

# Taking Responsibility: Moral and Historical Perspectives on the Japanese War-Reparations Issues<sup>†</sup>

By  
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## I.

### INTRODUCTION

A disturbing aspect of today's lawsuits and public controversies over World War II reparations claims by individuals and groups who suffered from war crimes is the fact that the issue has come to a climax only now—more than half a century after the war's end, and at a time when the people who indisputably were innocent victims of those crimes are so old that an estimated 10 per cent or more of them are dying each year.<sup>1</sup>

There are common themes in the histories of the Axis powers' war crimes and of the long delay in facing the question of what obligations rest now on the perpetrators, corporate or individual, and on the governmental actors and their progeny. Not only Germany and Japan, but the Allied powers as well, have been painfully slow in allowing relevant facts to come to light.<sup>2</sup> Swiss banks, multinational corporations, and many national governments have kept ugly secrets in their vaults and archives, hidden from public scrutiny for these passing decades. In some measure, this process of covering up and hiding away was justified because of asserted imperatives of inter-Allied rivalries and the Cold War situation that emerged immediately after the war, but was already taking shape even before the German and Japanese forces had surrendered. This ex-

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1. See generally Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 283 (2000) (Bazyler cites the figure of 10 per cent mortality per annum for Holocaust survivors, and it may be assumed that a similar proportion of World War II prisoners and civilian victims of atrocities are dying annually now). The article is a valuable review and analysis of the cases in American courts, but with abundant documentation of initiatives in the late 1990s by France and Germany in response to litigative and diplomatic pressures; see also the report of the Independent Commission of Experts chaired by Francois Bergier, a distinguished historian, which was established five decades after the war, in 1996, by the Swiss Government to provide a thoroughgoing professional historical investigation into the relationships of Swiss interests to the Nazi regime and its implications for claims against Swiss institutions by victims of German persecution, INDEP. COMM'N OF EXPERTS, SWITZ. – SECOND WORLD WAR, SWITZERLAND AND REFUGEES IN THE NAZI ERA (1999), <http://www.uek.ch/en/index/htm>.

2. Bazyler, *supra* note 1.

plains why the Western powers, led by the United States, hustled German rocket scientists and other scientific specialists out of their defeated country as the Allied troops advanced, seemingly with no concern as to how some of those scientists had directed the use of slave labor in their weapons development operations. Cold War “imperatives” also explain why the United States and presumably other Allied governments withheld for decades confirmed intelligence information and on-site information of Japanese atrocities in the form of medical experimentation conducted on her Allied prisoners of war as well as on civilians in conquered areas of Asia.<sup>3</sup> Similarly, neither industrial corporations nor governmental agencies would release the evidence until virtually forced to do so by the recent-day controversy over restitution. The evidence revealed how they had used slave labor and prisoner-of-war forced labor and either cooperated actively or turned their eyes away from these actions as they did from the brutalities of the concentration camps.<sup>4</sup>

There are other explanations, too—even less defensible, boiling down to the question of simple greed. Having enjoyed for so many decades the use and income based on assets that came into their hands as the result of the Holocaust and its notorious crimes, the banks, insurance companies, and industrial firms of Europe stepped forward only after being subjected to enormous political and diplomatic pressures to compensate individuals who were victimized.<sup>5</sup> A similar kind of simple greed is probably the full and uncomplicated explanation of why holders of art works well known to have been taken by Nazi forces and their collaborators in other governments and armies held out so long against any process or law of restitution.<sup>6</sup>

At least now we can say that on the European side there has been an acceptance of guilt and responsibility for what was done. Justice has not come in a timely way or in very generous measure, given the immeasurable depths of suffering that must be compensated in some way. Even so, the issue of responsibility has been confronted, however grudgingly.

With Japanese war crimes and responsibility, however, it is a different picture today—and it has been consistently so ever since the war. Successive Japanese government administrations, from even before the Occupation ended in 1952 to this very day, have resisted coming to terms with their country’s past. In standing firm against the judgments of history, Japan has had a tactical advantage that Germany did not: a peace treaty in which explicit obligations were set

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3. RICHARD B. FRANK, *DOWNFALL: THE END OF THE IMPERIAL JAPANESE EMPIRE* 324-26 (1999) (on the brutal atrocities in the form of “medical” experiments and dissection of live human bodies committed by the notorious Unit 371 in Ping Fan, Manchuria); Abraham Cooper, *Tokyo Must Address the Actions of Its Wartime ‘Killing Machine’*, *LA TIMES*, Apr. 26, 1999, at B5, available at 1999 WL 2152705.

4. Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 *BERK. J. INT’L L.*, 45, 50 (2002).

5. Roger P. Alford, *The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 *BERK. J. INT’L L.*, 4-10 (2002).

6. For a review of the recent-day efforts to identify works of art in museums and private hands taken from their original owners by the Nazi and other Axis controlled governments, see Bazyler, *supra* note 1, at 171, n. 697.

forth and important waivers specified, consistent with the extraordinarily generous terms of that treaty.<sup>7</sup> Moreover, Japanese courts have held firm, on the whole, to the traditional doctrine that the Hague Convention and other international agreements on human rights, including slave traffic and prisoner-of-war conventions, are not a basis for claims by individuals, but only by governments.<sup>8</sup> Nonetheless, Japan could have acted differently, accepting moral responsibilities in the interests of doing justice. It has not chosen to do so, even in the face of compelling evidence of terrible deeds and lasting harm to its wartime victims. After all, if the treaty contains a "waiver" clause on reparations, the clause can be voluntarily departed from and itself "waived" by the party that violated moral principles and transgressed against the norms of decent behavior in wartime.

## II.

### COMING TO TERMS WITH THE PAST

#### A. *The Treaty*

Where moral responsibility is concerned, the literal terms of positive law expressed in a peace treaty can be treated as the definition of minimum responsibilities; those terms need not be taken as a bar to voluntary action. In a case like Japan's, coming to terms with the past may be expressed at three levels. First, the country must acknowledge the facts. When a nation has slaughtered civilians, enslaved hundreds of thousands of people, mistreated and killed its military and civilian prisoners, or subjected a conquered people to military conscription and to service as sex slaves (cynically known as "comfort women"), it is unacceptable for that nation to deny the relevance of such well-documented behavior and incidents.<sup>9</sup> In such cases, the requirements of moral responsibility—above and beyond the outer limits of legal responsibility, defined by the Peace Treaty's "waiver" provision on reparations—must be paramount. Yet successive Japanese governments engaged in systematic denial of wrong-doing, as, for example, in admitting the existence of the sex-slave "comfort-women" program only in January 1992;<sup>10</sup> but denial is also evident at the more general level. This is most notable with respect to how the current Prime Minister and his government have endorsed official history textbooks that downplay or render altogether invisible these acts of the Japanese armed forces and government during the 1937-45 period of aggression, conquest, and warfare.<sup>11</sup>

7. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 3180-81, 136 U.N.T.S. 45, 60-61.

8. See M. Igarashi, *Post-War Compensation Cases*, 43 JAP. ANN. OF INT'L. L. 45 at 47-48, 54.

9. See discussion of facts of the several cases in Japanese courts provided in Igarashi, *id.* at 49 et seq.

10. *Id.* at 49.

11. The textbook controversy centers on approval by the Ministry of Education, Science, Sports and Culture of a nationalistic and revisionist book glossing over Japanese war guilt in the large and giving little or no attention to now-well-documented instances of "massacres, sexual slavery, forced labor and the use of chemical and biological warfare" by Japan during the Asian and Pacific wars of 1937-45. Seth Mydans, *Japanese Veteran Writes of Brutal Philippine War*, NY TIMES, INT'L. SEC., Sept. 2, 2001, at 8. See also Howard W. French, *Shrine Visit and a Textbook*

Beyond simple acknowledgement of the facts, there is a second level of taking responsibility: an apology to the victims. In this regard, the Asian cultural template is of special relevance, as we were reminded when the Japanese government and families of victims demanded face-to-face apologies for a U.S. submarine's collision with a Japanese fishery-training vessel off the coast of Oahu.<sup>12</sup> A similar stress on the importance of taking responsibility and formal apology was evident, a short time later, in the case of the American "spy plane" forced to land on Chinese mainland soil after a mid-air collision that proved fatal to the pilot of a Chinese fighter plane.<sup>13</sup> The contrast is indeed astonishing between the behavior of Japan in the Oahu submarine incident and the intransigent refusal of the Japanese government for more than fifty years to offer a formal apology, even without reference to any compensation or restitution, for World War II crimes. Even at the fiftieth anniversary of the Peace Treaty held in San Francisco in October 2001, the Japanese foreign minister spoke of the regrettable nature of acts committed by Japan in the war, but still stopped short of an outright apology.<sup>14</sup> Secretary of State Colin Powell reinforced the significance of this half-admission of guilt by reiterating the U.S. government's position that the Peace Treaty "waiver" foreclosed any claim of reparations, such as those being sought in California litigation by former prisoners of war.<sup>15</sup>

The third level of coming to terms with the past is, of course, to offer restitution once the facts are acknowledged and responsibility is accepted in the form of an apology. Japan has never come to this level of accepting responsibility and acting upon the admission of an obligation to provide reparations. Japan's official position, firmly supported by the U.S. government, has been that the Treaty's waiver provision discharges it from taking on any such obligation.<sup>16</sup>

Japan's determination to stand by the treaty's allegedly definitive waiver provision is unsatisfactory on two counts. First, neither the specific language of

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*Weigh on Koizumi's Future*, NY TIMES, INT'L. SEC., Aug. 12, 2001, at 3; *Koizumi Rejects Beijing's Demand for Text Revision*, JAPAN TIMES, May 18, 2001, at 1; Mark Schreiber, *Media Fans Textbook Flames*, JAPAN TIMES, May 20, 2001 at 12 (on South Korean press criticism of the government-supported textbook, and responses to criticism by Japanese revisionists "campaigning for [teaching] materials that nurture a more patriotic spirit among Japanese youths"). See generally JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* (1986), on the racism manifested by combatants and civilians on both sides.

12. Howard W. French, *U.S. Admiral Delivers Apology to the Japanese in Sub Sinking*, NY TIMES, Feb. 28, 2001, INT'L. SEC. at A4.

13. Fox Butterfield, *China's Demand for Apology is Rooted in Tradition*, NY TIMES, Apr. 7, 2001, at A6.

14. Charles Burruss, Ryan Kim & Elizabeth Fernandez, *War Memories Mar Peace Observance. Treaty with Japan is 50 Years Old, but Victims Can't Forget*, SF CHRON., Sept. 9, 2001 at A1.

15. *Id.* "The treaty dealt with the matter 50 years ago," Powell added, echoing U.S. government opposition to lawsuits filed by former POWs who were used as forced laborers by Japanese companies during the war. "...[A]t the same time, we have the utmost compassion for the veterans who suffered."

16. Congress has refused to reopen the peace treaty, citing that such efforts might undermine the Afghanistan war coalition. Charles Burruss, *Congressional Panel Kills Bill for Ex-POWs of Japan*, S.F. CHRON., Nov. 10, 2001, at A12.

the Treaty with regard to the waiver, nor the subsequent history of Japanese actions with respect to reparations, gives unqualified support to the U.S. and Japanese positions in recent litigation that the waiver is comprehensive and in effect conclusive as to Japanese obligations under international law. Chapter 5, Article 14 of the Treaty reads: "Except as otherwise provided in the present treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of prosecution of the War . . . ."<sup>17</sup> This provision serves as the legal anchor for Japanese (and U.S. government) resistance to the legitimacy of American war prisoners' and others' claims for wartime suffering.<sup>18</sup> Commonly known simply as "the waiver," arguably it has posed a barrier to the prosecution of numerous reparations claims such as those successfully imposed against Germany by the Allied governments and those later pursued by private litigants in civil actions against Germany, Austria, and the Swiss banks.<sup>19</sup>

Other provisions of the Peace Treaty, however, also demand our attention. Of particular interest is the language that Japan is required to:

[E]nter into negotiations with Allied Powers, so desiring, whose present territories were occupied by Japanese forces and damaged by Japan with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and where the manufacturing of raw materials is called for they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.<sup>20</sup>

This is an extraordinarily generous provision, with two features worth noting. First, it restricts the reparations to "repairing . . . damage," and makes no reference to harms done to the lives of individuals. There is no provision for money payments, and there is the curious provision protecting Japan from any new foreign exchange burdens—unquestionably to protect the United States foreign aid program for Japan, under which the entire Japanese economic recovery had been financed since the surrender, from additional burdens.<sup>21</sup>

The generosity and non-punitive character of these provisions is attributable to the U.S. government's determination, throughout the negotiations that led up to the Treaty's signature at San Francisco in 1951, to conclude a treaty that

17. Treaty of Peace with Japan, Sept. 8, 1951, Ch. 5, art. 14, 3 U.S.T. 3169, 3180-81, 136 U.N.T.S. 45, 60-61.

18. See Michael Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERK. J. INT'L L., 11, 25-31 (2002); *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d (N.D. Cal. 2000).

19. In addition, of course, Germany voluntarily appropriated compensation funds by way of reparations to concentration camp survivors and families of those exterminated, in the form of payments to the government of Israel.

20. Treaty of Peace with Japan, *supra* note 17.

21. Similar concern to protect the U.S. from having the cost of reparations in effect transferred to the U.S. Treasury arose with respect to the German reparations question. See the extended discussion of U.S. policy and inter-allied issues in J. E. Farquarson, *Ango-American Policy on German Reparations from Yalta to Potsdam*, 112 ENG. HIST. REV. 904 (1997).

would protect Japan from any serious economic or fiscal burdens. To that degree, we should be mindful of the way in which the United States itself bears responsibility for the dilemma of the slave laborers and prisoners of war, as well as others terribly harmed by Japan, in the present day's controversies and lawsuits at home and in Asia. As one commentator who champions the war sufferers' claims has recently written, by designing a peace treaty that would prevent any reparations burden from being imposed on Japan, the U.S. diplomatic strategy of 1951 "also fostered a deliberate forgetfulness whose consequences haunt us today."<sup>22</sup>

Obviously, the United States and Japan alike resort to a strict literalism today when it comes to the interpretation of the waiver provision and the Treaty's terms overall in these present-day confrontations. Ironically, Japan did not take so literal and restrictive a view of the Treaty in the past, when it engaged in post-1951 negotiations with the other Allied Powers. In those instances, it proved not only willing, but very eager, to depart from the literal terms of the Treaty, and to pay monetary compensation rather than to provide labor services for "production, salvaging, and other work" needed to "repair the damage" done in occupied Allied territories.<sup>23</sup> Moreover, with the cooperation of the United States in 1956, the Dutch government successfully pressed a claim on behalf of private citizens against Japan—albeit that the United States reportedly had to exert pressure on Japan to honor the claim. In the previous year, the British government reported two other deals by which Japan paid reparations of \$250 million to Burma and also paid Switzerland for "compensation for maltreatment, personal injury and loss arising from acts illegal under the rules of war."<sup>24</sup>

The United States government thus has "played a role in Japan's historical amnesia" by failing to confront the question of war guilt and responsibility for war crimes. As reported by an officer of the New American Foundation in a recent edition of *The New York Times*, recently declassified U.S. government archived documents indicate the U.S. State Department intentionally kept news of the agreement under wraps. The agreements contain information that potentially discredits the U.S. government's arguments in favor of regarding the Treaty's waiver provision as absolute and definitive.<sup>25</sup>

### *B. Japan's Different Postures Towards Citizens and Foreigners*

The second way in which Japan's position with regard to the claims of foreign civilians and prisoners of war is unsatisfactory is that it is inconsistent with two recent responses of the Japanese government to comparable claims of mistreatment from their own citizens. One such case occurred in 1996, when a

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22. Steven C. Clemons, *Recovering Japan's Wartime Past—and Ours*, *NY TIMES*, Sept. 4, 2001, at A27 (Op-Ed).

23. See *id.* Quotations are from the language of the treaty, Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 3180-81, 136 U.N.T.S. 45, 60-61.

24. Clemons, *supra* note 22.

25. *Id.*

large group of Japanese hemophiliacs who were infected with AIDS as the result of irresponsible actions by Japanese health authorities were awarded a large monetary judgment. Under Japanese law, the national government (I have been assured by leading Japanese lawyers) was indisputably protected by the prevailing doctrine of sovereign immunity. Yet the government chose to pay the claimants, acknowledging the accuracy of the facts brought out in the trials and taking responsibility for the harm that had been done to the sufferers.<sup>26</sup> More recently, a similar case involved compensation payments to 127 plaintiffs who had leprosy and were among many thousands of lepers forced by government health officials to live in isolation for many years long after it was known that there were effective cures for the disease. After a trial court handed down a judgment of \$15 million, the government "made the announcement that [it] would abandon its usual conservative posture on legal rulings and not contest the decision."<sup>27</sup> The government also issued an official explicit apology, declaring it was desirable to bring the case to a close and expedite payments "since the patients and former patients are already in advanced age."<sup>28</sup>

The action in the leprosy case was a departure from long-standing policy. Indeed, a former judge, who is now a prominent lawyer, recently termed the government's decision a "violation of rule of law" because it was under no legal compulsion to accept responsibility.<sup>29</sup> It seemed strange to him that abstract considerations of justice should have trumped the standard resort to immunity claims that would have permitted the government to resist taking responsibility. For the Japanese government, it seems, acting out of the same kind of respect for considerations of justice and putting aside the advantages of the Peace Treaty waiver's terms, is not acceptable when it comes to the claims of foreign victims—who were harmed only a few years before the 1953 adoption of the act under which lepers were confined. And, like most of the thousands harmed by the leper-segregation policy, now "in advanced age, too," these foreign victims must be paid immediately if their claims are to be meaningfully recognized and reparations afforded. The disregard for public opinion and the specific claims of war-crimes victims in Asia and the Western Allied nations was underlined when Prime Minister Junichiro Koizumi visited the Yasukuni shrine, known as the "symbolic heart of Japanese wartime militarism."<sup>30</sup> This is the shrine where Japan's war dead are honored and where the remains of Hideki Tojo (the war-

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26. Eric Feldman, *Blood Justice: Courts, Conflict, and Compensation in Japan, France, and the United States*, 34 *LAW & SOC'Y. REV.* 651, 679-82 (2000).

27. Calvin Sims, *Japan Apologizes to Lepers and Declines to Fight Isolation Ruling*, *NY TIMES*, May 24, 2001, at A3. At issue was their detention and isolation under a 1953 Leprosy Prevention Law not repealed until 1996, by which thousands of lepers were segregated and confined, some of them subjected to sterilization or abortion, despite the known availability of effective drugs to control the disease.

28. *Id.*

29. Statement at Tokyo international symposium on judicial reform in changing societies, (June 2001) (notes on file with author). The statement was made in a comment from the floor in discussion of a paper by the present author at that conference.

30. Doug Struck, *Japan Spurned by Neighbors*, *SF CHRON.*, Aug. 25, 2001, at A9.

time prime minister) and other leaders executed after conviction by the Tokyo War Crimes Tribunal are interred.<sup>31</sup>

The Japanese courts are ahead of the government in moving, albeit in small and hesitant steps, toward taking responsibility for war crimes. In a recent case a Tokyo court thus reportedly granted a judgment of \$166,000 in compensation to relatives of a Chinese man for his sufferings over a ten-year period as a slave laborer.<sup>32</sup> Another court ruled in August 2001 that the national government should be held responsible for the deaths of fifteen Koreans caught in an explosion while being transported as slave laborers on a Japanese navy transport ship. It is expected that in another sixty cases involving claims of slave laborers in Japanese courts, this decision might have some precedential effect, so long as plaintiffs "can show damage caused not by the war itself but some related circumstance that could be construed as calling for 'normal compensation.'"<sup>33</sup> Meanwhile, however, the Japanese government continues, with full support of the U.S. State Department, to resist taking responsibility for the sufferings of Americans and other foreigners in the proceedings of claimants in California and other courts outside Japan.

### III.

#### THE OCCUPATION LEGACY AND JAPANESE INTRANSIGENCE

Why, then, has the Japanese nation never been forthcoming in dealing with its own wartime past and with the demands of a just standard of restitution to victims of its war crimes? I believe that a large part of the answer to this deeply troubling question lies in the history of Allied-Japanese relations well before the Peace Treaty was signed. It is an answer that may be found in the legacy of the Occupation period, from 1945 to 1952, and in the way in which the Occupation regime under U.S. direction successfully insulated the Japanese people and their postwar leadership from the moral and political force of world opinion. It is my contention that the Occupation authority under General MacArthur laid down the foundation on which subsequent Japanese unwillingness to take responsibility for war crimes has developed. American complicity in the "historical amnesia" of Japan's governments and people since 1945 does not only consist of the U.S. role in writing the waiver into the Peace Treaty and hiding information of possible precedents for private claims against Japan by U.S. and other foreign citizens. It also consists of the entire fabric of the U.S.-Japanese relationship during the Occupation years.

There are two bookends, as it were, that bracket the history of American policy in the Occupation. The first consists of diplomatic correspondence exchanged in August 1945, at the very end of the war. Within the highest official circles in Japan, involving the Emperor himself as well as the military-led minis-

31. *Id.*; see also Stephanie Strom, *Japanese Premier Visits War Shrine, Pleasing Few*, NY TIMES, Aug. 14, 2001, at A1.

32. Mark Magnier, *Japan Ordered to Pay Koreans in 1945 Blast*, LA TIMES, Aug. 24, 2001, at A3.

33. *Id.* A spokesman for the government declared, "It is a very tough ruling for us." *Id.*



terial departments, there was a great deal of maneuvering to achieve two goals. The first was to distance the Emperor from any responsibility for the war, let alone supervision of operations that involved war crimes, in hopes (as proved indeed successful) of preserving the imperial court when surrender became inevitable.<sup>34</sup> The second goal was to extract important concessions from the Allied governments as to surrender terms, which previously had been announced as requiring "unconditional surrender" and in the Potsdam Declaration of July 26, 1945, as specifically requiring "just reparations in kind" as part of the proposed occupation terms.<sup>35</sup> Initially, the Japanese warlords responded to the Potsdam demands with a posture of *mokusatsu*, meaning literally "kill with silence," but also defined as embracing the attitude and a tactic of "killing with silence" or "taking no notice."<sup>36</sup> When surrender became the only choice, however, the Japanese proposed an alternative set of terms. Instead of unconditionally surrendering, they asked for priority in available shipping so as to bring home immediately to Japan their six million expatriates. They also sought priority in provision of available medical supplies and food for Japanese troops who would be cut off from their lines of supply.<sup>37</sup>

General Douglas MacArthur, then commander of American forces and soon to be appointed the supreme commander for the allied powers in the Occupation—in effect proconsul in all matters of governance and policy in Japan—shot back to Washington a cable from Manila objecting to what he called "these proposed secret terms" as being "violative not only of allied policies but of the precedent set by Japan itself in occupying other countries." He was appalled by Japan's arrogant demands that priority be given to its own needs. "The incidents of Bataan and Singapore are still fresh in the minds of the world," MacArthur wrote. He declared his outrage that "[t]he enemies' suggestion even goes to the point of preferential repatriative treatment of Japanese soldiers. Suggested ameliorations would relieve Japan of much of the physical and psychological burdens of defeat."<sup>38</sup>

It is a great irony of the subsequent history—and of the reparations controversy since the signature of the Peace Treaty—that in MacArthur's oversight of Japan in the Occupation era, he became the controlling figure in a process that in fact did work with great effectiveness to "relieve Japan of . . . the physical and psychological burdens of defeat." As the Supreme Commander, Allied Powers (known as SCAP), MacArthur initially gathered power into his own hands. The Allies were effectively pushed aside at the Tokyo headquarters, with the Allied Council of big powers rendered of entirely nugatory importance almost from the

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34. HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 509-11 (2000). The Japanese imperial court's and government's efforts to immunize Emperor Hirohito from any accountability continued on an intensified basis after the surrender and throughout the Occupation period. With MacArthur's support, these efforts were eminently successful. *Id.* at 556.

35. FRANK, *supra* note 3, at 231-37.

36. *Id.* at 234.

37. General of the Army Douglas MacArthur to the Chief of Staff (Aug. 17, 1945), 6 *FOREIGN RELATIONS OF THE UNITED STATES* 1945, at 671 (1969).

38. *Id.*

outset of the Occupation, ignored by MacArthur (who met with them personally only once and refused to do so again). The Far Eastern Council, made up fourteen of the Allied nations, though charged technically with setting occupation policies, was equally pushed out to the sidelines and deprived of all meaningful authority over SCAP.<sup>39</sup> Much of the story is nicely encapsulated in the phrase, "Defending Japan Against the Allies," which was used by one of MacArthur's high-ranking advisors as a chapter title in his memoir on the history of the Occupation.<sup>40</sup>

In substantive policy, MacArthur initially did oversee vigorous prosecution of the war crimes trials, and he instituted the important constitutional reforms which have endured to the present day in Japanese governance. He also undertook democratizing initiatives in regard to land and fisheries reform, the extension of civil rights to organized labor, expansion of suffrage, and efforts to break up the great Japanese industrial-financial combinations (the *Zaibatsu*). Initially, too, MacArthur seemed to be supportive of the so-called Pauley commission sent by President Truman in December 1945 to study the reparations question. This commission recommended a severe set of reparations actions, requiring that about one-half of the industrial capacity of the country be dismantled and distributed to the Asian nations and to Britain and France. In a press release issued on December 7, 1945 (four years to the day after Pearl Harbor), Pauley declared that "Japan still retains, in workable condition, more plant and equipment than its rulers ever allowed to be used for civilian supply and consumption even in peaceful years . . ." and contended that it would be only just to remove the "surplus" capacity to countries that had suffered under Japanese rule. "All Japanese financial and economic penetration of other countries must be wiped out," including a seizure of all assets located outside Japan, of the Emperor and Government as well as individuals and private firms.<sup>41</sup>

The other book-end that I have mentioned dates from 1951, six years later, and was set in place as the peace treaty was being negotiated and the occupation era about to end. It was expressed in a speech by John Foster Dulles, President Truman's special ambassador in charge of the negotiations, delivered at Whittier College. In this 1951 address, Dulles declared: "Reparations were unthinkable. To dismantle Japanese industrial plants, or turn over such assets to the Allies, would arouse public bitterness in Japan" and besides it "[would] constitute an almost inhuman burden to bear."<sup>42</sup>

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39. MICHAEL SCHALLER, *THE AMERICAN OCCUPATION OF JAPAN* 138-39 (1985); JOHN DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 79 (1999) ("... the imperious MacArthur until 1948 reigned as a minor potentate in the Far East."). See generally GEORGE H. BLAKESLEE, *THE FAR EASTERN COMMISSION: A STUDY IN INTERNATIONAL COOPERATION, 1945-1952* (1953) (the U.S. State Department's official history of the FEC); RICHARD B. FINN, *WINNERS IN PEACE; MACARTHUR, YOSHIDA, AND POSTWAR JAPAN* (1992).

40. THEODORE COHEN, *REMAKING JAPAN: THE AMERICAN OCCUPATION AS NEW DEAL*, chap. 8 (1987).

41. Various December telegrams, 6 *FOREIGN RELATIONS OF THE UNITED STATES* 1945, at 1010-1015 (1969).

42. John Foster Dulles, Address at Whittier College, Los Angeles, (Mar. 31, 1951), full text printed in *NY TIMES*, Apr. 1, 1951, at 46.

The path from MacArthur's refusal to grant concessions to Japan at the war's end, and from the Pauley Commission report calling for heavy reparations, down to the Whittier College speech of Dulles in 1951, was a path marked out by MacArthur himself almost before the ink on the Pauley Commission report had had a chance to dry. In only a matter of months after the occupation had commenced, MacArthur's attitude had become one of paternal concern and commitment to the rebuilding of the Japanese economy as part of the process by which Japanese sovereignty could be regained and the country restored to full status as an equal among equals in the community of nations. The general's dedication to this goal involved, among other things, overt opposition to the reparations policy. In 1947, for example, he won War Department support for dropping reparations, obtaining from the Department a report that ridiculed the original reparations program as one that would promote "wasted charity for undeserving Asians!"<sup>43</sup>

Beginning in 1947-48, American policy on the Japanese Occupation goals shifted dramatically, with the emphasis on reform and on punishment abandoned in favor of a new emphasis on speedy economic recovery and restoration of Japanese autonomy. Eagerly embraced by MacArthur, these goals were pursued in SCAP headquarters in a relationship of tension and disappointment as far as the Allies were concerned. The partners in war were largely pushed aside, their views given little respect, and their interests often systematically subordinated to Japan's. This tendency was given massive additional impetus, of course, by the Cold War, and then at a dramatically higher level by the outbreak of the Korean War and the consequent deepening of polarization in East Asia. The Communist regime's take-over of mainland China reinforced the U.S. government's determination to restore Japan's economic strength. The United States' new policy orientation—which became known as "reverse course"—constituted part of a larger policy aimed at aligning Japan in the American-led camp in the Cold War confrontation in Asia.<sup>44</sup>

MacArthur's *modus operandi* during the Occupation included a systematic insulation of Japan's government and its public-at-large from the impact of opinion in the Allied nations other than America itself. A lens through which to see how this occurred is offered by the history of Occupation policy on the reconstruction of marine fisheries and whaling, a major industry in Japan and a key source of food supply for the country's population in the Occupation years as it has always been.<sup>45</sup> In the months immediately following surrender, charged with feeding the Japanese people at survival levels, MacArthur decided to rebuild Japan's fleet of factory ships and catcher vessels for Antarctic whal-

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43. SCHALLER, *supra* note 39, at 128.

44. On economic policies and the shifting orientation of U.S. goals, see generally WILLIAM S. BORDEN, *THE PACIFIC ALLIANCE: UNITED STATES FOREIGN ECONOMIC POLICY AND JAPANESE TRADE RECOVERY, 1947-1955* (1984) (a thoroughly documented study, from archival sources), stressing the importance of the "Reverse Course" policy by which the U.S. shifted in 1947-48 to a policy of all-out reconstruction and revival of the Japanese economy.

45. See generally HARRY N. SCHEIBER, *INTER-ALLIED CONFLICTS AND OCEAN LAW: THE OCCUPATION COMMAND'S REVIVAL OF JAPANESE WHALING AND MARINE FISHERIES* (2001).

ing. This activity required very large, modern steel ships; and MacArthur took that requirement as an excuse for reopening Japanese shipyards, ordering that war ships in progress of construction should be converted to fishing vessels or whaling factory ships. This brought forth violent protests from the other Allied powers. The Allies wanted the shipyards for reparations, and they were also opposed to any restoring of capacity that might be used for naval rebuilding by Japan at the expense of their own security.<sup>46</sup> Besides, Japan had refused to cooperate in prewar efforts to bring Antarctic whaling under modest conservationist regulation, and was now seen as being subsidized for purposes of competing with their own (Allied) whaling fleets in the southern seas at a time when they were at great expense to invest in ships to replace the vessels sunk by the Japanese and Germans during the war.<sup>47</sup>

The whaling issue became a major irritant to inter-Allied relations. MacArthur fended off British, Norwegian, Australian, New Zealand, and other Allied nations' objections to the initial decision on whaling in winter of 1945-46 by declaring that it was a "one-time-only" emergency measure. The Allies would be fully consulted, he guaranteed, if additional expeditions were to be contemplated in future years. This promise, reiterated by the U.S. government in official Notes to the Allies, was to prove entirely false. In a word, the United States then and later dealt with the Allies on the Japanese whaling question in a manner that was consistently dissembling, dishonest, and manipulative. Each year a promise was made that the Allies, through the Far Eastern Council, would be fully consulted and have the final decision and authority; each year, as time went on, these assurances were shamefully violated and rendered meaningless. Thus successive whaling expeditions by the Japanese fleets were authorized under MacArthur's aegis without regard to the Allies' objections. The same process and policies were repeated with respect to the revival of Japan's marine fisheries. And the U.S. government also backed MacArthur's policy of authorizing Japanese participation, even before the Peace Treaty was signed and sovereignty restored, in the deliberations for formation and implementation of major international agreements that shaped the postwar structure of international economic relations.<sup>48</sup> All this was embittering, as the Allied governments recognized that they were being cast into the role of junior partners or worse, excluded from any real influence over the Occupation and subjected to heavy U.S. diplomatic pressure to accept the non-punitive terms of a generous peace treaty.<sup>49</sup>

What I have found most striking in the diplomatic correspondence between the Allies and Washington in this period was the way in which U.S. efforts were

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46. Harry N. Scheiber & Akio Watanabe, *Occupation Policy and Economic Planning in Post-war Japan*, in *ECONOMIC PLANNING IN THE POST-1945 PERIOD* 100, 103 (Erik Aerts & Alan S. Milward eds., 1990).

47. Memorandum of Conversation between Under-Secretary Lovett and British Embassy Counselors (July 1, 1947), 6 *FOREIGN RELATIONS OF THE UNITED STATES* 1947, at 245 (1972).

48. Secretary of State to Certain Diplomatic Offices (April 22, 1949), 7 *FOREIGN RELATIONS OF THE UNITED STATES* 1949, at 113-14 (1976); SCHEIBER, *supra* note 45, at 66-69. See also BLAKESLEE, *supra* note 39, at 105-22.

49. SCHEIBER, *supra* note 45, at 36-42, 187-195.

seen as a betrayal of common interests—especially with respect to the manner in which SCAP and the United States officialdom were insulating Japan from a recognition of how intensely other nations resented Japanese responsibility for a war of aggression and for a record of atrocities against innocent civilians and military prisoners. Thus a pattern of frustration, anger, and deeply felt bitterness was evident in many of the discussions that produced the peace treaty that the Americans had determined would be entirely non-punitive. Of course, MacArthur's approach and the U.S. government's view prevailed entirely. In this pattern of favoring Japan's recovery over what the Allied nations had hoped for in the occupation years, MacArthur became increasingly acerbic and hostile toward the wartime partners whose troops he had commanded. His rhetoric was as unrestrained, in some of these confrontations, as his policy was unyielding. MacArthur constantly declared that his was the high moral ground, and that opposition to his beneficent regime in Japan was evidence of a deplorable pursuit of sordid self-interest on the part of the Allied nations and his critics at home in America.<sup>50</sup> When Allied objections to his favoring of Japanese interests were made public, MacArthur was quick to denounce them as "distorted pronouncements and unwarranted criticism," while his own policies were, he claimed, "entirely just, humanitarian, and practical."<sup>51</sup> With respect to economic recovery generally, MacArthur denounced the Allied governments as "shamelessly selfish and negative" toward Japan.<sup>52</sup> On the matter of reparations more specifically, MacArthur won high-level State Department support for his views when, after meeting with the general in Tokyo, George Kennan, then head of the department's policy planning staff, denounced the reparations idea as "sheer nonsense . . . and basically inconsistent with the requirements of Japanese recovery."<sup>53</sup> Perhaps the most astonishing statement that MacArthur himself made on the matter was voiced in March 1948, when he demanded an abandonment of the reparations policy not only on economic grounds but also as a matter of justice because "Japan has already paid over fifty billion dollars by virtue of her lost properties in Manchuria, Korea, North China and the outer islands . . ."<sup>54</sup> One can easily imagine the reaction of the Asian-Pacific Allies to the idea that "lost properties" should be placed in the balance in this way.

The Japanese, for their part, accurately perceived MacArthur as their protector against vengeful and angry enemies. This did not escape notice among

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50. Thus MacArthur denounced what he termed "[the] selfish and venal pressures" from the Allied governments whose "main objection" to Japanese whaling expansion actually was their "desire to maintain [a] monopoly of [the] whaling industry." The Political Advisor in Japan to the Secretary of State (May 20, 1947), 6 FOREIGN RELATIONS OF THE UNITED STATES 1947, at 212, ¶ 4. (1972).

51. Radiogram from SCAP to War Department, marked "Urgent, Pass to Secretary of State Marshall" (July 5, 1947), folder FEAC 276, MacArthur Archives, MacArthur Memorial and Library Norfolk, Va. On a later occasion, MacArthur self-righteously rejected "on the grounds of legality, morality, [and] logic" the objections voiced by the Allies against his expansion of Japanese fishing in the U.S. Trust Territory waters of present-day Micronesia. MacArthur to the Secretary of the Army (Oct. 3, 1948), copy in SCAP Records, Record Group 331, U.S. National Archives.

52. FINN, *supra* note 39, at 202.

53. *Id.* at 204.

54. *Id.* at 198.

the Allies. For example, the Philippine representative in the Far Eastern Commission said at one point, rather sardonically, "The [Far Eastern] Commission does not need, I am sure, to be told with what jubilation the news of the new United States policy was received in Japan . . ."<sup>55</sup> Whereas it had been MacArthur himself who in August 1945 had invoked so eloquently the memory of Japan's atrocities of Bataan and Corregidor, it became commonplace after 1945 for the Allied diplomats to plead with MacArthur and the U.S. government to remember the common sacrifices of the war years and not throw away that legacy in favor of an undeviating preference for Japanese interests over their own. Typical of the Australian government's responses to MacArthur's policies was the statement by Canberra's representative on the Far Eastern Council in a 1947 session of that organization. Denouncing SCAP's reopening of the shipyards and construction of a whaling fleet that could easily be converted (as had been done by Japan in 1941) to military uses, he declared that he spoke for a country,

in the minds of whose people the memories are still very vivid of the dark days in 1942 when we stood exposed and alone and watched the full force of Japanese aggression advancing rapidly toward us. The memories of the invasion of New Guinea and Portuguese Timor, and the destruction of our northern port of Darwin, are not erased from the minds of the Australian people overnight, and we are determined that the Japanese will not have the slightest opportunity to menace our security again.<sup>56</sup>

Similarly, in their diplomatic communications criticizing SCAP's fisheries and whaling policies, the Australian and other Asian-Pacific governments indicated the depth of their resentment with SCAP in 1946 by referring to Japan as having so recently perpetrated "many of the foulest atrocities in modern history, committed not only against the peoples of Eastern and Southeastern Asia but against nationals of Australia, the United States, and other Allied powers."<sup>57</sup> Perhaps the deepest resentment of all was directed at MacArthur for giving priority to relief of domestic food shortages in Japan at a time when global food and oil supplies were in desperately short supply. A diplomat representing India thus expressed his outrage over MacArthur's favoring the Japanese in this way, declaring in 1946 that "barbarities committed by Japan" had been responsible for a famine in India three years earlier, resulting in the deaths of 1.5 million to 3 million of his people.<sup>58</sup>

As the Occupation wound down, with the San Francisco signing ceremonies scheduled for the peace treaty in 1951, a distinguished British diplomat, Sir Alvary Gascoigne, sent a long dispatch to the Foreign Office in London that is highly relevant to our consideration of the issues before this Symposium. Gas-

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55. BLAKESLEE, *supra* note 39, at 166 (quoting the Philippine delegate in the FEC, Carlos Romulo).

56. Statement of Mr. Makin in "Extracts from Minutes of the 6th Meeting of the FEB," June 12, 1947, marked July 24, 1947, copy in Record Group EA1, folder. 268/5/5/ pt. 3, New Zealand National Archives, Wellington, NZ.

57. Draft telegram to the Australian Embassy, Washington, Sept. 30, 1946, Department of External Affairs Records, A 1067/1, P 46/10/10/3, in the Australian National Archives, Canberra.

58. Statement of Sir Girja Bajpai, in the Far Eastern Council. BLAKESLEE, *supra* note 39, at 177.

goigne had served throughout the Occupation as the United Kingdom's liaison with SCAP. On being recalled, as Japan prepared to resume its sovereignty, Gascoigne undertook a long interview with Japanese Prime Minister Shigeru Yoshida, seeking to learn Yoshida's views on the entire range of outstanding issues in international affairs. Preserved today in the British archives in Kew, this report offers an important insight into the Occupation's legacy in regard to Japan's posture since 1951 on the reparations issue.<sup>59</sup> Whatever the accomplishments of the Occupation, Gascoigne found, there had been an abject failure by the United States in getting the message across to the Japanese government that other nations did not view postwar Japan or its burden of moral responsibilities in the way that General MacArthur viewed them. The Japanese did not understand, therefore, the abiding bitterness and anger with regard to how Japan had been treated so favorably and its economic reconstruction given so high a priority by the Americans at a time when the Allied economies had hardly recovered from the blows dealt them by the war. Gascoigne reported that Yoshida "does not, or will not, appreciate that some time must pass before the British colonial subjects in the United Kingdom territories of South-East Asia overcome their hatred of the Japanese for the barbarous manner in which the latter behaved in Hong Kong and Malaya, as well as in North Borneo and Tarawak, during the second world war."<sup>60</sup>

Gascoigne's report, which is consistent in its observations with the findings of all my own research in the Allied and Japanese archives of the occupation era, is indicative that Japan's misreading or ignorance of Allied opinion—or perhaps, for that matter, Japan's convenient deployment of the *mokusatsu* spirit in a new context, as an attitude consistent with resistance to coming to terms with the past and taking of responsibility for war crimes—was fully operative in 1951. Indeed, it was no less so than it had been when the Japanese war lords had misread Allied opinion so completely when they asked for special considerations in lieu of unconditional surrender six years earlier. Japan's obtuseness about the moral outrage that other nations and peoples felt, and from which they were so well protected by MacArthur's command and then by Dulles' stance on a non-punitive treaty, nurtured a mind-set that justified a refusal to come to terms with Japan's wartime past.<sup>61</sup> It was reinforced, moreover, by the U.S. need for Japanese consent to a defense treaty aligning it with the Americans

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59. *Conversation between His Majesty's Ambassador and the Japanese Prime Minister: Sir. A. Gascoigne to Mr. Bevin* (Received 29 January 1951), printed copy in FJ 10198/4 (19521), United Kingdom Public Records Office, Kew, U.K.

60. *Id.* "In reality," Gascoigne wrote, "Yoshida feels hurt . . . that we are not at present actively wooing Japan to the same extent as the United States."

61. George Clutton, another officer in the U.K. Liaison Mission in Japan, informed London in October 1951 of his view, similar to Gascoigne's: "I can only say that the majority of Japanese have no idea of the legacy of hatred they may have left behind them in South East Asia and that if I, or any other British official, were to tell them of it, we should probably be thought to be lying. . . ." Clutton, Despatch No., 332, Oct. 2, 1951, FJ102.77/6, KU.K. Public Records Office, Kew.

against the Soviet bloc as part of the larger Peace Treaty diplomatic package.<sup>62</sup> And it received the imprimatur of legality with that treaty's waiver provision.

That this mind-set is still in place in our time—evinced in Japan's determined resistance to accepting the legitimacy of claims against her government and industries advanced by those who suffered at her hands from 1937 to 1945—is evident from the consistent record of the Japanese government in the fifty years since Gascoigne filed his report.

#### IV. CONCLUSION

Even though the U.S. government continues to be officially committed to the permanent immunity of Japan and its citizens against any war-based claims asserted by the victims of slave labor policies, the Japanese military's sex-slavery regime for Korean "comfort women," and Japan's abuse of war prisoners,<sup>63</sup> the time has come for the Japanese to take responsibility for acts by their nation's imperialist wartime government that violated fundamental legal and moral norms in the conduct of war. A reparations policy was taken for granted in 1945. By the time the final peace agreement was reached, actual reparations had been dropped to only a shadow of what had originally been contemplated.<sup>64</sup> What had appeared to be a matter of simple justice in 1945 now had become the subject of a waiver provision in a non-punitive treaty—a document in which the relief afforded Japan from reparations was explicitly justified by reference to the distressed condition of the Japanese economy. Today, despite the long economic recession, Japan is in a very privileged position in terms of national economy and wealth. Today, the full record of actual reparations deals is becoming known, and the pretense that the waiver provision precluded any concessions can be set aside. Those who suffered and now claim reparations are of advanced years, just as are those who suffered at the hands of the government in Japan because of their affliction with leprosy and the callous policies that cost them their freedom for so many years. Today, it is time to fully come to terms with the moral imperatives of crimes committed in time of war, while the individuals who were personally affected are still able to prove their claims.

It is not necessary to even refer to the literal terms of the treaty, its waiver, or the deals that have been cut without regard to the waiver. Moral responsibility, especially in a cultural template that places so much importance on simple apology, requires a different kind of behavior now. Coming to terms with the nation's past is not too much to expect of Japan in light of all the treasure and favor lavished upon it by the victorious power that became its dedicated sponsor and benefactor during an occupation of unprecedented generosity leading to its

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62. See generally WALTER LAFEVER, *THE CLASH: A HISTORY OF U.S.- JAPAN RELATIONS* (1997); RICHARD N. ROSECRANCE, *AUSTRALIAN DIPLOMACY AND JAPAN, 1945-51* (1962).

63. See Bazzyler, *supra* note 18.

64. See BORDEN, *supra* note 44, at 61-82.



full restoration to the community of nations. To restore something of its victims' losses now is not asking a great deal of Japan in today's circumstances.<sup>65</sup>

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65. Some compensation has been extended to the "comfort women" by a private foundation (the Asian Women's Fund) to which Japan's government has granted some funding for that purpose. Also, Premier Kozumi wrote to women accepting such compensation a letter of apology indicating his acceptance of moral responsibility for Japan's sex slavery operations. *ASIAN WOMEN'S FUND, ACTIVITIES UPDATE*, at 1-8 and app. (Feb. 2002). However, only a few hundred women victims have been willing to accept such "remorse payments" because the Japanese Diet and Emperor have not acknowledged responsibility.