women System and Korean Comfort Women] (Akashi, 2003) 13-14.

<sup>21</sup> Haruyuki Yamate, *Senmon enshu shiryo* [Seminar materials] No. 2, (9), available at [http://page.freett.com/haruyamate/new\\_page\\_3-2.htm](http://page.freett.com/haruyamate/new_page_3-2.htm).

sexual services in wartime by and/or for the use of armed forces a practice of military sexual slavery'<sup>22</sup> and continued:<sup>23</sup>

The Special Rapporteur [...] holds the opinion that the practice of “comfort women” should be considered a clear case of sexual slavery and a slavery-like practice in accordance with the approach adopted by relevant international human rights bodies and mechanisms [...] the phrase “comfort women” does not in the least reflect the suffering, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in wartime. The Special Rapporteur, therefore, considers with conviction that the phrase “military sexual slaves” represents a much more accurate and appropriate terminology.

In her report, she responded to the Japanese government (claiming that the running comfort stations do not fall into the category of slaves in the 1926 Slavery Convention) emphasising that they are ‘rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation’. Article 1(1) of the 1926 Slavery Convention provides that: slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.<sup>24</sup> The Special Rapporteur did not clearly that running a comfort station is exercising the powers attaching to the right of ownership, however, recognises that women are forced to engage in sexual service on daily basis, which element constitute a sexually enslavement.

In conclusion, in some classification of victims of sexual violence by the Japanese Imperial military, comfort women in my paper will refer to women and girls who are repeatedly forced to engage in sexual intercourses regardless of place and contract since the most important element which should be discussed is the fact that freedom to have a sexual intercourse was deprived repeatedly and due to these experiences, they are kept away from public sphere and traumatised in their later life. For instance, females who are sent to the comfort stations or kept in a custody for sexual service stayed for a year or less in average since a number of them got weakening. After they are released and returned to home villages, they were insulted by families and neighbours because females were ‘possessed by enemies’. In many cases, if these females could return to their home, they are marginalised by community, which continue to impact on their entire life.

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<sup>22</sup> OHCHR, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Special Rapporteur, UN. Doc. E/CN.4/ 2003/75/ Add.1 (2003) at 12-15.

<sup>23</sup> Ibid.

<sup>24</sup> Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 Article 1(1).

At that time of the WWII, sexual slavery has been prohibited by customary international law. The general practices to prohibit slavery are emerged from the 18<sup>th</sup> century including *the United States Declaration of Independence*,<sup>25</sup> *the French Declaration of the Rights of Man and of the Citizen*<sup>26</sup> and *the 1807 Abolition of Slavery Act of Great Britain*.<sup>27</sup> It crystallised into a treaty in 1926 as *the Slavery Convention*.<sup>28</sup> As sexual slavery is not defined in the 1926 Convention, *the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* discourages prostitution by declaring 'prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community'.<sup>29</sup> The 1949 Convention considers the exploitation of prostitution, when money made through prostitution is passed on a systematic basis to anyone other than the prostitute herself, as a form of slavery.<sup>30</sup>

## 1.2 Current Redress for Comfort Women Survivors

Since the comfort women system is a part of the Japanese military operation during the WWII, the legal effect of these activities is governed by certain peace agreements concluded after the WWII with the Allied Powers and other countries which suffered damages by the war with Japan. The largest peace agreement is *the Treaty of Peace with Japan* (San Francisco Peace Treaty) with the Allied Powers in 1951.<sup>31</sup> By the effect of the San Francisco Peace Treaty, Japan regained full sovereignty in 1952. The negotiation of the peace conference at San Francisco discussed a reparation issue and compromised to insert an article on removal of state claims for war compensation. Article 14 (a) 1 of the San Francisco Peace Treaty obliged Japan to:<sup>32</sup>

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<sup>25</sup> United States Declaration of Independence (4 July 1776).

<sup>26</sup> French Declaration of the Rights of Man and of the Citizen (26 August 1789).

<sup>27</sup> Abolition of Slavery Act of Great Britain (28 August 1833) 3 & 4 Will.4 c.73.

<sup>28</sup> Slavery convention, supra 24.

<sup>29</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (adopted 2 December 1949 entry into force 25 July 1951) 96 UNTS 271, Preamble.

<sup>30</sup> David Weissbrodt, 'Slavery' in Max Planck Encyclopedias of International Law. Available at <https://0-opil-ouplaw-com.serlib0.essex.ac.uk/view/10.1093/law:epil/9780199231690/law-9780199231690-e874?rskey=XoRcnC&result=1&prd=MPIL>

<sup>31</sup> Treaty of Peace with Japan (adopted 8 September 1951, 28 April 1952) 3 UST 3169.

<sup>32</sup> Ibid, Article 14(1).

[P]romptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.

At the time of the peace conference, reparation was the most controversial. Since the US had controlled state of Japan from 1945, imposing immediate monetary obligations on Japan meant that the US would have had to cover them. Thus, the secretary of the State John Foster Dulles, the US delegate to the peace conference, explained that Japan has been 2 billion dollars short of money required and thus recommended to make reparation through the provision of services.<sup>33</sup>

Not only the San Francisco Peace treaty, Japan had agreements on war reparation with Burma, the Philippines, Indonesia, and Vietnam.<sup>34</sup> However, the issues of military sexual slavery were left behind at the time of negotiation and state parties decided an ultimate resolution by these agreements. The victims did not have an voice or social status to address their situations. For example, in the negotiation of *the 1965 Treaty of Basic Relations between Japan and South Korea*, the bodily and mental damages coming from the Japanese military sexual slavery was not addressed at all.<sup>35</sup> This fact was found and criticised in 2005, when ROK uncovered the whole records and documentations of the

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<sup>33</sup> Statement of John Foster Dulles in Conference for the Conclusion and Signature of the Treaty of Peace with Japan, (U.S. Department of State, 1951) 74, 82.

<sup>34</sup> Agreement for Reparations and Economic Co-operation Between Japan and the Union of Burma (5 November 1954) 4 UNT 1955; Agreement Between Japan and The Union of Burma on Economic and Technical Co-operation, (29 March 1963) 32 UNT 1963; Reparations Agreement Between Japan and The Republic of the Philippines (9 May 1956) 16 UNT 1956; Reparations Agreement Between Japan and The Republic of Indonesia (20 January 1958) 4 UNT 1958; Accord de Réparations Entre le Japon et la République du Viet-Nam [Agreement on Reparations Between Japan and the Republic of Vietnam] (13 May 1959) 1 UNT 1960; Accord Sur les Prets Entre le Japon et la République du Viet-Nam [Agreement Concerning Credit Between Japan and the Republic of Vietnam] (13 May 1959) 2 UNT 1960.

<sup>35</sup> OHCHR, *supra* 13, at 8.

negotiation process.<sup>36</sup> In contrast, the Japanese government has not declassified such documents, in particular, internally discussed records related to the claims on the war damages.

To date, many people have filed lawsuits against the Japanese government before Japanese domestic courts, seeking a compensation based on suffering as the result of the Imperial State of Japan's failure during the two Wars.<sup>37</sup> A series of the compensation cases related to wartime conducts can be categorised as follows. First, from the 1950s to the 1980s, Japanese nationals are started to bring a case for compensation putting a ground on loss of family, bodily injuries, and lost asserts that the plaintiffs would have been able to demand from the Allied Powers if their claims had not been waived by article 19 of the San Francisco Peace Treaty.<sup>38</sup> From the 1970s to the 1990s, Korean and Taiwanese labours employed by Japanese Imperial military sought a compensation for welfare benefits because, under domestic legal systems of both countries, those who waere living outside their home countries could not receive welfare benefits from their own government based on agreements between Japan and Korea or Taiwan.<sup>39</sup> Finally, in the early 1990s, increasing number of civil cases against the government seeking a compensation were brought by the comfort women survivors and foreign forced labours.<sup>40</sup>

Until now, there have been ten cases before the Japanese domestic courts sued by the comfort women survivors.<sup>41</sup> The plaintiffs are from five different countries and regions, all claiming a compensation and an apology from the government.<sup>42</sup> Against compensation complaints of wartime reparation, the Japanese government generally claims that

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<sup>36</sup> Ibid.

<sup>37</sup> Timothy Webster, 'The Price of Settlement: World War II Reparations in China, Japan and Korea' (2019) 51 NYU J INT'L L & POL 301, 312.

<sup>38</sup> Masahiko Asada, Nihon ni okeru sengo hoshō saiban to kokusai hō [Post-war compensation cases and international law in Japan], 1321 JURISUTO (2006) 26, 27.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> The Digital Museum, The Comfort Women Issue and the Asian Women's Fund. Available at <http://www.awf.or.jp/e4/lawsuit.html>

<sup>42</sup> Ibid.

the statute of limitations prevents plaintiffs from exercising the right to bring a civil claim to a court in twenty years from the time when the act in question was committed.<sup>43</sup>

Although most of the judgements have rejected the plaintiffs' claims, the statute of limitations, however, are not considered an absolute case-law by Japanese domestic courts. For instance, in 1998, the Supreme Court found that the statute of limitations for making a civil claim was not applicable to certain cases with special circumstances.<sup>44</sup> Article 724 of the Civil Code recognises the right to make a civil claim for twenty years. In this regard, article 158 extends the term of a statute of limitations by six months in case a minor or legally incompetent person does not have a legal representative during the final six months of the term. Article 158 cannot be applied directly to the statute of limitations of article 724 since it extends only the term that can be disrupted. However, the Supreme Court considered that the spirit of article 158 is protecting a legally incompetent person. It is unfair for a plaintiff to let the statute of limitations run out when he lacks a legal representation.

Following the ruling, the lower court, for the first time, decided that application of the statute of limitations to a compensation claim by a Chinese forced labour was unfair.<sup>45</sup> In this case, a man from People's Republic China (PRC), who was forced to work under ill conditions in Hokkaido at the end of the WWII, escaped the mine and hid in the wild for thirteen years even after the war. He sued the Japanese government claiming that the government did not search for him and protect him. The Tokyo District Court found this case applicable finding special circumstances. The lower court found that the government liable because it did not sincerely search for the report and lost the opportunity to compensate the plaintiff in 1958, and because his suffering was so severe. However, The Tokyo High Court reversed the first decision, and applied the statute of limitations. Although the High Court agreed that People's Republic China application of the statute of limitations of article 724 could be restricted where special circumstances would make its application extremely unjust and unfair.<sup>46</sup> The High Court did not find such circumstances because the reasons he could not file a case on time were not directly caused by the negligence but caused by following facts: Japan and the PRC did

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<sup>43</sup> Harry N. Scheiber, Stefan A. Riesenfeld Symposium 2001: Taking Responsibility: Moral and Historical Perspectives on the Japanese War-Reparations Issues, 20 BERKELEY J. INT'L L. (2002) at 233, 235.

<sup>44</sup> Law Library of Congress of the United States, Japan: WWII POW & Forced Labor Compensation Cases (2008) at 9.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

not have a formal diplomatic relationship until 1972 after WWII and ordinary PRC citizens could not obtain passports until 1985. The Chinese government first suggested the possibility of an individual's war reparation claims in 1995.

For another attempt to claim accountability for the comfort women issue, in 1994, twenty-seven Korean survivors and the Korean Council for the Women tried to submit criminal complaints to the Tokyo District Public Prosecutors Office calling for criminal investigation and prosecution of the perpetrators.<sup>47</sup> The Prosecutors office reject them on the following grounds: a criminal cannot be initiated due to the statute of limitation; the names of the perpetrators were unidentified; the facts of damage were unidentified.<sup>48</sup> It is December 2000 that the *Women's International War Crimes Tribunal on Japan's Military Sexual Slavery* was held in Tokyo by the initiative of the victims, their supporters and other human rights defenders in response to Japan's failure to prosecute perpetrators. Four international lawyers, led by Gabrielle Kirk McDonald, former President of the International Criminal Tribunal for the Former Yugoslavia as the President Judge, participated the Tribunal.<sup>49</sup> Although the Tribunal invited the government to observe, the government did not respond to its invitation.<sup>50</sup> The Judgment published at the Hague, the Netherlands, and accused ten high-ranking state officials, including Emperor Hirohito, finding guilty for crimes against humanity through state-sponsored sexual slavery.<sup>51</sup> Based on this judgement, the Tribunal made detailed recommendations and submitted to the government in 2002. However, since the government do not recognise a criminal liability of state officials who are not prosecuted by the Tokyo Trial including the emperor, the government did not engage in follow-up actions.<sup>52</sup>

In the recognition that criminal liability of the Japanese government has already been discharged, the government call the responsibility for the legacy of the WWII as a moral responsibility. In response to the increasing attention to the comfort women survivors, the government initiated a project entitled Asian Women's fund for distribution of monetary

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<sup>47</sup> Etsuro TOTSUKA, *Nihon ga shiranai sensō sekinin* [War responsibility that Japan does not know], *Hōgaku Seminar* [Legal seminars], N. 472, (1994) at 104-105.

<sup>48</sup> *Ibid.*

<sup>49</sup> *The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, Judgement on Common Indictment and the Application for Restitution and Reparation*, Case No. PT-2000-1-T (The Hague, 2001) 1051.

<sup>50</sup> OHCHR, *supra* 13, at 9.

<sup>51</sup> *The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, Judgement on Common Indictment and the Application for Restitution and Reparation* (The Hague, 2001) at 1051.

<sup>52</sup> OHCHR, *supra* 13, at 9.

reparation.<sup>53</sup> To date, this was a sole reparation programme accessible by the survivors until its termination in 2007. The government attempted to dilute its responsibility by this non-governmental fund. In this programme, the victims who desire to receive compensation had to submit documents to the government of home country. The process of qualification fully depends on these countries and only 'qualified victims' by their governments could get money and a letter. A letter came along with the signature of prime ministers at that time said:<sup>54</sup>

[I]n cooperation with the Government and the people of Japan, offers atonement from the Japanese people to the former wartime comfort women, I wish to express my personal feelings ('personal' is omitted after 1998) as well. The issue of comfort women, with an involvement of the Japanese military authorities at that time, was a grave affront to the honor and dignity [...] As Prime Minister of Japan, I thus extend anew my most sincere apologies and remorse to all the women who underwent immeasurable and painful experiences [...] I believe that our country, painfully aware of its moral responsibilities, with feelings of apology and remorse, should face up squarely to its past history and accurately convey it to future generations. [...] I pray from the bottom of my heart that each of you will find peace for the rest of your lives.

It is clear that the letter and the fund are not conformity with the concept of an apology as a method of reparation in international human rights law. Since this is the non-governmental fund, the letter emphasised that they recognised 'a relationship' between the government and the comfort women's losses but not recognise a direct responsibility with them. As I noted above, the first version of the letter included a term 'personal'. Although the government omitted this term later, it suggests that the government considers the fund an express of moral responsibility as one of Japanese national.

The legal framework of peace agreements after the WWII mainly dealt with inter-state relations. The issue of individual sufferings is left behind of the negotiation table and states kept silent with the legal status of individual rights to claim a reparation. In this situation, the comfort women survivors attempt to claim accountability for wartime conduct by the government through compensation cases and criminal cases. Although there is no case to obtain a compensation by the government, the Japanese domestic court are still open discussion to them. This is because, the obligation to provide effective a remedy has changed and evolved in the international governance. For instance, the Yamaguchi District Court

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<sup>53</sup> The Asia Women's Fund. Available at <http://www.awf.or.jp/e-guidemap.htm>.

<sup>54</sup> Eric K. Yamamoto and Sara Lee, Korean 'Comfort Women' Redress 2012 Through the Lens of U.S. Civil and Human Rights Reparatory Justice Experiences, (2012) 11 JKL, 123 at 143.

recognised, for the first time, that the government's unlawful inaction which let the comfort women survivors being suffered by the lack of legislation for a very specific period after 1993 when the government had officially acknowledged its involvement, and ordered the government to pay compensation.<sup>55</sup> The government, however, appealed and the Supreme Court finally dismissed the survivors's claims in the end.<sup>56</sup> Although the decision was reversed in the end, it was still incredible because it was the first case to recognise that lack of reparation constitutes a continuing violation and state has a responsibility to take actions not to continue the survivors' damaged situations caused by the lack of reparation. Moreover, the court overcame the temporal limitation by acknowledging that the rights-infringing period started at the time of the governmental investigation in 1993 since it was the first time that illegality of the comfort women system was recognised.

## **2. A Legal Framework governing the Historical Injustice**

This chapter discusses a legal framework which enable the comfort women survivors to obtain a remedy. As a premise of discussion, the claim of a remedy requires international responsibility triggered by a human rights violation. In case of the comfort women survivors, a primary question is whether the comfort women system was in violation of international law. For this answer, I will refer to my assessment in *1.1 Scope of Comfort Women* since the circumstances constitute sexual slavery, which has been prohibited by customary international law at the time of the WWII. Even if the illegality of the sexual slavery is apparent, we still face two procedural issues. First problem is whether the survivors had entailed individual right to obtain a remedy as a consequence of a violation of the prohibition against sexual slavery at the time of the WWII. This question needs an examination of general practices at the moment and the nature of obligations violated. If the violations at that time cannot invoke the individual right to remedy, another approach is retroactive application of human rights treaties which contain the right to a remedy. Thus, the second problem is whether retroactive application of human rights treaties is permissible. The latter question will be examined by case law of a continuing violation.

### **2.1 Source of the claim**

The international obligation to provide a remedy comes from the law of state responsibility, international human rights

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<sup>55</sup> Etsuro Totsuka, *Commentary on A Victory for Comfort Women: Japan's Judicial Recognition of Military Sexual Slavery*, (1999) 8 *Pacific Rim Law & Policy Association* 1, 47 at 47-49

<sup>56</sup> *Ibid.*

law and humanitarian law.<sup>57</sup> In the law of state responsibility, providing a remedy is one among reparation methods that states discharge or release itself from state responsibility for a breach of international law.<sup>58</sup> On the other hand, international human rights law and humanitarian law focus on individual rights to remedy. Human rights treaties impose states an obligation to provide an effective remedy because it is a basic human rights.<sup>59</sup> In the post-conflict societies, international human rights mechanisms offers a ground governing access to justice and redress for human rights violations. In many cases, human rights abuses are linked to long-standing political, economic, and social problem that law alone cannot repair and reparation serves an important role to tackle the cause of human rights abuse in society such as prejudice, ignorance, poverty and corruption, which thus require society to fix education and other general social effort.<sup>60</sup>

The law of state responsibility governs the consequences of a breach of international law. It requires a state to make reparation when it fails to comply, through an act or omission attributable to the state.<sup>61</sup> Even if the losses of injured party are caused by one measure of state's act or omission, the injuries for which reparations are various such as pecuniary damage and non-pecuniary damage.<sup>62</sup> A form of reparation should not be understood as demanding restoration of the status *quo ante*, but should afford an equivalent to that which has been lost.<sup>63</sup> The law of state responsibility requires a state to provide an appropriate reparation for the injured party where it would have been at the moment in question if the injury had not occurred.<sup>64</sup> Thus, a correlation should exist between the significance of the international obligation breached and the reparations owed and this correlation is governed by the principle of

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<sup>57</sup> Fiona McKay, What Outcomes for Victims, in *The Oxford Handbooks of International Law*, D. Shelton (eds), (OUP, 2013) at 922.

<sup>58</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc A/56/10, II Yearbook of the International Law 2, Article 28.

<sup>59</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

<sup>60</sup> UN Commission on Human Rights, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr Theo van Boven, Special Rapporteur' (2 July 1993), UN Doc. E/CN.4/Sub.2/1993/8, at 133-137.

<sup>61</sup> International Law Commission, *supra* 58, Article 2.

<sup>62</sup> *Ibid* Article 37(2) at 106.

<sup>63</sup> *Ibid*. Part III.

<sup>64</sup> *Ibid*.at 89.

proportionality.<sup>65</sup> The duty to provide a reparation is itself an international obligation that arises international responsibility if a state does not implement.<sup>66</sup> In the absence of enforcement authority, the injured party claiming reparations can act to uphold the public interests or legal order by punishing and deterring wrongdoing. Vattel explains that the injured party has a right to provide for their future security, and to chastise the offender, in order to deter future wrongdoing.<sup>67</sup> Garcia-Amador similarly claims that the concept of reparation in international law traditionally has included both a compensatory element and a punitive one.<sup>68</sup> These discussion shows that reparation triggered by the law of state responsibility must be retributive in order to fulfil standards of assessment under customary international law.

On the other hand, international human rights law and humanitarian law impose international obligations to states to provide a remedy as basic rights.<sup>69</sup> Most human rights treaties guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy.<sup>70</sup> Following a basic understanding of international law showed above, a state which violated human rights has a primary duty to afford redress to the victims. However, a wrongdoer is not a sole duty-bearer of violations of human rights under treaties. For instance, article 2 (1) of International Covenant on Civil and Political Rights (ICCPR) provides that each state party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the ICCPR, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>71</sup> Article 2 (3) follows that state parties have to ensure an effective remedy for individuals whose rights under the ICCPR is violated.<sup>72</sup> Human rights treaties recognise the nature of obligations under the ICCPR is on territorial or

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<sup>65</sup> Ibid. Article 51.

<sup>66</sup> *Factory at Chorzow* (Germany v. Poland) (Jurisdiction) [1928] PCIJ Rep Series A No. 17 at 29.

<sup>67</sup> Danish Shelton, *Remedies in International Law* (OUP, 2015), at 33; E de Vattel, *The Law of Nations*, (7<sup>th</sup> edition, Philadelphia, 1849), bk. II, s.at 51.

<sup>68</sup> Danish Shelton, *supra* 67, at 33; F. V. Garcia-Amador, *The Changing Law of International Claims* (London, 1984), ii, at 567.

<sup>69</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

<sup>70</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>71</sup> ICCPR, *ibid*, Article 2(1).

<sup>72</sup> ICCPR, *ibid*, Article 2 (3).

effective control basis.<sup>73</sup> The role of international tribunals is subsidiary and only becomes possible when a state in question has failed to afford the required remedy. While understanding the subsidiary, international human rights mechanisms such as the UN Charter bodies, the treaty bodies, and international and regional tribunal complement protections and vital for the integrity of global human rights mechanism, particularly when the state denies remedies deliberately and consistently. The nature of human rights obligations differs from other areas of international law where treaty and customary obligations are reciprocal. In general, counterparts confer equal benefits on each other and accept equal duties in return.<sup>74</sup> In contrast, human rights obligations aim at guaranteeing the enjoyment of individual human beings of those rights and freedoms rather than to establish reciprocal relations between states.

Obligation to provide an effective remedy is substantiated in the UN human rights treaties. At the time of an adoption of the UN Charter, although the Charter clearly prohibits states' discrimination based on race, sex, language, or religion, it did not mention substantive catalogues of human rights and sanction which follows breaches of human rights obligations.<sup>75</sup> The UN directed to draft human rights treaties including the Universal Declaration of Human Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights. The article 6 of CERD contains guarantees of an effective remedy including protection by national tribunal is in order state institutions against any act of racial discrimination as well as the right to seek from such a tribunal is just in adequate reparation or satisfaction for any damage suffered as a result of such discrimination.<sup>76</sup> In the Convention on the elimination of all forms of discrimination against women, state parties undertake 'to establish legal protection of the rights of woman on an equal basis with men and to ensure through competing national tribunal's and other public institutions the effective protection of woman against any act of discrimination'.<sup>77</sup> Article 14 (2) of the United Nations Convention against Torture guarantees a fair

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<sup>73</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136, at para.112.

<sup>74</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969 entry into force 27 January 1980) 1155 UNTS 331, Article 26.

<sup>75</sup> Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945 entry into force 24 October 1945) 1 UNTS.

<sup>76</sup> International Convention on the Elimination of All Forms of Racial Discrimination (entry into force 4 January 1969) 660 UNTS 195, Article 6.

<sup>77</sup> Convention on the Elimination of All Forms of Discrimination Against Women ( entry into force 18 December 1979)

and adequate compensation for torture victims including the full rehabilitation as well as requiring that states parties elect panel sanctions and prosecute perpetrators.<sup>78</sup> These treaties leave interpretation of treaty obligations to state parties including the question of what forms of reparation or satisfaction are required as well as the question of how broadly the term victim should be interpreted and who is liable for reparation or satisfaction. It is a matter of course to enable state parties to implement treaty obligations taking their cultural difference and resources into consideration. However, in a situation of Japan where Japan did not make any of declaration to accept UN treaty bodies' competence to accept complaints while ratifying all UN human rights treaties in the 1990s, it resulted in absence of driving force to implement and incorporate obligations inhuman rights treaties into domestic legal system.<sup>79</sup>

## **2.2 The individual right to claim a remedy at that time of the WWII**

At the time of the WWII, potential legal frameworks of the right to claim a remedy is the law of armed conflict. In 1906, *the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field* was established in place of the 1864 Geneva Conventions.<sup>80</sup> Through two Hague Peace Conferences, the Hague Conventions, in particular *the Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (the 1907 Hague Regulations) was drafted.<sup>81</sup> The Hague Regulations codified rules on the conduct of hostilities and provisions to be respected in the case of belligerent occupation. In the 1930s, the International Commission of Red Cross had submitted *the Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent* (the 1934 Tokyo Draft) to protect the civilian population in times of armed conflict.<sup>82</sup>

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1249 UNTS 13.

<sup>78</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ( entry into force 10 December 1984) 1465 UNTS 85, Article 14(2).

<sup>79</sup> OHCHR, Japan: Ratification Status. Available at <https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/JPIndex.aspx>

<sup>80</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 6 July 1906 entry into force 9 August 1907) 75 UNTS 31.

<sup>81</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907 entry into force 26 January 1910).

<sup>82</sup> ICRC, *the Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent* (Tokyo, 1934).

Japan ratified the 1907 Hague Regulations in 1911. The Regulations covered the protection of the women in the occupied areas. At that time, Japan colonised Taiwan and South Korea and the women and girls from these areas are not protected by the Regulations. On the other hand, in 1925 Japan signed to the *International Convention for the Suppression of Traffic in Women and Children of 1921*.<sup>83</sup> Articles 2 and 3 of the 1921 Convention imposes a state party to prosecute persons engaged in trafficking of women and children, but the 1921 Convention did not contain the clause of reparation. In this regard, Gay McDougall, a Special Rapporteur on the issue of systematic rape, sexual slavery, and slavery-like practices in armed conflict stated the existence of individual right to claim a remedy:<sup>84</sup>

[T]he Japanese Government's assertions that individuals are not subjects of international law are contradicted by several sources of international law, including: the Hague Convention No. IV of 1907; the Paris Peace Conference of 1919 (Treaty of Versailles); the Charter of the Tokyo War Crimes Tribunal; and customary international law. These various legal documents and theories demonstrate the obligation of States to pay compensation for breaches of international law.

On the other hand, the International Law Association established the International Committee on Compensation for Victims of War in May 2003, whose goal was adoption of a Declaration on Compensation for War Victims by 2010. The Committee found as follows:<sup>85</sup>

There was no consensus as to whether the present state of international law, as it results from applicable treaty and customary law, allows for any final conclusion as to the existence of a right to compensation, held and being enforceable by the individual victims of such violations of international law, as distinct from the universally accepted existence of the right of States to claim, in their own right, 'compensation' for violations of international law norms the victims of which were their nationals.

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<sup>83</sup> International Convention for the Suppression of Traffic in Women and Children of 1921 (adopted 30 September 1921 entry into force, 12 November 1947) Article 2 and 3.

<sup>84</sup> United Nations, Economic and Social Council, Commission of Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during the Armed Conflict, Final Report Submitted by Ms. Gay J. MacDougall, Special Rapporteur, UN. Doc E/CN.4/Sub.2/1998/13 (1998) at 57.

<sup>85</sup> Luke T. Lee, Introduction to International Law Association, Toronto Conference Report: Compensation for Victims of War Committee (2006) 6 J. R.S. no.1, at 12.

In my opinion, it is difficult to be in favour of Gay McDougall because general practices should have emerged at the time of the WWII although the future development expects the formulation of right to a remedy. Therefore, I conclude that the claim of a remedy should overcome the temporal limitations as discuss later.

### **2.3 Temporal Limitation in International law**

The examination in the former chapter concluded that the individual right to claim a remedy has not existed at the time of the WWII. In order to provoke that Japan has to redress the comfort women issue, I will examine following two situations. Firstly, under international law, there is a dispute that the statute of limitations is not applicable to *jus cogens* violations. If so, can the survivors address the violation of prohibition against sexual slavery is still effective? Secondly as an alternative argument, does the situation of the comfort women survivors fall into the category of a continuing violation and apply human rights treaties?

### **2.3 The Statute of Limitation**

The statute of limitations is a general principle of international law. Under international law, there is a big debate that certain crimes are not subject to any statute of limitation. The ICRC argues that the specific non-applicability of statutory limitations to war crimes has become a norm of customary law.<sup>86</sup> In *the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the ICJ found that article 9 of the Genocide Convention is applicable retroactively and the Court has a jurisdiction with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina based on article 9.<sup>87</sup> Although Yugoslavia submitted preliminary rejection, the Court explained that the Genocide Convention and in particular article 9 'does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*', and neither did the parties make any reservation to the Convention. This reasoning is criticised by Judge ad hoc Kreca, in his dissenting opinion of this case:<sup>88</sup>

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<sup>86</sup> ICRC, ICRC customary IHL study (2005) Rule 160. available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>

<sup>87</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro) Preliminary Objections, Judgment, I. C. J. Reports 1996, p. 595

<sup>88</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, dissenting opinion by Judge ad hoc Kreca, *ibid*, para.137.

Article IX of the Genocide Convention is a procedural provision of the Convention and, being an integral part of it, shares the Convention's destiny or, to put it more precisely, the destiny of its contractual provisions. Consequently, if the Convention does not have a retroactive effect - and it obviously does not - then its Article IX likewise has no such effect. So, as the general rule of non-retroactivity stipulates, the Convention is applied to the events and situations which took place after it had come into effect in relation to Bosnia and Herzegovina or, in the circumstances of the present case, when the Convention became applicable between Bosnia and Herzegovina and Yugoslavia.

In this case, Judges Shi and Koroma pointed out that prohibition of genocide is *jus cogens* and *Jus cogens* is an important safeguard against a strict temporal limitation. They argued that the treaty interpretation cannot exclude developments in the law subsequent to its adoption.<sup>89</sup> 'Even though a treaty when concluded did not conflict any rule of *ius cogens*, it will become void if there subsequently emerges a new rule of *ius cogens* with which it is in conflict'.<sup>90</sup> Art. 40 of the Draft Articles on State Responsibility referred to *ius cogens*:

- (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
- (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
- (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

In the commentary to Art. 40 Draft Articles on State Responsibility, the ILC further added the prohibition against torture, the basic rules of international humanitarian law which the ICJ describes as 'intransgressible', and the right of self-determination.<sup>91</sup> *Jus cogens* is understood as peremptory norms of international law accepted and recognised by the

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<sup>89</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, joint declaration of Judges Shi and Koroma, *ibid*, at 280.

<sup>90</sup> *Ibid*.

<sup>91</sup> In the commentary to Art. 40 Draft Articles on State Responsibility (2001

international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of international law having a same character'.<sup>92</sup> Thus, in theory, recognising certain international crimes as jus cogens carries with it the duty to prosecute or extradite, the non-applicability of the statute of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom such a state officials, against what category of victims, and irrespective of the context or time of their occurrence.<sup>93</sup>

However, in reality, it is difficult to find general practices that jus cogens violations which exist prior to entry into force of human rights treaty trigger jurisdiction of international courts. In *Chong and Others v. the United Kingdom*, the ECtHR has declared the application inadmissible.<sup>94</sup> The case is concerned the massacre in December 1948 by British military in the village of Batang Kali in Selangor, which is now a state of Malaysia but at the time was part of the British Empire. The applicants argued that there had never been a full and independent public investigation into the killings. The Court found that the applicants' complaint was out of its jurisdiction since the deaths had occurred more than ten years before the UK had given individual applicants the right to apply directly to the Court.<sup>95</sup> In any case, new evidence had come to light as early as 1970 (when the military had admitted that they had been ordered to carry out the massacre) so the applicants had lodged their application long after the Convention time-limit.<sup>96</sup>

States' reluctance to admit the effect of jus cogens to account for historical injustice is also found here. The Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity entered into force in 1970 and provided general prohibition of procedural application of the statute of limitation to (i) war crimes, particularly the 'grave breaches' enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims; (ii) crimes against humanity, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid; and (iii) the crime of genocide even if such acts do not constitute a violation of the domestic law of the country in which they were

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<sup>92</sup> Vienna Convention on the Law of Treaties supra 74, Article 26.

<sup>93</sup> M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 *Law & Contemp Probs* 63

<sup>94</sup> *Chong and Others v. the United Kingdom* (application no. 29753/16)

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

committed.<sup>97</sup> This convention is accepted only by 55 parties (Japan did not ratify nor sign this convention).

## 2.4 The Principle of Non-retroactivity

Article 28 of the Vienna Convention on Law of Treaties (VCLT) provides that 'unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.<sup>98</sup>

The principle of non-retroactivity prohibits treaty's provisions to apply to a state's conduct which exists before the date of the entry into force of a treaty. No obligations arise for the State party in following situations: first, any act or fact which took place before the date of the entry into force of the treaty. Past facts and situations are governed by international obligations at the time of commission. Second, continuing situations in which the effects of acts or facts extended over a period of time, but ceased to exist before the date of the entry into force of the treaty. However, if the situation, commencing in the past, continues to exist after the treaty's entry into force, the treaty covers the period after the entry into force. This latter case is not truly an exception to the principle of non-retroactivity, since the treaty's binding force commences solely as from the date of the entry into force of the treaty and does not concern earlier parts of the continuing situation. The Institute de Droit International followed same idea and adopted a resolution on intemporality of international law. The resolution confirms that subjects of international law such as states have the authority to determine the temporal scope of the application of norms.<sup>99</sup> Due to the lack of a clear indication, the Institute proposed that 'any rule which relates to the licit or illicit nature of a legal act shall apply while the rule is in force, but any rule which relates to the continuous effects of a legal act shall apply to effects produced while the rule is in force, even if the act has been performed prior to the entry into force'.<sup>100</sup> To sum up, application of the principle of non-retroactivity excludes or limits a lot of historical claims from the jurisdiction of UN treaty bodies, charter bodies, regional mechanisms and domestic courts. Human rights mechanisms often struggle to determine when particular violation has occurred. In doing so, they have developed a technique of 'continuing violations' to address the current failure of states to afford a remedy

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<sup>97</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968 Entry into force: 11 November 1970, in accordance with article VIII, Article I

<sup>98</sup> Vienna Convention on the Law of Treaties, *supra* 74, Article 28.

<sup>99</sup> the Institute de Droit International, *The Intertemporal Problem in Public International Law* (Wiesbaden, 1975).

<sup>100</sup> *Ibid.*

or take another action in response to the past abuses.

Under international human rights law, the concept of continuing violations has mitigated the effect of the rule against retroactivity, as has the independent requirement that a remedy be provided even for violations that took place before entry into force of a human rights treaty. Human rights mechanisms often admit cases as continuing violations where the effects of the even in question extended into the period covered by the jurisdiction of treaties. The concept of continuing violations enables victims of such violations to invoke international jurisdiction even when the original wrongful acts happened prior to acceptance of the treaty in question. Article 14 of the Draft Articles on the Origin of State Responsibility (2001) explains continuing violation of international law as follows:<sup>101</sup>

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Item 1 explains that the breach of international obligation starts by either instantaneous or continuing act and Item 3 added that the obligation to prevent violations follows automatically. Item 2 recognised the continuing violation itself. The Institute de Droit International explains that continuing act (1) occupies the entire period during which the act continues and (2) remains in violation of the international obligation.<sup>102</sup> Good Examples include 'the maintenance in effect of legislative provisions incompatible with treaty obligations, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent'.<sup>103</sup>

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<sup>101</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, supra 58, Article 14.

<sup>102</sup> Ibid, at 32.

<sup>103</sup> Ibid.

The criteria which determine whether an act is ceased or continuing depends on the nature of human rights or international obligations which relates to situations which the original act generated.<sup>104</sup> In *De Becker v. Belgium*, the European Commission has accepted the extension of their jurisdiction *ratione temporis* to situations involving a continuing violation which originated before the entry into force of the European Convention on Human Rights and Fundamental Freedoms (ECHR) but persists after that date.<sup>105</sup> De Becker, the journalist and the applicant who had been sentenced to death for treason during the WWII was released subject to conditions in 1961. At the time, Belgian criminal law limits certain rights of prisoners whose sentence is grave. Since this situation continued to apply after his release, the applicant claimed this is a violation of Freedom of Expression. The Commission considered that this was a continuing situation since, in the circumstances, the fact that 'prevention of exercising freedom of expression was repeated daily' constitutes a continuing violation.<sup>106</sup>

Deprivation of property is another example of interchangeable nature of violation between an instantaneous and continuing act, depending on the content of the international obligations which have been violated.<sup>107</sup> In *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, the ECtHR dealt with the issue whether failure to pay final compensation for nationalised property is a continuing violation or not. In this case, the Court found that Portugal is responsible for its omissions relating to rights guaranteed by the Convention after the date of its ratification since the government recognised the applicants' right to compensation from the moment the expropriation measures were imposed, but failed to ensure it.<sup>108</sup> In *Krstić v. Serbia*, a continued non-enforcement of a domestic decision in the applicant's favour against the State is in question and the applicant argued that the act of formal or *de jure* deprivation of possessions (expropriation or confiscation) is incompatible with the ECHR, and the deprivation which follows cannot be considered as a simple enduring effect of the original act, but as a continuing breach of the right of peaceful enjoyment of one's possessions.<sup>109</sup> Since the original act of 'deprivation' of a possession has been illegal, the keeping of the property by

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<sup>104</sup> Loukaidēs, L. G. *The European Convention on Human Rights : collected Essays* (Leiden: Brill | Nijhoff 2007) at 211.

<sup>105</sup> *De Becker v. Belgium*, ECtHR, judgement, Application no 214/5 (27 March 1962) para 143.

<sup>106</sup> *Ibid.*

<sup>107</sup> Loukaidēs, L. G, *supra* 104 at 215.

<sup>108</sup> *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, ECtHR, judgement, Application no 29813/96; 30229/96 (11 January 2000) para 23.

<sup>109</sup> *Krstić v. Serbia*, ECtHR, judgement, Application no Application no. 45394/06, (10 December 2013) paras.63-69.

Serbia by virtue of such act amount to a continuing unlawful interference with rights to possess such property.<sup>110</sup> In such circumstances, the government is considered to be in violation of the applicant's rights during all the period which has elapsed.<sup>111</sup>

On the other hand, there is another example of a continuing violation where an unlawful act triggers procedural obligations governing situations after the original act ceased. With respect to forced disappearance, the entire duration where victims are yet to be found considered a continuing violation since it violates procedural obligations continually.<sup>112</sup> A forced disappearance is difficult to consider an instantaneous act or event. It is rather considered 'a continuing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred'.<sup>113</sup> Thus, the procedural obligation to investigate will potentially persist as long as the fate of the person is unaccounted for and the ongoing failure to provide the requisite investigation will be regarded as a continuing violation, even where death may, eventually, be presumed.<sup>114</sup> In *Mocanu and Others v. Romania* (ECHR, 2014), the Court considers that the positive obligation to carry out an effective investigation under Article 2 and 3 of the Convention constitutes a detachable obligation capable of binding the State even when the death took place before the critical date. The Court had to deal with the investigation and the length of proceedings which followed the violent crackdown on anti-government demonstrations in Bucharest in June 1990. During the crackdown, the first applicant's husband was killed by gunfire and the second applicant was arrested and ill-treated by the police. The applicants claim the proceedings violate the standards put forward by the procedural aspect of article 2 and 3. In this respect, the ECtHR admits that the procedural obligation to investigate under article 2 is a separate and autonomous duty. It is a detachable obligation capable of binding the State even when the death took place before the entry into force.<sup>115</sup>

It is not difficult to understand the concept of a continuing violations of human rights in respect of all those cases above

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<sup>110</sup> Ibid.

<sup>111</sup> Loukaidēs, L. G, supra 104 at 230.

<sup>112</sup> ECHR, Practical Guide on Admissibility Criteria. at 54. Available at [https://www.echr.coe.int/Documents/Admissibility\\_guide\\_ENG.pdf](https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf)

<sup>113</sup> Loukaidēs, L. G, supra 104 at 232.

<sup>114</sup> *Varnava and Others v. Turkey*, ECtHR, judgement of Grande Chamber, Application no 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, (18 September 2009) paras.148-49.

<sup>115</sup> Ibid, at 138.

where the cause of the violations is clearly a continuing act or omission, such as the continuing unlawful prevention of persons from possessing and enjoying their properties and the non-enforcement of specific legal rights contrary to the Convention, such as a person's right to the execution of a judgment in his favour of legislation compatible with the obligations under the treaties of the State concerned. In most cases, there is a clear distinction between instantaneous and continuing violations. However, there are difficulties as regards the distinction between a continuing violation and an instantaneous violation with enduring effects. It is often argued that good example of the latter case is a released hostage. By the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is out of the category of a continuing violation, even though certain effects of the act such as bodily or mental damages may continue since such consequences are the subject of the secondary obligations of reparation in general.

If so, is the case of historical injustice out of a continuing violation and human rights treaties could not apply to the case of comfort women survivors? According to continuing violations examples above, a continuing violation emerge where international obligations or other human rights cover subsequent situations. In a case of comfort women, it is difficult to argue that obligation to provide effective remedy is continuing since the illegality of comfort women is yet to be determined before domestic courts nor international courts. However, the situation of survivors, where they are traumatised and often suffered bodily injury, and forced to be pregnant is continuing. In current situation, there is a high possibility that their situations are considered mere effects. However, a remarkable observation on states obligation to victims of sexual violence is issued recently from the Committee of CAT.<sup>116</sup> The complaint is a female citizen of Bosnia and Herzegovina who was raped by a member of the forces of Republika Srpska during the internal conflict of the former Herzegovina in 1992. Afterwards, she became pregnant and terminated, which left serious trauma causing various mental diseases. In 2015, she won the case before the Court of Bosnia and Herzegovina, which imposes the perpetrator to pay compensation. The latter was not able make the payment for such an amount. Since Bosnia and Herzegovina did not have funds to cover the payment either, the complainant could not receive compensation. So, she brought a case to the Constitutional court claiming that state failed to provide her with money. However, the Constitutional court ruled that such civil claim has a statute of limitation and the court applied it to her case. In these circumstances, the Committee found its jurisdiction even the rape happened in prior to entry into force of the Convention for Bosnia and Herzegovina, explaining that the domestic court's 2015 decision finding the perpetrator guilty of war crimes and ordering him to pay the complainant damages was issued after the State party's declaration under Article

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<sup>116</sup> Mrs. A v. Bosnia and Herzegovina, CAT, Communication No. 854/2017, UN Doc. CAT/C/67/D/854/2017 (22 August 2019)

22 of the Convention came into effect. The Committee concluded that it had *ratione temporis* jurisdiction given that the State failed to fulfil its obligations to ensure the complainant's right to 'fair and adequate compensation' as a result of the unenforceability of the domestic court's 2015 judgment. Looking detailed reasoning by the committee, the committee said that 'these events [rape and ill-treatment] gave rise to the ongoing obligations of Bosnia and Herzegovina to investigate, prosecute and sanction perpetrator, and to ensure that the complaint obtains redress and has enforceable right to compensation'.<sup>117</sup> Following the reasoning of this latest decision, these obligations will start at the very time of ratification of the Convention. It is pleasant interpretations of the obligations under the Convention, however, is still questionable of when the violation will start. In this decision, the committee recognised that violation of the article 14 is state's failure to enforce the domestic court's 2015 judgment, on the other hand, the committee recognises states obligation to suppress the situation in general by entry into force of the Convention. Since this decision is the first case to deal with states' accountability for survivors of sexual violence in armed conflict, the subsequent discussion will follow to examine the nature of obligation under the Convention. Thus, the possibility that lack of remedies for comfort women survivors is increasing, however, convincing evidence to show a clear continuing violation is still questionable.

Observing discussions above, redressing the historical injustices is difficult to be achieved by the mere retroactive application of human rights treaties. As I examined above, (i) the claim of a reparation as a consequence of international responsibility at the time of the WWII is not realistic. Although international law at the time of the WWII has established the prohibition against sexual slavery, international did not have a capacity to respond to the situations of the victims. Secondly, (ii) as a legal effect of *jus cogens* violations, it is hard for me to observe that the statute of limitation is non-applicable because, taking the spirit of the statute of limitations, the mere existence of *jus cogens* violation may not overcome the procedural problems. The purpose of the statute of limitations is preventing a mistake based on less authentic evidences in a situation that a long time passed. If the victims of the historical injustice will overcome this situation, there should be persuasive and enough evidences to prove the existence *jus cogens* violation. Thirdly, (iii) a bodily or mental damage after the illegal conduct does not fall into the concept of a continuing violation. In order to claim that the violation is continuing, human rights treaties should impose international obligations (procedural obligations, primary obligations or secondary obligations) governing aftereffects of the wrongful conduct. In case of the Comfort Women issue, finding these obligations is difficult. With respect to obligation to investigate, there is a possibility that subsequent developments of international give obligation to investigate to sexual violence since they are now considered as torture or crimes against humanity. The decision issued by CAT, may be in a same vein to support its formulation

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<sup>117</sup> Ibid.

although it is questionable now. Moreover, the fact that Japan did not allow individuals to bring a case to the UN treaty bodies is fatal. In many cases before the UN treaty bodies, the acceptance of competence of the treaty bodies to deal with case is a key data to determine a continuing violation.

In addition to conclusion above, I argue that providing a remedy through the legal procedure is not effective considering the nature and the circumstances of the comfort women survivors. In principle, human rights treaties require states to provide an effective remedy to individuals primarily and international human rights mechanisms complement states' function to protect individuals in case states lack adequate domestic remedies. Domestic remedies, however, are often not effective since states prioritise reconciliation in post-conflict period. It causes problems where a number of victims are not identical. Regional human rights mechanisms played an important role to tackle these situations. For example, the Inter-American Court of Human Rights (IACtHR) places reparations at the centre of its mandate, based on its understanding that the objective of international human rights law is to protect victims and to provide for the reparation of damages.<sup>118</sup> But generally, international human rights bodies limit themselves to find facts and issuing declaratory judgements, or recommend that compensation of an unspecified amount be paid to the claimants. Regional human rights mechanisms often award monetary compensation for both pecuniary and non-pecuniary damage. But non-monetary remedies, such as restitution or measures of rehabilitation are less likely to be awarded.<sup>119</sup>

An appropriate form of a remedy depends on the nature and the circumstances of the human rights abuse. In this regard, Torpey classified types of events which need to be redressed into three categories based on circumstances of violations.<sup>120</sup> The first set of claims arises from mass violations perpetrated in the war such as the WWII. It includes state-sponsored mass killings, forced labour, sexual exploitation, and related misdeeds by the Allied Powers. The second category is composed of claims in the aftermath of a transition to democracy. It more focuses on clarifying the circumstances of previous repression than on repairing the damage done, as in post-Communist Europe and in Latin America after the military's departure from power. The third category involves claims arising from European colonialism and its depredations. This category also involves post-colonial claims, such as cases of internal colonialism (American

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<sup>118</sup> Velasquez Rodoriguez v. Honduras, IACHR, (1988), Series C, 28, ILM 291, para.134.

<sup>119</sup> Danish Shelton, *supra* 67, at introduction.

<sup>120</sup> Torpey J, *Making Whole What Has Been Smashed. On Reparations Politics* (Cambridge, MA, Harvard University Press) at 24.

slavery, Jim Crow and South African apartheid).<sup>121</sup> He continues that aim of reparations can take form of two approaches mainly: Backward-looking approach or forward-looking approach.<sup>122</sup> A backward-looking approach more focus on seeking a compensation for the direct victims of human rights violations and symbolisation of the past wrong. Many claims related to events during the WWII are in harmony with this approach. On the other hand, a forward-looking approach attempts to redress the wrongs arising from a system of domination whose consequences persist into the present. They aim at transforming current social conditions that are legacies of the earliest system of domination. Considering classification above, a case of the comfort women survivors overlaps first and third situations since running comfort station is a large scale and systematic violation. This element is in favour of the backward-looking approach. On the other hand, the system of the comfort stations was strengthened by colonisation by the Imperial Japan. Lack of redress for comfort women survivors is not only a problem of Japan but also a problem of their home countries since although bringing a case to foreign court is prevented by state immunity and peace agreements, their home countries still have obligation to provide an effective remedy to individuals within their jurisdiction. Therefore, in my view, the case of comfort women survivors needs more radical approach, such as the retroactive application of a new customary law, not retroactive application of existing human rights treaties.

### **3. Potential impacts of Transitional justice to formulate state obligation to redress historical injustice?**

#### **3.1 Creation of a new law**

In principle, international law is composed of treaties, customary international law, and the general principle.<sup>123</sup> International legal order has been created by modification of existing norms or creation of new practices in order to protect human rights, in particular, after the WWII. For example, in *South West Africa Cases*, the ICJ dealt with the issues of existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory thereunder over South West Africa. The Mandates System was established by the Covenant of the League of Nations. After the establishment of the United Nations, South Africa claimed that the effect of the Covenant of the League of Nations was in force. At that time in question, South Africa established the apartheid in South West Africa. Thus, the questions was whether South Africa had, promoted to the utmost the material and moral well-being and the social progress of the inhabitants in accordance with the Mandate; whether the mandatory had not in harmony with the

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<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Statute of the International Court of Justice, Article 38 (1)

prohibition in the Mandate. A complaint argued that the international norm and standards of non-discrimination and non-separation has been formulated referring to UN declarations and resolutions, the UDHR, drafts of the two Covenants and regional human rights treaties as source of customary international law. In Dissenting Opinion of the case, Judge Tanaka recognised the Mandate was in force, however claimed that principles of non-discrimination and non-separation based on race has already established as customary international law and it governed the South Africa's Mandatory.<sup>124</sup> The Court accepted the principle that the relevance of the evolving practice and views of States, growth of experience and increasing knowledge in political and social science to the determination of obligations should be taken into account bearing on the nature and purpose of the old obligations.

In establishing customary international law, state practice is not an only source of it. In the South West Africa case, the court took into account resolutions of the General Assembly which repeatedly and strongly deny the apartheid policy of racial discrimination as an interpretation of the Charter, the 11 trust territories agreements, the Universal Declaration of Human Rights, the Draft Declaration on Rights and Duties of States adopted by the International Law Commission in 1949, the Draft Covenant on civil and political rights, the Draft Covenant on Economic, Social and Cultural Rights, the Declaration on the Elimination of all Forms of Racial Discrimination adopted by the General Assembly of the United Nations on 20 November 1963 and of regional treaties and declarations, particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms signed on 3 September 1953, the Charter of the Organization of American States signed on 30 April 1948, the American Declaration of the Rights and Duties of Man, 1948, the Draft Declaration of International Rights and Duties, 1945.<sup>125</sup> Judge Tanaka explained why they are considered:<sup>126</sup>

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<sup>124</sup> *South West Africa* (Liberia v. South Africa) Second Phase, dissenting opinion of Judge Tanaka, I.C.J. Reports 1966, p. 6, at 293-295.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

Parallel with such repetition, each resolution, declaration, etc., being considered as the manifestation of the collective will of individual participant States, the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method of the normative process. This collective, cumulative and organic process of custom-generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law.

Thus, the developments of transitional justice initiative also should be taken into account to examine the state's accountability for historical injustice.

### **3.2 the Evolvement of Transitional Justice Initiative in International Community**

Transitional justice initiative emerged in the late 1980s where many states try to transform their social system, from authoritarian or communitarian system to democracy as the ultimate goal.<sup>127</sup> At this stage, transitional justice focused on the legacy of authoritarian, repressive regimes and appropriate transition to democracy. Their focus substantiated to measures such as truth-seeking and retributive justice. Thus, at the early stage, transitional justice was concerned with violations of civil and political rights, not with structural violence or social injustices. This focus strengthened court-centred approach to injustice, by establishment of *ad hoc*, hybrid and international tribunals to punish international crimes including the crimes against humanity, the crimes of genocide and the crimes of aggression since prosecution and punishing wrongdoers of former regime attracted attention by public. However, with the increase number of civil wars in the 1990s, forms of violence became oriented and unsettled only by prosecution or punishment of wrongdoers. Although the goal of transitional justice was seeking the democracy, reconciliation and nation-building became important objects as well.<sup>128</sup> The court-centred approach to justice moved to multiple approaches of the designing of truth commissions aiming at national reconciliation, apologies and reparations as restorative justice. The shift from retributive justice to restorative justice involved local perspective moving away from grand institutionalised structures to the concerns of local victims directly affected by violence.

In short, the development of transitional justice initiative contributed to two aspects. First is globalisation of conflict or post-conflict situations, which means that more and more international attentions such as the UN, ICC and human rights

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<sup>127</sup> Fiona Mckay, *supra* 57, at 922.

<sup>128</sup> *Ibid.*

mechanisms participate in a project to heal the society of a country. Second is paying international attentions to local people and victim's voice and needs who are living with the legacy of violence. Therefore, transitional justice is not an initiative to transfer to democracy or liberal regime, but functions as a vehicle for peace-building and reconciliation.<sup>129</sup>

The fact that transitional justice has shed the light to the needs of reparations for victims in restorative measures had impact on function of remedies in international governance broadly. Traditionally, the compensatory justice has been the foundation of the law of remedies. The primary function of the remedy is to correct the wrong done to a victim for justice. It aims at place an aggravated party in the same position as an individual would have been had no injury suffered. Even an illicit conduct that causes no compensable harm or that brings an economic benefit to the victims is cause for complaints because it creates a moral imbalance between the victim and the wrongdoer. Moreover, while justice is primarily about the safeguard of the victim and not about the punishment of the perpetrators, the perpetrators are held responsible for providing a remedy in order to serve a moral need in some cases. Thus, compensation restores the victim's welfare and affirms his or her rights, but it also enforces the moral and legal duties owed by the wrongdoers to victims. In this regard, like compensatory justice, restorative justice seeks to repair the harm caused by an unlawful conduct, but restorative justice embraces a broader notion of the harm that needs to be repaired by addressing the larger community. Restorative justice can be traced to many religious and spiritual traditions and to aboriginal practices and customs around the globe which less on the outcome of redress claim than on a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermaths of the offense and its implications for the future. In this way, restorative justice puts into focus not only on the needs of victims, but also on those of the offender and the community (survivors of the legacy of violence).

International community sees healing of the legacy of violence is an essential ground for peace and security, which is suggested by some attempts including UN resolutions, guidelines and international conference. Firstly, in 1992, the Organisation of African Unit created an expert group whose mandate is exploration of the modalities and strategies of an African campaign for restitution similar to the compensation paid by Germany to Israel and to survivors of the Nazi Holocaust. African states also claimed at the 2001 UN Conference on Racism (Durban Conference) that historical colonisation triggered an right to financial compensations for victims of the slave trade, as well as victims of any other transnational racist policies and acts. In the conference, following two are discussed mainly: the treatment of victims of racism and racial discrimination; and creation of effective remedies, recourse, redress and other measures at all levels

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<sup>129</sup> Ibid.

of governance.<sup>130</sup> In the preparatory meeting for the Durban Conference held in the America, the action to correct inequalities that still persist in the society due to the legacy of slavery was addressed. They proposed specific measures making additional investments in basic social services such as health care, education, electricity, drinking water and access to justice. At the same time, preparatory meeting was held in Teheran, which recognised that state which pursued policies based on racial or national superiority should assume responsibility and compensate the victims of such policies and practices.<sup>131</sup>

Secondly, the UN tries to formulate agendas on reparation scheme, drafting *the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.<sup>132</sup> Although it is not legal-binding, it still offers detailed interpretations and concrete methodologies of effective reparation. In emphasising that 'the Principles ... do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law',<sup>133</sup> The accompanying report of the High Commissioner for human rights noted that in the text show was used only in cases where a binding international law is in effect is the term should was used this criterion appears to have been applied rather conservatively. the Principle explains that statute of limitation shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.<sup>134</sup> The right to the remedy for all victims of international human rights law is recalled and the premium preamble also recite it's rational for ensuring the right to remedy stating that by so doing the international community keeps faith and human solidarity with victims and survivors in the future human current generations and Lee a few rooms that international legal principles of accountability justice in the rule of law.

Thirdly, international community seek a way to combat conflict-related sexual violence. At the UN level, Security Council

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<sup>130</sup> United Nations World Conference Against Racism, Durban Review Conference (Geneva, 2009) at 20.

<sup>131</sup> United Nations World Conference Against Racism, Preparatory meeting report, UN Doc A/CONF.189/PC.2/9 (2001) para.50.

<sup>132</sup> UN, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005) 7.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

resolution 1820 (2008), 1888 (2009), 1960 (2010) and 2106 (2013) promised ending violence against women and girls and discussed the implementation of resolutions and to recommend strategic actions.<sup>135</sup> *The Nairobi Declaration of 2007 on Women and Girls' Right to Remedy and Reparation* was one of the most huge contribution to address women and girls' experience of conflict-related sexual violence and calling for states to take action to provide reparations to victims.<sup>136</sup> Contributing to the declaration and present at this gathering in 2007 were women's advocates and activists along with victims of abuse and violence from regions in conflict in Africa, Asia, Europe, Central, North and South America. Also, report of the UN Secretary General on Conflict Related Sexual Violence issued in March 2019 argued that, while the UN eagerly commit the issue of conflict-related sexual violence from an operational or technical perspective through the strengthening of security and justice institutions, the attempt also call for recognition and tackle on gender inequality as the root cause and driver of sexual violence, including in times of war and peace.<sup>137</sup> This shows that the UN faced a paradigm shift in the understanding of mechanisms of conflict-related sexual violence and its impact on international peace and security. The paradigm shift focused on finding and tacking a root cause of conflict paying attention to victims' perspective since it understands that it is essential for non-recurrence. It contributes to recognise and redress the atrocities that continue to occur, and that have occurred in the past.

## **Conclusion**

This paper examined my hypothesis that the international law requires the state to redress historical injustices through examination of two approaches: Retroactive application of existing human rights treaties and customary international law; and retroactive application of a new customary law to interpretation for human rights treaties and customary international law. Putting two approaches to case of comfort women survivors, I concluded that the latter approach is more effective and appropriate to redress reparation claims for the survivors.

Looking the history to achieve justice in the twenty and twenty-first century, international justice has largely overlapped with international criminal law. International criminal law has developed from the Nuremberg and Tokyo trial in order to regulate the behaviour of individuals. The tribunals attributed international responsibility to individuals for actions

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<sup>135</sup> UN, Report of the united nations secretary-general Conflict-related Sexual Violence, UN Doc S/2019/280 (29 March 2019) at 22.

<sup>136</sup> *The Nairobi Declaration of 2007 on Women and Girls' Right to Remedy and Reparation*

<sup>137</sup> UN, Supra 135.

qualified in international crimes. They promoted subjectification of individuals under international law, providing a foundation for the UN Security Council to establish the special criminal tribunals to deal with atrocities committed by all sides during particular armed conflicts: The International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994) and for the adoption of the Rome Statute in 1998. The International Criminal Court created by the Rome Statute is a permanent court, which has jurisdiction over war crimes, crimes against humanity, genocide and crimes of aggression. In this context, the initiative of transitional justice provides with the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof. Frank Haldmann describes that transitional justice covers past and future attempts, looking backward and forward.<sup>138</sup>

It leads us to pay attention to victims of States commission/omission during the WWII since their situations involve not only unformulated practice of effective reparation, but also lack of legal source in international law. The World War II (WWII) left us a great development of subjectification of individuals. It especially contributed to prosecuting criminal responsibility under international law. However, it was not enough to pay attention to the other side of individuals - victims' need. In case of Japan, even more than 80 years later, there are conflicts on facts, international obligation at the very time and definition of victims. It is recent that victims started to gain recognition with advocacy campaigns. Kim Hak-sun, the first South Korean who addressed that she was a victim of sexual slavery by Japanese military during the WWII, came into public in 1991. One of the reasons has been the stigma and silence around this issue, resulting in the understandable reluctance of victims to open their mouth. From 1990s, international community started to tackle issues related to conflict-related sexual violence. In reality, prosecutions of sexual violence during the war is difficult since neither international law nor domestic law prohibited it at that time of the WWII. At the International Military Tribunal for the Far East, military sexual slavery was removed from its subjects such as war of aggression, crimes against humanity and war crimes. Given the poor record on prosecutions, however, the question of apologies and reparations becomes important, as a measure of acknowledgement as well as recognition of the scale of the atrocities committed. In reality, there has been different treatment by Japan of the issue in various countries. With South Korea, the agreement on the issue of comfort women passed in December 2015 constituted a limited acknowledgment.<sup>139</sup> On 28 December 2015,

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<sup>138</sup> Danish Shelton, *supra* 67, at 24.

<sup>139</sup> Japan / S. Korea: "The long awaited apology to 'comfort women' victims is yet to come" UN rights experts. Available

the agreement between Japan and South Korea declared the issues arising from the widespread and systematic human rights violation of the comfort women as 'final and irreversible'. Japan agreed to acknowledge and express regret for its role and to provide a one-time contribution of 8.3 million US dollars to carry out joint projects with South Korea. For its part, the South Korean Government agreed to consider the removal of a statue commemorating the comfort women built in front of Japan's embassy in Seoul. In 2018, reiterating that the agreement would stand, the President of South Korea however called for a public and 'heartfelt apology', which shows no signs of materialising. Unfortunately, recent agreements between Japan and South Korea are not following international human rights norms completely since it lacks to include victim's perspective and need. However, Japan does not have such agreements or compensation with the Philippines, Taiwan or China, a few of the other countries that have survivors.

As a last remark, the transitional justice initiative is in a vein of subjectification of individuals pushing the victim's perspective into public sphere. It emphasises local agency, fair and open processes, and challenges to unequal and exclusive structures, in order to put the political and social approaches on the same table with the legal approach. In this collaboration of various approaches to achieve justice, the role of international law in the post-conflict societies may become one of various regulatory factors in international governance formulating horizontal network. It will gain 'strength from being woven with other strands to form a web of regulation that can be animated by networks of actors', but by itself cannot redress injustices based on oppression and domination in the future.<sup>140</sup>

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