Attempting to Go Beyond Forgetting: the Legacy of the Tokyo IMT and Crimes of Violence Against Women

Caroline Joan (Kay) S. Picart*

This article begins by first focusing on the Tokyo IMT's heritage of collective forgetting in relation to instances of systematized violence against women, especially the establishment of comfort stations in territories formerly occupied by the Japanese Imperial Army. In specific, after the Introduction, it describes the international political, legal and military factors that led to the formation of the Tokyo IMT; a brief overview of the trial; the political and pedagogical functions of the Tokyo IMT; and legal and extra-legal devices of the Tokyo IMT. Subsequently, it points out key differences between the Nuremberg and Tokyo Trials, in terms of their legal and political strategies and aims. From there, it analyzes the Tokyo IMT's legacy of forgetting crimes of violence against women, especially the crimes against the comfort women, which included a collusion of amnesia imposed by the Allied powers with the Japanese Imperial government, through the exploitation of various legal loopholes in international law. From there, it moves from the Tokyo IMT's specific history to a broader analysis of the functions of crimes of violence against women during wartime conditions in the twentieth century and why such

* Caroline Joan ("Kay") S. Picart is a J.D. Candidate (2012) at the University of Florida Levin College of Law and Adjunct Assistant Professor of Humanities at Santa Fe College. Prior to law school, she was an Associate Professor of English and Humanities at the Florida State University with a Courtesy Appointment at the Florida State University College of Law. She has a Ph.D. from the Pennsylvania State University and was a postdoctoral fellow at Cornell University's School of Criticism and Theory. The author is indebted to Professors Berta Hernandez-Truyol, Danaya Wright, Michael Seigel, Dominick LaCapra, Raymond Fleming, Kenneth Nunn and Katheryn Russell-Brown for their mentorship. She dedicates this article to her husband, Jerry Rivera; the Picart and Terrell families; and friends. She thanks the *East Asia Law Review* staff, especially Andreas Apostolides, Stephanie Brown, and Edward Mahaney-Walter for their patience, expertise, professionalism and genuine concern.

crimes, for the most part, have been invisible. To close, the article assesses the strengths and weaknesses of various ways in which women suffering such wartime crimes of violence, inclusive of the comfort women, may seek redress for such crimes.

I. INTRODUCTION 2
II. THE NATURE OF THE TOKYO IMT 5
A. The Road to Prosecution and a Jurisdictional Postscript 5
B. The Trial: A Brief Overview 9
C. The Purposes of the Tokyo Trial 15
D. Legal and Extra-Legal Devices of the Tokyo IMT 17
1. Pursuing Individual Responsibility 17
2. Creating a Historical Record 19
III. DIFFERENTIATING BETWEEN THE NUREMBERG AND TOKYO TRIALS 19
A. Issues of Fairness and Politics 20
B. The Degree of Involvement of the United States in the Tokyo Trial 22
C. The Strategy of Pursuing Crimes Against Peace 24
IV. THE TOKYO IMT'S LEGACY OF FORGETTING CRIMES OF VIOLENCE AGAINST WOMEN 26
A. Visualizing and Obliterating the Rape of Nanking 26
B. Attempting to Obliterate Traces of Comfort Stations and Comfort Women 29
V. THE CULTURAL DIMENSIONS OF THE CASE OF THE COMFORT WOMEN: ATTEMPTING TO GO BEYOND FORGETTING 35
VI. VIOLENCE AGAINST WOMEN AS MILITARY STRATEGY AND CULTURAL MYTH: THE EVOLUTION OF TWENTIETH-CENTURY WARS 37
VII. CONCLUSION: EVALUATING STRATEGIES OF LEGAL REDRESS FOR WARTIME CRIMES OF VIOLENCE AGAINST WOMEN 41

I. INTRODUCTION

> [I]f the dead from [the Rape of] Nanking were to link hands, they would stretch from Nanking to the city of Hanchow, spanning a distance of some two hundred miles. Their blood would weigh twelve hundred tons, and their bodies would fill twenty-five hundred railroad cars.

> Stacked on top of each other, these bodies would reach the height of a seventy-four-story building.[1]

There is no dearth of images representing the Holocaust; in fact, images from the Holocaust have become so ubiquitous that they have achieved the status of a form of visual rhetoric—a call to action against gross human rights violations.[2] Unlike the Nuremberg International Military Tribunal (Nuremberg IMT), which has been iconized and epideictically represented through Hollywood movies[3] and television mini-series,[4] the International Military Tribunal for the Far East (hereinafter, the Tokyo IMT) has left comparatively few traces, both in historical and legal texts,[5] and in popular culture.

Marita Sturken remarks:

> The process of history making is highly complex, one that takes place in the United States through a variety of cultural arenas, including the media, Hollywood narrative films, and museums in addition to the academy. That means that memories, artifacts, images and events often get marked as historical without the aid of historians.[6]

Even "historical" films that have the "look" of "authenticity," such as Spielberg's *Schindler's List*,[7] appropriate narrative techniques derived from horror such as Hitchcock's "shower scene" from *Psycho*,[8] and exploit the stock characters of the hyperfeminized, vulnerable Jewess and the hypermasculinized monstrous Nazi male officer.[9] Such "commodification of suffering"[10] may be understood as a part of the

---

[1] IRIS CHANG, THE RAPE OF NANKING 5 (1997).

[2] For example, Richard Raskin tracks the image of the Jewish child held at gunpoint by Nazi soldiers from its historical context to its incorporation into a number of works of art and appropriation into the "war of images" in the Middle East. *See* RICHARD RASKIN, A CHILD AT GUNPOINT: A CASE STUDY IN THE LIFE OF A PHOTO (2004).

[3] JUDGMENT AT NUREMBERG (Roxlom Films Inc. 1963).

[4] NUREMBERG (Alliance Atlantis Commc'ns et al. 2000).

[5] *See, e.g.*, RICHARD H. MINEAR, VICTOR'S JUSTICE (reprt. 2001) (1971); B.V.A. RÖLING, THE TOKYO TRIAL AND BEYOND (Antonio Cassese ed., 1993).

[6] Marita Sturken, *Absent Images of Memory: Remembering and Reenacting the Japanese Internment*, *in* PERILOUS MEMORIES 33–34 (T. Fujitani, Geoffrey M. White & Lisa Yoneyama eds., 2001).

[7] *Schindler's List* (Universal Pictures, *et. al.*, 1993).

[8] *Psycho* (Shamley Productions, *et. al*., 1960).

[9] CAROLINE JOAN (KAY) S. PICART & DAVID A. FRANK, FRAMES OF EVIL: THE HOLOCAUST AS HORROR IN AMERICAN FILM 36–69 (2006).

[10] "[T]he cultural capital of trauma victims—their wounds, their scars, their tragedy—is appropriated by the same popular codes through which physical and sexual violence is commodified, sold in the cinema, marketed as pornography, and used by tabloids and novelists to attract readers." Arthur Kleinman & Joan Kleinman, *The Appeal of*

complex, non-linear process of collectively attempting to "work through,"[11] or come to terms with, the trauma of the Holocaust. Yet when traces of memory have been suppressed, as if in a collectively agreed-upon amnesia, as they have been, in the case of the Tokyo IMT,[12] it is more difficult to work through that trauma. This is an attempt to work through the legacy of the Tokyo IMT, which has usually been either conflated with, or dismissed as simply corollary to, the Nuremberg IMT—a mistake that has far-reaching consequences, both legally and politically.

This article begins by first focusing on the Tokyo IMT's heritage of collective forgetting in relation to instances of systematized violence against women, especially the establishment of comfort stations in territories formerly occupied by the Imperial Japanese Army. In specific, after the Introduction, Part II describes the international political, legal and military factors that led to the formation of the Tokyo IMT; a brief overview of the trial; the political and pedagogical functions of the Tokyo IMT; and legal and extra-legal devices of the Tokyo IMT. Subsequently, Part III points out key differences between the Nuremberg and Tokyo Trials, in terms of their legal and political strategies and aims. Finally, Part IV analyzes the Tokyo IMT's legacy of forgetting crimes of violence against women, especially the crimes against the comfort women, which included a collusion of amnesia imposed by the Allied powers with the Japanese Imperial government, through the exploitation of various legal loopholes in international law. From there, Parts V and VI move from the Tokyo IMT's specific history to a broader analysis of the functions of crimes of violence against women during wartime conditions in the twentieth century, such as those in Rwanda and the former Yugoslavia, and contemplate why such crimes, for the most part, have been not only difficult to prosecute, but have remained invisible. To close, the article assesses the strengths and weaknesses of various ways in which such wartime crimes of violence against women, inclusive of the case of the comfort women, may seek redress. Though the case of the comfort women has remained without a legal solution, there have been successes in the cases of Rwanda, the former Yugoslavia, and Sierra Leone that could suggest useful strategies for litigating institutionalized sexual

---

Experience; The Dismay of Images: Cultural Appropriations of Suffering in Our Times in SOCIAL SUFFERING 10–11 (Arthur Kleinman, Veena Das & Margaret Lock eds., 1997).

[11] "Working-through implies the possibility of judgment that is not apodictic or ad hominem but argumentative, self-questioning, and related in mediated ways to action. In this sense, it is bound up with the role of distinctions that are not purely binary oppositions but marked by varying and contestable degrees of strength or weakness." DOMINICK LACAPRA, REPRESENTING THE HOLOCAUST: HISTORY, THEORY, TRAUMA 210 (1994).

[12] The imagery of absence or forgetting is ubiquitous in relation to the Tokyo IMT: "[T]he proceedings in Tokyo have become an all but forgotten chapter in the history of interpreting." KAYOKO TAKEDA, INTERPRETING THE TOKYO WAR CRIMES TRIAL 8 (2010).

slavery and other crimes of violence against women during wartime conditions.

II. THE NATURE OF THE TOKYO IMT

A. The Road to Prosecution and a Jurisdictional Postscript

As World War II drew to a close, on July 26, 1945, the United States, the United Kingdom and China met and issued the Potsdam Declaration regarding the terms of Japanese surrender.[13] Much like the Agreement and Charter which authorized the Nuremberg IMT (hereinafter, collectively, the "Nuremberg Charter"), with their heavy didactic emphasis,[14] the Potsdam Declaration declared that "stern justice" was to be "meted out to all war criminals, including those who have visited cruelties upon . . . prisoners."[15] As with the Nuremberg IMT, the legal basis for the Tokyo IMT was military. After the atomic bombings of Hiroshima on August 6 and Nagasaki on August 9, Emperor Hirohito's surrender was announced on August 15; but the official ending of wartime hostilities came only when representatives of the Japanese government signed the Instrument of Surrender on board the USS *Missouri* in Tokyo Bay on September 2, 1945.[16] Simultaneously, the Instrument of Surrender subjected the Emperor and the Japanese government to the authority of the Supreme Commander for the Allied Powers in Japan—U.S. General Douglas MacArthur—who essentially shaped policy in relation to procedures regarding war crimes prosecutions and the occupation of Japan.[17] Japan's occupation began when General MacArthur arrived on August 30, 1945.[18]

On September 11, 1945, MacArthur authorized the arrests of thirty nine prominent war crimes suspects, including the former Prime Minister and War Minister, General Hideki Tōjō.[19] Within several months, approximately one hundred individuals had been detained at the Sugamo prison in Tokyo[20] as suspected "Class-A war criminals,"[21] or "major war

---

[13] *Id.* at 10.
[14] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 472 E.A.S. 1, 1, 82 U.N.T.S. 279, 280 ("[T]hose German Officers . . . who have been responsible for . . . atrocities and crimes will be sent back to the countries in which their abominable deeds were done . . . .").
[15] Proclamation of Terms for Japanese Surrender (Potsdam Declaration), ¶ 10, July 26, 1945, 3 Bevans 1204, 1205 (1968).
[16] TAKEDA, *supra* note 12, at 10.
[17] MADOKA FUTAMURA, WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE 52 (2008).
[18] *Id.*
[19] TAKEDA, *supra* note 12, at 11.
[20] *Id.*
[21] FUTAMURA, *supra* note 17, at 53.

criminals"[22] for committing "crimes against peace."[23] The Tokyo Tribunal was created based on the Charter of the International Military Tribunal for the Far East (hereinafter, the "Tokyo Charter"), which was issued on January 19, 1946;[24] the Charter of the International Military Tribunal for the Far East was modeled on the Nuremberg Charter, and included prosecution for crimes against peace, conventional war crimes and crimes against humanity as its jurisdictional grounds.[25]

Although the Nuremberg Charter had already been announced on August 8, the Tokyo Charter took months to develop. In the meantime, President Harry S. Truman appointed Joseph Keenan, formerly the leader of the U.S. Justice Department's criminal division, as the chief prosecutor for the Tokyo Trial.[26] Keenan arrived in Japan on December 6, 1945, accompanied by an army of forty lawyers and aides.[27] In considerable contrast with Nuremberg, where the United States, the United Kingdom, France, and the Soviet Union each sent its own prosecution team, here there was simply one consolidated team led by Keenan, incorporating representatives from the eleven Allied countries.[28] On December 8, 1945, the fourth anniversary of the attack on Pearl Harbor according to the Japanese calendar, the International Prosecution Section was established.[29] It was only after the International Prosecution Section was in place that the Tokyo Charter was established, drafted by the U.S. prosecution team, and approved and announced by MacArthur.[30] The Tokyo Charter was later amended through consultations with the other Allied countries.[31]

With the Tokyo Charter officially in place, each of the nine signatories to the Japanese Instrument of Surrender nominated a judge, but it was General MacArthur who appointed these judges on February 15, 1946.[32] The tribunal was comprised of eleven judges: one from each of the Instrument's nine signatories (Australia, Canada, China, France, Great Britain, the Netherlands, New Zealand, the Soviet Union and the United States) and, after MacArthur amended the Tokyo Charter on April 26, 1946 in response to a call from the Far Eastern Commission, the Allied Powers' highest policy-making agency for the occupation of Japan,[33] India and the Philippines, each of which were also represented in the

---

[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] TAKEDA, *supra* note 12, at 11.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 12.
[33] *Id.*

prosecution.[34] Although Sir William Webb, the Australian judge, was vulnerable to charges of bias based on his prior position as the chief investigator for atrocities committed by the Imperial Japanese Army against Australian prisoners of war, he became the President of the Tribunal, and remained in that post for the duration of the trial.[35]

In March, 1946, selections of the accused began, and on April 29, 1946, indictments were issued for twenty eight defendants.[36] Among these were former general and Prime Minister Hideki Tōjō and seventeen other military officers.[37] Four of the defendants were former prime ministers, and most of the rest had been members of wartime cabinets.[38]

Seven of the accused, at the end of the trial, filed motions with the U.S. Supreme Court for leave to file petitions for writs of habeas corpus.[39] In terms of jurisdiction, the petitioners claimed that the Tokyo Tribunal was a U.S. military tribunal over which the U.S. Supreme Court had jurisdiction, and that the U.S. executive branch had overstepped its boundaries by establishing a court and legislating crimes—something the U.S. Constitution reserved for Congress.[40] The petitioners claimed that an unauthorized crime was being prosecuted through an unauthorized procedure, which would thus give the U.S. Supreme Court jurisdiction to grant habeas corpus.[41] They also argued that there was no treaty basis for the Tokyo Tribunal.[42] These arguments were dismissed by the Supreme Court, as stated in full below:

> We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers. Under the foregoing circumstances the courts of the United States

[34] FUTAMURA, *supra* note 17, at 53.
[35] TAKEDA, *supra* note 12, at 12.
[36] FUTAMURA, *supra* note 17, at 53.
[37] *Id.*
[38] *Id.*
[39] Hirota v. MacArthur, 335 U.S. 876–81 (1948) (agreeing to hear arguments). The seven petitioners were Hirota, Dohihara, Kido, Oka, Sato, Shimada, and Togo.
[40] *See* U.S. CONST. art I, § 8 ("The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court."); U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL 29 (2008).
[41] *Id.*
[42] *Id.*

> have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of habeas corpus are denied.[43]

Justice Douglas, although he concurred, expressed some cautionary thoughts regarding setting a precedent of refusing to exercise extra-territorial jurisdiction over the Tokyo IMT because it left no basis for judicial scrutiny of this type of tribunal, essentially giving the Tokyo IMT absolute power.[44] Douglas stated that prisoners under the Tokyo IMT's mandates had no recourse for appeal, and doubted that his colleagues would have affirmed such a state of affairs had the prisoners been U.S. citizens.[45] Nevertheless, the majority clearly agreed with the Tokyo IMT, which stated in its judgment that "[t]he Tribunal was established in virtue of and to implement the Cairo Declaration of the 1st of December 1943, the Declaration of Potsdam of the 26th of July 1945, the Instrument of Surrender of the 2nd of December 1945, and the Moscow Conference of the 26th of December 1945."[46] Whatever controversies arose regarding the validity of the Tokyo IMT as an international tribunal, what is clear is that the chief justification for its existence is found in Paragraph 10 of the Potsdam Declaration; it is this item as well that ironically paves the way for the eventual "forgetting" of many of Japan's WWII atrocities during the Cold War realignment of powers. Stated in full, Paragraph 10 of the Potsdam Declaration reads as follows:

> We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.[47]

---

[43] Hirota v. MacArthur, 338 U.S. 197, 198 (1948).
[44] *Id.* at 205.
[45] *Id.*
[46] BOISTER & CRYER, *supra* note 40, at 31.
[47] Proclamation of Terms for Japanese Surrender (Potsdam Declaration), ¶ 10, July 26, 1945, 3 Bevans 1204, 1205 (1968).

B. The Trial: A Brief Overview

On April 29, 1946, twenty eight "Class A" defendants, all of whom had been Japanese military and political leaders during WWII, were indicted of "crimes against peace (Class A)," "conventional crimes (Class B)" and "crimes against humanity (Class C)."[48] In spite of reservations expressed by, for example, Australia, the Allied Powers ultimately agreed, as Paragraph 10 of the Potsdam Declaration had implied, to protect Emperor Hirohito from prosecution and to place the blame purely on the shoulders of his military and political subordinates.[49] We shall return to the corollary effects of this decision later.

The Tokyo Trial opened on May 3, 1946, with Sir William Webb's much quoted statement that "there has been no more important criminal trial in all history."[50] The case for the prosecution lasted until January 24, 1947.[51] The prosecution charged that:

> [T]he accused participated in the formulation or execution of a common plan or conspiracy to wage declared or undeclared war or wars of aggression and war or wars in violation of international law, treaties, agreements and assurances against any country which might oppose them . . . with the object of securing military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and all countries bordering thereon and islands therein and ultimately the domination of the world.[52]

The prosecution also raised concerns about war crimes and crimes against humanity, and included a section developed against individual defendants.[53]

Along a parallel track to the Nuremberg Trial, during the presentation of the prosecution's case, the defense team was allowed to raise a motion to challenge the jurisdiction of the Tokyo IMT. Briefly summarized, the defense characterized the tribunal as constituting ex post facto legislation (i.e., as defining and punishing crimes ex post facto), because the Potsdam Declaration referred specifically to war crimes, and

---

[48] TAKEDA, *supra* note 12, at 12–13.
[49] *Id.* at 13.
[50] *Id.*
[51] *Id.*
[52] Joseph Keenan, *Prosecution Opening Statement* (June 4, 1946) *in* 1 THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST IN TWENTY-TWO VOLUMES 435, (R.J. Pritchard & S.M. Zaide eds., 1981) [hereinafter THE TOKYO WAR CRIMES TRIAL].
[53] FUTAMURA, *supra* note 17, at 53.

did not mention crimes against peace or crimes against humanity.[54] Additionally, the defense team argued that because the Potsdam Declaration limited the jurisdiction of the tribunal to the Pacific War, any charges unassociated with the war, or that had already been settled, were beyond the Tokyo IMT's jurisdiction.[55] Finally, the defense raised additional claims: that a tribunal composed of representatives of victors over Japan in WWII

> can be neither fair, legal nor impartial; [that] war is not a crime;[56] [that] individuals may not be charged with

---

[54] *Id.* The ex post facto defense was presented both at Nuremberg and Tokyo and failed in both trials for similar reasons: (i) that murder, assault and torture were illegal at international law, (ii) terms such as "crimes of humanity" or "genocide" were novel, but only because society had not previously conceived of such systematic killing, and (iii) international law needed to evolve, and be able to go within the borders of sovereign states to protect their people from government abuse. This last point suggested that individuals rather than states could be the proper targets of international legal prosecution. *See* Otto Kranzbuhler, *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333, 339–342 (1965); Bernard D. Meltzer, *Robert H. Jackson: Nuremberg's Architect and Advocate*, 68 ALBANY L. REV. 55, 59–60 (2004). Finally, Henry Stimson gives a passionate defense against the charge of ex post facto law; and appeals for the general fairness of the trials and the punishments. For Stimson, the charge of ex post facto law assumes "that if the defendant had known the proposed act was criminal he would have refrained from committing it. [But] [n]othing in the attitude of the Nazi leaders corresponds to this assumption; their minds were wholly untroubled by the question of their guilt or innocence . . . ." Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFF. 179, 183 (1947). Furthermore, Stimson argues that international law, like common law, must not be viewed as static but as evolving, and thus, Nuremberg was "a new judicial process . . . not *ex post facto* law . . . [but rather] the enforcement of a [universal] moral judgment [on the part of human society] which date[d] back a generation" to the Kellogg Pact. *Id.* at 184–85.

[55] FUTAMURA, *supra* note 17, at 53.

[56] This was also a problem at Nuremberg because the trials were consciously staged in Germany as "historical" trials—meaning trials with a clear "political aspect." *See* Kranzbuhler, *supra* note 54, at 334–35. Similarly, Kranzbuhler also mounts another devastating critique regarding the violation of the principle of separating executive from judicial powers at Nuremberg: "two of the legislators of the London Charter . . . the American, Jackson, and a Britisher, Sir David Maxwell Fyffe, acted as chief prosecutors, thus part of the executive power, while two other legislators of the London Charter, a Frenchman, Falco, and a Russian, Nikichenkow, reappeared at Nuremberg in the capacity of judges. By this personal overlapping, the doctrine of separation of powers was grossly neglected and thus the authority of the administration of justice greatly impaired from the very outset." *Id.* at 338. Judge Röling, like Judge Pal, was also critical of the idea that crimes against peace existed prior to and during World War II because he did not see the Kellogg-Briand Pact as a criminal statute; nor did he see its provisions as sufficiently determinate to determine what was "aggressive" versus "self-defensive." Nevertheless, rather than side with Judge Pal, he concurred with the majority regarding the legality of the charges but established a different legal basis for it:

> There is no doubt that powers victorious in a 'bellum justum' and as such responsible for peace and order thereafter, have, according to international law, the right to counteract elements constituting a threat

> responsibility for wars; [that] killing in war is not murder follows from the fact that war is legal; and [that] violations of the laws and customs of war are punishable by a trial by a military commission but not by an international military tribunal . . . .[57]

The prosecution responded by pointing out the significance of international law that was already in place, and the unconditional nature of Japan's surrender.[58] At this stage, the President of the Tribunal dismissed the defense motions "for reasons to be given later."[59]

The case for the defense arguments followed and lasted until January 12, 1947.[60] The defense's presentation consisted of five parts, covering "general problems, relations with Manchuria and Manchukuo, with China, with the Soviet Union and the Pacific War."[61] The defense had two aims: first, principally, to claim that "all of the acts committed by the defendants and the government of Japan were acts of self-defense against provocative acts of other nations threatening and interfering with Japan's recognized and legitimate rights in Asia and her right of national existence," and second, to deny "the existence of the conspiracy and joint action by the defendants in committing crimes against peace."[62] Individual defenses followed (ending on January 12, 1948),[63] which in turn were followed by "rebuttal, surrebuttal, prosecution summation, defense summation and prosecution reply"[64] (ending in April, 1948).[65] The Tokyo Trial is noteworthy for its length and complexity, doubling the number of witnesses, sessions, and duration of the proceedings of the Nuremberg Trial: 419 witnesses testified; there were 4,336 documents accepted as evidentiary exhibits; the transcript was 48,412 pages long.[66] In contrast, the Nuremberg Trial ended in less than one year.[67]

> to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensive conduct to seek and retain the custody of the pertinent persons[.]

Robert Cryer, *Röling in Tokyo: A Dignified Dissenter*, 8 J. INT'L CRIM. JUST. 1109, 1115–16 (2010).

[57] FUTAMURA, *supra* note 17, at 53–54.
[58] *Id.* at 54.
[59] 1 THE TOKYO WAR CRIMES TRIAL, *supra* note 52, at 319.
[60] TAKEDA, *supra* note 12, at 13.
[61] FUTAMURA, *supra* note 17, at 54.
[62] *Id.*
[63] TAKEDA, *supra* note 12, at 13.
[64] FUTAMURA, *supra* note 17, at 54.
[65] TAKEDA, *supra* note 12, at 13.
[66] FUTAMURA, *supra* note 17, at 54.
[67] TAKEDA, *supra* note 12, at 13.

To illustrate the tortuousness of the proceedings, at the Tokyo IMT, the eleven judges took seven months to write the judgment, and it took eight days to read out, starting on November 4, 1948.[68] During the trial, two of the defendants died of natural causes; one underwent a mental breakdown and was found incompetent to stand trial.[69] But the remaining twenty five were found guilty by the majority; judges from the Philippines, France, the Netherlands and India, as well as the president of the tribunal, Judge Webb, submitted separate dissenting opinions.[70] Although nine of the eleven judges signed the majority decision, five judges wrote separate opinions, which included dissents by the French judge, Henri Bernard, and the Indian judge, Radhabinod Pal.[71] Judge Pal's 1,235 page dissent was strikingly different: he argued against the majority opinion, stating that the Tokyo Trial was ex post facto legislation; that there was no evidence of a conspiracy in Japanese foreign policy during the 1930s and 1940s; that Japan had simply fought a defensive war; and that therefore all defendants should have been acquitted.[72] However, probably in the interest of expediency given the length of the trial, none of the dissenting opinions were read from the bench.[73]

Seven out of the twenty five defendants found guilty, including General Tōjō, were sentenced to death by hanging;[74] sixteen were sentenced to life imprisonment, one to twenty years' imprisonment, and one to seven years' imprisonment.[75] It was at this point that the Tribunal responded to the defense's motions, rejecting the defense challenges that: aggressive war was not a crime; there was no individual accountability for war; and the Tokyo Charter constituted illegitimate ex post facto legislation.[76] The Tokyo Tribunal grounded its reasoning on the Nuremberg IMT's judgment of October 1946, echoing the former's statements that "[t]he Charter is not an arbitrary exercise of power on the part of the victorious nations but is the expression of international law existing at the time of its creation."[77] The Tokyo IMT, like the Nuremberg IMT, also rejected the "victor's justice" argument—that a

[68] FUTAMURA, *supra* note 17, at 54.
[69] TAKEDA, *supra* note 12, at 14.
[70] *Id.* at 14.
[71] FUTAMURA, *supra* note 17, at 54–55.
[72] *Id.*
[73] *Id.*
[74] TAKEDA, *supra* note 12, at 14.
[75] FUTAMURA, *supra* note 17, at 54.
[76] *Id.* at 54.
[77] 20 THE TOKYO WAR CRIMES TRIAL, *supra* note 52, at 48, 437 (quoting the Nuremberg IMT).

judicial body composed of representatives from the victorious nations was incapable of impartiality and fairness.[78]

Some scholars have argued that the Tokyo Trial, in comparison to the Nuremberg Trial, was a grandly staged "third-string road company of the Nuremberg show."[79] Numerous reasons abound to explain why the Tokyo Trial is remembered in a less flattering light than the Nuremberg Trial.[80] Boister and Cryer decry the Tokyo IMT's "at times cavalier approach to individual liability"[81] in its reliance on a conspiracy-led narrative that resulted in what David Cohen describes as the Tokyo IMT's "drift from the individual to the collective."[82] The result, according to

---

[78] *See* BOISTER & CRYER, *supra* note 40, at 32–37 (providing a detailed analysis of the various jurisdictional and procedural challenges to the Tokyo IMT's authority, including the "victor's justice challenge").

[79] MINEAR, *supra* note 5, at 3.

[80] For example, Minear points out that perhaps due to the destruction of all wartime records by Japanese soldiers, as well as the distance from the sites of the crimes as well as the dearth of witnesses, the Tokyo IMT had less stringent criteria for admitting materials into evidence. Thus, Article 13 of the Tokyo Charter (which was virtually identical to the Nuremberg Charter in text, but not in implementation) stated: 'The tribunal shall not be bound by the technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.' In part, this approach responded to the difficulty, if not sheer impossibility—across the vast expanses of space and time—to secure incriminating evidence, much of which had been purposefully destroyed, or to locate witnesses. Minear details some of the more problematic evidentiary instances that resulted: "There were press releases offered by the prosecution, although the tribunal rejected press releases offered by defense. There was a conversation with a person since deceased. There were letters from private Japanese citizens to the War Ministry; these the defense denounced as 'crank letters.'" *Id.* at 120. Yet even more damning was the Tokyo IMT's uncertainty regarding what the rules were, and thus, its high reliance on the "large and somewhat unpredictable discretion" of the eleven politically-chosen judges. *See* Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (1945), available at *http://avalon.law.yale.edu/imt/jack_preface.asp*. *But see* Kevin R. Chaney, *Pitfall and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57, 76 (1995) (stating that the defendants at Nuremberg also faced evidentiary hurdles because evidence that implicated the Allied powers was inadmissible).

[81] BOISTER & CRYER, *supra* note 40, at 245. *See also* Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L L. 1085, 1094 n.40.

[82] David Cohen, *Beyond Nuremberg: Individual Responsibility for War Crimes in Human Rights in* POLITICAL TRANSITIONS 60–61 (C. Hesse & R. Post eds., 1999); *see also* Sellars, *supra* note 81, at 1094 n.38. Additionally, Neil Boister sees the legacy of the Tokyo IMT as "a tale of how, using the doctrines of inchoate conspiracy (approved by the Majority judgment), joint criminal enterprise (approved by the Majority judgment) and unjustified homicide (neither accepted nor rejected by the Majority) these two concepts—collective responsibility and comprehensive responsibility—can be run together to 'resolve' the problem of dealing efficiently with an extremely complex situation." Neil Boister, *The Application of Collective and Comprehensive Criminal Responsibility for Aggression at the Tokyo International Military Tribunal: The Measure of the Crime of Aggression?*, 8 J. INT'L CRIM. JUST. 425, 446 (2010).

Boister, was the infinite expansion of responsibility for crimes of aggression at the Tokyo IMT, and thus, their "over-criminalization."[83] The "ironic" or "paradoxical" result of this strategy of turning an entire class of leaders into scapegoats, was to absolve a still larger class, that of the polity at large, from responsibility for the war or from the crimes committed in connection with it. Thus, many Japanese, unlike most Germans, ended up feeling no guilt or responsibility for the crimes committed by their country and by their countrymen during the Second World War.[84]

Yet, as Kirsten Sellars argues in *Imperfect Justice at Nuremberg and Tokyo*, the Tokyo IMT must also be viewed within the context of the backlash against the Nuremberg IMT's Charter and Indictment, and especially the most critically-reviewed category of charges, that of "crimes against peace."[85] In her review of Boister and Cryer's work, Sellars notes that Tokyo became a "catalyst for debate about the future of international law."[86] In reviewing the dissent of Judge Pal, who "famously absolved the Japanese defendants of all guilt," and the broader background of dissent and criticism which had marked the reception of the Nuremberg Trial by contemporary jurists, Sellars contends that "[t]he prosecuting powers were well aware" that the "crimes against peace" charge had been found wanting on legal grounds, and "hoped that the Tokyo Judgment would confirm Nuremberg's determinations on aggressive war, thereby settling the debate."[87] The inadvertent result of this effort to shore up Nuremberg was that the crimes that had formed the moral core of the Nuremberg IMT's Indictment, "crimes against humanity," and their accompanying evidence in the form of riveting footage of Holocaust camps, were eclipsed. Thus, whereas Germany's crimes came to be viewed as "exceptional," Japan's became framed as "unexceptional."[88] The popular inference drawn, and the eventual

---

[83] *Id.*

[84] *Id.* Boister believes the lesson to be learned from the Tokyo IMT's dismal heritage is that "the more you hold a group of individual leaders legally responsible for war, the less the rest of the population feel politically responsible." *Id.*

[85] Sellars, *supra* note 81, at 1097 ("As a consequence, every possible measure was taken to ensure that Tokyo backed Nuremberg over this problematic charge, from the drafting of the Tokyo Indictment, which attempted to reinforce the crimes against peace charge with the conspiracy and murder charges, to the attempts before and during the trial to focus on aggression to the exclusion of other substantive charges.") Determined that Nuremberg—especially in relation to its characterization of "crimes against peace"—should not be dismissed as "bad law," the prosecuting powers "either privately sounded out the judges over schemes designed to ensure that the judgment echoed the Nuremberg line . . . or pressured them to abandon their disagreements with crimes against peace . . . ." *Id.*

[86] *Id.* at 1094.

[87] *Id.* at 1095, 1097.

[88] *Id.* at 1093.

patrimony resulting, were that although Japan "had certainly presided over wholesale assaults and terrible atrocities . . . they had not broken the mould of international politics by instituting polices to systematically annihilate entire national, ethnic, racial or religious groups."[89] Again, this helps explain another basis for the Tokyo IMT's tragic heritage of amnesia and denial.

On November 24, 1948, General MacArthur, operating under the legitimizing aegis of the Tokyo Charter, confirmed the judgment of the Tokyo Tribunal.[90] However, there was a temporary stay of execution while the defendants appealed to the U.S. Supreme Court for writs of habeas corpus; they appealed on November 29, 1948,[91] and that appeal, as discussed supra, was dismissed on December 20, 1948.[92] The executions were carried out inside Sugamo Prison on December 23, 1948.[93] Ultimately, the Japanese government accepted the Tokyo Tribunal's decision in the San Francisco Peace Treaty of September 1951, which in 1952 ended the American occupation of Japan.[94]

C. The Purposes of the Tokyo Trial

The Tokyo IMT styled itself after the Nuremberg IMT, adopting the same heavily didactic tone, and attempting to justify its holdings both as principled judgments and as historical tutelage. For example, Robert M.W. Kempner, one of the junior prosecutors at Nuremberg, described the Nuremberg Trial as "the greatest history seminar ever held in the history of the world."[95] Sir Hartley Shawcross, the British chief prosecutor, remarked in a similar vein that the Nuremberg Trial would leave behind "an authoritative and impartial record to which future historians may turn for truth."[96] In a parallel way, Chief Prosecutor Joseph Keenan vividly described his vision for the purpose of the Tokyo Trial:

> Our purpose is one of prevention or deterrence. It has nothing whatsoever to do with the small meaner purpose of vengeance or retaliation. But we do hope in these proceedings that it is neither impossible nor improbable that the branding of individuals who visit these scourges

---

[89] *Id.*
[90] FUTAMURA, *supra* note 17, at 55.
[91] *Id.*
[92] *Id.*
[93] TAKEDA, *supra* note 12, at 14.
[94] FUTAMURA, *supra* note 17, at 55.
[95] IAN BURUMA, THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN 144–45 (1994).
[96] 3 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, 92 (1947).

> upon mankind as common felons, and punishing them accordingly, may have a deterring effect upon aggressive warlike activities of their prototypes of the future, should they arise.[97]

Thus, the Tokyo prosecution's language was laced with grandiose didactic metaphors, picturing the Tokyo IMT as the trial to "end all wars . . . [and] part of the determined battle of civilization to preserve the entire world from destruction."[98]

However, the Tokyo Trial's strategic objectives were also simultaneously aligned with the United States' forward-looking policy objectives regarding its occupation of Japan. These objectives were:

> (a) to insure that Japan will not again become a menace to the United States or to the peace and security of the world;
> (b) to bring about the eventual establishment of a peaceful and responsible government which will respect the rights of other states and will support the objectives of the United States as reflected in the ideals and principles of the Charter of the United Nations.[99]

The overarching and implicit goal was therefore to transform Japan, through demilitarization and democratization, from being an enemy to an ally, in anticipation of what eventually came to be called the Cold War realignment. The United States, growing increasingly estranged from China and from the U.S.S.R. for ideological reasons, foresaw that it would be necessary to maintain friendly relations with Japan.[100] In addition, "after the 1949 Communist revolution in China, neither the People's Republic of China nor the Republic of China demanded wartime reparations from Japan (as Israel had from Germany) because the two governments were competing for Japanese trade and political recognition."[101] The result, as we shall later see, has been a heritage of convenient collective amnesia, both by the former Allies and by Japan. Nevertheless, it is instructive to examine the procedural devices of the Tokyo IMT against the backdrop of the Nuremberg IMT, in order to

---

[97] 1 THE TOKYO WAR CRIMES TRIAL, *supra* note 52, at 387–88.
[98] *Id.* at 384.
[99] *See* FUTAMURA, *supra* note 17, at 56 (citing government memorandum SWNCC 150/4/A, of Sept. 21, 1945).
[100] CHANG, *supra* note 1, at 11.
[101] *Id.*

assess how the Tokyo IMT achieved its objective of converting Japan from a military enemy to a political and economic ally.[102]

D. Legal and Extra-Legal Devices of the Tokyo IMT

Similar to the Nuremberg IMT, the Tokyo IMT endorsed demilitarization and democratization. And just as with Nuremberg, it was not enough merely to punish the war criminals being tried. It was necessary to convince the Japanese people that these war criminals deserved their punishment. To accomplish this end, the Allies pursued two strategies: first, pursuing the individual responsibilities of war criminals (as opposed to arguing for a blanket indictment of Japan), and second, creating a didactic historical record of the war and its associated war crimes.

1. Pursuing Individual Responsibility

Article 10 of the Potsdam Declaration clearly described the Allied goal of differentiating between the individual war criminals and the main of the Japanese nation: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."[103] In addition, Article 10 also provided the blueprint for the demilitarization and democratization of Japan, which was closely tied up with the strategy of individualizing (and thus de-collectivizing) responsibility for Japan's WWII crimes. "The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for . . . fundamental human rights shall be established."[104] Yet it was Article 6 that clearly pointed a finger at specific individuals and specifically contributed to the physical demilitarization of Japan, which would later be constitutionalized, by excising its former military leaders, whom it implied were malicious deceivers and master manipulators:

---

[102] There are two parallel observations connecting the Tokyo IMT to the Nuremberg IMT. First, the United States also tried to convert Germany into an ally, for similar political reasons. Second, even though Nuremberg is remembered as more successful than Tokyo, some scholars believe that the Nuremberg Trial promoted a similar collective amnesia; indeed, sentences at Nuremberg became progressively lighter over the course of the proceedings. *See* Brian F. Havel, *In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust*, 80 IND. L.J. 605, 635 (2005) (examining efforts in Austria to expunge war guilt).

[103] Proclamation of Terms for Japanese Surrender (Potsdam Declaration), ¶ 10, July 26, 1945, 3 Bevans 1204, 1205 (1968).

[104] *Id.*

> There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.[105]

But physical demilitarization was just the first step; the next was the psychological demilitarization of Japan, by rhetorically strengthening a narrative of these insidious war criminals victimizing the hapless and oblivious Japanese nation, and by emphasizing the legitimacy and fairness of the Tokyo Trial. Keenan's opening statement drove that point home:

> We must reach the conclusion that the Japanese people themselves were utterly within the power and forces of these accused, and to such extent were its victims . . . . [W]e would point out that the forces of occupation, who have the full power under the terms of surrender to implement its terms in such manner as they should see fit, have given full opportunity to the Japanese people and to the world to observe the fair manner in which the [trial] is being conducted.[106]

Keenan's rhetoric simultaneously poised him as the speaker both for Japan's external victims (in particular, China) and for those Japanese who also suffered under its repressive regime. Keenan thus contrasted the "[s]tern punishment imposed by orderly international tribunals"[107] with the probable "bloody purges"[108] and "judicial lynchings"[109] that outraged non-Japanese and Japanese victims would enact, if justice were not meted out to these war criminals. In taking this position, Keenan allegedly spoke for the victims of the Japanese army during WWII. Yet what ultimately emerged from the trial was the protection of U.S. interests in avenging the attack on Pearl Harbor (as an initial step to rehabilitating its former enemy), not the protection of the rights of civilians of other Asian nations ravaged by Japan during WWII.[110]

---

[105] *Id.* at ¶ 6.
[106] 1 THE TOKYO WAR CRIMES TRIAL, *supra* note 52, at 468.
[107] FUTAMURA, *supra* note 17, at 58.
[108] *Id.*
[109] *Id.*
[110] *See id.* (citing MacArthur and others).

2. Creating a Historical Record

Clearly, the purpose of the Tokyo Trial was more than simply punishment. The Tribunal focused on leaving behind a didactic legacy and a specific historical narrative—one that was meant for future generations, especially the Japanese. As the defense stated: "[t]he purpose of the trial was to convince the Japanese people that their leaders misled them into war."[111] Similarly, the Allied-controlled Japanese media in its major newspapers "serialize[d] the history of the Pacific War, based on the sources offered by General Headquarters, SCAP, the so-called GHQ" headed by General MacArthur.[112] The Japanese media's story mimed the narrative of the Tokyo Trial: that conniving militarists in the Japanese government kept the truth from the Japanese nation, and had brutally committed atrocities in China and the Philippines, particularly victimizing Allied soldiers and locals.[113]

However, the trial was not meant only for the Japanese, but also intended to appease the American public regarding the attack on Pearl Harbor, and to justify why it had been necessary to drop two Atomic bombs on Japan.[114] As the Dutch judge, Bernard Victor Aloysius Röling, said, "a trial was . . . desired to show the American people and the whole world the criminal treachery of the attack on Hawaii."[115] Even more importantly, for posterity's sake, staging a trial, rather than a summary execution, was important as an "ethical example of democracy, showing that law and justice can be applied even to enemies through a fair trial."[116]

III. DIFFERENTIATING BETWEEN THE NUREMBERG AND TOKYO TRIALS

Although there are many similarities between the Nuremberg IMT and the Tokyo IMT (especially given that the Tokyo Charter was based on the Nuremberg Charter), there are also striking differences between them, which help explain why there is a general silence regarding the gains of the Tokyo IMT. These differences can be roughly grouped into three subtopics: (i) issues of fairness and politics, (ii) the degree of involvement of the United States in the Tokyo trial, and (iii) the prosecutorial strategy of pursuing crimes against peace rather than crimes against humanity.

---

[111] MINEAR, *supra* note 5, at 126 n.3.
[112] FUTAMURA, *supra* note 17, at 59.
[113] *Id.*
[114] *Id.*
[115] RÖLING, *supra* note 5, at 79.
[116] FUTAMURA, *supra* note 17, at 59.

A. Issues of Fairness and Politics

If the Nuremberg Trial has suffered from the reputation of being an example of "victor's justice," the Tokyo Trial is viewed even more ambivalently, as evidenced in the judges' varying opinions at its conclusion. For one thing, there was much negative feedback regarding the trial's lack of procedural fairness. For example, in terms of access to lawyers familiar with the Anglo-American law of the Tribunal, the prosecution was clearly privileged. The Japanese government requested that General MacArthur provide British and American lawyers for the defense.[117] However, because British lawyers were prohibited by British law from practicing in foreign jurisdictions, all fifteen attorneys eventually allocated were provided solely by the United States, and in spite of urgent requests, arrived two weeks after the beginning of the trial.[118]

In addition, out of 230 translators, 175 worked with the prosecution and only 55 with the defense. The scope of their work included "approximately 30,000 pages of exhibits" and "3,195 documents, plus countless other statements . . . in English, Japanese, Chinese, Annamese [that is, Vietnamese], Dutch, French, German, Italian, Malayan, Russian, Spanish, Swedish, Burmese, Marshallese, Mongolian, Solomon Island dialects, and Tho, a language used in northern French Indochina."[119] The defense's concern over the lack of translators is revealed in a letter, dated November 25, 1946, from the defense to a court administrative officer: "[I]t would be a tremendous embarrassment to the Supreme Commander [MacArthur], the Tribunal and the Defense should . . . the Defense break down because of [an] inability to process and clear those documents without undue delay."[120] Furthermore, initially, the defense had only three translators to assist them, while the prosecution had 102.[121] Nevertheless, the prosecution's mammoth translation team also worked against it, contributing to, as Meirion and Susie Harries hypothesize, "constant breaches of security," that is to say, press leaks.[122]

---

[117] TAKEDA, *supra* note 12, at 12.
[118] *Id.*
[119] *Id.* at 42 (quoting *200 Language Experts Complete Huge Task*, NIPPON TIMES, Nov. 14, 1948).
[120] *Id.* at 43 (quoting D.F. SMITH, ADDITIONAL TRANSLATORS, TYPISTS, EQUIPMENT AND SUPPLIES, Records of Allied Operational and Occupation Headquarters, World War II (Records Group 331), U.S. National Archives, Nov. 25, 1946).
[121] JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE AFTERMATH OF WORLD WAR II 467 (2000).
[122] MEIRON HARRIS & SUSIE HARRIS, SHEATHING THE SWORD: THE DEMILITARIZATION OF JAPAN 117 (1989).

On the broader issue of the trial's fairness, the question of whether it or Nuremberg produced the harsher (arguably unduly harsh) sentences is debatable, but there are good arguments in support of Tokyo.[123] For example, the Nuremberg Tribunal acquitted three, but the Tokyo Tribunal acquitted no one.[124] On the other hand, the Tokyo IMT sentenced only seven out of twenty-five defendants to death, while the Nuremberg IMT meted out the death sentence to twelve out of twenty defendants.[125] But as Richard Minear points out, when death and life-imprisonment sentences are combined, the Tokyo trial seems more punitive; it so sentenced twenty-three out of twenty-five accused individuals, while the Nuremberg trial sentenced fifteen out of twenty-two.[126] Ultimately, the legitimacy of the Tokyo IMT was clouded by statements from some of its judges concerning the unnecessary harshness of some of its sentences.[127] In some ways, more memorable than the majority opinion was the 1,235-page dissent of the Indian Judge Radhabinod Pal.[128] Judge Pal argued that every defendant ought to be acquitted, (i) because the Tokyo Trial was "*ex post facto* legislation," (ii) because "there was no evidence . . . of a conspiracy in Japanese foreign policy during [the] 1930s and 1940s," and (iii) because Japan's wars had simply been in "self-defense" rather than motivated by aggression.[129] These arguments were later marshaled in support of the claim that Japan's war crimes had never happened, and that the Tokyo IMT had been simply an unabashed instance of "victor's justice."

Finally, in terms of politics, the Tokyo IMT bears a clearer imprint of the shift in relations between the United States and the Soviet

---

[123] For a comparison of the Tokyo and Nuremberg trials: *See generally* FUTAMURA, *supra* note 17; Zachary D. Kaufman, *The Nuremberg Trial v. The Tokyo Tribunal: Designs, Staffs, and Operations*, 43 J. MARSHALL L. REV. 753 (2010); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551 (2006); Zhang Wanhong, *From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (On the Sixtieth Anniversary of the Nuremberg Trials*, 27 CARDOZO L. REV. 1673 (2006); Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, http://www.lawofwar.org/Tokyo%20Nurembueg%20article.htm (last visited Dec. 29, 2011). For accounts of the Nuremberg trial: *See generally* PERSPECTIVES ON THE NUREMBERG TRIAL (Guénaël Mettraux ed., 2008); THE NUREMBERG WAR CRIMES TRIAL AND ITS POLICY CONSEQUENCES TODAY (Beth A. Griech-Polelle ed., 2009); NORBERT EHRENFREUND, THE NUREMBERG LEGACY (2007). For analyses of the Tokyo IMT: *See generally* ARNOLD C. BRACKMAN, THE OTHER NUREMBERG (1987); TIM MAGA, JUDGMENT AT TOKYO (2001).

[124] FUTAMURA, *supra* note 17, at 61.

[125] *Id.*

[126] MINEAR, *supra* note 5, at 31–32 n.24.

[127] FUTAMURA, *supra* note 17, at 61.

[128] *Id.* at 55.

[129] *See id.* (summarizing his arguments).

Union. The Nuremberg trial closed in October 1946,[130] and by 1948 it was clear that both the United States and Great Britain had lost enthusiasm for any further prosecutions of Japanese Class A war criminals, given the length of the Tokyo Trial.[131] Since by 1947 the objectives of demilitarization and democratization seemed to have been sufficiently achieved, the United States pivoted and sought to transform Japan into an ally in the fight against communism in Asia.[132] Thus, after General Tōjō and others were executed on December 1948, nineteen Class A war crimes suspects, initially held in custody in anticipation of a second round of trials, were released.[133] Shortly thereafter, in February 1949, General MacArthur announced the official policy regarding ceasing prosecutions against major war criminals in Japan.[134] Emboldened by the shifting political climate, in 1952, Japan requested several states to release their war criminals, based on the premise that the formalization of peace could give the issue of Japanese war crimes a political solution.[135] Finally, by the end of 1958, all former Allies, with the Communist exceptions of the Soviet Union and China, had released their remaining Japanese prisoners, including Class B and C war criminals.[136] That political solution helped to cement the Tokyo IMT's heritage of collective amnesia.

B. The Degree of Involvement of the United States in the Tokyo Trial

The United States, particularly in the form of General MacArthur, clearly had a dominant hand in shaping the events surrounding the Tokyo IMT, unlike the Nuremberg IMT. The Nuremberg Charter issued from the London Agreement, which was a joint declaration by the United States, France, the Soviet Union and the United Kingdom, and eventually ratified by nineteen other countries.[137] In contrast, General MacArthur, through an executive decree, issued the Tokyo Charter.[138] Furthermore, the Tokyo Charter (though based on the Nuremberg Charter) was drafted by the prosecution, which was staffed purely by American lawyers.[139] As if that were not egregious enough, the Tokyo Charter granted MacArthur the authority to appoint the judges and the president of the tribunal, and to

---

[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 62.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*

review their judgments.[140] This is in sharp contrast to Nuremberg, where the four Allied powers who had signed the London Agreement each appointed their own judges, who in turn chose the president of the Nuremberg Tribunal.[141] Finally, unlike Nuremberg, where each of the four signatories had their own chief prosecutors,[142] at Tokyo, because the United States had played a dominant role in the military defeat of Japan, there was simply one chief prosecutor from the United States and ten associate prosecutors from the other countries.[143]

Precisely because U.S. political interests shaped the unfolding of the Tokyo Trial, there were several significant issues that were not addressed. For example, the human experiments and biological warfare research conducted by Unit 731 in Manchuria under Lieutenant General Ishii Shiro, along with Japan's alleged use of biological weapons in the Chinese theater, were granted immunity in exchange for information.[144] It appears the United States wanted to monopolize the information on biological warfare, and concealed it from the Soviet Union;[145] as Judge Röling points out with the benefit of hindsight, one defendant who established a biological laboratory escaped a death sentence simply because the Court was not informed of the relevant facts.[146]

Furthermore, principally because MacArthur strongly opposed the indictment of the Japanese Emperor (even if the Japanese military had waged war in his name), the Emperor was similarly granted immunity.[147] As part of the U.S. strategy to rehabilitate and convert Japan into an ally, the Japanese Emperor was shielded from prosecution in the hope of preserving social order. In keeping with their own political interests, both China and the Soviet Union agreed to go along in granting imperial immunity; only Australia objected.[148]

Finally, ironically, many crimes committed in Asia were deemed beyond the purview of the Tokyo IMT. Out of the eleven judges, only three came from Asia: China, India and the Philippines, although it was the Asian countries that had been ravaged by the Japanese army.[149] Although the Nanking Massacre was addressed to some extent,[150] Japan's actions in Taiwan and Korea, areas which were under colonial rule, did not come under scrutiny, leading to the question of why the Nazi atrocities

---

[140] *Id.*
[141] *Id.*
[142] *Id.* at 63.
[143] *Id.*
[144] *See generally* S.H. HARRIS, FACTORIES OF DEATH (rev. ed. 2002).
[145] RÖLING, *supra* note 5, at 48.
[146] *Id.* at 49–50.
[147] FUTAMURA, *supra* note 17, at 63.
[148] *Id.* at 172 n.68.
[149] *Id.* at 63.
[150] *See infra* Section IV.A.

against German Jews differed from these acts as crimes against humanity.[151] In sum, American and other Allied interests in securing the post-war Pacific arena helped cement the Tokyo IMT's legacy of effacement and forgetfulness.

C. The Strategy of Pursuing Crimes Against Peace

Unlike the Nuremberg IMT, which had four counts for indictment (conspiracy, crimes against peace, war crimes, and crimes against humanity), the Tokyo IMT had a complicated 55 counts, which were grouped into headings: "Crimes against peace (Group I: counts 1 to 36); murder (Group II: counts 37 to 52); and conventional war crimes and crimes against humanity (Group III: counts 53 to 55)."[152] The procedure of lumping together conventional war crimes with crimes against humanity, *de facto*, caused crimes against humanity to disappear into war crimes, giving the impression that the Japanese crimes were somehow not as heinous as the Nazi atrocities—a position that is problematic, as we have seen earlier.[153]

The Tokyo Trial appeared to focus more on crimes against peace than on crimes against humanity, for "no defendant was prosecuted without a charge of committing crimes against peace."[154] Although no one was given a death sentence for conspiracy and crimes against peace alone, at Tokyo, "22 defendants out of 25 were found guilty of at least one count in the category of crimes against peace, while in Nuremberg, 16 out of 22 defendants were charged for crimes against peace and 12 were found guilty."[155]

However, the more important aftermath of choosing to pursue crimes against peace, as opposed to crimes against humanity, was that it led to controversy and confusion. Crimes against peace, which hinged on whether the war had been "aggressive" or simply "defensive," constituted a more contested legal category than conventional war crimes and crimes against humanity.[156] While the war in Europe clearly started with Nazi aggression, there were conflicting narratives regarding whether Japan's war in the Pacific was purely aggressive or had an element of self-

---

[151] *Id.* at 63–64.
[152] *Id.* at 64.
[153] *See* Sellars, *supra* note 81, at 1092–93 (observing the collective perception of the "unexceptional" character of Japanese crimes, compared to the German Holocaust); Boister, *supra* note 82, at 439–46 (describing the complex strategies employed by the prosecution to demonstrate how killing in an "unjustified war" constituted murder, a consequence of which was the abandonment of a charge of "crimes against humanity")
[154] FUTAMURA, *supra* note 17, at 65–66.
[155] *Id.*
[156] *Id.*

defense.[157] Nevertheless, the net effect of focusing on crimes against peace, as opposed to crimes against humanity, was to obscure the extent of the Japanese atrocities during World War II. Unlike Nazi brutality, which became the iconic image of inhumanity, Japanese crimes, especially dealing with gender violence, were covered over, as part of the price of converting Japan from enemy into ally, with the emerging Cold War realignment of alliances. As Iris Chang points out:

> After the 1949 Communist revolt in China, neither the People's Republic of China nor the Republic of China demanded wartime reparations from Japan (as Israel had from Germany) because the two governments were competing for Japanese trade and political recognition. And even the United States, faced with the threat of communism in the Soviet Union and mainland China, sought to ensure the friendship and loyalty of its former enemy, Japan. In this manner, cold war tensions permitted Japan to escape much of the intense critical examination that its wartime ally [Germany] was forced to undergo.[158]

Ironically, the U.S. strategy at the Tokyo IMT backfired: not only has the trial become largely forgotten or remembered with shame, but it has also been decried as a notoriously political "show trial" by the majority of the Japanese, who felt collectively persecuted. [159] The result was a psychologically complex reaction, which succeeding generations imbibed: "While the Japanese . . . because of passive acceptance and cynicism, remained as bystanders at the Tokyo Trial and did not take its significance actively and personally . . . they, nonetheless, felt frustrated that the trial blamed them collectively as a nation."[160] This complicated mix of collective guilt and denial persists even today, and ironically, one of the guiding principles behind the Tokyo IMT, designed to shield the Japanese from collective responsibility, has been blamed for helping generate a sense of "responsibility over past war crimes [that have] . . . stretched out vertically and horizontally, growing into a timeless collective responsibility."[161]

---

[157] *Id.*
[158] CHANG, *supra* note 1, at 11.
[159] Boister, *supra* note 82, at 447 (noting the Tokyo IMT's "almost negligible impact in Japan except as something to be condemned as victor's justice").
[160] FUTAMURA, *supra* note 17, at 142.
[161] *Id.* at 143.

IV. THE TOKYO IMT'S LEGACY OF FORGETTING CRIMES OF VIOLENCE AGAINST WOMEN

A. Visualizing and Obliterating the Rape of Nanking

At the Tokyo Trial, atrocities committed by the Japanese were revealed through a variety of sources: news reports, surveys, statistics, and witness testimony.[162] The Tokyo IMT unearthed a pantheon of horrible new ways of torturing human beings:

> [O]f marches (such as the infamous Bataan Death March) in which gravely ill and starved prisoners dropped dead from exhaustion, of the savage conditions behind the construction of the Siam-Burma Death Railway, of the Japanese "water treatment" that pumped water or kerosene into the noses and mouths of victims until their bowels ruptured, of suspension of POWs by wrists, arms or legs until their joints were literally ripped from their sockets, of victims being forced to kneel on sharp instruments, of excruciating extractions of nails from fingers, of electric shock torture, of naked women forced to sit on charcoal stoves, of every imaginable form of beating and flogging . . . even of vivisection and cannibalism.[163]

Chang claims that empirical studies show that the Japanese surpassed the Nazis in their cruelty towards captives: "only one in twenty-five American POWs died under Nazi captivity, in contrast to one in three under the Japanese."[164]

Yet the chief metaphor for Japanese atrocities, at the Tokyo IMT, was the Rape of Nanking. Chang passionately argues for the uniqueness of the brutality of Rape of Nanking, not only for the sheer number of deaths, but also for the cruelty with which the deaths were executed.

> [W]hether we use the most conservative number—260,000—or the highest—350,000—it is shocking to contemplate that the deaths at Nanking far exceeded the deaths from the American raids on Tokyo (an estimated 80,000-120,000 deaths) and even the combined death toll of the two atomic blasts at Hiroshima and Nagasaki by the

---

[162] CHANG, *supra* note 1, at 173.
[163] *Id.*
[164] *Id.*

> end of 1945 (estimated at 140,000 and 70,000 respectively).
>
> . . .
>
> Chinese men were used for bayonet practice and in decapitation contests. An estimated 20,000-80,000 Chinese women were raped. Many soldiers went beyond rape to disembowel women, slice off their breasts, nail them alive to walls. Fathers were forced to rape their daughters, and sons their mothers, as other family members watched. Not only did live burials, castration, the carving of organs and the roasting of people become routine, but more diabolical tortures were practiced, such as hanging people by their tongues on iron hooks or burying people to their waists and watching them get torn apart by German shepherds. So sickening was the spectacle that even the Nazis in the city were horrified, one proclaiming the massacre to be the work of "bestial machinery."[165]

The Tokyo IMT unequivocally denounced the Rape of Nanking, citing it as an instance of clear government policy, sanctioned by the highest levels of government (except for the Emperor), which were informed of the developments, and even celebrated the atrocities in Japan, before international condemnation set in. Chang claims in commemoration of the victory over Nanking, special Nanking noodles were prepared in Tokyo;[166] Japanese children proudly carried globe-shaped, candle-lit paper lanterns in evening parades to symbolize Japanese ascendancy; [167] photos of the atrocities committed were proudly heralded.[168] It was only after news of international outrage (interestingly, more about the bombing and sinking of the U.S.S. Panay, an American gunship, than all the slaughter, rape, and torture)[169] broke out that the Japanese government sought to exert damage control by concealing the extent and nature of the atrocities committed, and to replace the shocking news with propaganda.[170]

The Rape of Nanking unfolded in the international spotlight. Months before, and during the actual siege, media correspondents provided vivid, up-to-date coverage of the events.[171] The three American journalists most influential in forming public opinion were *New York*

---

[165] *Id.* at 6.
[166] *Id.* at 144.
[167] *Id.*
[168] *Id.* at 143.
[169] *Id.* at 146.
[170] *Id.* at 144.
[171] *Id.* at 143.

Times reporter, Frank Tillman Durdin; *Chicago Daily News*' Archibald Steele; and the Associated Press' C. Yates McDaniel.[172] All three men were not only instrumental to writing riveting stories about the events, but also became actively involved in saving Chinese lives and retrieving body parts of relatives whom the Japanese had murdered.[173] In addition, Universal Studios' Norman Alley and Fox Movietone's Eric Mayell happened to be on board the ill-fated U.S.S. Panay, and managed to squirrel away footage of the action; the film was initially buried in mud, and later retrieved and played in theaters across the United States.[174] Furthermore, not only had the events occurred in full view of the Japanese Embassy in Nanking, but also, the International Committee had visited the Japanese Foreign Office and the Japanese Embassy, to file reports, and even purportedly filing two protests a day for the first six weeks of the Nanking Occupation.[175]

Given the extent of the coverage, it is difficult to believe that the Japanese Emperor and the royal family were completely unaware of the extent and brutal nature of the slaughter. Nevertheless, Matsui Iwane, the commander of Japan's Central China Expeditionary Force, assumed complete responsibility for the Nanking atrocities.[176] Chang conjectures that the "tubercular," "sickly" and "frail" Matsui had simply been a (willing) scapegoat as he was not even in Nanking when the city fell into Japanese hands.[177] Furthermore, Matsui's testimony, at the Tokyo IMT had significant gaps, and was contradictory. "[H]e waffled between lies and occasional self-denunciation. He tried to make excuses . . . sometimes denied [the atrocities] completely . . . and [engaged in] . . . circuitous, vaguely mystical discussions about Buddhism and the nature of Sino-Japanese friendship."[178] In addition, the self-flagellating Matsui erected, in his hometown of Atami, close to Tokyo, a shrine of remorse—a statue of Kannon, Buddhist Goddess of Mercy, sculpted from clay imported from the Yangtze River mingled with Japanese soil.[179] To atone further, the Matsui family hired a priestess to chant prayers and weep for the dead Chinese.[180] Nevertheless, Matsui never pointed a finger at the royal family, saying only that the tragedy occurred because of his failure to guide Prince Asaka and the Emperor, and that it was his duty to die for them.[181]

---

[172] *Id.* at 144.
[173] *Id.* at 144–45.
[174] *Id.* at 146.
[175] *Id.* at 174.
[176] *Id.* at 174–75.
[177] *Id.* at 174.
[178] *Id.* at 175.
[179] *Id.*
[180] *Id.*
[181] *Id.*

Despite the strong indirect proof that the royal family most likely was aware of, and sanctioned, the brutalities committed by the Japanese military in Nanking,[182] both Prince Asaka and Emperor Hirohito never spent a day in jail, and lived on to "enjoy lives of leisure and national adoration."[183] Another shameful legacy of the Tokyo IMT is that whereas many of the Japanese torturers were awarded full military pensions and benefits from the Japanese government, "thousands of their victims suffered (and continue to suffer) lives of silent poverty, shame, or chronic physical and mental pain."[184] That relegation to silence has been described as a "second rape," not by Japan, but by the colluding Allied powers.[185]

B. Attempting to Obliterate Traces of Comfort Stations and Comfort Women

If the Nazis systematized the extermination of Jews through gas chambers, the Japanese systematized the rape and sexual slavery of women in territories occupied by the Japanese between 1930-1945 through "comfort stations."[186] These women were sometimes listed as "war supplies;"[187] in other accounts, they were referred to as "girl armies," which is appropriate, as 80% of the reported Korean comfort women were between fourteen to eighteen years old.[188] The statistical data, gathered through hotlines set up in 1992 to gather data on these military barracks of sexual slavery, conjures up an efficient and vast machinery for shipping women, under the jurisdiction and supervision of Japan's Ministry of War,[189] comparable to the Nazi bureaucracy of sending Jews to death camps:

> Among the Tokyo callers, who were the most numerous, 79 referred to comfort stations in China, 56 to Manchuria, 36 to Southeast Asia, 22 to the Western Pacific, 23 to Japan and 6 to Korea. In Kyoto, 65 callers referred to China, . . . 4 to Korea, 2 to New Guinea, . . . 4 to . . . [Indonesia], 8 to the Philippines, 3 to Burma and 2 each to

---

[182] *Id.* at 178–79.
[183] *Id.* at 180.
[184] *Id.* at 181.
[185] *Id.* at 199.
[186] GEORGE HICKS, THE COMFORT WOMEN 17 (1994).
[187] *Id.* at 17.
[188] *Id.*
[189] YOSHIMI YOSHIAKI, COMFORT WOMEN 82–83 (Suzanne O'Brien trans., Columbia Univ. Press 2000) (1995).

> Malaya, Thailand, French Indochina, Japan and Taiwan . . . .[190]

The wide range of nationalities represented in the "girl army" showed how ruthlessly and systematically women of all nationalities who came under Japanese control were duped, abducted or violently forced to become sex slaves:[191] Korean, Taiwanese, "Manchus" (meaning non-Chinese ethnic groups), mainland Chinese, Indonesians, Vietnamese, Filipinas, Dutch, Burmese, Malays, White Russians (in Manchuria), Thai, and also, interestingly, Japanese.[192] In addition, the ratio of troops to comfort women is staggering, and reveals an estimate of the total enslaved population. The "ideal" ratio (of troops to comfort women) would have been 29:1 (meaning each soldier would have access to sex every day),[193] but the actual ratio, based on studies, is closer to 50:1,[194] leading to the following calculation: "If we assume a ratio of 50:1, then the total of some 7 million troops from all theatres of war indicates that there would have been about 139,000 comfort women at most."[195]

One justification for the creation of these barracks of sexual slavery was that it would theoretically prevent the Japanese army from engaging in an unmitigated spree of rapes,[196] as had happened at Nanking. Sadly, the establishment of the comfort stations did not stop rape in any of the occupied territories.[197] Not only did the creation of the comfort stations engender an officially sanctioned system of sexual violence; in addition, it also strengthened a culture of permissiveness, because punishments for rape remained lenient in the Japanese Army Penal Code.[198] Looting, combined with rape, though, was another matter, as the punishment for the combined offense, according to Paragraph Two, Article 86 of the Army Penal Code: "at least seven years of penal servitude and at most lifetime imprisonment."[199] To escape the combined charge, rapists simply killed their victims, and military commanders looked the other way, viewing rape as a means for "building troop morale."[200]

The other goal, in building comfort stations, was to prevent Japanese soldiers from becoming infected with sexually transmitted

---

[190] HICKS, *supra* note 186, at 17.
[191] *Id.* at 20.
[192] *Id.* at 18.
[193] *Id.* at 19.
[194] *Id.*
[195] *Id.*
[196] YOSHIAKI, *supra* note 189, at 45. *See also* CHANG, *supra* note 1, at 52–53.
[197] *Id.*
[198] *Id.*
[199] *Id.* at 66.
[200] *Id.* at 68.

diseases, knowing that soldiers used sex as a release from the stress and trauma of war;[201] even more importantly, if the infected soldiers returned home and spread the diseases in their home country, a health pandemic would emerge.[202] As a small sample of the problem, the number of soldiers of the 19th and 20th Divisions of the North China Area Army, who had contracted sexually transmitted diseases came to 985.[203] To stem the tide of diseases, the military banned the use of civilian prostitutes and gave strict and detailed instructions on the best way to avail of the comfort stations, including an injunction presuming that every comfort woman is a carrier of sexually transmitted diseases.[204] Thus, elaborate instructions were issued, which included checking for the woman's health papers (proving she had recently been inspected for sexually transmitted diseases); making the woman wash before sex; always using a condom and a disinfecting lubricant; disinfecting immediately after intercourse; stopping by the medical office for treatment especially with signs of early infection, among others.[205] Given the complexity of these instructions, it is highly doubtful that the soldiers actually followed them, and thus, it is hardly surprising that instead of decreasing the spread of sexually transmitted diseases, ironically, the comfort stations actually facilitated the spread of these diseases.[206]

Nevertheless, there is evidence that the Japanese government very deliberately designed the comfort stations to fit into loopholes in international law, prohibiting the trafficking in women and girls. There were four international treaties in force at that time: (i) The International Agreement for the Suppression of White Slave Traffic (1904),[207] (ii) The International Convention for the Suppression of White Slave Traffic (1910),[208] (iii) The International Convention for the Suppression of Traffic in Women and Children (1921),[209] and (iv) The International Convention for the Suppression of Traffic in Adult Women and Girls (1933).[210] Although Japan did not sign the 1933 treaty, by 1925 it was a signatory to the other three, all of which outlawed the prostitution of underage girls, even with their consent, and rendered criminal the use of violence, compulsion, or fraud in forcing a woman "of age" to become a

[201] *Id.* at 66.
[202] *Id.* at 69.
[203] *Id.*
[204] *Id.* at 70–71.
[205] *Id.*
[206] *Id.*
[207] *Id.* at 156.
[208] *Id.*
[209] *Id.*
[210] *Id.*

prostitute.[211] However, there was a major loophole in the three treaties: they exempted colonies from their prohibitions. For example, Article 11 of the 1910 treaty presumed in the absence of a writing to the contrary that none of the treaty's prohibitions applied to signatories' colonies.[212] Similarly, Article 14 of the 1921 treaty allowed signatories to declare their colonies exempt from treaty provisions.[213]

Given these loopholes, the Japanese government considered Korea, Taiwan, China, Southeast Asia and the Pacific Region—all occupied territories, and therefore colonies—as exempt from prohibitions against the trafficking and prostitution of girls.[214] That to some extent explains the proliferation of comfort stations in the occupied territories, especially in Korea. The Japanese tried to prevent the occupied territories from uniting in rebellion, and exploited regional tensions to maintain control. Korea, unlike Taiwan, was historically antagonistic to China, and its population easier to isolate.[215] As a consequence of cultural prejudices and Japanese exploitation of regional tensions, Korean women suffered more than most. In terms of ethnic status, in the eyes of the Japanese, they were desirable because they ranked as most akin and were second only to Japanese and Okinawan women. After them in the pecking order came the Chinese, and lastly Southeast Asians, who were darker-skinned and thus not as desirable.[216] Finally, because Japan never ratified the 1933 treaty, which explicitly prohibited rounding up women and forcing them to become prostitutes, even with the woman's consent, it could technically claim that it had broken no international laws.[217] However, given the already existing widespread international consensus regarding the prohibition, embodied in treaties, it could be argued that Japan flagrantly violated an effectively existing international custom.[218]

Ultimately, the Japanese military was just as guilty as the Nazis were of "crimes against humanity"—defined by the Nuremberg IMT as "murders, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war," as well as "persecutions on political or racial grounds."[219] However, at the Tokyo IMT, "not even one person was tried for crimes against

---

[211] Who was classified as a minor differed in the various treaties. For example, the 1910 treaty set the age as under twenty years old, while the 1921 treaty raised the age of consent to twenty-one. Japan initially attached a reservation, changing the required age to eighteen; however, in 1927, Japan removed its reservation, thus indicating its assent to the definition of minors as being under twenty one years old. *Id.* at 156–57.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*; *see also* HICKS, *supra* note 186, at 169.
[216] HICKS, *supra* note 186, at 48.
[217] YOSHIAKI, *supra* note 189, at 163.
[218] *Id.*
[219] *Id.* at 162.

humanity."[220] The reasons for why Japan was not prosecuted for its sexual enslavement of women in its occupied territories, among other crimes, are manifold. Not only were rape victims reluctant to come forward because of shame,[221] but also Japan, the Allied powers and even other Asian nations colluded, to render these crimes "resolved" through a "political solution."

> Eager to attract or maintain Japanese development aid and investment, the postwar governments of Asian nations colonized or occupied by Japan during the war have often been reluctant to press issues of Japan's responsibilities to its victims. Not only the Japanese but other Asian governments as well would just as soon forget, for different but complementary reasons, that comfort women ever existed.[222]

---

[220] *Id.*

[221] HICKS, *supra* note 186, at 19; *see also* CHANG, *supra* note 1, at 11.

[222] Suzanne O'Brien, *Translator's Introduction* to YOSHIMI YOSHIAKI, COMFORT WOMEN 1, 5 (Suzanne O'Brien trans., Columbia Univ. Press 2000) (1995). In addition, deniers of the Rape of Nanking have attempted to cover up the massacre. Iris Chang describes the controversy over the inclusion of accounts of the Rape of Nanking in Japanese historical textbooks and obstruction of evidence in Japanese academia. *See* CHANG, *supra* note 1, at 209–10. However, just as equally, the process of rendering visible, to the international community, the travesty of the treatment of the comfort women is rich and complex. Yoshimi Yoshiaki's *Jūgun Ianfu* ("*Military Comfort Women*"), published in Japanese in 1995 and in English in 2000 as *Comfort Women*, is probably the canonical historical text, by a Japanese historian, which wrestles with questions of Japanese war crimes and war responsibility. *See generally* YOSHIAKI, *supra* note 189. Hicks has also done much to bring the comfort women to light. He provides accounts ranging from descriptions by comfort women of their ordeals and their lives after the war; to the story of a Japanese journalist, Senda Kako, setting up hotlines for former comfort women in Tokyo, Kyoto, Osaka and South Korea; to Kim Hak Sun's brave disclosure as the first former comfort woman to publicly tell her story, which culminated in a class action lawsuit launched in the Tokyo District Court in 1991; to retelling the events of February 1993, when Japanese scholars called on their government to allow accounts of Japanese atrocities committed in Korea from 1910 to 1945 to be included in school textbooks. *See generally* HICKS, *supra* note 186. *See also* LEGACIES OF THE COMFORT WOMEN OF WORLD WAR II (Margaret Stetz & Bonnie B. C. Oh eds., 2001); DAVID ANDREW SCHMIDT, IANFU: THE COMFORT WOMEN OF THE JAPANESE IMPERIAL ARMY OF THE PACIFIC WAR (2000); C. SARAH SOH, THE COMFORT WOMEN (2008); TOSHIYUKI TANAKA, JAPAN'S COMFORT WOMEN (2003); TRUE STORIES OF THE KOREAN COMFORT WOMEN (Keith Howard ed.; Young Joo Lee trans., 1995); WASHINGTON COALITION FOR COMFORT WOMEN ISSUES, INC., COMFORT WOMEN SPEAK (Sangmie Choi Schellstede, ed.; Soon Mi Yu photographer, 2000); Anthony Brown, *Japanese Comfort Women: One Woman's Story: The Account of Felicidad de Los Reyes*, 9 KASAMA (July–Aug.—Sept. 2006), *available at* http://cpcabrisbane.org/Kasama/Archive/FelicidadDeLosReyes.htm (last visited Dec. 27, 2011).

Nuancing what appears, from the view of historical distance, to be an unproblematic blanket of collusion, Yuma Totani[223] argues that "the Allied prosecutors—and in particular, the Dutch member—substantiated the Japanese commission of various forms of sexual violence including sexual slavery, targeted . . . at the Asian female population."[224] Repeatedly, Totani points to documentary traces of the prosecution's attention (or at least non-dismissal) of sexual violence perpetrated against Asian women. For example, "rape and other acts of physical abuse" were among the fifteen general patterns of Japanese war crimes appended to the indictment;[225] in addition, during the trial, the prosecutors supplied additional evidence about other types of war crimes, implied in but not specifically identified in the indictment, such as civilian-targeted atrocities, including "deportation and use of numerous Asian civilians as slave laborers."[226] Nevertheless, Totani does point out that this extensive documentation did not cover the Korean and Taiwanese comfort women, but instead focused on "military sexual slavery targeted to women of enemy nationalities, such as Chinese, Dutch, Indonesian and Vietnamese women."[227] Although she does not develop the idea, Totani points to the liminal status of Koreans and Taiwanese—from the perspective of the Allied forces, they were both victims (forced to serve the Japanese) and victimizers (who had assisted in Japan's aggression and atrocities),[228] unlike the other Asian nationalities, who were clearly regarded as "enemies" of Japan. Ultimately she arrives at the same conclusion: "As history shows, Allied prosecutors did not explore th[e] possibility [of prosecuting this systematic sexualized violence against women in the Japanese colonies] and ultimately failed to hold Japanese leaders accountable for organized sexual slavery." She concurs that "this unfortunate omission can be validly considered as one major historical shortcoming of the Tokyo Trial."[229]

---

[223] Elizabeth Borgwardt argues that a modern treatment of the Tokyo IMT must take into account Boister & Cryer's *The Tokyo International Military Tribunal* (2008) and Totani's *The Tokyo War Crimes Trial* (2008) or it runs the risk of being dismissed by scholars as not being properly up to date. *See* Elizabeth Borgwardt, *Étienne Jaudel,* Le procès de Tokyo: Un Nuremberg oublié, 29 LAW & HIST. REV. 306, 307 (2011) (book review).
[224] YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL 179 (2008).
[225] *Id.* at 108.
[226] *Id.* at 109.
[227] *Id.* at 14.
[228] *Id.* at 13.
[229] *Id.* at 14.

V. THE CULTURAL DIMENSIONS OF THE CASE OF THE COMFORT WOMEN: ATTEMPTING TO GO BEYOND FORGETTING

Although this article focused initially on the historical, political, and legal dimensions of the papering over of Japan's wartime crimes of violence against women, cultural dimensions are also part of the picture. For example, Japanese soldiers widely believed that sex before battle provided a charm against injury.[230] Thus, soldiers wore amulets made from the pubic hairs or from the possessions of comfort women.[231] Conversely, sexual deprivation was believed to make one accident-prone, probably because of the lack of stress-relief, given the savage training the Japanese military underwent.[232] And since an army's strength is no greater than that of its weakest link, there was a great deal of pressure for soldiers to visit comfort stations; men who resisted were forced by their own comrades.[233] The soldiers' favorite victims were *hua gu niang*[234]—young girls—because virgins were supposed to provide particularly potent protection. Yet as the Nanking Massacre shows, all women (and even men) were targeted for rape: women in their eighties were not spared, pregnant women about to go into labor were violated and their fetuses slashed from their wombs for amusement, preteen girls had their vaginas slashed to rape them more effectively, and fathers and husbands were forced to witness the rapes of their kin before being forced to rape them as well and then finally killed.[235] As one Japanese psychiatrist, First Lieutenant Hayao Torao noted, in his report on "Phenomena Particular to the Battlefield and Policies Toward Them," and in specific on "Sexual Desire and Rape": "Because the idea that [soldiers] are free to do things to enemy women that would never be permitted at home is extremely widely held, when they see young Chinese women, they are drawn to them as if possessed."[236]

Of course, a phenomenon as complex as the Japanese comfort stations is not reducible to a simple excuse for unmitigated "Japan bashing." For example, the Japanese simply exploited pre-existing gender and class discrimination within Korean society to target young, poor women.[237] Nor were all relationships between the Japanese soldiers and their "girl army" necessarily completely devoid of tenderness, or

---

[230] HICKS, *supra* note 186, at 32.
[231] *Id.*
[232] *Id.* at 33.
[233] *Id.*
[234] CHANG, *supra* note 1, at 90.
[235] *Id.* at 91–96.
[236] YOSHIAKI, *supra* note 189, at 67.
[237] *Id.* at 5.

sometimes even real concern.[238] And the Japanese were not unique, in their use of prostitution, as a way to relieve the psychological pressures of war and strengthen "troop morale."[239]

As the rape centers set up by Serbian forces during the Yugoslavian civil war demonstrate, rape as a military weapon and as a means of subjugation remains viable and is not a World War II relic. Although the International Criminal Tribunals for the former Yugoslavia and for Rwanda have successfully indicted numerous individuals on charges of torture and genocide for crimes that entail sexual violence against women, and the statutes of the International Criminal Court (ICC) clearly outline rape and sexual slavery as crimes against humanity, these courts have jurisdiction only over crimes post-dating the Rome Treaty's signing in July 1998.[240] Former comfort women, and other victims of imperial Japan, therefore have no international legal recourse against their victimizers or against the Japanese government,[241] given Japan's recalcitrant denial of any wrongdoing save for a public apology, issued in July 1992.[242] Although comfort stations' survivors have engaged in an activism that has raised an awareness concerning systematic rape and sexual slavery during armed conflict,[243] these former comfort women "have yet to receive a yen of compensation from the Japanese government."[244] Particularly given the virulent racism with which the

---

[238] For example, there are stories of Japanese soldiers falling in love with, and trying to protect, comfort women, sometimes even planning to marry them after the war. HICKS, *supra* note 186, at 80.

[239] The Roman Empire had a system of prostitution that resembled that used by the Japanese Imperial Army; similarly, the sixteenth century Spanish Duke of Alva's army, when invading the Netherlands with an armada, was accompanied by "400 mounted whores and 800 on foot." *Id.* at 29.

[240] *Id.* at 19.

[241] *See, e.g.*, Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005) (affirming dismissal of an Alien Torts Statute action against Japan litigated by fifteen former comfort women from China, the Philippines, South Korea, and Taiwan, because of the possible adverse effect on U.S. foreign relations with Japan, China, and Korea). *See also* HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1213–15 (3d ed. 2008) (1996).

[242] *Id.* at 264.

[243] *See, e.g.*, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, 50th Sess., ¶ 6, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (by Gay J. McDougall, Special Rapporteur), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/3d25270b5fa3ea998025665f0032f220 (last visited Dec. 29, 2011) (remarking in a United Nations report that comfort women's activism provided a "significant impetus" for the commissioning of the report, and advocating that systematic sexual violence against women be prosecuted as a crime against humanity).

[244] HICKS, *supra* note 186, at 271.

Japanese were portrayed during World War II,[245] it is surprising how easily that collective animosity became effaced, replaced by a diplomatic final solution, dressed in legal trappings. Although forgetting is often part of the process of working through trauma, in the case of the Tokyo IMT, an artificially imposed collective amnesia simply worked, ironically, to generate even more complex mechanisms of denial and guilt, in the Japanese, and thus, as a corollary, a problematic heritage of shame and denunciation, for the Tokyo IMT.[246]

VI. VIOLENCE AGAINST WOMEN AS MILITARY STRATEGY AND CULTURAL MYTH: THE EVOLUTION OF TWENTIETH-CENTURY WARS

Anne Llewelyn Barstow uses statistics to frame a contrastive analysis of the casualties of war during World War I, to wars that followed in its wake. "[I]n World War I, the ratio of military personnel killed to civilians killed was 8:1; in World War II it was 1:1; in the many smaller wars since 1945, the ratio has been 1:8. This means that the victims of wars have changed: the great majority being civilians, they are now mainly women, children, and the elderly."[247] A crucial strategy in these new wars is control over women's sexuality and reproductive ability.[248] There are four ways in which women are particularly targeted, within the context of contemporary military campaigns.

The first is illustrated in the case of the Korean, Taiwanese and Japanese comfort women. Here, women are kidnapped, held hostage, gang-raped, and forced into prostitution in rape camps and detention camps.[249] Although the horrifying heritage of Japan's comfort stations should have spurred the international community to condemn it as a crime against humanity, it was left unpunished by the Tokyo IMT;[250] the practice has been more recently resurrected in the extensive crimes of sexual abuse and rape in Bosnia-Herzegovina.[251] The cultural myth

---

[245] For example, the Western Allies frequently described the Japanese as "subhuman," often portraying them as "apes and vermin." JOHN W. DOWER, WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 9 (1986).

[246] *See* Havel, *supra* note 102, at 648 (stating that collective amnesia is also a problem with regard to the Holocaust and Nuremberg trials).

[247] Anne Llewelyn Barstow, *Introduction* to WAR'S DIRTY SECRET: RAPE, PROSTITUTION, AND OTHER CRIMES AGAINST WOMEN 3 (Anne Llewelyn Barstow ed., 2000).

[248] Catharine A. MacKinnon, *Rape, Genocide and Women's Human Rights in* ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 180, 181 (2006).

[249] HICKS, *supra* note 186, at 17.

[250] YOSHIAKI, *supra* note 189, at 162.

[251] *See Contemporary Forms of Slavery*, U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, 47th Sess., ¶ 4, U.N. Doc. E/CN.4/Sub.2/1995/38 (July 13, 1995) (by Linda Chavez), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1995.38.En (last

behind this strategy is that men, unless they are allowed to rape within secure conditions, will engage in dangerous raping sprees, or surreptitiously sneak off to brothels, engaging in dangerous sex with infected prostitutes.[252] Iris Chang notes that the Japanese high command organized the vast network of comfort stations, after the scandal of the Rape of Nanking, to "prevent further mass rape of conquered populations with the ensuing world condemnation and control the spread of venereal disease through the troops as well."[253]

Second, rather than a "spontaneous" release, rape is a "strategic" and systematic endeavor, a military tactic planned and authorized by higher authorities to serve two purposes: (i) to enhance male bonding, thus enabling them to become better killing machines,[254] and (ii) to humiliate and demoralize the enemy through particular cruelty to the women, seen as "property" of enemy men.[255] Once again, we see elements of these in the Japanese war crimes of sexual abuse, especially in the Rape of Nanking,[256] where the transformation of "normal" young men into killing machines practically inured them from guilt and granted them immense power in dehumanizing their prey. As Azuma Shiro, a former Japanese soldier remarked, "[p]erhaps when we were raping her we looked at her as a woman . . . but when we killed her, we just thought of her as something like a pig."[257] Similarly, Rwandan Hutu genocidaires, inverting European racialized mythology, dubbed Tutsis "cockroaches" and their women "serpents."[258] The Tutsi women were particularly targeted for violent attack because of their "beauty" (i.e., "Europeanized" features).

---

visited Dec. 29, 2011) (reporting to the United Nations on large-scale rape by Serbian military forces). Scholars have attempted to define and distinguish the various categories of sexual crime: "*Rape* denotes vaginal, oral, or anal sexual intercourse without the consent of one of the people involved. *Sexual assault* is a broader term, which includes rape and other forced or coerced sexual acts, as well as mutilation of the genitals. *Sexual violence* is the most general term, used to describe any kind of violence carried out through sexual means or by targeting sexuality." M. CHERIF BASSIOUNI & MARCIA MCCORMICK, SEXUAL VIOLENCE 3 (1996).

[252] JIN SUNG CHUNG, ILL BON KUK WE AN BU JUNG CHACK EUI HYUNG SUNG KWA BYUNWHA [THE FORMATION AND CHANGE OF COMFORT WOMEN POLICY IN JAPANESE HISTORY] 1–2 (1990).

[253] Iris Chang, *The Rape of Nanking in* WAR'S DIRTY SECRET: RAPE, PROSTITUTION, AND OTHER CRIMES AGAINST WOMEN 46 (Anne Llewelyn Barstow ed., 2000).

[254] HICKS, *supra* note 186, at 29.

[255] Susan Brownmiller, *Making Female Bodies the Battlefield in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 181 (Alexandra Stiglmayer ed., 1994).

[256] CHANG, *supra* note 1, at 49–50.

[257] *Id.* at 48.

[258] Laura Flanders, *Rwanda's Living Casualties in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 97 (Alexandra Stiglmayer ed., 1994).

> Stereotypes portrayed Tutsi women as arrogant and deceptive—and sexually special. Fetishized parts of the Tutsi's supposedly "European" physiology were singled out for mutilation: noses, necks, fingers—as well as genitals. Survivors murmur that their rapists wanted to "see what Tutsis look like inside."[259]

Third, both Serbian commanders[260] and Rwandan political leaders[261] have added, in addition to rape and torture, forced and deliberate impregnation as a cruel innovation. Specifically, in relation to the case of Bosnia-Herzegovina, the U.N. Commission of Experts concluded that "[t]he practices of 'ethnic cleansing' . . . sexual assault and rape . . . have been carried out . . . so systematically that they strongly appear to be the product of a policy."[262] Subsequently, the U.N. General Assembly asserted even more strongly that they were "[c]onvinced that this heinous practice [rape and violence against women] constitutes a deliberate weapon of war in fulfilling the policy of ethnic cleansing carried out by Serbia in Bosnia and Herzegovina, and . . . that the abhorrent policy of ethnic cleansing was a form of genocide.[263] Sexual crimes of violence are used to nation-build, by forcing dispersal of the racially undesired group. "Rapes spread fear and induce the flight of refugees; rapes humiliate,

---

[259] *Id.*

[260] Catherine MacKinnon remarks on the inhumanity of filming "[t]his campaign of expansion through ethnic extermination [that] has included rape, forcible impregnation, torture, and murder of Muslim and Croatian women, 'for Serbia.'" Catherine A. MacKinnon, *Turning Rape into Pornography: Postmodern Genocide in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 73 (Alexandra Stiglmayer ed., 1994).

[261] Laura Flanders states: "The number of pregnancies said to be caused by force suggest that so-called genocidaires raped 250,000 to 500,000 women and girls in less than one hundred days." Flanders, *supra* note 258, at 96.

[262] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), transmitted by letter dated May 27, 1994 from the Secretary-General to the President of the Security Council, U.N. Doc. S/1994/674, ¶ 313; *see also* S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

[263] G.A. Res. 49/205, ¶ 2, U.N. Doc. A/RES/49/205 (Mar. 6, 1995). *See also Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45*, U.N. Econ. & Soc. Council, Comm'n on Hum. Rts., 50th Sess., ¶ 268, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994) (by Radhika Coomaraswamy), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/75ccfd797b0712d08025670b005c9a7d (last visited Dec. 29, 2011).

demoralize, and destroy not only the victim but also her family and community; and rapes stifle any wish to return."[264]

Yet genocidal rape as tied up with forced impregnation has its origins in an even more insidious cultural myth—one even more dangerous in the case of Bosnia-Herzegovina because even the women—raped or not—Serbian, Moslem or Christian, believed in it. Not only were raped women shunned (and rendered ashamed and guilty) because of the loss of their virginity.[265] Even more devastatingly, if they were impregnated, because the "thing[s] inside"[266] their wombs had the paternal heritage of the enemy, the babies were therefore regarded as of the same "race" as the rapist.[267] Such a cultural myth stubbornly refused to acknowledge the woman's biological contribution to the creation of a child, and reduced her, even more, to a vilified, passive vessel of the enemy's sperm. Beverly Allen succinctly analyzes the central kernel of this masculinist and racist myth: "Serb 'ethnic cleansing' by means of rape, enforced pregnancy, and childbirth is based on the uninformed, hallucinatory fantasy of ultranationalists whose salient characteristic, after their violence, is their ignorance."[268]

Finally, there is one more use of violence against women as a strategy of war: the kidnapping of women to function as "wives" (i.e., slaves) for soldiers, as practiced today in Sudan and by rebels in northern Uganda.[269] In some ways, the comfort women who traveled with the Japanese Imperial Army served this, among other, functions as well.[270] An associated practice, of treating human beings as part of the spoils of war, is of kidnapping young boys, old enough to work, to be exploited as slaves.[271]

Ultimately and ironically, the picture that emerges, in the wake of the Tokyo IMT's failure to prosecute for the crimes of violence against the

---

[264] Alexandra Stiglmayer, *The Rapes in Bosnia-Herzegovina in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 85 (Alexandra Stiglmayer ed., 1994).
[265] Todd Salzman, "*Rape Camps," Forced Impregnation, and Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia in* WAR'S DIRTY SECRET: RAPE, PROSTITUTION, AND OTHER CRIMES AGAINST WOMEN 64–67 (Anne Llewelyn Barstow ed., 2000).
[266] Stiglmayer, *supra* note 264, at 131.
[267] BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA 63 (1996).
[268] *Id.* at 97.
[269] Barstow, *supra* note 247, at 9.
[270] *See* Chung Hyun-Kyung, *Your Comfort Versus My Death in* WAR'S DIRTY SECRET: RAPE, PROSTITUTION, AND OTHER CRIMES AGAINST WOMEN 18 (Anne Llewelyn Barstow ed., 2000).
[271] *See* Marion Ciborski, *Guatemala: We Thought It Was Only the Men They Would Kill in* WAR'S DIRTY SECRET: RAPE, PROSTITUTION, AND OTHER CRIMES AGAINST WOMEN 129 (Anne Llewelyn Barstow ed., 2000).

comfort women by the Japanese Imperial Army,[272] is not a cessation or even diminishing of such crimes, but their escalation into even more heinous forms.

The final section of this article reviews the complexities of prosecuting rape and other crimes of violence against women within the contemporary context of war; nevertheless, it also examines some of the ambiguous legal gains, and makes preliminary proposals for how violent sexual crimes, such as those inflicted on the comfort women, might be explored.

VII. CONCLUSION: EVALUATING STRATEGIES OF LEGAL REDRESS FOR WARTIME CRIMES OF VIOLENCE AGAINST WOMEN

In light of the Rome Statute's grant of jurisdiction to the ICC to prosecute "rape, sexual slavery, enforced prostitution . . . [and] any other form of sexual violence of comparable gravity,"[273] rape is now viewed as a criminal offense both under national and international rules of war.[274] Nevertheless, rape and other forms of sexualized violence remain characterized principally as affronts on personal dignity or crimes against

---

[272] Investigations on Class B and C crimes (conventional war crimes and crimes against humanity), as opposed to Class A crimes (crimes against peace) were "conducted by the United States, Britain, Australia, France, Holland, Philippines, China and the Soviet Union, in their own occupied territory in Asia, based on their own laws and jurisdiction." Although these proceedings were plagued by numerous problems, such as the dearth of interpreters, wrongful arrests, procedural issues, "[m]ore than 55,000 individuals were taken into custody and 5,700 faced trial as Class B and C criminals. A total of 984 were sentenced to death, 475 to life imprisonment and 2,944 to limited prison sentences," not counting trials by the Soviet Union, which remain uncounted. FUTAMURA, *supra* note 17, at 75. However, as Totani pointed out, in relation to military sexual slavery the prosecution focused on gender violence against women of enemy nationalities, such as Chinese, Dutch, Indonesian, and Vietnamese women, not colonial subjects, such as Korean and Taiwanese women. TOTANI, *supra* note 224, at 14.

[273] *Id.* at 157.

[274] *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (protecting the "person [and] honour" of civilians, requiring that they be treated "humanely" and without discrimination, and that specifically they be protected against "[v]iolence . . . [o]utrages upon personal dignity . . . rape, enforced prostitution . . . [and] [s]lavery"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75–76, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (prohibiting "[o]utrages upon personal dignity . . . enforced prostitution . . . [and] rape," and providing for "special respect" and treatment of female prisoners, particularly those pregnant or with infants); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3(I)(a), (c), 27, 76, 97, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (prohibiting, inter alia, "outrages upon personal dignity" and "attack[s] on [female] honour, in particular . . . rape [or] enforced prostitution," and providing for respectful treatment of female detainees and internees).

honor[275] in contrast with "pure" crimes of violence, such as murder and torture. As a result of this binary distinction (wartime crimes against dignity and honor versus wartime crimes of violence), rape is set apart from the more violent crimes, and either suffers from masculinist/sexist dimensions (rape as a violation of a man's honor), or causes women to internalize these same value systems (as requiring the violation of a virgin). Thus, the key issue, in terms of seeking justice in international forums for these wartime sexualized crimes of violence, is whether rape and other forms of sexualized assault can qualify as what are termed "grave breaches," because such breaches give rise to universal jurisdiction, which means:

> [E]very nation has an obligation to bring the perpetrators to justice through investigating, arresting and prosecuting offenders in its own courts or extraditing them to more appropriate forums. The existence of universal jurisdiction also provides a legal rationale for trying such crimes before an international tribunal and for the obligation of states to cooperate.[276]

Part of the problem, however, is that the Geneva Conventions do not itemize rape as a grave breach of international law.[277] Grave breaches are defined as "wil[l]ful killing, torture or inhumane treatment" and "wil[l]fully causing great suffering or serious injury to body or health."[278]

---

[275] *See, e.g.*, *id.* at art. 27, ¶ 2 ("Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."); Protocol II, *supra* note 274, art. 4.

[276] Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 201 (Alexandra Stiglmayer ed., 1994).

[277] *Cf.* Charles Krauthammer, *The Truth About Torture* in TORTURE 307, 308 (Sanford Levinson ed., 2004) ("[The] Geneva Conventions were written . . . [to deter] the kind of barbaric treatment of civilians that had become so apparent . . . during the Second World War . . . by promising combatants who treated noncombatants well that they themselves would be treated according to a code of dignity if captured . . . [but] would be denied the protections of that code if they broke the laws of war and abused civilians themselves."). Although rape might be classified as a form of torture, there is thus a military focus to the Conventions that may have led its drafters to overlook detailed protection of female civilian. *Cf.* John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad in* TORTURE 145, 147 (Sanford Levinson ed., 2004) ("[T]he United Nation's Code of Conduct for Law Enforcement Officials says that the phrase ['cruel, inhuman or degrading treatment or punishment'] 'should be interpreted . . . [broadly] against abuses, whether physical or mental.' International tribunals have given additional content to these definitions . . . . Rape . . . [is] torture as well.").

[278] *See* Protocol I, *supra* note 274, art. 85(1), (3), (5) (extending the treatment of "grave breaches" in the Geneva Conventions to the Protocol, defining all "grave breaches" as war crimes, and specifically forbidding willful attacks on civilians); Geneva Convention IV, *supra* note 274, arts. 146–47 (requiring that contracting parties enact legislation to punish

While military campaigns have evolved to include rape, sexual slavery and forced impregnation as forms of torture and genocide, international law has not sufficiently evolved to recognize that rape has become a form of torture, within the context of war.[279] Indeed, despite the strong condemnation of ethnic cleansing in Bosnia, the United Nations' interpretation of whether rape constitutes a grave breach of humanitarian law for the purposes of the International Criminal Tribunal for the former Yugoslavia is ambiguous. For example, the U.N. Human Rights Commission's sharp condemnation of ethnic cleansing in Bosnia characterized the practice as a war crime "in the circumstances,"[280] implying that it is only within such severe circumstances that rape and sexual abuse can rise to the level of being a war crime. Similarly, the Declaration of the 1993 World Conference of Human Rights in Vienna, despite its strong wording, reserved such censure for "systematic" rape and abuse.[281] Even though the report declines to recognize rape as a "grave breach" giving rise to universal jurisdiction, it does recognize that rape and forced prostitution can rise to the level of a "crime against humanity." For example, Article 2 itemizes as grave breaches "(a) wil[l]ful killing; (b) torture or inhuman treatment, including biological experiments; (c) wil[l]fully causing great suffering or serious . . . injury to body or health."[282]

Although much still needs to be done to bring international law's characterization of what is a "grave breach" more in conjunction with the evolution of contemporary wartime strategies of brutalization, there is evidence of some evolution in international law between the CAT convention and the Rome Treaty, broadening the reach of this label to cover more categories of rape and sexual violence. In particular, this trend is evident in evolving law on sexual torture as developed in some ad hoc tribunals established during the Rwandan and Yugoslav conflicts.[283] In

---

such "grave breaches" "if committed against persons or property protected by the present Convention").

[279] Catharine A. MacKinnon, *Crimes of War, Crimes of Peace in* ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 141 (2006).

[280] *Rape and Abuse of Women in the Territory of the Former Yugoslavia*, U.N. Comm'n on Hum. Rts. Res. 1993/8, 49th Sess., ¶ 1, U.N. Doc. E/CN.4/RES/1993/8 (Feb. 23, 1993), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/da5c27fcdab1e435c1256a7e0043f04e (last visited Dec. 29, 2011).

[281] *Report of the World Conference on Human Rights: Report of the Secretary-General*, U.N. G.A. World Conference on Hum. Rts., June 14–25, 1993, §§ III.I.28, III.II.B.38, U.N. Doc. A/CONF.157/24 (Part I) (Oct. 13, 1993), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/A.CONF.157.24+(Part+I).En.

[282] U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993) S/25704, art. 2, ¶¶ 37–40, pp. 10–11 (May 13, 1993).

[283] Patricia Viseur Sellers, *Preventing Torture: Implications of General Comment 2: Implementation of Article 2 by States Parties of the U.N. Convention Against Torture and*

the *Akayesu* case, for instance, the International Criminal Tribunal for Rwanda compared rape to torture, finding that often it "is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person," and observing that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts."[284] The Court noted that rape is not defined under international law, but proposed that it should be understood as part of a broader class of crimes of "sexual violence," which would include "any act of a sexual nature which is committed on a person under circumstances which are coercive."[285] The Court notably refused to limit its definition of sexual violence to acts involving physical penetration.[286] Subsequently, this groundbreaking recognition—that rape and sexualized violence cannot be reduced to mere physical penetration—was reinforced by the *Muhimana* case, which focused on the coercive power of group force within the context of genocide.[287]

A further possible strategy for redress for victims of such crimes is to characterize them as crimes against humanity, a legal category first formulated in the Charter and the Judgment of the Nuremberg Trial.[288] Like grave breaches, crimes of humanity also give rise to universal

---

Other Cruel, Inhuman or Degrading Treatment or Punishment, 11 N.Y. CITY L. REV. 339, 343–50 (reviewing the facts of the *Celebi*, *Furundzija* and *Kunarac* cases in relation to the Rome Statute's characterization of torture as "an act where there is a knowing infliction of severe pain and suffering, whether physical and mental;" which can be "committed by a State or a non-State actor;" and which requires that "the victim of torture . . . be in custody or under the control of the perpetrator")

[284] Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, art. 7.7 (Sept. 2, 1998), http://www.ictrcaselaw.org/docs/doc15154.pdf (noting "the cultural sensitivities involved in public discussion of intimate matters and recall[ing] the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured").

[285] *Id.*

[286] *See id.* ("Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.").

[287] *See* The Prosecutor v. Mikaeli Muhimana, Case No. ICTR-95-1B-T, Judgment, ¶ 546 (Apr. 28, 2005), http://www.ictrcaselaw.org/docs/doc64965.pdf, *aff'd*, Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgment, art. XIX (May 21, 2007), http://www.ictrcaselaw.org/docs/20070521-jgt-951B-01-en.pdf ("[C]oercion is an element that may obviate . . . consent . . . in the crime of rape. . . . [M]ost cases charged under international law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive."); *see also* Hirondelle Press Agency, ICTR/Muhimana—Prosecutor Says that Killings in Kibuye Were "Intimate Murders," Mar. 29, 2004, *available at* http://www.hirondellenews.com/content/view/991/287; ICTR/Muhimana—Muhimana Gets Life Sentence for Mutiple Rapes in Rwanda Genocide, May 2, 2005, *available at* http://www.hirondellenews.com/content/view/2325/287.

[288] *See Report of the Int'l L. Comm'n to the G.A.*, Int'l L. Comm'n, 2nd Sess., 374–78, U.N. Doc. A/1316 (June 5 to July 29, 1950), *available at* http://untreaty.un.org/ilc/reports/english/a_cn4_34.pdf ("formulat[ing]" and commenting upon "the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal").

jurisdiction, but do not rely on treaties, and are immune from the question of whether an international conflict or a civil war is involved.[289] Indeed, both rape and forced prostitution are recognized as "crimes against humanity" in the report establishing the statute of the International Tribunal for the former Yugoslavia.[290] The report defines crimes of humanity as "inhumane acts of a very serious nature, such as willing killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds."[291] While this is an advance, the description of rape is thus very similar to its characterization in relation to a "grave breach"—that it is only when rape is extreme and unusual that is rises to the heinousness of being a crime against humanity. Theoretically, such a view makes analytic sense, but in terms of the pragmatic picture of contemporary warfare, and its deployment of rape as a strategy of persecution, the distinction between a "normal" rape and a "genocidal" rape seems moot.[292]

Perhaps the U.S. Alien Tort Act is an additional legal mechanism that victims of such sexualized crimes could use, as it has been used in relation to apprehending and indicting atrocities related to Rwanda and Bosnia.[293] The Alien Tort Act gives U.S. district courts jurisdiction over suits filed by aliens alleging torts committed anywhere in violation of the law of nations.[294] Filartiga v. Pena-Irala[295] established a three-pronged test: (i) the alien must sue, (ii) the suit must be in tort, and (iii) the tort must have been done in violation of the law of nations.[296] Ironically, this formerly obscure law has been instrumental to seeking justice in the Rwandan and Bosnian cases. And as Susan Shin points out, it was theoretically possible that Alien Tort Statute could also have been deployed to seek long-delayed justice for the comfort women.

> The Korean [and other] comfort women satisfy all three prongs [of the *Filartiga* test], as they are aliens suing the Japanese government for the violation of an internationally recognized norm of customary international law prohibiting military sexual slavery. While rape was officially absent from international treaties at the close of World War II, the prohibition

[289] Copelon, *supra* note 276, at 203.
[290] U.N. Secretary-General, *supra* note 282, art. 5, ¶ 48, p. 13.
[291] *Id.*
[292] MacKinnon, *supra* note 248, at 181.
[293] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (Bosnian case); Mushikiwaho v. Barayagwiza, 1996 WL 164496 (S.D.N.Y. 1996) (Rwandan case).
[294] Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).
[295] *Id.*
[296] *Id.*

> against slavery was well established at that time, therefore granting the comfort women standing under the Act.[297]

Unfortunately, in October 2001, a U.S. court dismissed a case brought by former Korean comfort women, because it found the Japanese government to have immunity under the Foreign Sovereign Immunities Act (FSIA).[298] Specifically, the court rejected the argument that Japan's organizing of the comfort stations fell into the commercial activities exception of the FSIA as well as the argument that because of a *jus cogens* violation, Japan had lost its immunity.[299] Perhaps, as Shin points out, individual criminals could still be prosecuted, even if the suit against the Japanese government failed.[300]

An alternative to this implicit demand for an immediate and conclusive litigated resolution of comfort women's claims might be found in a Truth and Reconciliation Commission—assuming creation of such an institution were feasible. Where such mechanisms have succeeded, as in South Africa, they have addressed not only individual claims but at least part of the historical trauma and suffering that these typically leave behind.[301] However, the South African example seemed to have worked well largely because of its timing—as a form of transitional justice, when, for a brief period, there was popular support for the view that "amnesty was the price for allowing a relatively peaceful transition to full democracy."[302] Yet as Martha Minow also points out, Truth and Reconciliation Commissions are "less compatible where the victimized group has been expelled or so decimated that it has no nation in which to reconcile and rebuild.[303] Moreover, the distance in time separating survivors from the events suffered, and likewise, their effective geographic distance, for the most part, from the society of the perpetrators, mean that "Truth and Conciliation" is still not a viable solution.

In contrast, however, Amy Palmer remarks that in Sierra Leone the "Truth and Reconciliation Commission . . . has shown the world how successful open communication regarding widespread [sexual]

---

[297] Susan H. Shin, *Justice Delayed: Accountability in the "Comfort Women" Case in* ACCOUNTABILITY FOR ATROCITIES 443 (Jane E. Stromseth ed., 2003).
[298] Joo v. Japan, 172 F. Supp. 2d 52, 64 (D.D.C. 2001). The court also held that the case presented a non-justiciable political question. *Id.* at 64–67.
[299] *Id.* at 56–64.
[300] Shin, *supra* note 297, at 444.
[301] *See generally*, PATRICIA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001).
[302] MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 55 (1998).
[303] *Id.* at 63.

victimization can be."[304] In the ten-year war that left 75,000 dead,[305] forced marriage was routinely used to subjugate women of the opposing side, who were held hostage and systematically raped. This was distinct from the shorter-term modes of rape common in Rwandan and Yugoslavia.[306] As Palmer notes, there is a distinction between sexual slavery and forced marriage, as the types of "conjugal duties" that the "bush wives" were forced to bear were not exclusively sexual, but in some ways a bush wife's forced status as a "wife" was even worse, because of the external pressure reinforcing the coercion that she stay with her "husband" (especially when there were children from the "marriage").[307] Like the Sierra Leone "wives" who were branded by their captors, their chests carved with the letters "RUF" or "ARC" (which made escape harder, as these signs were interpreted as indicating allegiance to the rebel cause, making them vulnerable to attacks),[308] the comfort women were "branded" by their experiences of having been comfort women, often unable to reintegrate back into society and sometimes rendered sterile.

As the violent Sierra Leonean civil war unfolded, sexual violence, perpetrated by various factions, broke out on a massive scale. Mysteriously, however, it went almost unreported in the media, as the international community attended almost exclusively to the more widely-reported issue of forced amputation.[309] In addition to falling below the radar of the international media and the conscience of the world community, the experience of the bush wives of Sierra Leone evokes other similarities to the plight of the comfort women. In both cases, there is the use of coercion to make the captured woman a "wife," or a relatively permanent companion—or sometimes, less flatteringly, a type of "war supply." Bush wives, like the comfort women, also discovered after their war had ended that their plight had not, due to the lingering stigma of "having been married to a rebel and having assisted in rebel activities," which made return to family and community difficult.[310] As a striking

---

[304] Amy Palmer, Comment, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of "Forced Marriage"*, 7 NW. U. J. INT'L HUM. RTS. 133, 159 (2009).
[305] *Id.* at 134.
[306] *Id.* at 135; Sellers, *supra* note 283, at 343–48.
[307] *See* Palmer, *supra* note 304, at 134 (describing how thousands of women and girls "were forced to assume all the obligations of a traditional wife [and] also raped repeatedly, beaten and branded, made to care for their captor-husbands, and, if they became pregnant, forced to give birth to children").
[308] *Id.* at 135; Sellers, *supra* note 283, at 343–48.
[309] Palmer, *supra* note 304, at 144–45 (noting that by one estimate, up to 50% of Sierra Leonean women have been victims of sexual violence, and by another, that 215,000 to 257,000 women and girls have been so victimized).
[310] *Id.* at 134; *see also* HICKS, *supra* note 186, at 247–49 (documenting the tragic case of Kim Pok Tong, who became incapable of bearing children and an isolated widow living on meager savings).

indication of this harsh reality, many of the "bush wives" have remained together with their captors even to the present day.[311]

In this context of such stigma, trauma and loss, Palmer provides an intriguing account of how at least some victims were able to achieve legal redress through the mechanism of a Truth and Reconciliation Commission.[312] In addition, Palmer provides a striking account of how the Truth and Reconciliation Commission facilitated exchanges between victims and perpetrators that allowed "genuine healing and reconciliation" to occur.[313] Most importantly to this discussion about ways of achieving legal redress, the Appeals Chamber of the Special Court for Sierra Leone recognized not only sexual slavery but also forced marriage as a crime against humanity.[314] Though several key defendants were acquitted of this charge, Palmer notes that the Court has set an "important precedent for future prosecution of gender-based crimes in both ad hoc tribunals and the permanent ICC."[315]

As international human rights law continues to develop, even the comfort women or their heirs may eventually attain some form of legal redress. Article 7 of the Rome Statute, which covers crimes against humanity—and which delineates the reach of the ICC's prosecutorial jurisdiction in such cases—clearly covers crimes of forced marriage, and authorizes prosecution for "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."[316] In light of more recent conflicts and continuing humanitarian violations, perhaps the real heritage of the comfort women is less a history of collective amnesia than a history of attempting to work through the trauma of sexual slavery—a process that continues today. Such a process is far from simple because "working through" trauma (an act of analysis that produces interpretations allowing for responsible control) cannot be sharply delineated from its pathological twin of "acting out" trauma, or repetitively rehearsing it.[317] But it is a

---

[311] *See* Palmer, *supra* note 304, at 145.

[312] *Id.* at 156 (describing how in the initial stages the TRC commenced inquiries that ultimately resulted in the identification and bringing to justice of some perpetrators).

[313] *See id.* at 134 (describing how the Truth and Reconciliation Commission was first established to "provide a forum for both the victims and perpetrators of human rights violations to tell their story, [and] get a clear picture of the past in order to facilitate genuine healing and reconciliation").

[314] *Id.* at 156–57.

[315] *Id.*

[316] Rome Statute of the International Criminal Court, art. 7(1)(g), *entered into force* July 1, 2002, 2187 U.N.T.S. 3 (defining "[c]rime[s] against humanity" as including any such sexual violence, when committed knowingly and systematically "against any civilian population"); Palmer, *supra* note 304, at 157.

[317] *See generally* DOMINICK LACAPRA, WRITING HISTORY, WRITING TRAUMA (2001) (discussing the relationship of trauma with memory and with the telling and writing of

process we must continually challenge ourselves to undertake lest we forget not only our history but our humanity.

history, particularly in relation to the Holocaust); DOMINICK LACAPRA, HISTORY AND MEMORY AFTER AUSCHWITZ (1998) (same); LACAPRA, *supra* note 11 (same).