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Enforced Prostitution in International Law
Through the Prism of the Dutch
Temporary Courts Martial at Batavia

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31.1. Introduction

The crimes associated with the euphemistically named “comfort women” system instituted in the countries once occupied by Japan have largely gone unpunished. The surviving victims still await compensation and sometimes even acknowledgement of their ordeal. The Judgments of the Temporary Courts Martial located in Batavia in the Dutch East Indies (now Jakarta, Indonesia), relating to wartime sexual violence, are a largely forgotten and understudied resource. However, they represent the first occasion in history when individual members of the military as well as civilian “brothel” owners were convicted of enforced prostitution as a violation of the laws and customs of war.¹ Enforced prostitution and its

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counterpart – sexual slavery – have been persistent features of armed conflict since before the Second World War. It is believed that in 1918 poverty-stricken Japanese women and girls, many from Kyushu, were forced into prostitution when Japan entered Siberia. Following Japan’s invasion of China in 1932 the use of girls and women for prostitution became systematised by the Imperial Japanese Army. According to George Hicks, the first “comfort stations” under direct control of the Japanese military were established in Shanghai in 1932, after which the system escalated. In contrast to the small number of cases addressing sexual offences in the trials held after the Second World War, those concerning modern conflicts, from the former Yugoslavia to Sierra Leone, have focused extensively on the victimisation of women and girls.

2. “The War Crimes Commission, set up in 1919 to examine the atrocities committed by Germany and the other Axis powers during World War I, had found substantial evidence of sexual violence and had subsequently included rape and forced prostitution among the violations of the laws and customs of war”. Anne-Marie de Brouwer, Supranational Criminal Prosecution of Sexual Violence, Intersentia, Antwerp, 2005, p. 5.


4. Ibid.

5. As the system expanded the military turned the management over to private operators. George Hicks, The Comfort Women: Japan’s Brutal Regime of Enforced Prostitution in the Second World War, W.W. Norton, New York, 1997, p. 47.


The Judgments of the Temporary Courts Martial of Batavia which relate to enforced prostitution, the anonymised original copies of which were initially obtained in 2006 from the Royal Library in The Hague,⁸ are now the subject of a project being co-ordinated at the Centre for Rights and Justice in the Faculty of Law at the Chinese University of Hong Kong. The project, initiated in February 2014, aims in its first stage to translate the Judgments from Dutch into English accurately and consistently, incorporating explanations as to relevant translation decisions, and to gather and organise the authentic material relating to the trials online, making it freely accessible. This will serve as a basis for the second stage of the project which aims at researching enforced prostitution in international law through the prism of the Batavia trials.⁹ This chapter provides some preliminary insights into the significance of these trials, both in helping to identify the historical origins and definition

⁸ A translation project was established by Danny Friedmann in 2006. Three Judgments of the Temporary Courts Martial related to enforced prostitution, Case No. 40/1946, 72/1947 and 72A/1947, were acquired, and translated from Dutch into English by volunteers from the community of Korean adoptees in the Netherlands.

⁹ Despite their significance, the cases have not been comprehensively studied. Knut Dörmann contends that there are few legal sources clarifying the elements of enforced prostitution. It seems he was familiar with the Awochi case but not with the other Temporary Courts Martial relevant to enforced prostitution: Judgments of the interconnected Cases No. 72/47, 72A/47 and 34/1948. Knut Dörmann, Louise Doswald-Beck and Robert Kolb, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary, Cambridge University Press, Cambridge, 2003, p. 339. The unfamiliarity is in part due to the unwillingness of the Dutch Ministry of Foreign Affairs, the Archives of Instituut voor Oorlogs-, Holocaust- en Genocidestudies (Institute for War, Holocaust and Genocide Studies) in Amsterdam and the National Archives of the Netherlands in The Hague, who are restricting access to the relevant judgments of the Temporary Courts Martial in Batavia, namely for 75 years after the date of their publication. This means that the first Temporary Court Martial in Batavia of 1946 will be publicly available and accessible in 2022 and the last one of 1949 in 2025. The argument used is that this is done to protect the privacy of those involved in the cases, not just the victims, but also the accused. There is an exception if the people involved have passed away. After 75 years all restrictions to public accessibility are lifted, unless in exceptional circumstances, according to Article 15 Dutch Archive Act 1995 (Archiefwet 1995). Relevant examples can be found here: Number archive inventory (Nummer archiefinventaris): 2.09.19, Inventory of the Archives of the Courts-Martial (Army) in the Netherlands and Dutch East Indies, 1923–1962, National Archives of the Netherlands (Inventaris van de archieven van de Krijgsraden (te Velde) in Nederland en in Nederlands-Indië, 1923–1962, Nationaal Archief).
of the war crime of enforced prostitution and in re-igniting the ongoing quest for justice and reconciliation with regard to Japan’s institutionalised system of sexual slavery during the Second World War.

The first part briefly explains the background to the Batavia trials and the applicable sources of procedural and substantive law. The war crime of enforced prostitution as defined in the trials is then described before turning to the modern definition of enforced prostitution and terminological controversies. In this context, the question of whether the war crime of enforced prostitution is a relic of the past or an active category in contemporary international criminal law is considered. Finally, the lessons learned or not learned at Batavia as it concerns Japan’s ongoing reluctance to recognise full responsibility for the “comfort women” system are addressed.

31.2. Background to the Batavia Trials and Sources of Law

In 1943, while the Western and Eastern hemispheres were ensnared in conflict, 17 Allied Powers meeting in London established the United Nations Commission for the Investigation of War Crimes, which soon after became the United Nations War Crimes Commission (‘UNWCC’). Its objects and powers were two-fold: first, to investigate and record the evidence of war crimes, identifying where possible the individuals responsible; and second, to report to the governments concerned in cases in which it appeared evidence might be expected to be forthcoming. These functions were extended with advice and recommendations to member governments on questions of law and procedure to carry out the objects of the Allied Powers. The 30 October 1943 Declaration of Moscow, signed by the Soviet leader Joseph Stalin, the US President Franklin D. Roosevelt and the British Prime Minister Winston Churchill on behalf of the Allied Powers, proclaimed that the “major” criminals should be dealt with as the Allies should decide, and that the “minor” criminals should be sent back to the countries in which they had done

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10 The United Nations War Crimes Commission was established in London on 20 October 1943.
12 Ibid., p. 13
their atrocious deeds to be dealt with by the laws of those countries.\textsuperscript{13} The four-power London Agreement of 8 August 1945 decided that an International Military Tribunal would be established for the trial of major war criminals.

Trial arrangements in the Western hemisphere were mirrored in the East. The major war criminals of Japan were to be tried before the International Military Tribunal for the Far East (‘IMTFE’) in Tokyo, established according to a declaration of General Douglas MacArthur, the Supreme Commander for the Allied Powers, on 19 January 1946.\textsuperscript{14} A great number of the prosecutions in the Far East were conducted from various central offices in Yokohama, Singapore, Hong Kong and Batavia. In the Dutch East Indies, the Japanese “minor” war criminals were to be tried before the Temporary Courts Martial, based on national law in recognition of sovereignty, but also applying international law. The Allied South East Asia Command (‘SEAC’) was given the task of co-ordinating all activities in the field of prosecution and preliminary research. The Dutch trials were entrusted to the Temporary Courts Martial, which were provided for by the Revised Administration of Justice in the Army, established by an Ordinance of 28 June 1945\textsuperscript{15} in Brisbane, where the Dutch East Indies government in exile partially resided.\textsuperscript{16} In the meantime, the war with Japan continued until 15 August 1945. Lieutenant Governor-General in exile Hubertus van Mook ordered from Brisbane the establishment of a Bureau to Investigate War Crimes in the Dutch East

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\textsuperscript{13} \textit{Ibid.}, p. 1.
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\textsuperscript{16} The Dutch East Indies government in exile resided partially in Ceylon (Sri Lanka), which belonged to the British war theatre (place of operation) and partially in Melbourne, later Brisbane, which belonged to the American war theatre. Loe de Jong, \textit{Het Koninkrijk der Nederlanden in de tweede wereldoorlog 1939–1945}, Part 11c (Nederlands-Indië III), Staatsuitgeverij, ’s-Gravenhage, 1988, p. 2.
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Indies on 11 September 1945, while Lord Louis Mountbatten led the British occupation of Java in the same month. The trials before the Temporary Courts Martial in Batavia followed a procedure whereby the prosecutor (Auditeur-Militair) brought charges and requested a punishment for the accused. After the presentation of the evidence, a bench of military judges announced the verdict. The punishment was then approved in a process known as the “fiat execution”, according to which the High Representative of the Crown (Hoge Vertegenwoordiger van de Kroon) had the final say on carrying out the penalty. There was no possibility of appeal, but the commander-in-chief had a revising power.

As Lord Wright, chairman of the UNWCC put it: “War is organised murder, devastation and destruction. But the laws of war draw a line between legitimate acts and illegitimate acts done in war”. Enforced prostitution was not a codified qualification in the Criminal Law of the Dutch East Indies. Its origins may be found in international law, beginning with Article 46 of the Hague Convention 1899 which requires respect for “[f]amily honours and rights, individual lives and private property, as well as religious convictions and liberty”. The protection of “family honours” as it was expressed in treaties of the pre-First World War is organised murder, devastation and destruction. But the laws of war draw a line between legitimate acts and illegitimate acts done in war”.

For the adjudication of war crimes it was held necessary that the courts martial had available a college presided over by legally qualified chairs. At the most important Temporary Courts Martial one or more members or substitute members were appointed from legal officials who would be first militarised if this was necessary. L.F. de Groot, Berechting Japanse oorlogsmisdadigers in Nederlands-Indië 1946–1949. Temporaire Krijgsraad Batavia, Art and Research, ’s-Hertogenbosch, 1990, pp. 18–19.

The procedure that needs to be followed in case of a rejection of the fiat execution is a consequence of Article 113 juncto Article 114 Adjudication War Crimes, Bulletin of Acts and Decrees 1946 No. 74 (“Rechtspleging Oorlogsmisdrijven” van de regelen welke ingevolge de “Ordonnantie Rechtspleging Oorlogsmisdrijven” van toepassing zijn op de strafrechtspleging ter zake van oorlogsmisdrijven). Herein it is determined that if the Temporary Court Martial perseveres after the rejection of the fiat execution by the Commanding Officer, the latter should submit the case to the Governor General. If the Governor General considers that the judgment should be executed, he orders the Commanding Officer to provide the judgment with the fiat execution; ibid., p. 20.

History of the UNWCC, p. 20, see supra note 11.

Laws and Customs of War on Land (Hague II), 29 July 1899.
War period, including Article 46 the Hague Convention 1907, was based on the notion that women deserved protection as the property of men. The first explicit reference to enforced prostitution, which arguably expresses the beginning of a reconceptualisation, is contained in the list of Violations of the Laws and Customs of War in the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (‘Commission on Responsibility’) presented to the Preliminary Peace Conference at the conclusion of the First World War. “Rape” appears as point (5) on the list and “abduction of girls and women for the purpose of enforced prostitution” as point (6). Japan participated in the Commission on Responsibility and although it made reservations relating to the immunity of the Japanese Emperor and responsibility for abstaining from the prevention of crimes, it made no reservation to the prohibition of enforced prostitution.

The proceedings at Batavia appear unique among the post-Second World War trials in invoking the war crime of abducting girls and women for the purpose of enforced prostitution. The Dutch government in exile issued an Extraordinary Penal Law Decree in 1943 in an attempt to

23 Laws and Customs of War on Land (Hague IV), 18 October 1907.
26 Ibid., pp. 151–52.
avoid implementing retrospective legislation and probably also to deter persons from committing war crimes. However, the scope of this Decree is only relevant for war crimes committed within the Netherlands, or outside the Netherlands within Europe.\textsuperscript{28} In 1946 the Lieutenant Governor-General of the liberated Dutch East Indies passed four ordinances\textsuperscript{29} for the Dutch East Indies to equip the Temporary Courts Martial with a substantive and procedural legal framework that would allow it to adjudicate war crimes in accordance with the norms of international law. Ordinance No. 44 on the Definition of War Crimes enumerates 39 such crimes.\textsuperscript{30} Article 1 states: “War crimes are understood to mean facts which constitute a violation of the laws or customs of war in time of war committed by nationals of an enemy nation or by foreigners in the service of the enemy”.\textsuperscript{31} It is notable that the list provided in Ordinance No. 44 corresponds almost entirely with the categories in the Report of the Commission on Responsibility. Thus, the crime of enforced prostitution is included as follows: Ordinance No. 44, 1946: Article 1(7) Abduction of

\begin{itemize}
\item \textsuperscript{28} Articles 4 and 15, Extraordinary Penal Law Decree 1943, \textit{ibid.}
\item \textsuperscript{29} Ordinance No. 44 Definition of War Crimes (\textit{Ordonnantie begripsomschrijving oorlogsmisdrijven} No. 44, Stbl. v. N.I. 1946). According to Ordinance Description Criminal Law No. 45 (\textit{Ordonnantie strafrechtsomschrijving} No. 45) \textit{Bulletin of Act and Decrees of Dutch East Indies} 1946, he is guilty who commits or has committed a war crime punishable by the death penalty or life imprisonment or temporary imprisonment of at least one day and a maximum of twenty years. In addition the Ordinance provides that the general provisions of the Military Penal Code, besides various provisions of the first book of the Criminal Code, do not apply (including Articles 50 and 51 of the latter Code, which exclude criminal liability for acts to execute a statutory provision or implement a legal requirement or to implement an official order issued by the competent authority. Ordinance Jurisdiction War Crimes No. 46 (\textit{Ordonnantie rechtsmacht oorlogsmisdrijven} No. 46) \textit{Bulletin of Act and Decrees of Dutch East Indies} declares the provisions relating to the jurisdiction of the military court in the Dutch East Indies, subject to certain modifications applicable in respect of war crimes. Ordinance Legal Procedure War Criminals No. 47 (\textit{Ordonnantie rechtspleging oorlogsmisdadigers} No. 47, \textit{Bulletin of Act and Decrees of Dutch East Indies} determines whether the Revised Justice in the Army is applicable to criminal proceedings in respect of war crimes and also any new arrangements that criminal justice established.
\item \textsuperscript{30} Ordinance No. 44, Definition of War Crimes (\textit{Ordonnantie begripsomschrijving oorlogsmisdrijven}) \textit{Bulletin of Act and Decrees of Dutch East Indies} 1946.
\item \textsuperscript{31} \textit{Ibid.}, Article 3, War Crimes Definitions Ordinance makes clear that the Ordinance came into effect as of 4 June 1946. The general Dutch East Indies substantive criminal law remained applicable to war crimes in so far there were not rules for war crimes expressly deviating rules from the general criminal law. The provisions in regard to war crimes were designated as special criminal provisions within the meaning of Article 63(2) Criminal Law of the Dutch East Indies.
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girls or women for the purpose of enforced prostitution, enforced prostitution.

31.3. The War Crime of Enforced Prostitution in the Batavia Trials

The collection of cases addressing enforced prostitution at Batavia include Case No. 40/1946 against Washio Awochi; Case No. 72/1947 against 12 accused (whose identities are not disclosed in the available version of the Judgment but revealed by De Groot⁴²); Case No. 72A/1947 against one accused (understood to be Colonel Ikeda Shoichi³³); and Case No. 34/1948 against General Major Nozaki Seiji. The victims were all Indo-European or Dutch nationals.³⁴ The fact pattern that forms the basis of the charges in these cases involves women and girls, some in the 12- to 16-years-old age group, being taken from internment camps on the pretext that they would work in an office for the Japanese authorities or in a restaurant. Instead they ended up in brothels where they were beaten and repeatedly raped, and forced to serve Japanese men as prostitutes in what emerges as an organised system directed by the military with civilian collaboration. The charges in these cases include rape, ill-treatment, abduction of girls and women for the purpose of enforced prostitution, and enforced prostitution.

The UNWCC published a summary of the Washio Awochi case in the Law Reports of Trials of War Criminals.³⁵ The full text of the Judgment of the Temporary Courts Martial in Batavia supplements this interpretive summary. Awochi was a civilian hotel keeper who ran the so-called Sakura Club where women and girls were recruited and forced, under direct or indirect threat of intervention by the Japanese Military Police (‘Kempeitai’), to serve Japanese civilian men as prostitutes. As the

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³³ De Groot, 1990, pp. 32–33, 66, see supra note 19.


judgment notes, the notion of contact with the Kempeitai in a society under Japanese occupation was regarded at a minimum as being synonymous with deprivation of liberty and physical abuse. Awochi was convicted of the war crime of enforced prostitution and sentenced to 10 years’ imprisonment, the young age of some of the victims constituting an aggravating factor. Abduction was not a feature of the case and the outcome points to the conceptual separation for the first time of the war crime of “abduction of girls or women for the purpose of enforced prostitution” from “enforced prostitution”, both categories appearing in the Ordinance No. 44. The case stressed the involuntary aspect of enforced prostitution, amounting to “compulsion in all its possible forms”.  

The remaining three cases concerned members of the military charged alone or jointly with civilians. These cases shed more light on the planning of the crimes, the chain of command and the absence of voluntariness of the girls and women. Case No. 72/1947 dealing with events in Semarang, for example, charged military officers described as “heitan officers” under a concept that resembles the modern notion of command responsibility. The evidence that proved involuntariness on the part of the women and girls included the deception used to lure them from the internment camps, the fact that many attempted to run away, to commit suicide or simulated insanity and illness, and the fact that threats and coercion were employed to break their resistance. The Judgment states in an obiter dictum that even if some of the women and girls were recruited voluntarily, the inhuman circumstances they then faced were “contrary to morality and humanity” and therefore criminal, suggesting that such coercive conditions would exclude any possibility of consent. A clear statement was also made to the effect that representatives of the government of the occupying forces used the situation of “helplessness, dependence and subjection” in the internment camps in an organised manner to force the women and girls into prostitution.

Some of those convicted by the military courts at Batavia, including three related to Case No. 72/1947, were pardoned and released much

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36 Ibid., p. 124.
earlier than the sentences that were pronounced at the Temporary Court Martial\(^\text{37}\) and approved by the High Representative of the Crown.

### 31.4. Enforced Prostitution in Contemporary International Criminal Law

According to Dan Plesch and Shanti Sattler, the extensive work of the UNWCC and the tribunals associated with it serves as a source of customary international law that relates directly to the current work of the International Criminal Court and the \textit{ad hoc} tribunals in operation since the 1990s.\(^\text{38}\) Indeed, the International Committee of the Red Cross (‘ICRC’) has identified customary international humanitarian law and catalogued 161 rules, including Rule 93 which prohibits enforced prostitution as one of the forms of sexual violence.\(^\text{39}\) The ICRC also made

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\(^\text{37}\) Major General Nozaki Seiji was found guilty by the Temporary Court Martial in Batavia (Judgment, Case No. 34/1948) of the war crimes of “enforced prostitution”, “rape” and “ill-treatment of prisoners” and was sentenced to 12 years’ imprisonment. However, Nozaki was discharged on 30 July 1953, after five years, because he was paroled. De Groot, 1990, p. 406, see \textit{supra} note 19. Colonel Ikeda Shoichi was found guilty by the Temporary Court Martial in Batavia (Judgment, Case No. 72A/1947) for the war crimes of “enforced prostitution”, ”rape” and “ill-treatment of prisoners”, was sentenced to 15 years’ imprisonment, but was paroled after six years on 18 March 1954. De Groot, 1990, pp. 419–20 see \textit{supra} note 19. Furuya Iwao, who was a citizen in the service of the Japanese Army, was found guilty by the Temporary Court Martial in Batavia (Judgment, Case No. 72/1947) for the war crime of “enforced prostitution” and was sentenced to 20 years’ imprisonment. The Minister of Foreign Affairs, J. Luns, decided on 5 December 1958, taking into account Article 11 of the San Francisco Peace Treaty with Japan and the request by the Japanese government to remit the remaining imprisonment time to the criminals of war crimes from the B and C category, that whereas the conduct of the war criminals after their provisional release has not given rise to complaints, the remaining imprisonment time will be waived. Therefore Furuya was released after 11 years. De Groot, 1990, pp. 435–36, see \textit{supra} note 19.


reference to national law contained in military manuals stating that rape, enforced prostitution and indecent assault are prohibited and may constitute war crimes.\textsuperscript{40}

The conclusions of the ICRC are supported by the 1949 Geneva Conventions. Article 27 of Geneva Convention IV \textsuperscript{41} provides that: “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”.\textsuperscript{42} This Article, according to the Commentary to Article 76 of Protocol I Additional to the Geneva Conventions of 1977, was introduced as a reaction to the abuses perpetrated against women during the Second World War.\textsuperscript{43} Article 76(1) of Protocol I\textsuperscript{44} states: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”.\textsuperscript{45} Article 75(2)(b) Protocol I to the Geneva Conventions\textsuperscript{46} provides fundamental guarantees that are gender neutral.\textsuperscript{47} It states that “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault” are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents. Therefore, in the history of the Geneva

\textsuperscript{40} Henckaerts and Doswald-Beck, \textit{Ibid.} fn. 145 citing military manuals of Argentina (§§ 1584–1585); Australia (§§ 1586–1587); Canada (§ 1588–1589); China (§ 1590), Dominican Republic (§ 1591); El Salvador (§ 1592); France (§§ 1594–1595); Germany (§ 1596); Israel (§ 1597); Madagascar (§ 1598); Netherlands (§ 1599); New Zealand (§ 1600); Nicaragua (§ 1601); Nigeria (§ 1602); Peru (§ 1603); Senegal (§ 1604); Spain (§ 1605); Sweden (§ 1606); Switzerland (§ 1607); Uganda (§ 1608); United Kingdom (§§ 1609–1610); United States (§§ 1611–1615); Yugoslavia (§ 1616).

\textsuperscript{41} Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

\textsuperscript{42} Article 27, Geneva Convention IV 1949, third sentence.

\textsuperscript{43} Comment to Article 76 Protocol I to the Geneva Conventions 1987, para. 3152, pp. 892–93.

\textsuperscript{44} Article 76 Protection of Women Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

\textsuperscript{45} Notably the word used in the English version is “forced” rather than “enforced”, in French “\textit{la contrainte à la prostitution}”.

\textsuperscript{46} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

\textsuperscript{47} Commentary on Article 75 Protocol I to the Geneva Conventions, 1987, para. 3049, p. 874.
Conventions and their Additional Protocols, enforced prostitution originated as an attack on a woman’s honour and was then prohibited as an outrage upon personal dignity.\textsuperscript{48}

Enforced prostitution is included in the Statute of the Special Court for Sierra Leone as a crime against humanity and as a war crime under the category of outrages upon personal dignity.\textsuperscript{49} In the Statute of the International Criminal Tribunal for Rwanda (‘ICTR Statute’) it is mentioned as an outrage upon personal dignity.\textsuperscript{50} Though not expressly enumerated, outrages against personal dignity have also been charged under the non-exhaustive Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia (‘ICTY Statute’).\textsuperscript{51} However, enforced prostitution had almost disappeared from the international criminal trial scene as a relevant characterisation of sexual violence until it was specifically named as a war crime and a crime against humanity in the Rome Statute of the International Criminal Court (‘ICC Statute’). Article 8(2)(b)(xxii) of the ICC Statute prohibits with respect to armed conflicts of an international character “committing rape, sexual slavery, enforced prostitution, forced pregnancy, […] enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions”. A provision expressed in similar terms in Article 8(2)(e)(vi) is applicable to non-international armed conflicts. The distinctive elements of enforced prostitution as expressed in the ICC Elements of Crimes\textsuperscript{52} include:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by

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\textsuperscript{49} Article 2(g), Statute of the Special Court for Sierra Leone, January 16, 2002. Article 3(e) Statute of the Special Court for Sierra Leone refers directly to Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 which criminalises “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.

\textsuperscript{50} Article 4(e) Statute of the ICTR, 31 January 2010 (https://www.legal-tools.org/doc/8732d6/).

\textsuperscript{51} Aleksovski Judgment, see \textit{supra} note 6; ICTY, Aleksovski Appeals Judgment, see \textit{supra} note 6.

threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.

2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

According to Robert Cryer et al., some delegations were concerned by the “paucity of precedent” for the element of pecuniary or other advantage but it was nevertheless adopted. The definition was apparently designed to distinguish enforced prostitution from sexual slavery having reference to the ordinary meaning of the term “prostitution”. No charges have so far been brought under the ICC provisions concerning enforced prostitution and in the jurisprudence of the ad hoc tribunals as well as the developing jurisprudence of the ICC, much more attention has been paid to the related concepts of enslavement and in particular sexual slavery. The core elements of sexual slavery are “exercising any or all of the powers attaching to the right of ownership over one or more persons and causing the victim to engage in one or more acts of a sexual nature”.

Cryer et al. have argued that the concept of enforced prostitution is “problematic in that it obscures the violence involved, it is rooted in chastity and family honour, and it degrades the victim; thus ‘sexual slavery’ is generally preferred as properly reflecting the nature and seriousness of the crime”. Consistent with the notion of honour current at the time, there was an assumption expressed in the Batavia cases that Dutch women and girls would be unwilling to serve the “enemy” in a profession considered “indecent and in conflict with respectability

53 Cryer et al., 2010, pp. 256–57, see supra note 48.
54 Ibid., p. 257.
55 The ICTY Trial Chamber and Appeals Chamber Judgments extended the qualification “enslavement” in the context of a system of “rape camps” in the Kunarac and Others case. They were found guilty of enslavement. Kunarac and Others Appeal Judgment, see supra note 6.
56 Special Court for Sierra Leone cases, see supra note 7.
57 ICC, 2011, see supra note 52.
58 Cryer et al., 2010, p. 256, see supra note 48.
according to Western standards”. 59 This might point to discriminatory attitudes towards women inherent in the very word “prostitute”. 60 The Special Rapporteur reporting to the UN Sub-Commission on the Promotion and Protection of Human Rights on the topic of “Systematic rape, sexual slavery and slavery-like practices during armed conflict” states that “the only party without honour in any rape or in any situation of sexual violence is the perpetrator”. 61 She argues that sexual slavery encompasses most, if not all, forms of enforced prostitution and claims enforced prostitution, as it appears in international treaties, has been “insufficiently understood and inconsistently applied” though without citing any attempts at its application. 62 While acknowledging that “enforced prostitution remains a potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict situations”, she states a clear preference for conduct which might amount to enforced prostitution to be characterised and prosecuted as sexual slavery. 63 She refers to the “comfort stations” in Japan during the Second World War and the “rape camps” more recently in the former Yugoslavia as particularly egregious examples of sexual slavery. 64 According to the Judgment of the Women’s International War Crimes Tribunal for the Trial of Japan’s Military Sexual Slavery (‘Women’s International War Crimes Tribunal’), established by Asian women’s organisations in 2000 as a people’s tribunal, survivors of the “comfort women” system vehemently object to the crimes against them being classified as forced prostitution. 65 The Women’s International War Crimes Tribunal argued that sexual slavery constituted a crime under international law between 1937 and 1945, even though the terminology of sexual slavery was not used at the time. 66 It then went on to say that the “identification of sexual

59 Netherlands Temporary Court Martial at Batavia, Case No. 72/1947, Judgment, p. 13.
60 Women’s International War Crimes Tribunal, Case No. PT-2000-1-T, Judgment, 4 December 2000, para. 635.
62 Ibid., para. 31.
63 Ibid., paras. 32–33.
64 Ibid., para. 30.
66 Ibid., para. 621.
slavery as an international crime in our Charter and as a matter of international law today is, in our opinion, a long overdue renaming of the crime of (en)forced prostitution”. The basis for this statement was that the terminology of enforced prostitution obscures the gravity of the crime, hints at a level of voluntariness, and “stigmatizes its victims as immoral or ‘used goods’”.  

The Batavia cases to an extent suggest the contrary – that the crime was considered uniquely serious – and warranted focused cases to highlight the particular suffering of the women and girls involved. Sentences were sometimes as high as twenty years’ imprisonment or in one case even the death penalty. It should also be noted that involuntariness was considered the major element of the crime. It can only be speculated whether a similar factual scenario would be prosecuted under the heading “enforced prostitution” today when various other characterisations are available in the ICC Statute. It emerges from the Batavia Judgments that the visitors paid for the services provided. It is clear that the victims were coerced into working hard to increase earnings for the brothels and the accused Awochi, for example, drew a very good income. The ICC definition of enforced prostitution appears applicable in such circumstances.

An important consideration highlighted by the Women’s International War Crimes Tribunal is that characterising Japan’s military “comfort women” system as enforced prostitution may assist those who deny responsibility in describing the victims as prostitutes and “camp followers”, suggesting voluntariness and immorality and thus Japan’s innocence. This consideration extends beyond the individual criminal responsibility perspective and links the discussion to the ongoing problem of Japan’s failure as a state to acknowledge responsibility.

### 31.5. Lessons Learned or Not Learned at Batavia and the Kōno Statement

On 4 August 1993 the Chief Cabinet Secretary of Japan, Yōhei Kōno, made a statement which included the following assumption: “The recruitment of the comfort women was conducted mainly by private

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67 Ibid., para. 634.
68 Ibid., para. 634.
69 Ibid., para. 634.
recruiters who acted in response to the request of the military”.\(^70\) Kōno also stated: “We hereby reiterated our firm determination never to repeat the same mistake by forever engraving such issues in our memories through the study and teaching of history”.\(^71\) Prime Minister Shinzō Abe’s first cabinet in March 2007 made the statement: “The material discovered by the government contained no documentation that directly indicated the so-called coercive recruitment by the military or the authorities”. Neither Kōno nor Abe seem to have taken the evidence of the Temporary Courts Martial in Batavia into account. In November 2013 the Japan Times reported that Hirofumi Hayashi, Professor of Modern Japanese History at Kanto Gakuin University, “found trial documents at the National Archives of Japan relating to six cases heard before tribunals set up for Class B and Class C war criminals after the end of WW II by China’s Nationalist Party and the Netherlands, then the colonial ruler of the Dutch East Indies”. Hayashi indicated that the materials needed to be further scrutinised, adding that he did not understand why the Japanese Ministry of Justice did not submit those documents as evidence at the time the Kōno statement was drafted.\(^72\)

Abe stated that: “The Kōno statement put dishonour on the back of Japan by indicating that the military stormed into houses, kidnapped women and turned them into comfort women”.\(^73\) Arguably Abe has aggravated the problem by not only refusing full recognition of the war crimes but also by visiting the Yasukuni Shrine,\(^74\) where war criminals of


\(^71\) Ibid.

\(^72\) “Archive Data for Years Have Shown ‘Comfort Women’ Were Taken by Force: Professor”, in Japan Times, November 21, 2013.

\(^73\) Abe was considering to review the Kōno Statement to make its scope more limited; “Abe: No Review of Kono Statement Apologizing to ‘Comfort Women’”, in Asahi Shimbun, 1 February 2013. Yohei Kōno criticised Abe for challenging his statement for going too far; John Hofilena, “Kono: PM Abe Wrong to Challenge Japan’s 1993 ‘Comfort Women’ Apology”, in Japan Daily Press, 1 July 2013.

Class A and B\textsuperscript{75} are enshrined. It has been suggested that some of the Taiwanese and Korean victims of the enshrined war criminals are also enshrined to “serve the emperor and protect the divine nation”\textsuperscript{76} in the hereafter. A controversial process of schoolbook revisionism has been underway, aiming to downscale the number of civilians killed by Japanese soldiers during the 1937 Nanjing Massacre, and to present as disputable whether the Japanese Army played a direct role in forcing women from Korea and elsewhere to provide sex to its soldiers.\textsuperscript{77} This leads to an educational climate whereby historical facts are glossed over if they are not welcome to the national agenda.\textsuperscript{78}

\textsuperscript{75} Class A crimes are “against the peace”, Class B crimes are “war crimes”, Class C crimes are “crimes against humanity”, according to the categorisation of Article 5 International Criminal Tribunal for the Far East Charter, 19 January 1946 (http://www.legal-tools.org/uploads/tx_ltpdb/CHARTER_OF_THEINTERNATIONAL_MILITARY_TRIBUNAL_FOR_THE_FAR_EAST.pdf).

\textsuperscript{76} “Kidnapped and slaves to Japan’s military in life, tens of thousands of Taiwanese, Koreans and other in death have been subjected to Shinto ritual by Yakusuni Shrine priests hijacking, imprisoning, and enslaving them as guardian spirits of Japan to serve the Emperor and protect the divine nation along side some 1,000 war criminal souls, including perpetrators of atrocities against Taiwanese, Koreans, and others, and members of the deceased’s own families”. Barry Fisher, “Yasukuni Shrine, Typhoon’s Eye of Japan’s Spiritual/Political Storm Rejecting Wartime Victim Redress”, Paper Presented at International Academic Symposium: Yasukuni Shrine, Columbia University, New York, 8 November 2007.


\textsuperscript{78} Abe also appointed Katsuto Momii as Director-General of the state broadcaster NHK, who discussed the sex slavery issue on 25 January 2014, making the remark that “such women could be found in any nation that was at war, including France and Germany” and characterised the international anger as “puzzling”; “Japan NHK Boss Momii Sparks WWII ‘Comfort Women’ Row”, BBC News, 26 January 2014. The next day Morii apologised; “Japan’s NHK Boss Apologises for ‘Comfort Women’ Comments”, BBC News, 27 January 2014. Toru Hashimoto, the Mayor of Osaka, first stated that war sex slaves were necessary to “maintain discipline in the ranks and provide rest for soldiers who risked their lives in battle”; “Japanese Mayor: Wartime Sex Slaves Were Necessary”, in\textit{ Jakarta Post}, 14 May 2013. One week later Hashimoto made it publicly known that he doubted whether it was the state’s will to engage in organised abduction of women for human trafficking, and argued that there is an understanding of the majority of Japanese historians that there is no evidence of the involvement of the government. Hashimoto also said that Japanese armies were not the only army involved in sexual misconduct during the Second World War; “Osaka Mayor Hashimoto Inflames ‘Comfort Women’ Row”, BBC News, 27 May 2013. See also “Japan’s National Broadcaster: My Country Right or Righter: The Ghosts of the Past Once Again Embrace Shinzo Abe”, in\textit{ The Economist}, 8 February 2014.
The polarised attitudes towards these historical events are reflected in media reports of incidents of Koreans slicing off the top of their little finger in protest.\textsuperscript{79} Less bloody but not more sanguine, every Wednesday since 1992, a protest has been held at the Peace Monument, the memorial for sex slaves opposite the Japanese embassy in Seoul.\textsuperscript{80} It is organised by the Korean Council for the Women Drafted for Military Service by Japan\textsuperscript{81} and demands the following actions: acknowledge the war crime; reveal the truth in its entirety about the crimes of military sexual slavery; make an official apology; make legal reparations; punish those responsible for the war crime; accurately record the crime in history textbooks; and erect a memorial for the victims of military sexual slavery or establish a historical museum in Japan. In 2013 the Japanese ambassador to Seoul demonstrated against a memorial opposite the Japanese embassy for Korean sex slaves.\textsuperscript{82} In February 2014, 300 legislators signed a petition to remove the replica of the Seoul memorial in Glendale, California.\textsuperscript{83}

The issue of wartime enforced prostitution remains an unresolved legal problem and obstacle for reconciliation in the countries of the Asia-Pacific region that were occupied by Japan. In South and North Korea, China,\textsuperscript{84} Taiwan, the Philippines, Singapore, Malaysia, Myanmar, Papua


\textsuperscript{80} The Wednesday demonstrations [수요 집회], which means “demand meeting” in Korean, aim to obtain justice for the sex slavery committed during the Japanese occupation of Korea.

\textsuperscript{81} Korean Council for the Women Drafted for Military Service by Japan. The Wednesday demonstrations are now in their twenty-second year. Jo Hyeong-guk, “22nd Anniversary of Wednesday Demonstration: ‘We’ve Waited 22 Years Not a Word of Apology from Japan’”, in \textit{Kyunghyang Shinmun}, 10 January 2014. See also Jaeyeon Woo, “Tears, Gratitude and Anger Mark the 1,000th Protest”, in \textit{Korea Realtime}, 14 December 2011.


\textsuperscript{83} Kirk Spitzer, “Japan’s Lawmakers Launch Campaign Against ‘Comfort Women’ Memorials”, in \textit{Time}, 25 February 2014.

\textsuperscript{84} Sun Xiaobo and Xie Wenting talked with Gen Nakatani, Deputy Secretary-General of Japan’s ruling Liberal Democratic Party and Member of the House of Representatives: “It’s reasonable to say that historical issues hinder the progress of security”. See “Territorial Issues Stick in Throat, but Tokyo and Beijing Can’t Give Up Eating”, in \textit{Global Times}, 18 February 2014.
New Guinea, Timor-Leste, Guam, Indonesia and the Netherlands, the matter is extremely sensitive and topical, kept alive by surviving victims, now 55 from South Korea alone, their families and compatriots. For the victims it might be said that: “The past is never dead. It’s not even past”. The UN Security Council conference “War, Its Lessons and the Search for a Permanent Peace”, which was held on 29 January 2014, made it painfully clear how divided memories, or rather patriotic versions of the truth, can obstruct reconciliation between nations. South Korea, North Korea and China all condemned the Japanese Prime Minister’s visit to the Yasukuni Shrine, revisionism of Japan’s history textbooks and the way Japan is dealing with the “comfort women” issue.

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91 See the research of Daniel Snyder entitled “Divided Memories and Reconciliation”, Shorenstein Asia-Pacific Research Center, Stanford University, which started in 2006.
92 Reconciliation, the common definition is the restoration of friendly relations; the action of making one view or belief compatible with another. However, one can also see reconciliation as both a goal and a process. David Bloomfield, Teresa Barnes and Luc Huyse (eds.), *Reconciliation After Violent Conflict: A Handbook*, International Institute for Democracy and Electoral Assistance, Stockholm, 2003, p. 12.
93 Oh Joon, Representative of South Korea to the UN, stated for example: “Many Japanese leaders had continually shown an attitude of historical revisionism by paying tribute at Yasukuni, where Second World War criminals were enshrined”. Japan’s Representative to the UN, Kazuyoshi Umemoto, answered: “Yasukuni enshrined 2.5 million souls, and they were not only Second World War criminals, but also those who had sacrificed their lives in domestic turmoil. The Prime Minister had visited the shrine to renew Japan’s pledge never to wage war again, not to pay homage to the war criminals”. Security Council, 7105th Meeting, UN Doc. SC/11266.
94 The Representative of South Korea stated that “the leadership of Japan had a distorted view of what happened under imperialism”. The Representative of Japan did not respond to the issue of history books. The Representative of South Korea urged Japan to reconcile.
In February 2014 the Chief Cabinet Secretary Yoshihide Suga announced that Japan was considering a re-examination of the Kōno Statement, to make its scope more limited. He said: “The testimonies of comfort women were taken on the premise of their being closed-door sessions. The government will consider whether there can be a revision while preserving” the confidence in which they were given.\(^{96}\) However, Abe said in the same month that Japan will not review the Kōno Statement.\(^{97}\)

### 31.6. Conclusion

Japan was accused by the Allies of adopting a policy of total war,\(^ {98}\) “not merely because all the nation’s resources of men and material were swept into the war, but also because the war was waged with a total disregard of all human and moral or legal restraints”.\(^ {99}\) John Hickman observed a striking difference between how the Japanese Army first scrupulously adhered to international humanitarian law in the 1904–1905 Russo-Japanese War and in the First World War, but seemed to ignore international law during the Second Sino-Japanese war in 1937–1945 and with its past and with the victims of its aggression, while teaching the same to its youth”. The Chinese Representative stated that Japan should draw lessons from war “required facing history squarely because facts spoke louder than words”. The Representative of North Korea warned that they would meet defeat if they continued in that direction; \textit{ibid.}\(^ {95}\)

The Representative of South Korea stated that Japan had yet to take governmental responsibility in addressing the “comfort women” issue. The Representative of China stated that regarding “comfort women”, the “Yasukuni Shrine still validated as deities war criminals, whom Japan’s delegate had described as having made the ultimate sacrifice”. The Japanese Representative answered that “Japan had also expressed remorse over the question of ‘comfort women’, an issue that should not be politicised”. Then the South Korean Representative responded that “[o]n the issue of ‘comfort women’ forced into sexual slavery Japan had never accepted legal responsibility. It was not a charity or humanitarian issue, but a matter of crime and accountability”; \textit{ibid.}\(^ {96}\)

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\(^{96}\) “Japan Considers Revision of Comfort Women Apology”, Agence France-Presse, 24 February 2014.

\(^{97}\) “Abe: No Review of Kono Statement Apologizing to ‘Comfort Women’”, see \textit{supra} note 73.

\(^{98}\) In the Shōwa period, under the reign of Emperor Shōwa (Hirohito), Imperial Japan launched several policies to promote a total war effort against China and Western powers and increase industrial production. These included the National Spiritual Mobilization Movement and the Imperial Rule Assistance Association. Elise K Tipton, \textit{Modern Japan: A Social and Political History}, Routledge, London, 2008, pp. 136–37.

\(^{99}\) History of the UNWCC, p. 9, see \textit{supra} note 11.
the Second World War, which degenerated into unprecedented brutality.\textsuperscript{100} Knut Dörmann et al. contended that due to the findings of the Awochi case, a compromise was made about the elements of enforced prostitution, so that both pecuniary advantage and other advantages were included.\textsuperscript{101} One can argue that the “other advantage” was that the deployment of enforced prostitutes became part of the total and brutal war: to strengthen the fighting spirit of the soldiers, to prevent the soldiers from becoming disabled by sexually transmittable diseases and, especially after the Nanjing massacre, which was widely publicised and internationally criticised, to prevent them from raping local women.\textsuperscript{102}

Kim Hak-sun became the first survivor of the Japanese “comfort women” system to go public with her story in 1991\textsuperscript{103} which might have acted as a catalyst for the interest in the issue. Subsequently, the actions of human rights advocates culminated in a public hearing in Tokyo in 1992,\textsuperscript{104} and the establishment of the Women’s International War Crimes

\begin{footnotes}
\footnote{100}{John Hickman suggests three explanations: indoctrination in brutality of the ordinary soldiers and officers, the changed perception by its leaders of Japan’s role in the international system, and Japanese military decision-makers learned from waging protracted war in continental China against the conventional and guerrilla forces of an enemy that could be bested on the battlefield yet not defeated, practices transferred to other fronts and military occupations in Southeast Asia and the insular Pacific. John Hickman, “Explaining the Interbellum Rupture in Japanese Treatment of Prisoners of War”, in \textit{Journal of Military and Strategic Studies}, 2009, vol. 12, p. 1.}

\footnote{101}{Dörmann \textit{et al.}, 2003, p. 339, see supra note 9.}


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Enforced Prostitution in International Law Through the Prism of the Dutch Temporary Courts Martial at Batavia

Tribunal in Tokyo in 2000, all organised by non-governmental organisations, because of the reluctant stance of the Japanese government. Survivors and perpetrators have written their memoirs and given their testimonies about enforced prostitution under Japanese occupation. Scholars have investigated the possibility of reparations from a human rights perspective and mapped the different international treaties under which enforced prostitution could fall. However, there is a gap in the knowledge regarding the adjudication of the war crime of enforced prostitution following the Japanese occupation. In this respect, the Judgments of the Temporary Courts Martial in Batavia are of great historical significance. Not only did they sentence for the first time those accused of the war crime of enforced prostitution, they also demonstrated the planning, selection, abduction, management – in short the systematic involvement – of the Japanese military and clarified the lack of


107 Kiyosada (Seiji) Yoshida, Atashino Sensō Hanzai: Chōsenjin Kyōsei Renkō [My War Crimes: The Impressment of Koreans], Sanichi shobo, Tokyo, 1983, in which the author confesses to forcibly procuring women from Jeju Island in Korea under the direct order from the Japanese military.


“voluntariness” of the girls and women. One can argue that the Judgments are also still germane for the survivors, their families and compatriots, since they might be used as evidence in a case for reparations against Japan. Further, women often experience difficulties in some countries of asylum in being recognised as refugees when the claim is based on such persecution. An unequivocal recognition such as this is pertinent when recalling the invisibility of enforced prostitution, rape and sexual bartering that so dominated the landscape of occupied and liberated Asia-Pacific after the Second World War.

The representation of the “comfort women” issue has undergone a symbolic shift from the vocabulary of “prostitution” to that of “slavery”. Judges at the ICTY have qualified rape as torture, sexual enslavement and crimes against humanity; and at the ICTR, rape as genocide. This combination of two or more qualifications is creative, and can provide a solution when there is no more precise qualification available. In the Kunarac case, where women were taken to apartments and hotels run as brothels for Serb soldiers, enforced prostitution as a possible outrage against personal dignity was not considered and enslavement was deemed the right qualification. Arguably, the trend is to usher the war crime of enforced prostitution from the stage of individual criminal responsibility. Further study of the origins of this crime as contained in the historical and perhaps also historic Judgments of the Dutch Temporary Courts Martial at Batavia may help to determine its future relevance.

112 Soh theorises the ideologies of the three principle parties, wartime Imperial Japan, the troops and contemporary activists, respectively, implicated in the debate as patriarchal fascism, masculinist sexism and feminist humanitarianism. Soh, 2000, p. 61, see supra note 103.
114 Kunarac and Others Judgment, see supra note 6; ICTY, Kunarac and Others Appeals Judgment, see supra note 6.
116 Kunarac and Others Judgment, see supra note 6.
Historical Origins of International Criminal Law: Volume 2
Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 2 comprises contributions by prominent international lawyers and researchers including Professor LING Yan, Professor Neil Boister, Professor Nina H.B. Jørgensen, Professor Ditlev Tamm and Professor Mark Drumbl.