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Ripe for Justice: A New UN Tool to Strengthen the Position of the “Comfort Women” and to Corner Japan into its Reparation Responsibility

Brooke Say*

We want justice. We want the Japanese government to take responsibility. . . . What we are saying is the truth. We didn't come here to lie. We didn't come here to see Japan. We came here to tell the truth

Esmeralda Boe, East Timor¹

The Comfort Women's Story

The most recent report by the Special Rapporteur on violence against women found that in seven of eight reviewed countries in Asian

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NOTE: This comment is based upon information current as of January 2005. Action by the United Nations, Japan, and other international players could affect the continued accuracy of my statements and conclusions.

1. A surviving comfort woman, at the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery sums up the thoughts of her fellow victims and the passions of the United Nations community. The Tribunal passed a non-binding judgment of guilt on Japan's military as well as Emperor Hirohito for constructing, implementing, and supporting the “comfort stations.” Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan at ¶2 (2000), available at <http://home.att.ne.jp/star/tribunal/jedgement-e.html> http://www.womennews.co.kr/ewnews/etop_2000.htm#j (last <http://www.fire.or.cr/dic01/triboralverdict.htm>) (last visited January 25, 2004) [hereinafter Women's Tribunal].

conflicts, the clash led to sexual abuse and rape of women.² Up until the early 1990s, the “comfort women” were not even such a statistic.³ Yet, the absent record was not because these women were a few victims tucked in an unknown part of the world, but because of a systematic deception by the Japanese government and military.⁴ “Comfort women”⁵ is the euphemism used to describe the estimated 200,000⁶ Korean, Chinese, Indonesian, Filipino, Taiwanese, Dutch, and Japanese women⁷ lured, coerced,⁸ or forced into prostitution for the Japanese Army during World War II (1930s-1940s).⁹ The “comfort system” consisted of “rape camps”¹⁰ run by the military that allowed a soldier access to sexual

2. ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, SPECIFIC HUMAN RIGHTS ISSUES: SYSTEMATIC RAPE, SEXUAL SLAVERY AND SLAVERY-LIKE PRACTICES DURING ARMED CONFLICTS, REPORT OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS at ¶ 24, U.N. Doc. E/CN.4/Sub.2/2003/27 (2003) [hereinafter HIGH COMMISSIONER REPORT].

3. Women’s Tribunal, *supra* note 1, at ¶ 1.

4. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION OF HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, CONTEMPORARY FORMS OF SLAVERY: SYSTEMATIC RAPE, SEXUAL SLAVERY AND SLAVERY-LIKE PRACTICES DURING ARMED CONFLICT, FINAL REPORT SUBMITTED BY MS. GAY J. MCDUGALL, SPECIAL RAPPOREUR at ¶ 57, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) [hereinafter MCDUGALL FINAL REPORT] available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/7fba5363523b20cdc125665a800312a4b/3d25270b5fa3ea99802566f0032f220?OpenDocument> (Last Visited January 25, 2004).

5. For the entirety of this paper, the words “comfort women” will be surrounded by parenthesis to respect the euphemistic quality of their title and to respect the memory of the women themselves.

6. *Id.* See also USTINA DOLGOPOL & SNEHAL PARANJAPPE, COMFORT WOMEN: AN UNFINISHED ORDEAL, REPORT OF A MISSION, 29-53 (INTERNATIONAL COMMISSION OF JURISTS 1993). [hereinafter DOLGOPOL REPORT].

7. Troy Germaine Taylor, *Where Comfort Means Slavery*, PACIFIC RIM MAGAZINE 1 (2003), available at <http://www.langara.bc.ca/prm/2003/comfortwomen.html>.

8. The testimonies of victims speak to the deception employed by the army to recruit sexual slaves. Agents of the Japanese army offered girls well-paid, war-related jobs, as factory-workers, cooks, or laundresses, while their true “employment” would be in sexual service to the Japanese government. See GEORGE L. HICKS, COMFORT WOMEN, SEX SLAVES OF THE JAPANESE IMPERIAL FORCE XII, 24, 42, 75 (Allen & Unwin 1995); see generally GEORGE L. HICKS, COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR 45 (W.W. Norton & Co., 1995).

9. The Japanese kept an elaborate record of the operation of the period, treating the rape camps as another type of “wartime amenity.” The documented regulations for show an attempt to instill a “sense of decorum and legitimacy for the brutal practice.” While the majority of the women were either tricked or forced, some Japanese prostitutes willingly entered into the operations. Japan has over the years attempted to call all of the “comfort women” “volunteers.” UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS: REPORT OF THE SPECIAL RAPPOREUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, MS. RADHIKA COOMARASWAMY, IN ACCORDANCE WITH THE COMMISSION ON HUMAN RIGHTS RESOLUTION 1994/45 at ¶ 20, ¶ 27, U.N. Doc. E/CN.4/1996/Add.1 (1996) [hereinafter COOMARASWAMY REPORT].

10. MCDUGALL FINAL REPORT, *supra* note 4, at ¶ 7.

services for a fee.¹¹ Japan claimed that these camps prevented the Japanese army from raping civilian women, and saved Japan from the embarrassment of another “Rape of Nanking.”¹² Despite Japan’s attempt at further legitimatizing the system by institutional regulation of the rape camps, the military kept the women and girls in inhumane and horrendous conditions.¹³ Though they housed an abundance of torture and isolation, the “comfort” camps lacked adequate hygienic facilities, water, food, and ventilation and radiated disease and filth.¹⁴ In these inhumane conditions the Japanese army expected the women to service as many as sixty to seventy men per day.¹⁵

The “comfort system” has left survivors in utter devastation. The fact-finding of the Judgment of the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery (the Women’s Tribunal) revealed that today’s survivors suffer from both initial and continuing violations of their rights.¹⁶ The thirty percent that survived arguably suffered an even worse fate than those deceased: physical scars like forced pregnancy and abortion, sterility, STDs, insomnia, and mutilation, emotional wounds resulting in nervous breakdowns and psychological trauma, and societal stigmas resulting in poverty and ostracism.¹⁷ Many women found the shame, ostracism, and trauma unbearable, and committed suicide.¹⁸ The survivors remain ghosts of women past, dead in most respects.¹⁹

11. The “comfort system” originated from the high incidence of rape occurring by the Japanese troops in Japan’s attempts to conquer Asia, especially after the “Rape of Nanking” in 1937. The army established “comfort stations” as an attempt to discipline their army. COOMARASWAMY REPORT, *supra* note 9, at ¶ 25; Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in the United States Federal Court*, 16 BERKELEY WOMEN’S L.J. 174, 177-78 (2001); *see generally*, IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* (Penguin Books 1997).

12. The Japanese government also wanted to provide relief to its soldiers from the stress of strict military service. *See generally*, GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR*, 32, 45 (W.W. Norton & Co.1995).

13. Women’s Tribunal, *supra* note 1, at ¶ 21.

14. *Id.*

15. COOMARASWAMY REPORT, *supra* note 9, at ¶ 34.

16. Women’s Tribunal, *supra* note 1, at ¶ 35.

17. Wawrynek, Christine, U.N. Reports, *World War II Comfort Women: Japan’s Sex Slaves or Hired Prostitutes*, 19 N.Y.L. SCH. J. HUM. RTS. 913, 915 (2003); Arakawa, *supra* note 11, at 180; Women’s Tribunal, *supra* note 1, at ¶¶ 20-21.

18. Arkawa, *supra* note 11, at 180.

19. “My husband said, ‘it is better to have a left over dog than a left over person.’” (Belen Alonso Sagun, Philippines). “I don’t want to die as the ghost of a virgin.” (Mun Pil-gi, Korea); Women’s Tribunal, *supra* note 1, at ¶ 2. Dr. Yun Chung Ok, former president of the Korean Council for the Women Drafted for Military Sexual Slavery by Japan and advocate for the Women’s International War Crimes Tribunal on Japan Military Sexual Slavery, has estimated that only around 136 former “comfort women” still survive out of the highest estimates of 400,000 total victims. Among her many

Just as shocking as the original events is the fact that no binding court of law has held Japan accountable for these World War II crimes,²⁰ nor has Japan ever accepted legal responsibility for the "comfort system" and provided compensation to its victims.²¹ Only recently have several Japanese officials pledged moral responsibility, still consistently rejecting any legal compulsion.²² Official resistance has continued even as numerous international bodies²³ have requested that the Government compensate victims and recognize violations of treaties and norms.²⁴ Sadly, this stagnancy persisted even after the Japanese government made its own review of the allegations, examined wartime archives, and interviewed "comfort women," for an official study released in August of 1993.²⁵ As it stands, the atrocities of the "comfort system" are mainly

"comfort women" causes, Yun hopes to someday establish a monument to the "unknown comfort woman," so like "unknown" soldiers of war they can be recognized for their inhumane suffering and undying persistence of justice. Taylor, *supra* note 9, at ¶ 3.

20. Women's Tribunal, *supra* note 1, at ¶ 4 (including the International Criminal Tribunal for the Far East of 1946 or the Nuremberg Trials).

21. *Id.* at ¶¶ 4, 5, 20-21. In fact, Japan argues that it has no obligation under international law, and that if it did, those obligations were settled at the 1951 San Francisco Peace Treaty between the Allied powers and Japan after World War II and the 1965 Agreement on the Settlement of Problems Concerning property and Claims on Economic Cooperation between Japan and South Korea. COOMARASWAMY REPORT, *supra* note 9, at ¶¶ 106-107.

22. COOMARASWAMY REPORT, *supra* note 9, at ¶ 92.

23. The Women's Tribunal and the International Labour Organization are among a few of the international bodies that have demanded Japan bring justice through reparations and apology. Numerous foreign domestic bodies have made similar demands (i.e.: the Government of Korea). The U.S. House of Representatives demanded a "clear and unequivocal" apology and "immediate" compensation by the Japanese government to the "comfort women." Also, international jurists in Geneva, Switzerland ruled in 1993 that women who were forced to be sexual slaves of the Japanese military during World War II deserve at least \$40,000 each as compensation for their "extreme pain and suffering." H. CON. RES. 126, 105th Cong. (1998).

24. Among the number of international treaties and norms that Japan violated (*infra* notes 122-126), the Committee of Expert on the Application of Conventions and Recommendations of the International Labour Organization determined that the "comfort system" of military sexual slavery breached the ILO Forced Labour Convention, 1930 (No.29). UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS: CONTEMPORARY FORMS OF SLAVERY, SYSTEMATIC RAPE, SEXUAL SLAVERY, AND SLAVERY-LIKE PRACTICES DURING ARMED CONFLICT, UPDATE TO THE FINAL REPORT SUBMITTED BY MS. GAY J. MCDOUGALL, SPECIAL RAPPORTEUR, at para. 73, U.N. Doc. E/CN.4/Sub.2/2000/21 (2000) [hereinafter MCDOUGALL UPDATE]. The International Labour Organization even insisted that Japan take the initiative to meet with the organizations representing the women in order to develop a solution that responded to the majority's expectations for compensation. *Id.* (citing the Report of the Committee on the Application of Standards, International Labour Conference, 87th Session (June 1999) Geneva, at ¶ 8).

25. The Japanese study was entitled "On the issue of wartime 'comfort women' of 4 August 1993 by the Japanese Cabinet Councilors' Office on External Affairs." MCDOUGALL REPORT, *supra* note 5, Appendix, at ¶ 2 (citing U.N. Doc.

unremedied as the Japanese government denies²⁶ their legal liability for the “problem” of the “Comfort Women”²⁷: “no official compensation, no official acknowledgement of legal liability, and no prosecutions.”²⁸

I. Introduction

Japan’s continued refusal to make an official apology and take full responsibility for its government’s sexual enslavement of “comfort women”²⁹ has stirred an international outrage.³⁰ Running parallel to Japan’s defiance is an international persistence towards granting reparations to victims of human rights violations, one that has saturated United Nations policy.³¹ Yet, until now, there existed no general set of rules of customary international law that provided for individual

E/CN.4/1996/137,annex I).

26. MCDougall FINAL REPORT, *supra* note 4, Annex, ¶¶ 22-30. McDougall analyzes some of these typical excuses for refusing compensation, with the international responses to these defenses supported by customary international norms and treaties Japan was a party to.

27. See generally MCDougall FINAL REPORT, *supra* note 4, Annex, at ¶ 3; COOMARASWAMY REPORT, *supra* note 9.

28. MCDougall FINAL REPORT, *supra* note 4, at ¶ 72.

29. The author uses the term “comfort women” only in its historical context. Special Rapporteur Gay McDougall reflected that the historical choice of such a euphemism for so great a tragedy reflects how both the “international community as a whole, and the Government of Japan in particular, has sought to minimize the nature of the violations” against Asian women in the World War II period. MCDougall UPDATE, *supra* note 24, at n.97.

30. Indisputable proof of came in 1992, when a Japanese professor dug up wartime documents from the Japanese Self-Defense Agency archives and published evidence of the military’s “comfort station” system. COOMARASWAMY REPORT, *supra* note 9, at ¶¶ 41-43, 94; Suzanne O’Brien, Translator’s Introduction to YOSHIMI YOSHIKI, COMFORT WOMEN I, 7 (Suzanne O’Brien trans., Columbia University Press 2000) (1995). The government responses that followed varied from shifting the blame to civilians, to claiming voluntary participation and force, though each without an admission of legal responsibility. Japan has taken moral responsibility, and a few Japanese officials have given apologies. *Id.* The issue of an official apology is not without debate. Various news sources and media have declared certain statements by the Japanese Prime Ministers and government officials “apologies.” However, most “comfort women” activists refuse to accept these various statements as “apology.” See e.g., Washington Coalition for Comfort Women Issues, Inc. (WCCW), March 2005, at www.comfort-women.org; Mo Yan-chih, WWII ‘Comfort Women’ Still Waiting for Apology, TAIPEI TIMES, March 12, 2005 at <http://www.taipetimes.com/News/taiwan/archives/2005/03/12/2003245895>.

31. See generally Gabriela Echeverria, REDRESS, *The Draft Basic Principles and Guidelines on the Right to Remedy and Reparation: An effort to develop a coherent theory and consistent practice of reparation for victims*, at ¶ 20, available at <http://www.article2.org/mainfile.php/0106/60/#16>. “... Today there is an extensive corpus of law designed to protect all individuals from the abuses of governments, including ones own, both in times of peace and war. International law is also increasingly concerned with the individuals involved in atrocities, whether perpetrator or victim.” *Id.*

reparation claims for grave violations of human rights.³² In recent response, the UN Commission on Human Rights has focused its attention on developing a new substantive and comprehensive declaration that grants a broad right to reparation supported by the norms of substantive international law.³³ Already recognized as an authoritative source and declaration, the Draft, titled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law" ("Draft"),³⁴ could push Japan a step closer to justice and transformation.³⁵ The Draft may enable compensation and public recognition for "comfort women" in a way that past international pressure on the Japanese government has failed³⁶: an instrument of justice that the international community has waited for.³⁷

This comment focuses generally on how the Draft's Principles satisfy a great need in the international community for a tangible and unified source of reparations policy. More importantly, this comment focuses specifically on how the Draft will bolster the "comfort women" in their battle against Japan, by improving their position as victims and applying more pressure on Japan. Section II is an overview of the

32. Tomuschat, Christian, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 183 (2002).

33. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, 56TH SESSION, ITEM 11 (D): CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY, THE RIGHT TO RESTITUTION, COMPENSATION, AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, FINAL REPORT OF THE SPECIAL RAPPORTEUR, MR. M. CHERIF BASSIOUNI, SUBMITTED IN ACCORDANCE WITH COMMISSION RESOLUTION 1999/33, Annex U.N. Doc. E/CN.4/2000/62) (2000) [hereinafter DRAFT].

34. *Id.*

35. Lasco, Chante, Staff Article, *Repairing the Irreparable: Current and Future Approaches to Reparations*, 10 HUM. RTS. BR. 18, 20 (2003) (NGOs call attention to the fact that even in its Draft Guidelines form the principles are a point of reference for international jurisprudence on a national practice, including Inter-American Court of Human Rights Rulings). See Vandeginste, Stef, *Reparation*, 146, available at www.unog.ch/uncc (last visited December 11, 2003).

36. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS: QUESTION OF THE HUMAN RIGHTS OF ALL PERSON SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, C.H.R. Res. 1997/29, ESCOR Supp. (No.3) at 106, U.N. doc. E/CN.4/1997/104) (1997).

37. See Etsuro Totsuka, (Visiting Scholar, University of Washington), *War Crimes Japan Ignores: The Issue of "Comfort women": Achievements in the UN and Further Challenges*, 8 (November 30, 1999), available at <http://www.jca.apc.org/JWRC/center/english/Warcrime.htm> (last visited January 25, 2004) (the author points out that numerous UN experts and commissions have been pushing for justice, but resolves that "a long lasting international campaign for the implementation of the recommendations from Ms Coomaraswamy, the ILO Committee of Experts and Ms McDougall" still lies ahead).

inadequacy of current international reparations instruments and policies, focusing on their lack of detail and accountability. Section II also traces the history of the Draft Principles through the UN Human Rights Commission. Section IV centers, in great detail, on the Principles themselves: the form and content of remedies and the international norms that comprise the Draft. This section endeavors to (1) show how the Principles surpass current approaches and will enable positive change in enforcing reparations policy and (2) designate how specific Principles will improve the position of the “comfort women,” enforce the reparations that they and UN experts have called for, and enhance their fight for justice in Asia.

Section IV analyzes Japan’s reaction to the Draft as indicative of its weakening defenses. This section also examines the ability of several Japanese court judgments, the Asian Women’s Fund, and the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery,³⁸ acting in conjunction with the Draft, to lay the foundation for a substantive reparations policy. Finally, Section IV shows the strength of the Draft as an already authoritative source for international change.

Section V concludes that regardless of Japan’s response, the Draft’s victim-centered focus³⁹ gives unprecedented, broad rights to victims and broad remedies for mistreatment that tailor to the “comfort women’s” circumstances.⁴⁰ The comment resolves that at the very least the Draft will be a catalyst for consideration of a Japanese reparations policy and a foothold for the international community and the “comfort women” over Japan. At the most, it sees the Draft delivering true justice to these Asian women, their families, and their societies.

II. Fragments to Foundations: Building Reparation Policy from the Ground Up: Road to Reparations

A. *The Inadequacy of Current International Reparation Policies and Instruments*

At present, rights of reparation and compensation are scattered among a diversity of sources, in a variety of descriptions.⁴¹ A strikingly

38. Women’s Tribunal, *supra* note 1, at ¶ 6.

39. Lasco, *supra* note 35, at 20 (citing the Draft Preamble). By “adopting a victim-orientated point of departure, the community, at local, national and international levels, affirms its national solidarity and compassion with victims of violations . . . as well as with humanity at large.” *Id.*

40. DRAFT, *supra* note 33, at ¶¶ 25-26 (Principles 25-26).

41. See Asian Legal Resource Centre, *The Draft Guidelines Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* 3, available at

different reparations policy is necessary to match the rising interest in victims' justice, and to aid the "comfort women's struggle."⁴² Instead of providing strength in numbers, a multiplicity of standards dilutes the overall impact and hinders their substantive application as international norms providing full reparation.⁴³ A spectrum of international instruments acknowledge a generalized right to an effective remedy or a right to adequate compensation for violations of international norms.⁴⁴ Yet, many international documents provide remedy rights for victims in such vague terms that allow each state to interpret "remedy" as it sees fit, leaving reparations at inconsistent, and sometimes nonexistent, levels.⁴⁵

www.alrc.net/mainfile/php/odcumente/115. The author's examples of current instruments include: the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention of the Rights of the Child, and the United Nation Convention on the Protection of All person from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, all reference the right to reparation, the Inter-American Torture Convention, the African Charter of Human and Peoples' Rights, the American Convention of Human Rights, and the European Convention of Human Rights obligate state to afford reparation, effective remedies, or adequate compensation. The Centre also cites the jurisprudence of treaty-based bodies like the Human Rights Committee, the Committee Against Torture, the Inter-American Commission and Court of Human Rights, and the European court of Human Rights affecting the scope and form of current reparations policy. *Id.*

42. Tomuschat, *supra* note 32, at 170.

43. *Id.*

44. UNITED NATIONS, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES: REVIEW OF FURTHER DEVELOPMENT IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED, STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, FINAL REPORT SUBMITTED BY MR. THEO VAN BOVEN, SPECIAL RAPPORTEUR, at ¶¶ 26, 28, U.N. DOC. E/CN.4/Sub.2/1993/8 (1993) [hereinafter VAN BOVEN STUDY]. Other international instruments providing a generalized right to a remedy for victims of violation of international human rights and humanitarian law include: The Universal Declaration of Human Rights at Article 8 (G.A. Res. 217A, art. 8, U.N. Doc. A/RES/271A(III) (1948); the International Covenant on Civil and Political Rights at Article 2, The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (U.N. G.A. Res. 40/34), The Rome Statue of the International Criminal Court. However, several, like the Universal Declaration do not mention any kind of reparation, just remedy. See Vandeginste, *supra* note 35, at 150-151; BASSIOUNI REPORT, *infra* note 53.

45. Article 8 of the Universal Declaration of Human Rights imparts that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." G.A. Res. 217A(III), U.N. GAOR, the Sess., Supp. No., at 71, U.N. Doc. A/810 (1948). The UN General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985 recognizes more specific rights, but conditions the "endeavor to provide financial compensation" with a non-mandatory "should." G.A. 40/34, annex, 40 U.N. GAOR, Supp. No. 53, at 214, U.N. Doc. A/40/53 (1985). More progressive binding treaties like the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) offer "an enforceable right to fair and adequate

Arguably, the Rome Statute for the International Criminal Court⁴⁶ offers the most progressive and recent response (only two years old) to reparations demands. However, it falls short of a comprehensive statement, and again leaves the details of “restitution, compensation, and rehabilitation” to the States.⁴⁷ As scholars have noted, leaving details to the States often leaves victims neglected yet again.⁴⁸ Even one of the most advanced international regimes in the field of human rights, the European Convention of Human Rights, gives substantial discretion to courts to grant “just satisfaction . . . only if necessary.”⁴⁹ This provision remains another example of the perpetually weak link between a violation and the right to reparation.⁵⁰ Unfortunately, such broad language has often been translated into mere “judicial pronouncement” of a State’s breach of commitments, as “sufficient” redress, instead of financial compensation for victims.⁵¹

B. A Necessity Many Years Due

Current reparation approaches in international instruments embody the very hindrances to full reparation that necessitated the Draft Guidelines. Relegating the right to reparation to a sentence in a sea of international policy, failing to adequately accommodate a victim’s specific needs, narrowing reparations to compensation, and subverting the revelation of truth, are just a few examples of the flaws of current attempts.⁵² While similar in enforcement status to other non-binding

compensation, including the means for as full rehabilitation as possible” but specify no further. See VAN BOVEN STUDY, *supra* note 44, at ¶ 28.

46. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998, Art. 12, U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998), *available at* <http://www.un.org/icc> [hereinafter ROME STATUTE]. The Rome Statute also provides for reparations from a Victims’ Trust Fund in Article 79 for those “natural person who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,” including genocide, crimes against humanity, and jurisdictionally specified war-crimes. See Lasco, *supra* note 35, at 21 (the ICC hopes that the fund will yield more than court-ordered reparations).

47. ROME STATUTE, *supra* note 46, at 1045, Article 75(2).

48. Tomuschat, *supra* note 32, at 170.

49. *Id.*

50. *Id.* at 183.

51. *Id.*

52. VAN BOVEN STUDY, *supra* note 44, at ¶¶ 134-135; UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, 56TH SESSION, ITEM 11(D): CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF : INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY: THE RIGHT TO RESTITUTION, COMPENSATION, AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, FINAL REPORT OF THE SPECIAL RAPPORTEUR, MR. M. CHERIF BASSIOUNI, SUBMITTED IN ACCORDANCE WITH COMMISSION RESOLUTION 1999/33, U.N. Doc. E/CN.4/2000/62 (2000) [hereinafter BASSIOUNI REPORT].

declarations, the detail of the Draft Guidelines already carries greater weight in the international community than the water-downed⁵³ compensation clauses scattered among international instruments. The Draft's twenty-seven Principles give procedure and substance to reparations policy, which has already begun to engender an international consensus.⁵⁴

The Asian Legal Resource Centre, one of the many Non-Governmental Organizations (NGOs) seeking justice for victims, confirmed the flawed state of reparations policy: a "coherent and universal set of norms" on reparations is necessary to harmonize a rapid development of the rights that deviate from previous convoluted attempts.⁵⁵ The Centre joins the UN and many other organizations in its hope that the Basic Principles will be the yardstick by which treatment of victims of human rights violations will be measured.⁵⁶ While nothing new, the Draft adeptly unites existing international norms, and puts force behind emerging ones.⁵⁷

C. *Drafting History and Procedure*

On August 31, 1989, Resolution 1989/13 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities assigned Dutch lawyer, Theo van Boven, now former head of the UN Center for Human Rights, to a study of the right to restitution,⁵⁸ compensation,⁵⁹

53. Lasco, *supra* note 35, at 20.

54. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS: ADMINISTRATION OF JUSTICE, MASS AND FLAGRANT VIOLATIONS OF HUMAN RIGHTS WHICH CONSTITUTE CRIMES AGAINST HUMANITY AND WHICH TOOK PLACE DURING THE COLONIAL PERIOD, WARS OF CONQUEST AND SLAVERY, at ¶ 12, U.N. Doc. E/CN.4/Sub.2/2001/8 (2001). See also HIGH COMMISSIONER REPORT, *infra* note 3, at ¶ 11 (expert Bassiouni hoping that the Draft would "consolidate international *corpus juris*" on the subject of reparations).

55. Asian Legal Resource Centre, *supra* note 41, at 4. The Centre pinpoints 4 needs in a comprehensive reparation policy: (1) clarify the terminology surrounding the international legal norms on "reparation"; (2) guarantee that the victim will be the "point of departure" for development; (3) clarify the connection of the right to international human rights law and humanitarian law; (4) ensure that the measure of damages correlates to the gravity of the harm).

56. Lasco, *supra* note 35, at 20.

57. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, CIVIL AND POLITICAL RIGHTS: THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW, NOTE BY THE HIGH COMMISSIONER FOR HUMAN RIGHTS at ¶ 7, U.N. Doc. E/CN.3/2003/63 (2003) [hereinafter HIGH COMMISSIONER NOTE]; *id.*, annex I, at ¶ 11.

58. Restitution relates to the re-establishment of the victim's position prior to the violations of human rights, taking the form of restoration of liberty, citizenship or residence, employment and property. VAN BOVEN STUDY, *supra* note 44, at ¶¶ 9-11 (current Principle 22).

rehabilitation,⁶⁰ and satisfaction and guarantees of non-repetition⁶¹ for victims of gross violations of human rights and fundamental freedoms.⁶² After examining existing international human rights norms alongside the decisions and views of international human rights organs, on compensation, van Boven outlined the original twenty-seven Basic Principles and Guidelines surrounding these rights.⁶³ Thereafter, the Commission on Human Rights appointed U.S./Egyptian lawyer Cherif Bassiouni in resolution 1998/43, as an independent expert to revise van Boven's principles and guidelines.⁶⁴ The Commission on Human Rights then adopted the Draft Guidelines titled "Basic principles and guidelines on the rights to a remedy and reparation for victims of violations of international human rights and humanitarian law."⁶⁵ Most recently the Chairperson-Rapporteur held a consultative meeting from September 30 to October 1, 2002, where fifty-two Member States and twelve Intergovernmental Organizations (IGOs) and NGOs supplied feedback and proposed changes in hopes of forthcoming completion.⁶⁶ On April 23, 2003, the Commission on Human Rights requested another consultative meeting that examines a revised version.⁶⁷ The Commission stood dedicated to finalization of the Draft in that meeting, so as to

59. Compensation pertains to economically assessable damage resulting from human rights violations, including physical or mental harm, pain, suffering, emotional distress, lost opportunities, including education, loss of earnings and earning capacity, reasonable medical and other expenses of rehabilitation, harm to property or business; harm to reputation or dignity, and reasonable costs and fees of legal or expert assistance in obtaining a remedy. *Id.*

60. Rehabilitation is the provision of legal, medical, psychological and other care, and measure to restore the dignity and reputation of victims. *Id.*

61. Satisfaction and guarantees of non-repetition implies the cessation of continuing violations; verification of facts and full and public disclosure of the truth; apology, including public acknowledgement of facts and acceptance of responsibility; bringing to justice the person responsible for the violations; commemorations and paying tribute to the victims; including of an accurate record of human rights violations in educational curricula and materials. *Id.*

62. *Id.* at ¶ 1.

63. *Id.* at ¶¶ 1-4 (van Boven revised two versions of the document, E/CN.4/Sub.2/1993/8 and E/CN.4/Sub.2/1996/17, respectively, with a 3rd version in E/CN.4/1997/104 (Draft Basic Principles and Guidelines) on January 16, 1997); BASSIOUNI REPORT, *supra* note 52, at ¶ 1.

64. E.S.C. Res. 1998/43, U.N. ESCOR, 54th Sess., 52nd mtg., Supp. No. 3, at 151, U.N. Doc. E/CN.4/RES/1998/43 (1998).

65. Resulted in a final report in January of 2000. BASSIOUNI REPORT, *supra* note 52, at ¶ 1.

66. See generally HIGH COMMISSIONER NOTE, *supra* note 57.

67. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS: HIGH COMMISSIONER, THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GRAVE VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, COMMISSION ON HUMAN RIGHTS RESOLUTION, at ¶ 5, U.N. Doc. E/CN.4/2003/L.11/Add. 4 (Resolution 2003/34).

submit the final outcome to the Commission in its 60th session “as a matter of priority.”⁶⁸ Though it has been a long road to this reparation innovation, the positivity that permeated the latest meeting indicates that an end is in sight.⁶⁹

III. The Draft’s Principles⁷⁰—A Boost for International Law and the “Comfort Woman”

A. Preamble: The “Victim-Based” Perspective

Just a glance at the *seven* pages outlining the Draft Guideline’s Principles indicates that the Draft Guidelines are no ordinary attempt to recognize a victim’s right to reparation.⁷¹ The sheer detail of the Principles shows an intentional acknowledgement of the broad international sources of reparation rights and the State’s obligations. The drafters did not slip the victim’s right to reparation into a footnote, sentence, or paragraph, or base the drafting on what scholars, politicians, or ambassadors thought the rights should address. In an unprecedented statement, the preamble establishes that the document was written from a “victim-oriented point of departure.”⁷² By the drafters’ intention, the entire development of the right not only stems from that specific

68. *Id.* As of April 1, 2005 the Commission had still not officially adopted the Draft, though it had just been re-presented to the Commission. See *UN Press Release Draft Basic Principles and Guidelines on Right to Remedy for Victims of Human Rights Violations Presented to Commission: HR/CN/05/29 April 1, 2005 available at* <http://domino.un.org/UNISPAL.NSF/0/8855bd95a3730ade85256fd9004f74f1?OpenDocument>.

69. An earlier call in 2000 to comment on the draft was extremely modest, with only 6 states replying. The last meeting brought much more substantial and positive support. See generally ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, QUESTION OF THE HUMAN RIGHTS OF ALL PERSON SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT: VIEWS AND COMMENTS RECEIVED FROM STATES ON THE NOTE AND REVISED DRAFT BASIS PRINCIPLES AND GUIDELINES ON THE RIGHT TO REPARATION FOR VICTIMS OF [GROSS] VIOLATIONS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW, REPORT OF THE SECRETARY GENERAL, U.N. DOC. E/CN.4/1998/34 (1997). Tomuschat offers that while the Draft Guidelines have sat on the agenda of the Commission for many years, as the result of the complications in international law and practice in dealing with individuals and nations, they still constitute a “new-and almost revolutionary-approach to the issue [of reparations policy].” Tomuschat, *supra* note 32, at 183.

70. The Principles are examined in their current form, as they stand before revision in the final consultative meeting. The changes proposed in the last consultative meeting are examined in a later section as indicators of section still needing to be “ironed out” before finalization. Japan’s comments on specific principles are also outlined to enable prediction of the effect the Draft Guidelines will have on their reparations policy.

71. DRAFT, *supra* note 33.

72. Lasco, *supra* note 35, at 20 (citing Draft Preamble); see generally VAN BOVEN STUDY, *supra* note 42.

perspective, but takes tangible form in the structure and content of the draft.⁷³ For example, the drafters organized the Principles according to the established needs and rights of victims, i.e., Victim's Right to a Remedy, instead of by legal sources and instruments.⁷⁴ Indeed, the Draft upholds a revolutionary approach to reparations.⁷⁵

By shifting the focus from international assumptions about what remedies should entail, and stepping into the victim's standpoint, the Draft Guidelines also correct many of the faults entrenched in current reparation policies.⁷⁶ Instead of just studying the foundation for the right in international law, expert drafter, van Boven, compared the heap of reparation attempts in international instruments to the articulations made by real victims of violations.⁷⁷ Principally, he discovered that numerous instruments explicitly disregard the victim they intend to help, resulting in their apparent elusiveness.⁷⁸ Ironically, these "authorities" found the perspective of the victim a "complication, an inconvenience, and a marginal phenomenon."⁷⁹ In response, van Boven set a "previously unrecognized capstone" to standardize development of the principles: the victim-based perspective.⁸⁰ The Commission followed suit by shaping the Principles around their "compassion with victims of violations."⁸¹ The Draft requires States to recognize the victim's right to fair and adequate reparation and commit "to render justice by removing or redressing the consequences of the wrongful acts and by preventing . . . violations."⁸²

Starting from the victim's perspective nearly guarantees a set of Principles that better molds reparations to the diverse needs of victims, and enables repair for each individual situation of harm. Indeed, the

73. HIGH COMMISSIONER NOTE, *supra* note 57, at ¶ 6.

74. *Id.*

75. Tomuschat, *supra* note 32, at 183.

76. Asian Legal Resource Centre, *supra* note 41, at 4.

77. VAN BOVEN STUDY, *supra* note 44, at ¶ 131, ¶ 124 (finding that the Special Rapporteur on extrajudicial, summary or arbitrary execution recently state that with regard to compensation granted to families of victims, only one Government had reported that "indemnification was being provided" and that large numbers of victims, "as a result of the actual content of national laws . . . fail to receive reparation which is due to them").

78. *Id.* at ¶¶ 130-135.

79. *Id.* at ¶ 133.

80. Asian Legal Resource Centre, *supra* note 41, at 4.

81. Lasco, *supra* note 35, at 20.

82. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES: THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES, REVISED SET OF BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW PREPARED BY MR. THEO VAN BOVEN PURSUANT TO SUB-COMMISSION DECISION 1995/117, at ¶ 7, U.N. Doc. E/CN.4/Sub.2/1996/17 (1996).

“comfort women” position is not unique among victims of rape, which has for centuries been “downplayed as an unfortunate but inevitable, side-effect of war.”⁸³ But the women’s situation is also unusual, as a tragedy hidden for decades. They stand as women victims, whose country refuses an official apology and full public disclosure of truth, whose bodies bear physical scars of violation, and whose dignity was permanently disfigured. The Draft looks at reparation through the eyes of a raped woman, providing Principles that treat her with an equal right to remedy and supplying a cornucopia of reparations to match her needs.⁸⁴

Women’s Rights scholars are one of several sources that affirm the Draft’s excellence in ingesting that “international law must better reflect the experience of women and the true nature of the harms done to them.”⁸⁵ Numerous experts, NGOS, and UN officials have for years delineated the need for consideration of the specific circumstances and needs of female victims of sexual slavery.⁸⁶ Moreover, van Boven’s final report highlights “violence against women” as a matter of widespread concern and “highly relevant” in the drafting of the Principles.⁸⁷ Special Rapporteur on systematic rape, sexual slavery, and slavery-like practices during periods of armed conflict, Gay J. McDougall’s 2000 update to the Commission stressed that States must promote equal access to justice, equal remedies, and equal forms of redress for women victims of international law violations.⁸⁸ Principle 27 deals with these requests directly.⁸⁹ Further, the Principles’ victim-based perspective accommodates McDougall’s recommendations for “an

83. MCDUGALL FINAL REPORT, *supra* note 4, ¶ 1010 (quoting Machel, A/51/306, at ¶ 91).

84. DRAFT, *supra* note 33, at ¶ 27 (Principle 27’s Non-Discrimination Among Victims).

85. *Id.*

86. See, e.g., UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS: SPECIFIC HUMAN RIGHTS ISSUES, WRITTEN STATEMENT SUBMITTED BY ASIAN-JAPAN WOMEN’S RESOURCE CENTRE, NON-GOVERNMENTAL ORGANIZATIONS IN SPECIAL CONSULTATIVE STATUS, U.N. Doc. E/CN.4/Sub.2/2003/NGO/47 (2003) [hereinafter ASIAN-JAPAN WOMEN’S RESOURCE CENTRE].

87. VAN BOVEN STUDY, *supra* note 44, at ¶ 22.

88. MCDUGALL UPDATE, *supra* note 24, at ¶ 83.

89. Principle 27: Non-Discrimination Among Victims; “The application and interpretation of these principles and guidelines must be consistent with internationally recognized human rights law and be without any adverse distinction grounded on rounds such as race, colour, gender, sexual orientation, age, language, religion, political or religious belief, national ethic or social origin, wealth, birth, finally or other status, or disability. DRAFT, *supra* note 33, at ¶ 27. Most importantly, Principle 27 adheres to customary international law to prevent only male relatives to claim and receive compensation on behalf of women victims. MCDUGALL FINAL REPORT, *supra* note 4, at ¶ 89.

effective, gender-sensitive response” that pinpoints the “full range of obligations, legality and accountability of all parties . . . [and] the steps to ensure adequate prevention, investigation, and criminal and civil redress, including compensation of victims.”⁹⁰

B. Principles 8 and 9: Broad Definition of Victim

In furtherance of favoring the victim’s perspective, Principles 8 and 9 broadly define the “victim.”⁹¹ Principle 8 describes the victim in terms of the usual physical, economic, or legal conceptions of harm.⁹² But Principle 8 also recognizes that a victim suffers emotional and mental harm, psychological elements of harm which the 2002 UN consultative meeting stressed as of great importance and consistent with international standards found in the Convention against Torture.⁹³ Moreover, the Draft’s “victim” also includes a “dependent or a member of the immediate family or household of the direct victim, as well as [a person who intervened to assist a victim or prevent further violation]” who experiences physical, mental, or economic harm.⁹⁴ By detailing numerous and broad conceptions of harm in the definition, the Draft Guidelines enable corresponding reparations for each specific harm in Principles 21 through 25, the Forms of Reparations.⁹⁵ Such correlation is yet another example of the victims’ priority under the Principles.

Principle 10 also demands compassionate and respectful treatment for the victim’s dignity and human rights by States, IGOs, and NGOs.⁹⁶ The Principles support ensuring the “safety and privacy,” and avoiding the re-traumatization, of victims and their kin, especially in legal or administrative procedures designed to provide justice and reparation.⁹⁷

“Comfort system” victims will seize on these Principles that recognize and repair the fullness of their injury. While physical injury marred every girl and woman made to service sixty soldiers a day, the

90. MCDUGALL FINAL REPORT, *supra* note 4, at ¶ 109.

91. A person is “a victim” where, as a result of acts or omission that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person’s fundamental legal rights. A “victim” may also be a dependant or a member of the immediate family or household of the direct victim.

DRAFT, *supra* note 33, at ¶ 8 (Principle 8).

92. *Id.*

93. Drafters also commented that the terms might benefit from further clarification in the text. HIGH COMMISSIONER NOTE, *supra* note 57, at ¶ 36.

94. DRAFT, *supra* note 33, at ¶ 8.

95. *Id.* at ¶¶ 21-25 (Principles 21-25).

96. *Id.* at ¶ 10.

97. *Id.* (Principle 10).

healing of emotional scars and economic and social rehabilitation likely presents the greatest need in the lives of the now eighty and ninety year old women survivors.⁹⁸ The inclusion of reparation to a victim's family members also meets the needs of Asian families who suffer alongside the continuing injustice to the "comfort women."⁹⁹ Asian families of victims have also been subject to the ostracism associated with their "comfort women" as well as the psychological suffering shared in the experience.¹⁰⁰ While the majority of "comfort women" have died since the atrocity first began, Principle 8 enables reparation to reach beyond death to remedy wrongs.¹⁰¹

C. Principles 21-25: Forms of Reparations

Though the Draft only commands that States "should" provide reparation in the form of restitution,¹⁰² compensation, rehabilitation, and satisfaction¹⁰³ and guarantees of non-r  p  tition, it succeeds in using terms that denote particular and wide-ranging types of redress, material and non-material, for victims of human rights violations. The effect of this particularity and expansivity allows the Draft to mold reparations to victims' circumstances, echoing the victim-based perspective.¹⁰⁴ Though

98. COOMARASWAMY REPORT, *supra* note 9, at ¶ 34; *but see* Taylor, *supra* note 7, at ¶ 1 (saying that the average was around 30-40). "My husband said, 'it is better to have a left over dog than a left over person.'" (Belen Alonso Sagun, Philippines). Women's Tribunal, *supra* note 1, at ¶ 2.

99. *See* Taylor, *supra* note 7, at ¶ 9. The author sat in an interview with former "comfort woman," Lee Ok Soon, now 76, living in a specially designed nursing home exclusive to former Korean "comfort women." Lee spoke of the ostracization she still experiences: "I have two brothers and two sisters who are younger than me," she said. "My brothers come to visit me quite often—now they know—but back in 1996 when I was first reunited with them, I didn't tell them any details. Now, they feel sorry for me and spend time with me and counsel me, but my two sisters are very different. They feel quite ashamed of me and say that it was all my fault. They won't visit me at all." *Id.*

100. *Id.*; *see generally*, HICKS, *supra* note 12, (many "comfort women" only began their demands in the 1980s, when most of their family members had died and they no longer would "cast shame" upon them).

101. DRAFT, *supra* note 33, at ¶ 8;

102. Principle 22 defines restitution as restoring "the victim to the original situation before violations . . . occurred . . . include[ing] restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence, and restoration of employment and return of property." *Id.* at ¶ 22.

103. Satisfaction is generally defined as another form of redress that includes "the giving of something with the intention, express or implied, that it is to extinguish some existing legal or moral obligations . . . the fulfillment of an obligation; especially the payment in full of a debt"(explained in Principle 25). BLACKS LAW DICTIONARY, 1343 (7th ed. 1999).

104. One scholar has noted that the Draft's adoption "would result in standards that are amenable to universal application by all states, reflecting the various legal cultures and traditions of the world, rather than those of only one or some sections," thus better molding reparations to each victim's situation in the world. Echeverria, *supra* note 31.

the Draft itself does not mention particular violations like systematic sexual slavery, it incorporates van Boven's intent to take into account "violence against women,"¹⁰⁵ and reflects the expert recommendations on compensation, made by Special Rapporteur on Systematic Rape, Gay J. McDougall, from her study of the "comfort women" and other female victims of sex crimes.¹⁰⁶ While some NGOs criticize the Draft as skipping over reparation for rape victims and demand specific reference to gender-specific violations, McDougall's reports show she sees the Draft as a great leap forward.¹⁰⁷ The Special Rapporteur identified that the greatest need was for a reparations policy that accounts for (1) the gravity, scope, and intentionality of violations (now accounted for in Principle 15),¹⁰⁸ (2) the culpability of public officials (Principle 16),¹⁰⁹ (3) the time passing since the first occurrence, (4) the psychological harm caused by the delay in relief (Principle 23),¹¹⁰ (5) and compensation for any (a) economically-assessable damage; (b) physical or mental harm, (c) pain and suffering, emotional distress, (d) lost opportunities in education, earnings, and earning capacity, (e) reasonable medical and other expenses of rehabilitation, (f) harm to reputation or dignity, and (g) reasonable cost and fees of legal assistance to obtain a remedy (Principles 23 and 24).¹¹¹ Therefore, not only does the Draft give superior rights to all victims, it incorporates the very issues that experts on sexual violence and the "comfort women" have found most essential to a well-rounded reparation solution. It also satisfies women's rights activists, who desire that the Principles in application consider gender-specific "consequences and obstacles to redress," while not necessitating their specific presence in the document.¹¹²

Principles 23 and 24's compensation for rehabilitative care (i.e., "costs for legal, expert, medical, psychological, or social services") mirrors McDougall's final report recommending that victims of sexual

105. VAN BOVEN STUDY, *supra* note 44, at ¶ 22.

106. See *infra* note 217 and accompanying text.

107. *Id.*

108. Principle 15 reads that "reparation should be proportional to the gravity of the violations and the harm suffered." Draft, *supra* note 32, at ¶ 15.

109. Principle 16 reads that "In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for its acts or omission constituting violations of international human rights and humanitarian law norms." *Id.* at ¶ 16.

110. Principle 23 provides for compensation for "(a) Physical or mental harm, including pain, suffering and emotional distress; . . . (e) Cost required for . . . psychological and social services." *Id.* at ¶ 23.

111. MCDUGALL FINAL REPORT, *supra* note 4, Annex, ¶ 67; see also Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 544-45 (1994).

112. MCDUGALL UPDATE, *supra* note 24, at ¶ 70.

violence be afforded "appropriate support services, including psycho-social counseling, legal aid, emergency medical care, and reproductive health services."¹¹³ As victims of sexual slavery, "comfort women" survivors have struggled and continue to struggle in poverty, unable to receive proper medical or psychosocial rehabilitation.¹¹⁴ In essence, they are raped again, constant victims of history with their life and health ripped from their very bodies. Not unlike other victims of human rights violations, the "comfort women" may finally receive comfort from these Principles. By providing for whole-person reparation, Principle 23(d) allows compensation not only for bodily injury, but also accounts for the intangible destruction of reputation and dignity.¹¹⁵

It is important to remember that the reparation forms listed in the Draft are not exhaustive of the types of remedy, but rather just suggestions remedying common types of damage.¹¹⁶ The adoption of these Principles gives the "comfort women" the first international source of tangible remedies able to cater to their needs.

Even more than adhering to expert opinions on reparation, the Draft's reparation forms match what the "comfort women" have themselves consistently requested: "sincere and individual apologies," acknowledgement of participation by the Japanese government and army, recognition of the nature and extent of violation of international law, and compensation for individual victims.¹¹⁷ Van Boven's research confirmed that many victims' first request in demanding justice is for the "Revelation of truth." Yet, current reparation policies center primarily on monetary compensation.¹¹⁸ In contrast, the draft takes the view that "it must be clearly known what should be repaired and prevented" and outlines a range of repairs to be made for the violations.¹¹⁹ In addition to Principle 23's compensation, Principle 25 grants victims life-altering "satisfaction and guarantees of non-repetition" that include a(n):

(a) apology, including public acknowledgement of the facts and

113. McDougall FINAL REPORT, *supra* note 4, at ¶ 104.

114. *Id.*

115. DRAFT, *supra* note 33, at ¶ 23.

116. HIGH COMMISSIONER NOTE, *supra* note 57, Annex I at ¶ 141.

117. COOMARASWAMY REPORT, *supra* note 9, at ¶¶ 61-65; "I lost my life. I was regarded as a dirty woman. I had no means of supporting myself and my job opportunities were extremely limited. I suffered terribly. The next generation of Japanese people must know my suffering that their parents did such bad things." (Teng-Kao Pao-Chu, Taiwan). Women's Tribunal, *supra* note 1, at ¶ 2.

118. VAN BOVEN STUDY, *supra* note 44, at ¶ 134.

119. Jose Zalaquett, *The Matthew O. Tobriner Memorial Lecture; Balancing ethical imperatives and political constraints: The dilemma of new democracies confronting past human rights violations*, 43 HASTINGS L.J. 1425, 1433 (1992) (quoting a statement by a member of the Chilean National Commission on Truth and Conciliation).

- acceptance of the responsibility;
- (b) cessation of continuing violations;
- (c) full and public disclosure of truth;
- (d) official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of victims;
- (e) commemorations and tributes to victims;
- (f) accurate account of violations in educational materials;¹²⁰
- (g) prevention of the recurrence of violations.¹²¹

These provisions demonstrate the principle that “society cannot simply block out a chapter of its history; it cannot deny the facts of its past, . . . [Truth] brings a measure of healthy social catharsis.”¹²² Principle 25 indicates the Draft’s intent to address the restoration and rehabilitation of Japanese society, by requiring prevention, publicizing of victims rights, and full public disclosure.¹²³ Hope remains that these public offerings can begin to repair the damage done to the victims, and to society itself, allowing everyone to “move on with life.”¹²⁴

In sum, the Draft obligates the States to avoid the half-hearted or ineffective reparations policies that plagued the past and have resulted in the suffering of thousands like the “comfort women.” It provides the Basic Principles that should guide policy-making and unites the effort to remedy past injustices. By establishing such a broad package of reparation rights, the Draft has finally given “comfort women” a substantive international source for the demands they have made on Japan. Further, the Draft supports both financial and non-financial elements of reparation, meeting what victims have voiced as practical

120. Many “comfort women” have requested that historical and educational books be revised to reflect the true history of Japan during World War II and the army’s “comfort system.” COOMARASWAMY REPORT, *supra* note 9, at ¶ 60. See Kathleen Woods Masalski, *Examining the Japanese History Textbook Controversies (2001)*, available at <http://www.indiana.edu/~japan/Digests/textbook.html#5> (speaking of the conservative movement to “correct history” the Japanese history curriculum initiated in the early 1990s by Fujioka Nobukatsu, in order to remove any reference to “dark history,” like the comfort women).

121. DRAFT, *supra* note 33, at ¶ 25 (Principle 25).

122. Zalaquett, *supra* note 119, at 1433.

123. DRAFT, *supra* note 33, at ¶ 25.

124. Vandeginste, *supra* note 35, at 148.

and personal needs.¹²⁵ The scope of the reparations enables a victim-tailored remedy and a nearly mandatory State response that could be a piece to Japan's reparation transformation.

D. Principles 6 and 7: No Statute of Limitations

Principle 6 highlights a significant piece of developing reparation policy, especially to the "comfort women's" access to remedy: the non-applicability of the statute of limitations on crimes under international law.¹²⁶ Experts Bassiouni and van Boven observed from their studies that the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes against Humanity had received growing support in the international community, under-girded by similar provisions in the Rome Statute and the Convention Against Torture.¹²⁷ The statute of limitations ban fits with what van Boven found common among victims.¹²⁸ Instead of finding that the passage of time has an "attenuating effect" on the victim's suffering, studies showed that post-traumatic stress increases, and with it the exponential need for material, medical, psychological, and social assistance and support over a long period of time.¹²⁹ The "comfort women" and their supporters seem especially cognizant of this effect, and in the past few years they have increased their persistence for official and legal acknowledgement of their continued suffering.¹³⁰

Despite the importance of the inapplicability of the Statute of Limitations in Principle 6, it came under increased criticism in the 2002 consultative meeting.¹³¹ As a major point of disagreement, it could inhibit the more timely completion of the Draft. Though the drafters desire a clearer statement of the authority and scope of the idea that the Statute of Limitations "should not unduly restrict the ability of a victim to pursue a claim . . .," the experts agree that ratification of the

125. *Id.* at 147.

126. DRAFT, *supra* note 33, at ¶ 6.

127. HIGH COMMISSIONER NOTE, *supra* note 57, Annex, ¶¶ 62-63.

128. *See infra* note 128.

129. VAN BOVEN STUDY, *supra* note 44, at ¶ 135 and General recommendations).

130. Totsuka, *supra* note 37, at 7-10 (noting some "healthy and undeniable developments in Japan. There emerged, in recent years, an increasing number of male and female citizens, historians, lawyers, journalists, politicians, who are aware of the facts; who are willing to accept the historical facts as war crimes committed by the Japanese; and who are working in letting the state of Japan take its state responsibilities. This is a hope for new Japan. Although it will take some time for them to become majority, they are becoming a formidable power and willing to cooperate with and fight for the victims and peoples in Asia); *see also* McDougall Report, *supra* note 3, at nn.99-103 (citing the numerous current suits that have been filed by the "comfort women").

131. HIGH COMMISSIONER NOTE, *supra* note 57, at ¶¶ 27-29, ¶¶ 62-63.

Convention on the Non-Applicability of Statutes of Limitation by around forty-four States and the growing international consensus found in the Rome Statute and the Convention against Torture on disposing of Statute of Limitations support its inclusion in the Draft.¹³²

Not surprisingly, Principle 6 has also been one of Japan's greatest points of contention, as a Statute of Limitations has often been the tool of excuse for denying reparations to the "comfort women" today.¹³³ The Statute of Limitations in Japan cuts off civil claims after twenty years.¹³⁴

Thus, the Statute of Limitations issue remains distinctly important to the "comfort women." Frequently, women who endured sexual slavery face "particularly grave social and legal obstacles to coming forward in a timely manner. Such obstacles are significantly exacerbated when [a Government] . . . conceal[s] the true nature or the scope of the violations."¹³⁵ The "comfort women" endured the physical violations nearly sixty years ago, which is far beyond almost every State's Statute of Limitations for rape crimes. However, it took almost forty years for the world to recognize and react to the atrocity, a combination of the women's shame and Japan's deception. As one "comfort woman," Maxima Dela Cruz of the Philippines, admitted: "We went back home and we were crying. We couldn't tell anyone or we would be executed. It was so shameful so we dug a deep hole and covered it."¹³⁶

E. Principles 1-3 and 16: Japan's Violations and Obligations

Principles 1-3 capture the basic intent of the drafters, un-bracketed by "should" enforcement limitations. These principles lay the customary international legal foundations and sources for the right to reparations.¹³⁷ The draft also leaves room for future developments in international law. Not surprisingly, the principles also serve as Japan's greatest source of contention towards the Draft. These principles stand as the greatest obstacle in the way of Japan's evasion of its past sins.¹³⁸

Principle 1 (Obligation to Respect) heralds that "every State has the obligation to respect, ensure respect for and enforce international human rights and norms that are, *inter alia*; (a) contained in treaties to which it is a State party; (b) found in customary international law; or (c) incorporated in its domestic law."¹³⁹ Principle 2 insists that States

132. *Id.*

133. See generally 1997 COMMENTS, *infra* note 153, at ¶ 6.

134. MINPO (Civil Code) § 167; Parker & Chew, *supra* note 98, at 539.

135. MCDougall FINAL REPORT, *supra* note 4, at ¶ 90.

136. Woman's Tribunal, *supra* note 1, at ¶ 2.

137. DRAFT, *supra* note 33, at ¶¶ 1-3.

138. See HIGH COMMISSIONER NOTE, *supra* note 57, Annex I, at p. 23, 30, and 178.

139. DRAFT, *supra* note 33, at ¶ 1 (Principle 1).

"shall ensure" that domestic law is consistent with international obligations by incorporating these norms through judicial/administrative procedures that allow effective access to reparations.¹⁴⁰ Principle 3 (Scope of Obligation) pinpoints the State's duty to prevent, investigate, and take action against violations, while providing victims with access to appropriate reparations.¹⁴¹ Principle 16 reinforces the State's duties in Principles 1-3, and requires with a mandatory "shall" (evidence of an international norm), that a State provide reparation to victims for its acts or omissions constituting violations of international human rights and norms in accordance with international norms within.¹⁴²

Nearly the entire international community stands against Japan's violation of specific international norms/obligations.¹⁴³ A few of these violations include: *jus cogens* norms of sexual slavery,¹⁴⁴ crimes against humanity,¹⁴⁵ violations of the Geneva Convention of 1949 and Article 27 of the Fourth Geneva Convention¹⁴⁶, violations of the International Convention for the Suppression of the Traffic in Women and Children of 1921-22,¹⁴⁷ and violations of the Hague Conventions and Regulations of

140. *Id.* at ¶ 2 (Principle 2).

141. *Id.* at ¶ 3

142. *Id.* at ¶ 3, ¶ 16 (Principle 3).

143. *See generally infra* note 137.

144. *Jus cogens* norms are "principles of international law accepted by international community of State as a whole as a norm from which no derogation is permitted [even by agreement]." They are prohibited at all times and in all places violation is subject to universal jurisdiction and can be prosecuted by any State. *Prinz v. Federal Republic of Germany*, 26 F.2d at 1173 (D.C. Cir. 1994); *see* The Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352, 8 I.L.M. 679, 698 (Article 53 states that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

145. Article 6(c) of the Charter of the International Military Tribunal, Nuremberg, defines crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, pt. II, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288; MCDUGALL FINAL REPORT, *supra* note 4, at ¶¶ 36, 41 (finding that sexual violence and slavery falls within the definition of "inhumane acts").

146. Article 27 of the Geneva Convention states: "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution or any form of indecent assault" during times of war, outlining rape as a international war crime. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287, 306 [hereinafter Fourth Geneva Convention]; *see also* COOMARASWAMY REPORT, *supra* note 9, at ¶ 98.

147. The Suppression Convention also required member states to take steps to prevent

1907.¹⁴⁸ Japan has responded with several excuses for not accepting legal liability or providing compensation including: (1) that “comfort women” have no right to legal compensation because only recent development in international law give them this right, and they cannot be applied retroactively; (2) that the act of rape was not prohibited under the Hague Convention No. IV of 1907 or applicable customary of international law in force during World War II; (3) that any rights the “comfort women” may have had were fully satisfied by peace treaties and settlement agreement between Asian states after World War II, the San Francisco Peace treaty of 1951; (4) that slavery does not describe the system of “comfort stations,” and (5) that prohibitions against slavery were not a customary norm under World War II international law applicable to Japan.¹⁴⁹ Likewise, each of these has been refuted by current international obligations with the support of every UN member, except Japan.¹⁵⁰ In sum, Principles 1-3 and 16 mandate Japan’s taking responsibility for breaches of international obligations. This mandate

the traffic of women and children. Japan has argued that article 14 allowed colonial powers to exclude their colonies from the scope of the Convention, thus excluding Korea. See The International Convention for Suppression of the Traffic in Women and Children, Mar. 31, 1922, art. 3, 9 L.N.T.S. 417, 423, 425; Yvonne Park Hsu, “*Comfort Women*” from Korea: Japan’s World War II Sex Slaves and the Legitimacy of Their Claims for Reparation, 2 PACIFIC RIM L. & POL’Y J. 97, 108 (1993).

148. The Hague Conventions and Regulations of 1907 require a connection to armed conflict for certain crimes, which for the “comfort women” is satisfied by WWII. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, October 18, 1907, arts. 1-56, U.S.T.S. 539, 2 A.J.I.L. Supp. 90, DA Pam 27-1 (*entered into force* January 26, 1910).

149. MCDUGALL FINAL REPORT, *supra* note 4, Annex, at ¶ 4, ¶¶ 9-62, *see also* MCDUGALL UPDATE, *supra* note 24, at ¶ 36.

150. The international community finds fault with Japan’s arguments for the following reasons:

(1) because Japan’s concealment of involvement prohibits any attempts to rely on treaties to avoid liability and the San Francisco and Asian treaties indicate they were not intended to foreclose claims for compensation by individuals for harm committed in violation of human rights or humanitarian law; COOMARASWAMY REPORT, *supra* note 9, at ¶103.

(2) substantive customary international law prohibited sexual slavery like the “comfort system”; I CHERIF BASSIOUNI, INTERNATIONAL CRIME: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985, 419 (Oceana, 1986) (at least 20 international instrument suppressing slave trade by 1932; international abolition of slavery in history);

(3) Japan has prohibited slave trade throughout its history; MCDUGALL FINAL REPORT, *supra* note 4, at ¶ 13;

(4) early authoritative sources on rules war explicitly prohibited rape or mistreatment of women during war; MCDUGALL FINAL REPORT, *supra* note 4, Annex, at ¶ 20 (Verdict 231 of the Temporary Court Martial in Batavia deemed the “abduction of girls and woman for forced prostitution” as war crimes).

corresponds to the victim's right of compensation for such breaches.¹⁵¹

IV. Analysis: Is Japan ready for the Draft Guidelines?

A. *The Reaction: Japan in the Draft Consultative Meeting 2002 and 1997's Written Comments*

Despite the obvious benefits presented in the Draft Guidelines and Principles, good principles do not always guarantee a good reaction. Japan's reactions in the 2002 Consultative meeting and its 1997 written responses exemplify that principle. Viewed together, the comments indicate that Japan has left some of its older Draft contentions, and gained others, while still maintaining concern for victims. While Japan's responses retain much of their stubborn aversion, they also show significant awareness the eyes of justice are staring them down.

Japan's September 1997 comments on the Draft maintained their traditional defenses that have blocked the "comfort women's" access to justice since World War II.¹⁵² The 1997 response centered on the Japanese Government's belief that individuals are not subjects of international law (without an international agreement specifying procedures available to exercise individual rights), and thus are incapable of using international instruments to bring claims against States.¹⁵³ This argument has been expressly rejected by the rest of the international community.¹⁵⁴ Thereafter, Japan asserted that there were no grounds for

151. MCDUGALL FINAL REPORT, *supra* note 4, at ¶ 45.

152. MCDUGALL FINAL REPORT, *supra* note 4, Annex, at ¶ 68.

153. UNITED NATIONS, ECONOMIC AND SOCIAL COUNSEL, COMMISSION ON HUMAN RIGHTS, QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECT TO ANY FORM OF DETENTION OR IMPRISONMENT: VIEWS AND COMMENTS RECEIVED FROM STATES ON THE NOTE AND REVISED DRAFT BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO REPARATION FOR VICTIMS OF [GROSS] VIOLATIONS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW, REPORT OF THE SECRETARY GENERAL, Japan, at ¶ 1, U.N. Doc. E/CN.4/1998/34 (1997) [hereinafter 1997 COMMENTS].

154. The Draft itself affirms that international law of human rights applies to individual, not just states, and thus capable of using international instruments to bring claims against states. 42 U. PA. J. INT'L ECON. L. 509, 531. See MCDUGALL FINAL REPORT, *supra* note 4, at ¶¶ 45-46 (The Hague Convention No. IV of 1907, Paris Peace Conference of 1919, Charter of the Tokyo War Crimes Tribunal, and customary international law supply the State's obligation to pay compensation for breaches of international law, thus providing that individuals are subjects of int'l law). Moreover, Japan itself has acknowledged individual compensation in the Greece-Japan agreement, UK-Japan agreement, and Canada-Japan agreement, which all have provisions for compensation "for personal injury or death which occurs before the existence of a state of war . . . for which Government of Japan [is] responsible according to international law." RICHARD B. LILLICH AND BURNS H. WESTON, INTERNATIONAL CLAIMS, THEIR SETTLEMENT BY LUMP SUM AGREEMENTS. PART II: THE AGREEMENTS, Charlottesville: 334, 231, 249, (Univ. Press of Virginia 1975); see MCDUGALL FINAL REPORT, *supra*

the duty to pay reparations to individual victims.¹⁵⁵ Japan also attacked the Draft (principally Principles 1-3) as forcing States to take uniform measures to enforce a rule without regard for the unique legal systems of each State.¹⁵⁶ Finally, the Japanese government argued that there is no consensus on what acts constitute "crimes under international law" and therefore universal jurisdiction is inappropriate.¹⁵⁷

However, in the minutes of the most recent consultative meeting, Japan made no mention of its once fundamental argument about individuals and unique States in international law.¹⁵⁸ Instead, Japan has focused its efforts to subdue the Draft's force (a not-so-subtle attempt to avoid remedying the "comfort women"), by skewing its purported understanding of the international obligations supporting the Draft.¹⁵⁹ Japan has never resisted a chance to remind others that the "Guidelines are not intended to be legally binding."¹⁶⁰ Yet even as Japan's arguments shift, their truth remains consistently unpersuasive. Japan's traditional excuses (reflected in their Draft comments), have been totally refuted by the remaining member States and international community.¹⁶¹

In its consideration of international obligations for reparations (the heart of Principles 1-3), Japan probes for, and usually disagrees with, the majority's finding as to current obligations. For example, Japan questioned whether the measure stipulated in Principle 2 (the duty to ensure that domestic law is consistent with international legal obligations) was an "existing obligation[], or points that the international community should make obligatory" (incorporating norms of international human rights into domestic legal system, adopting judicial administrative procedures that provide prompt access to justice, etc.).¹⁶² When the experts responded that they constitute existing obligations and that no new obligations are introduced in the guidelines, Japan jumped to make a dramatic proposal, likely key in its decision whether to fully support the draft.¹⁶³ By the end of the meeting, when every State that spoke favored speeding up adoption for 2004, Japan delivered the only

note 4, at ¶ 47.

155. *Id.*

156. 1997 COMMENTS, *supra* note 153, at ¶¶ 2-3. It follows that Japan criticized the Draft's elimination of the Statute of Limitations (Principles 6-7), suggested reparation forms (Principles 21-25), duty of investigation and prosecution (Principles 4 and 5), and disclosure of information requirements (offering that information should be restricted by an individual right to privacy. *Id.* at ¶ 4.

157. *Id.* at ¶ 5.

158. See generally HIGH COMMISSIONER NOTE, *supra* note 57.

159. See, e.g., *id.*, Annex I, at ¶ 23.

160. *Id.* at ¶ 82.

161. See discussion and reference, *supra* notes 151 and 155.

162. *Id.* at ¶ 23-24.

163. *Id.* at ¶ 178.

negative response.¹⁶⁴ Japan proposed this disclaimer: "Nothing in the present Basic Principles and Guidelines shall be construed as having any implication as regards the rights and obligations of States under international law concerning the matters dealt with in the present basic Principles and Guidelines."¹⁶⁵ Japan left no mystery to its distaste for the Drafter's Principle 2 obligations.¹⁶⁶

When it comes to reparations, Japan consistently questions their scope and form. For example, the State asked if the "appropriate remedies" of Principle 3(d) were limited to those listed in the document, and what "facilitat[ing]" these remedies entailed.¹⁶⁷ Commenting on Principles 24 and 25, which cover rehabilitation and satisfaction and guarantees of non-repetition, Japan again inquired as to the types of specific concrete measures that are envisaged as "official declarations" and "public acknowledgement," and then questioned whether these were "necessarily effective to recover from the damage."¹⁶⁸ Experts Bassiouni and van Boven's responses reflected the majority's chief focus, the victim-orientation of the document and the desire to create broad reparation rights.¹⁶⁹

However, in the 2002 meeting, Japan also displayed a more positive focus on the victim's position. Then, as usual, it grew distracted from strengthening the victim's position with its concern about what the Draft might require of it.¹⁷⁰ First, Japan showed concern that if groups of victims have the right to make claims without the consent of all victims represented, Principle 13 might run contrary to victims rights.¹⁷¹ Japan spoke of its desire for a clearer definition of the victim in Principles 8 and 9, so as to better appropriate compensation.¹⁷² In contrast, it found "mental suffering and impairment of legal rights" too obscure a type of

164. *Id.*

165. *Id.*

166. *Id.* at ¶ 155 (Japan seeking clarification of Principle 27's "internationally recognized human rights law").

167. Similarly, Japan inquired on the scope of the reparations mentioned in Principle 16, to which the experts (Bassiouni and van Boven) replied that reparations should be related to international obligations. *Id.* at ¶ 122.

168. *Id.* at ¶ 132.

169. *Id.* at ¶ ____.

170. *Id.* at ¶ 123.

171. *Id.* at ¶ 96 (However, this could be read oppositely to show that Japan was concerned that a comfort women could bring a claim for all comfort system victims and obligate Japan to reparations for all, rather than waiting for victims to come forward one at a time, perhaps lessening the blow. However, that Japan shows these initial understandings of the victim's perspective shows a leap forward in their thinking. No longer are they contesting the principles b/c individuals are not subject to international law, but rather by "grasping at what straws they have left" before they admit their wrongs.).

172. *Id.* at ¶ 67.

harm and not useful to calculate damages. Then, Japan's austerity took a final plunge: recommending that compensation be limited only to victims directly affected (i.e., alive).¹⁷³ The International Society for Traumatic Stress Studies met Japan with an equally sharp response, citing as scientific fact that victims pass suffering to other generations.¹⁷⁴ Japan's comment comes as no surprise; many of the "comfort women" are dead, so reparation could only travel to their surviving relatives.¹⁷⁵

Japan was not the first, nor the only, State to speak in opposition to Principles 4 and 5, the Duty to Prosecute, or to Principles 6 and 7, the Inapplicability of Statute of Limitations. Japan expressed agreement with the U.S., Sweden, Canada, and Russia's understandings that there is no duty to prosecute under customary international law unless explicitly worded in a treaty.¹⁷⁶ Sweden, Canada, the U.S., Argentina, Mexico, and Japan were among the several states that found that the Non-applicability of Statute of Limitations had only been ratified by a few States, and could not be considered customary international law. The Draft experts responded that they found evidence of growing support for the principle.¹⁷⁷ However, even if the Statute of Limitations provision does not get full support, international law provides that the Statute of Limitations is inapplicable when new material facts, like the 1993 exposition of the "comfort system" come to light.¹⁷⁸

B. *Analysis: A Weakening in the Barrier?*

The 2002 Comments paint a realistic picture: Japan is grasping at straws and losing its battle with justice. Its contentions with the Draft have been consistently refuted by the UN, member States, experts, and

173. *Id.*

174. *Id.* at ¶ 77.

175. Katha Pollitt, *Cold Comfort*, THE NATION (2001), available at <http://www.thenation.com/doc.mhtml%3Fi=20010611&s=pollitt>. As one author noted, the comfort women who survived are now in their seventies and eighties, and most will soon die. Because only a few married or had children, "there won't be many descendants to continue the fight for reparations. By stonewalling, the Japanese government will have won." *Id.*

176. Japan did go a step further than other critics, and was not convinced of the "existence of other crimes under international law" that did not come from the requirements of a treaty to which a State was a party. HIGH COMMISSIONER NOTE, *supra* note 57, Annex I, at ¶ 41.

177. See *supra* note 19.

178. The Statute of Limitations in Japan bars any civil or criminal cases. But, even if the Statute of Limitations could present a problem, it remains inapplicable when new "material facts" come to light. Because the first official hearings and the initial admission by the Japanese government on "comfort stations" were not held by Japan until 1992, and not until 1993 did the government admit the military's role in establishing and administering them, these exceptional circumstances prevented "comfort women" from pursuing claims. MCDUGALL FINAL REPORT, *supra* note 4, Annex, at ¶ 40.

customary international law.¹⁷⁹ Moreover, the international playing field has changed. The adoption of the first substantive international reparations declaration is in sight.¹⁸⁰ As Japan offered its old defenses to responsibility in 2002, they were countered by increased pressure on new fronts in the 21st Century, like the revised Draft, the court judgments, the Asian Women's Fund, and the Women's Tribunal. While Japan's comments hardly hide the fact that its government does not want to accede legal responsibility for the "comfort system," their mere involvement in the process indicates they are at least facing, instead of ignoring, the international norms. Japan's direct confrontation with the Principles, as a consultative member State, forces them to alter the façade they normally hold out to the international community. All of these factors indicate that Japan's position is weakening under the pressure of international forces.

C. The Catalysts: Reparation Rights and Reparation Policies (The Playing Field is Changing)

Argentina's procedural response to human rights violations is a hopeful example of the correlation between the initial stages of enforcement of reparation rights and the eventual adoption of reparation policies in Japan.¹⁸¹ The proceedings initiated by victims from Argentina before the Inter-American Commission on Human Rights created the backbone for a national reparation policy.¹⁸² Among other things, the judgment issued "certificates of forced disappearance" in recognition of the tragedy and to enable relatives of the "disappeared" to practically deal with impending inheritance matters.¹⁸³ Moreover, the Inter-American judgment acted as a catalyst to respond to survivors' cries for truth and an active reparations policy, while not forgetting more practical matters affecting survivors. In 1991, the international and domestic efforts culminated in the government Human Rights Office's implementation of reparation legislation to compensate victims of specific human rights violations.¹⁸⁴

Even more than the Inter-American judgment, the judgment of the Women's International War Crimes Tribunal of 2001, the Asian Women's Fund,¹⁸⁵ and a recent Japanese court judgment,¹⁸⁶ have laid the

179. See *supra* notes 150 and 154.

180. DRAFT, *supra* note 33.

181. Vandeginste, *supra* note 35, at 146.

182. *Id.*

183. *Id.*

184. *Id.* at 155.

185. *Id.* at 158. The Asian Women's Fund (formally called the Asian peace and Friendship Fund for Women) is criticized by many as a "welfare-oriented system based

foundations for acknowledgement of reparation rights. Indeed, in April of 1998 the Shimonoseki Branch of the Yamaguchi District Court of Japan found that the Japanese Government had a duty to enact legislation to compensate the comfort women for "a violation of fundamental human rights relating to the core values expressed in Section 13 of the Japanese National Constitution," and that in their neglect they had "committed a new harm."¹⁸⁷ The Court also awarded the 300,000 yen (US\$2,300) to three former "comfort women" from Korea.¹⁸⁸ Though a pithy monetary compensation, this judgment stands in stark contrast to the many cases that have been brought in Japanese courts only to be dismissed or ruled against.¹⁸⁹ Many other cases have been filed, the first in 1991,¹⁹⁰ and at least six other groups of women had filed lawsuits by 1996.¹⁹¹ Claimants have included Filipino, Korean,¹⁹² Chinese, and

on gender and development needs rather than on acceptance of responsibility for wrongdoing and an obligation to provide reparation." The response to the Fund reinforced the need to maintain a link between material reparation awarded and acknowledgement of wrongdoing and responsibility. The "comfort women" themselves often view the fund as another way Japan has sought to avoid legal responsibility and State compensation for the atrocity as the fund is privately funded. COOMARASWAMY REPORT, *supra* note 9, at ¶ 63, ¶ 74.

186. See *infra* note 157 (Shimonoseki Judgment).

187. McDougall FINAL REPORT, *supra* note 4, at ¶¶ 50-51 (citing "Claim for Compensation of Pusan Comfort Women and Women's Voluntary Labor Corps and Demand for Official Apology to the Women's Voluntary Labor Corps and to the Comfort Women" (Decision of 27 April 1998 following oral argument of 29 September 1997), Shimonoseki Branch, Yamaguchi District Court (unofficial translation)); Etsuro Totsuka, *Commentary on a Victory for "Comfort Women": Japan's Judicial Recognition of Military Sexual Slavery*, 8 PACIFIC RIM J. 47-61 (1999) [hereinafter Totsuka Commentary]; translated by Taihei Okada, "The 'Comfort Women' Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan," *id.*, pp.63-108.

188. McDougall REPORT, *supra* note 4, at n.100 (citing Dan Grunebaum, "WWII sex slaves win historic lawsuit," United Press International, 28 April 1998; Heisei 4 (wa) 349, 5 (wa) 373, 6 (wa) 51). See also Totsuka Commentary, *supra* note 155, at 47.

189. See Venderweert, Susan Jenkins, Comment, *Seeking Justice for "Comfort" Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese Army May Find Their Best Hope of Success in U.S. Federal Courts*, 27 N.C. J. INT'L L. & COM. REG. 141, 160-163 (2002); see Totsuka, *supra* note 37, at 9-10; see also McDougall REPORT, *supra* note 4, at n.101 (citing Heisei 5 (wa) 5966, 5 (wa) 17575, 6 (wa) 1218) (The Tokyo District court held that individuals had no right under international law to demand compensation against Japan's violations of international law.).

190. See DOLGOPOL REPORT, *supra* note 7, at 31; McDougall REPORT, *supra* note 4, Annex, ¶ 51.

191. See *Former 'comfort women' testify in court*, THE DAILY YOMIURI, July 20, 1996, at 2 (Japan); see generally Shellie K. Park, Comment, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PAC. L. & POL'Y J. 2 (2002).

192. McDougall FINAL REPORT, *supra* note 5, at ¶ 51; see *Eight Dutch Citizens Sue Japan over War*, N.Y. TIMES, January 26 1994, at A9 (Plaintiffs include at least one

Koreans living in Japan.¹⁹³ Both the Yamaguchi court decision and that of the Tokyo District Court are being appealed by the Japanese government and the claimants, respectively.¹⁹⁴ Several "comfort women" also attempted to find justice in U.S. courts, only to be foiled by the Foreign Sovereign Immunities Act of 1976.¹⁹⁵ As a whole the suits have brought increased attention both within and outside Japan to the "comfort women's" pursuit of numerous governmental avenues for justice.

Yet, the Draft Guidelines promise more than most Japanese courts could offer in executed judgments. In a civil law system, the Japanese courts do not have broad equitable powers of common law courts to tailor remedies to the express needs of victims (i.e., anything beyond monetary).¹⁹⁶ However, other government branches can meet the demands for reparations beyond compensation by following the Draft model and one Japanese court's insistence on legal accountability.

Prospects of change also spring from the legislative branch of the Japanese government. Some proposed Japanese legislation calls for the establishment of a "fact-finding bureau to investigate Japan's system of military sexual slavery . . . [as well as government] compensation for war-related injuries and violation."¹⁹⁷ Other Japanese officials have introduced compensation bills in the Japanese Legislature, though none have yet survived.¹⁹⁸

victim of comfort stations; Parker, *supra* note 112, at 545.

193. Taylor, *supra* note 8, at ¶ 3.

194. Totsuka, *supra* note 38, at 9.

195. The most recent case in the U.S. was that of *Hwang v. Japan*. The court found that Japan was entitled to immunity from suit because the commercial activity exception to the FSIA did not apply retroactively to events before 1952, and that the 1951 Treaty of peace with Japan created a settled expectation, and that a violation of *jus cogens* norms did not constitute an implied waiver of sovereign immunity. *Hwang v. Japan*, 332 F.3d 679 (D.C. Cir. 2002).

196. Tong Yu, *Recent Developments: Reparations for Former Comfort Women of World War II*, 36 HARV. INT'L L.J. 528, 537 (1995).

197. McDOUGALL FINAL REPORT, *supra* note 4, at n.104 (referencing a statement made by Koh Tanaka, Member of the House of Representatives of Japan, to the fifty-fourth session of the United Nations Commission on Human Rights, April 6 1998). "A Mr. S. Motooka and 25 Members of the House of Councilors submitted a "Bill for establishment of fact-finding committee on the issue of the victims of sexual coercion during wartime" to the House in June 1996. This was aborted with no debate. Further movements for legislative measures are continuing. (E. Totsuka, "International Legal Issues between ROK and Japan concerning Comfort Women", In Lee, Jang-Hie (ed.), *International Legal Issues between Republic of Korea and Japan* (1998). pp.63-88.). Another legislative proposal is being made by many Members of the House of Representatives organized "the Hon. Mr K. Tanaka, and represented by Co-Chairpersons the Hon. Ms. Toshiko Hamayotsu, Member of the House of Councilors and the Hon. Mr. Yukio Hatoyama, Member of the House of Representatives." Totsuka, *supra* note 38, at 10.

198. See *Compensation Depends on Party Vote, Japanese Diet Member Says*, JAPAN

The Asian Women's Fund¹⁹⁹ remains one of the greatest, though most controversial, steps towards reparations. In July of 1995, the Japanese Government set up this charitable fund, and engaged the Red Cross to support NGOs by attempting to alleviate, through counseling services, support research, academic study, and meetings addressing women's issues, the problems that Asian women face today.²⁰⁰ This so-called "atonement fund," primarily supported through private donations of the Japanese public, enables these groups to "promote the desire to convey to these ["comfort"] women, the sincere apologies and remorse felt by the Japanese people."²⁰¹ The UN and the Sub-Commission on Human Rights have welcomed this compensation fund, but not without some hesitation.²⁰² In reliable Japanese fashion, the government has eluded yet another chance to accept official legal liability and provide compensation by having private persons donations compensate for the harm the government engendered. The Fund does not satisfy or acknowledge official legal responsibility and compensation for the crimes.²⁰³ Rather it remains another gesture of moral responsibility that merely supports the work of NGOs.²⁰⁴ For many, the fund is simply a welfare-oriented system based on gender and development needs, rather than a concession of responsibility.²⁰⁵ As one Japanese scholar has noted, in the carefully worded "apologies linked with the fund, Japan used the word "owabi," connoting a gesture "slightly more weighty than an 'excuse me' offered when one bumps shoulders with someone on the subway."²⁰⁶ Only a few former comfort women have accepted the payments, most finding the use of private money another way for Japan to avoid responsibility.²⁰⁷

Nonetheless, at the very least the fund demonstrates Japan's recognition of the importance of compensation for and public acknowledgement of the "comfort women." The criticisms of the Fund demonstrate the importance of reparations that link material reparation rights with acknowledgement of wrongdoing and responsibility.²⁰⁸ The

POLICY & POLITICS, Aug. 26, 2002, available at http://www.findarticles.com/cf_dls/m0XPQ/2002_August_26/90916834/p1/article.jhtml.

199. The Asian Women's Fund website, available at <http://www.awf.or.jp/english/index.html>. (Compare to Principle 18).

200. *Id.*; see also MCDUGALL FINAL REPORT, *supra* note 4, Annex, at ¶ 64.

201. MCDUGALL FINAL REPORT, *supra* note 4, Annex, at ¶ 64.

202. *Id.*

203. *Id.*

204. *Id.*

205. Vandeginste, *supra* note 35, at 158.

206. Taylor, *supra* note 7, at ¶ 8.

207. See Andrew Pollack, *Japan Pays Some Women From War Brothels, But Many Refuse*, N.Y. TIMES, Aug. 14, 1996, at A.1.

208. Vandeginste, *supra* note 35, p.158.

Draft Guidelines make this connection by demanding reparation, beyond mere compensation, to satisfaction in the form of an official apology, public knowledge, and accurate historical acknowledgement.²⁰⁹

The final instrument utilized in the pursuit of the “comfort women’s” justice is the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery. The International Organizing Committee (IOC), chaired by representatives from Japan, the Philippines, and South Korea, launched the Tribunal in Tokyo from December 8-12, 2000.²¹⁰ The culmination of survivor’s unmet demands, UN Special Rapporteurs, and the international community, the failure of the World War II Allies to prosecute Japanese officials (despite the evidence of the sexual slavery) and Japan’s own failure to prosecute, apologize, and provide reparations,²¹¹ spurred the body to action. As a result, the Tribunal created one the most public international initiatives for the “comfort women’s” justice.²¹² The Tribunal was headed by four judges, and attended by over seventy-five survivors (some testifying), international NGOs, and the civil society of the Asian-Pacific Region.²¹³ The government of Japan was invited, but did not attend.²¹⁴

The Tribunal’s initiative was to examine the evidence and develop a historical record, thereby creating greater international pressure on Japan.²¹⁵ In short, the Tribunal’s 2001 Judgment found that the Japanese government, Emperor Hirohito, and numerous other public officials had committed crimes against humanity in violation of its treaty obligations and obligations under customary international law.²¹⁶ Further, the judgment reflected the revised Draft principles by recognizing Japan’s obligation under international law to provide compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.²¹⁷ The judgment also reflected many of the specific remedies outlined in the

209. DRAFT, *supra* note 34, at ¶ 25 (Principle 25).

210. WOMEN’S TRIBUNAL, *supra* note 1, at ¶ 7.

211. *Id.* at ¶ 4.

212. *Id.*

213. *Id.* at ¶ 14.

214. *Id.* at ¶ 13.

215. *Id.* at ¶ 6.

216. Japan’s treaty obligations included the 1907 Hague Convention Respecting the Laws and Customs of War on land, the 1921 International Convention for the Suppression of the Traffic in Women and Children, and the 1930 ILO Convention Concerning Forced Labour. Japan violated norms of customary international law, in the 1907 Hague Convention and 1926 Slavery Convention. Further, in the 1951 San Francisco Peace Treaty, Japan accepted the Judgment of the IMTFE. *Id.* at ¶ 25, ¶ 27, ¶ 39; *see also* FEMINIST INTERNATIONAL RADIO ENDEAVOR—FIRE: THE FIRST WOMEN’S INTERNET RADIO, *The Oral Judgment delivered by the Judges of the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery*, Dec 4, 2001 The Hague, available at <http://www.fire.or.cr/dic01/triboralverdict.htm>.

217. *Id.* at ¶ 32, ¶ 36.

Draft.²¹⁸ Yet despite all its potential, the Tribunal was limited to exercising moral authority, and remained unable to enforce its findings beyond making a recommendation to the Commission on Human Rights and UN members.²¹⁹ Several “comfort women” activists delivered the verdict from the Tribunal to the Japanese Foreign Minister, but have heard nothing in response.²²⁰

After reviewing several of the judicial, administrative, and legislative mechanisms recently used to pursue the “comfort women’s” reparations, it is obvious that all lack the binding force found in a national reparations policy. Likewise, each effort lacks direct involvement by the Japanese government or binding authority, enabling Japan to continue downplaying their importance. In contrast, the Draft Principles constitute a mechanism with the external force of international law, the compensation creed of the Fund, and the substantive policy of legislation. But most importantly, it is a document in which Japan is readily involved. Japan’s voluntary involvement in the drafting, though perhaps an attempt at steering the Principles to its viewpoints, represents a recognition of the weight that the Basic Principles could carry as a universal norm. Even if it is just another effort to “make Japan look better” in the eyes of its critics, at least Japan remains sensitive to what is unacceptable conduct.

More importantly, Japan’s involvement in the adoption of the Draft Guidelines Basic Principles exposes the country to a basic and readily-adoptable policy with the support of the international community. Where critics have found the Asian Women’s Fund to be a mere “welfare fund,” lacking in true remorse, and the Women’s Tribunal without binding force, a substantive, model of Principles now lies at Japan’s fingertips.²²¹ At the very least, Japan has been aiding in the

218. See Women’s Tribunal, *supra* note 1. The judgment demanded: (1) acknowledge full responsibility and liability, (2) issue frank and full apology, promise non-repetitions, and take legal responsibility, (3) compensate the victims/survivors, (4) establish a mechanism to investigate the violations, (5) recognize and honor victims in memorials, museums, and libraries, (6) include the history of the “comfort system” in textbooks to ensure accurate education, (7) repatriate survivors, (8) disclose all documents/ materials relating to the “comfort system,” (9) identify and punish principal perpetrators, (10) locate and return remains of deceased comfort women upon request of family members. *Id.*

219. Written statement submitted by the International Centre for Human Rights and Democratic Development (Rights & Democracy), a non-governmental organization in special consultative status to the Commission on Human Rights, 58th Session, Item 12(a) of the provisional agenda: *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, available at <http://serveur.ichrdd.ca/english/prog/IntHRAdvocacy/58CommissionComfortWomenEng.html> (last visited January 25, 2004).

220. Taylor, *supra* note 8, at ¶ 5.

221. COOMARASWAMY REPORT, *supra* note 9, at ¶ 63, ¶ 74.

construction of yet another flashing sign forcing them to face the truth. At the very most, it has the answers in its hands. Either interpretation elevates the overall position of the "comfort women," to one with greater international and political support.

Certainly, one could argue that the *de minimus* compensation, court judgments, and compensation fund were intended by Japan as another avoidance of what victims truly want. While on the surface these mechanisms may seem an attempt at appeasement, they may actually reflect the beginnings of change in Japan. Chief Cabinet Secretary Igarashi's announcement that the Fund was to enable the Japanese people "to face squarely the past and to ensure that it is rightly conveyed to the future generations" was in itself a great leap from the stringent denials of 30 years past.²²² Arguably, the greatest leap would have entailed public compensation. But the importance of the step towards justice cannot be ignored for a lack of perfection, compared to a historical lack of acknowledgement. The judgments, Fund, and UN pressure can now utilize this significant change as a stepping stone to government reparations and legal accountability. The Draft Guidelines represent that substantive policy. The Guidelines uphold the morals and ideals that Japan must obtain to bring justice to the "comfort women": victims' rights, punishment of perpetrators, numerous forms of reparation, public apology, and prevention.²²³

D. Reality: the Draft as an Enforcement Mechanism

1. Binding Treaty or Declaration

The most straightforward concern with the Draft's impact on the "comfort women's" pursuit of justice lies in its UN status as a non-binding declaration. However, the declaration *is binding* to the extent that it reflects principles of customary international law.²²⁴ The Draft Guidelines designate these binding international norms by using the term "shall," and less mandatory, and now emerging, norms with "should."²²⁵ In truth, the Draft Principles' pervasiveness depends on State action, as the Principles have no international enforcement mechanism.²²⁶

222. *Id.* at ¶ 132.

223. *Id.* at ¶ 137.

224. JEFFREY L. DUNOFF, STEVEN R. RATNER, AND DAVID WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 32 (Aspen Law & Business 2002). Thus, the international community stands behind the idea that Japan violated a *jus cogens* norm with its "systematized sexual slavery." *Id.*

225. HIGH COMMISSIONER NOTE, *supra* note 57, at ¶ 8, ¶ 11; see also DRAFT, *supra* note 34.

226. Lasco, *supra* note 35, at 20.

Admittedly, this non-binding status, like current non-binding approaches, could impede enforcement of compensation for a government like Japan that committed the abuses. But even a binding treaty is limited by states' willingness to comply (with the jurisdiction of arbitral bodies) without an "international police force."²²⁷ What makes the Draft of unprecedented importance is its substantive coverage, victim-centered ideology, (nearly) unanimous international support, and foundation in customary international law. It is not an ordinary reparations statement. Scholars recognize that even the Draft's emerging norms have "potential to impact" domestic and international norms and become part of customary international law with the backing of nearly 50 member States.²²⁸ Overall, the Principles provide an important tool, bolstered by the "degree that governments are willing to implement the Principles domestically."²²⁹

2. Draft's Current Position

The Commission on Human Rights has already seen the broad potential for impact on international policy in only the Draft Guidelines-stages of the document. It is already an authoritative source of reference for international jurisprudence and national practice, as rulings of the Inter-American Court of Human Rights,²³⁰ the ICC's Preparatory Commission,²³¹ and several national legislators²³² have referenced the Basic Principles. In spite of its nonbinding nature, the Draft gives "bite" to reparation beyond the "bark" other UN instruments have boasted. NGOs see the Draft Guidelines as a universal document that will standardize victims' rights to reparations, and overcome the fragmented nature of the current legal framework for reparations in instruments.²³³ With all hope the Drafters will see the Basic Principles become the "benchmark" by which a State's treatment of victims is measured.²³⁴

Finally, Japan's own consultative role in the Draft Guidelines makes it even harder for them to deny adoption of similar policy. This UN mechanism enables *legal* compensation for the "comfort women." However it is accepted in Japan, it adds another layer to the forceful

227. Dunoff, Ratner, & Wippman, *supra* note 224, at 36-37.

228. McDOUGALL FINAL REPORT, *supra* note 4, Annex, at 20.

229. *Id.* at 21.

230. See Castillo Paez Case, Judgment of November 3, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 34 at ¶¶82-83 (1997); Bámaca Velásquez Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of February 22, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 91 at ¶75 (2002); Vandeginste, *supra* note 35, at 150.

231. Vandeginste, *supra* note 35, at 150.

232. *Id.*

233. Lasco, *supra* note 35, at 20.

234. *Id.*

mechanisms for change, like the Fund, the judgments, the legislative proposals, and the Japanese government's recent admission of the extent of their involvement in the "comfort system." However excellent the Draft's provisions, the decision to accept international law and to redress its violations, lies only with Japan. The Draft provides a simple framework for this next step backed by unified support. Despite Japan's preliminary steps in appeasement, the opportunity for a leap forward seems undeniable.

Meanwhile, critics like McDougall, continue to raise the bar by concluding that "anything less than full and unqualified acceptance by the Government of Japan of legal liability and the consequences that flow from such liability are wholly inadequate. It now falls to the Government of Japan to take the necessary final steps"²³⁵ to provide adequate redress.²³⁶ With most surviving "comfort women" in their eighties, time itself adds continued pressure. As those who still deny the reality of the "comfort system" die, so will the "comfort women," leaving the hope of repairing damage to the living, limited to reparations for the memories of the dead. Indeed, the Principles intersect at a time where the need is most immediate.

3. Draft Principles and Sexual Violence Reparations

As the Draft comes closer to completion, a few NGOs have spoken out about its feasibility for gender-specific and sex-based crimes. The Asian-Japan Women's Resource Center (AJWRC) and Violence Against Women in War Network Japan (VAWW-NET Japan) filed a written statement with the UN in accordance with Economic and Social Counsel Resolution 1996/31, expressing their critiques of the Draft.²³⁷ ARWRC and VAWW-NET Japan contended that the Basic Principles are "insufficient" to address gender specific crimes and to continuing

235. Many scholars have supplied their recommendations for Japan's reparation policy goals. They share many of the same ideals, undergirded by the realization that steps must be taken rapidly because of the advancing age of the surviving "comfort women." For example, Dolgopol and Paranjape suggest implementation of:

1. a new administrative fund for providing legal compensation with international representation;
2. a UN and Japanese Government appointed panel of national and international leaders with decision-making authority to set up an adequate compensation scheme to provide official, monetary compensation which:
 - a. determines the adequate level of reparation;
 - b. establishes an effective system of publicizing the fund and identifying victims;
 - c. establishes an administrative forum to expeditiously hear all claims.

DOLGOPOL REPORT, *supra* note 6, at 135-36.

236. MCDUGALL FINAL REPORT, *supra* note 4, Annex, at ¶ 69.

237. ASIAN-JAPAN WOMEN'S RESOURCE CENTRE, *supra* note 86, at 1.

violations, and demand guidelines above and beyond the Draft.²³⁸ However, the UN Special Rapporteur, after her own studies in numerous countries, including Japan, only praised the Draft. She commended it for bringing “clarity . . . consistency and a wider scope of reparations for gender-related violations,” and “sexual violence committed during armed conflict,” while also implying that they are a step in the right direction for the “comfort women” victims themselves.²³⁹

V. Conclusion

International treaties, customary international law, the international community, members of the Japanese citizenry, the United Nations, Special Rapporteurs, the Japanese Court system, and, most importantly, the “comfort women,” all recognize that Japan has a duty to provide reparations, an official apology, and justice to these victims. Glimmers of recognition of this duty, in the form of the Asian Women’s Fund, legislative agendas, and at least one branch of the judiciary,²⁴⁰ are appearing in the Japanese government, which has ignored the “comfort system” injustice for over fifty years. The foundations have been laid for substantive action. Moreover, the “comfort women’s” persistent demands for justice come at a time when the victim’s international cry for substantive and enforceable reparations for human rights violations has been heard by the United Nations. The Draft Basic Principles constitute the nexus of the victims’ needs and the international community’s passion.

The Draft is unprecedented excellence in international law. It provides substance and detail to the international community’s growing support for reparations which are currently diluted in numerous international documents. It delivers universal principles which can be tailored to each individual situation using the “victim-based perspective.” Not only does the Draft strengthen the position of victims, but it also arms these victims with tangible reparation rights. Most importantly, the Draft has gained widespread recognition in the international community, even before its formal adoption.

Viewing the Draft in light of the “comfort system” further extends

238. *Id.* at 2.

239. MCDougall UPDATE, *supra* note 25, at ¶ 70.

240. Tutsuka, *supra* note 35, at 8. “The Judgement recognizes that the Diet members have the duty to enact the law to compensate the victims and that they have failed to do so. Since it took a clear stance against the legislature, it is politically important and will help the lobbying activities. In contrast to the recommendations from the United Nations or the Japan Federation of Bar Associations (JFBA), which were helpful but did not impose any legal duty, this judgement will force the Japanese government to act as it orders, if it is put into effect.” *Id.*

its value. The text itself strengthens the position of the "comfort women" in international society as victims of gender-related human rights violations, and provides specific remedies that mold to their needs, recognize past harm, and compensate for it. It excels in compelling and upholding the very reparations the "comfort women" victims most desire: accurate historical accounts, government compensation, and most importantly, an official apology. In sum, the Draft embodies what most scholars have found to be crucial elements in a Japanese reparation policy.

Even if Japan does not adopt the Draft Principles, the Draft's role as the most substantive reparations force in the international and domestic community cannot be denied. If history is any indication of Japan's weakening defenses (i.e., the Asian Women's Fund and the Shimonseki Judgement), the slow steps toward justice are gradually quickening. Never before have education, news, and historical accounts allowed more people to encounter the reality of the horrific tragedy Japan called the "comfort women." Until now, a Japanese court has never found its own government at fault for the "comfort system." It is in this extraordinary moment that the UN delivers a substantive reparations policy: the Draft. The culmination of these forces in a policy that combines the "backward-looking objective of compensation victims with the forward-looking objectives of political reform"²⁴¹ has never been more appropriate for the "comfort women." As Japan continues to lose respect in the international community, from its own people, and from its own courts, the time for reconciliation has also never been more "convenient." As an unparalleled comprehensive tool in the international reparations community, the Draft will, at the very least, provide the "comfort women" with a tangible source of hope and a force for justice to rise above their helplessness and despair.²⁴² At the most, it may be the final salvation the "comfort women," of battered soul, psyche, society, and body, have been waiting decades for.

241. Vandeginste, *supra* note 35, at 148.

242. *Id.*