

### Transitional Justice Delayed Is Not Transitional Justice Denied: Contemporary Confrontation of Japanese Human Experimentation During World War II Through a People's Tribunal

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Human experimentation by Japanese officials during World War II presents one of the most horrifying instances of state-sponsored brutality. Since the end of the war, however, the Japanese government has not officially recognized that the atrocities occurred, nor has the U.S. government acknowledged its postwar role in sheltering the perpetrators of these heinous acts. This appalling yet unaddressed affair therefore demands international attention. Because typical transitional justice options are unavailable or inappropriate, the solution may lie in an innovative civil society initiative: a people's tribunal that could pressure the Japanese and U.S. governments to bring meaningful closure to this tragedy.

I begin this Comment by explaining the need for contemporary confrontation of Japanese human experimentation during World War II. I then make the case that a people's tribunal is a compelling transitional justice option for addressing these crimes. I argue that a people's tribunal could raise public awareness about these offenses and shame the relevant authorities into action. I further argue that, in any event, other transitional justice options would not be suitable for this case. I conclude by drawing some lessons from this case study

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about the promise and perils of attempting to promote justice and accountability for past atrocities.

## I. THE MODERN NEED TO ADDRESS JAPANESE WARTIME HUMAN EXPERIMENTATION

Both the historical and political background of Japanese human experimentation and recent geopolitical developments in East Asia make this issue particularly crucial to address today.

### A. *Historical and Political Background*

During World War II, Japanese officials experimented on thousands of civilians and Allied soldiers, possibly including U.S. prisoners of war.<sup>1</sup> The most notorious research was conducted in Manchuria by the Imperial Japanese Army's Unit 731, led by Lieutenant General Shiro Ishii.<sup>2</sup> These experiments, sometimes referred to as the "Asian Auschwitz," included vivisections, dissections, weapons testing, starvation, dehydration, poisoning, extreme temperature and pressure testing, and deliberate infection with numerous deadly diseases.<sup>3</sup> Had the war continued, the Japanese planned to use the biological weapons developed from these experiments to attack the U.S. military in the Pacific and possibly even the west coast of the United States itself.<sup>4</sup>

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1. Sources differ on whether Americans were among the victims of Unit 731. See GARY K. REYNOLDS, U.S. PRISONERS OF WAR AND CIVILIAN AMERICAN CITIZENS CAPTURED AND INTERNED BY JAPAN IN WORLD WAR II: THE ISSUE OF COMPENSATION BY JAPAN 13-19 (Cong. Research Serv. Doc. No. RL30606, 2001), <http://www.fas.org/man/crs/RL30606.pdf>; see also SHELDON H. HARRIS, FACTORIES OF DEATH: JAPANESE BIOLOGICAL WARFARE, 1932-45, AND THE AMERICAN COVER-UP 113-31 (rev. ed. 2002).
  2. Unit 731 is discussed in various sources. See, e.g., YVES BEIGBEDER, JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE 53, 72-74 (1999); JOHN L. GINN, SUGAMO PRISON, TOKYO: AN ACCOUNT OF THE TRIAL AND SENTENCING OF JAPANESE WAR CRIMINALS IN 1948, BY A U.S. PARTICIPANT 242-45 (1992); HAL GOLD, UNIT 731 TESTIMONY: JAPAN'S WARTIME HUMAN EXPERIMENTATION PROGRAM (1966); HARRIS, *supra* note 1; YUKI TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II 135-65 (1996); PETER WILLIAMS & DAVID WALLACE, UNIT 731: JAPAN'S SECRET BIOLOGICAL WARFARE IN WORLD WAR II (1989); John Saar, *Japan Accused of WWII Germ Deaths*, WASH. POST, Nov. 19, 1976, at A1. Declassified U.S. government documents relating to Japanese medical experimentation during World War II can be found online. See The Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, The National Archives, <http://www.archives.gov/iwg> (last visited Apr. 15, 2008).
  3. Japanese human experimenters injected some of their subjects with bubonic plague, cholera, anthrax, smallpox, gangrene, streptococcus bacteria, and syphilis. See generally sources cited *supra* note 2.
  4. See GOLD *supra* note 2, at 86-92.

When the war ended, the U.S. government offered immunity and other incentives—including money, food, and entertainment—to over 3,600 Japanese government agents, physicians, and scientists involved in these experiments. Recently declassified U.S. government documents and testimony from Japanese involved in or knowledgeable about the experiments reveal that the U.S. government was interested in how the work of Ishii and other Japanese, however unethical, could be of use to the U.S. military.<sup>5</sup> Senior U.S. officials felt that obtaining data from the experiments was more valuable than bringing to justice the individuals involved because the information could be used to advance the United States' own weapons development program. U.S. officials were also concerned about preventing other countries, particularly the Soviet Union, from obtaining the data.<sup>6</sup> This strategy was possible because, unlike Josef Mengele and his Nazi cohorts who performed similar experiments on human guinea pigs but who “were too well known for their war crimes” to become collaborators with the United States,<sup>7</sup> the Japanese human experimenters were relatively anonymous. American policymakers could thus partner with the implicated Japanese officials with little fear of a public-relations backlash.

After being granted immunity, some Japanese who participated in the medical experiments went on to assume prominent roles in postwar Japanese society. They acquired senior positions in the health ministry, academia, and the private sector.<sup>8</sup> U.S. officials, motivated by a desire to build an alliance with postwar Japan to combat communism, allegedly were aware that these Japanese sought important positions and may have even helped them obtain their jobs.<sup>9</sup>

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5. See, e.g., C.A. WILLOUGHBY, REPORT ON BACTERIOLOGICAL WARFARE (1947) (on file with The Yale Law & Policy Review); Letter from C.A. Willoughby, U.S. Army Forces, Pac., Military Intelligence Section, Gen. Staff, to Major Gen. S.J. Chamberlin, Dir. of Intelligence, War Dep't Gen. Staff (July 22, 1947) (on file with The Yale Law & Policy Review).
  6. See BEIGBEDER, *supra* note 2, at 72-74; GOLD, *supra* note 2, at 86-143; HARRIS, *supra* note 1, at 147-233; THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM 85-86, 131, 134 (Chihiro Hosoya et al. eds., 1986); Awaya Kentarō, *In the Shadows of the Tokyo Tribunal*, in THE TOKYO WAR CRIMES TRIBUNAL: AN INTERNATIONAL SYMPOSIUM 79, 85-86 (C. Hosoya et al. eds., 1986); B.V.A. Röling, *The Tokyo Trial and the Quest for Peace*, in THE TOKYO WAR CRIMES TRIBUNAL: AN INTERNATIONAL SYMPOSIUM, *supra*, at 125, 131, 134; Shane Green, *The Asian Hell of Unit 731*, AGE (Melbourne, Australia), Aug. 29, 2002, at 11; Kyodo, *US Paid for Japanese Human Germ Warfare Data*, AUSTRALIAN BROADCASTING CORPORATION, Aug. 15, 2005, <http://www.abc.net.au/news/newsitems/200508/s1437314.htm>; Justin McCurry, *Japan's Sins of the Past*, GUARDIAN (London), Oct. 28, 2004, <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,1338296,00.html>.
  7. JOHN LOFTUS & MARK AARONS, THE SECRET WAR AGAINST THE JEWS: HOW WESTERN ESPIONAGE BETRAYED THE JEWISH PEOPLE 290 (1994).
  8. GOLD, *supra* note 2, at 139-43; WILLIAMS & WALLACE, *supra* note 2, at 235-42.
  9. GOLD, *supra* note 2, at 139-43; WILLIAMS & WALLACE, *supra* note 2, at 236.

Thus, the U.S. government made a conscious decision not to hold accountable thousands of Japanese suspected of direct involvement in some of the most horrific crimes of World War II, including those who participated in offenses allegedly planned and perpetrated against Americans. The incipient Cold War, and the superpowers' attendant desire to secure competitive advantages, had chilled the U.S. government's enthusiasm for investigating and prosecuting Japanese human experimenters. U.S. officials believed that their research would be useful in the arms race developing between the United States and the Soviet Union. U.S. war memorials and history books gloss over these facts.

### B. Recent Developments

In recent years, Japanese nationalism and revisionism have grown, particularly about the country's wartime atrocities.<sup>10</sup> For example, early in his term, Shinzo Abe, who served as the Japanese prime minister from September 2006 to September 2007, erroneously claimed that there was no evidence that Japan employed sexual slavery during World War II.<sup>11</sup> Meanwhile, Japan has steadily increased its military spending, despite having been constitutionally barred since the end of World War II from maintaining its own "land, sea, and air forces."<sup>12</sup> In 2007, Japan spent the equivalent of \$41.75 billion on its military, the sixth largest annual military budget of any country in the world.<sup>13</sup>

Japan's changing attitudes and capabilities have alarmed its neighbors, particularly China and Korea, which suffered numerous atrocities at the hands of the Japanese in World War II.<sup>14</sup> As I have argued elsewhere, Japan's failure to acknowledge the atrocities it has committed casts uncertainty over its recent military resurgence. To assuage the fears of China, Korea, and other countries

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10. See, e.g., Howard W. French, *Specter of a Rearmed Japan Stirs Its Wartime Generation*, N.Y. TIMES, June 20, 2001, at A1; Francis Fukuyama, *The Trouble with Japanese Nationalism*, PROJECT SYNDICATE, 2007, <http://www.project-syndicate.org/commentary/fukuyama2>; Shane Green, *Japan's Lack of Remorse Troubling as It Manoeuvres to Rearm*, SYDNEY MORNING HERALD, June 19, 2003, at 15; Norimitsu Onishi, *Long After War Trials, Japan Still Honors a Judge*, N.Y. TIMES, Aug. 31, 2007, at A4; George F. Will, Editorial, *The Uneasy Sleep of Japan's Dead*, WASH. POST, Aug. 20, 2006, at B07; Paul Wiseman, *Nationalism Gains Strength in Japan*, USA TODAY, July 27, 2007, at 6A.
  11. See, e.g., Editorial, *No Comfort*, N.Y. TIMES, Mar. 6, 2007, at A20; Norimitsu Onishi, *Denial Reopens Wounds of Japan's Ex-Sex Slaves*, N.Y. TIMES, Mar. 8, 2007, at A1; Norimitsu Onishi, *Premier's Sudden Resignation Leaves Japan in Disarray*, N.Y. TIMES, Sept. 13, 2007, at A3; Editorial, *Shinzo Abe's Double Talk*, WASH. POST, Mar. 24, 2007, at A16.
  12. KENPŌ, art. 9, para. 2.
  13. Global Security, *World Wide Military Expenditures*, <http://www.globalsecurity.org/military/world/spending.htm> (last visited Apr. 15, 2008).
  14. See, e.g., French, *supra* note 10; see also Green, *supra* note 10.

in the Pacific Rim—where memories of a brutal, imperialistic Japanese government remain vivid—modern-day Japan should both acknowledge and apologize for the atrocities its military perpetrated in World War II. Japan's neighbors will, in part, look to how the current Japanese government treats the crimes of previous Japanese regimes to interpret how Japan will manage its newfound military might in the years to come.<sup>15</sup>

In addition to the practical benefits for Japan's diplomatic relations, the Japanese government should come to grips with its past for ethical reasons, out of respect for survivors, victims, and their families. Other governments have recently issued apologies for their past wrongs, recognizing that doing so is a necessary first step on the path towards reconciliation and achieving long-term peace and stability.<sup>16</sup>

At the same time, other countries, including the United States, could do more to help establish an accurate record not only of Japanese atrocities but also of the postwar authorities who were able but unwilling to punish them.<sup>17</sup> The door is therefore open to a new U.S. policy, grounded in morality, which acknowledges the United States' politically expedient cover-up of Japanese wartime atrocities. Just as Japan's leaders should be more forthcoming about their dark past, so too should the United States recognize that it was complicit in hiding that shameful affair. A change in U.S. policy may even help motivate a change in Japan's.

## II. A PEOPLE'S TRIBUNAL AS A MEANS TO EXAMINE PAST ATROCITIES

Even if acknowledging Japanese wartime atrocities is sound policy, the reality is that the United States and Japan may continue to be silent about their re-

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15. See Zachary D. Kaufman, Recent Development, *No Right to Fight: The Modern Implications of Japan's Pacifist Postwar Constitution*, 33 YALE J. INT'L L. 266 (2008).
  16. For example, on February 13, 2008, Australian Prime Minister Kevin Rudd officially apologized for past wrongs committed by his country's government against Aborigines and Torres Strait Islanders. As part of his apology statement, Rudd declared, "The Parliament is today here assembled to deal with this unfinished business of the nation, to remove a great stain from the nation's soul, and in a true spirit of reconciliation to open a new chapter in the history of this great land, Australia." Tim Johnston, *Australia Says "Sorry" to Aborigines for Mistreatment*, N.Y. TIMES, Feb. 13, 2008, at A14 (quoting Rudd). The offenses some Aborigine rights advocates claim the Australian government committed against Aborigines include human experimentation, particularly on children. See, e.g., *Aborigines "Used in Experiments"*, BBC NEWS, <http://news.bbc.co.uk/2/hi/asia-pacific/7348144.stm> (last visited Apr. 15, 2008).
  17. To be sure, the U.S. government has taken some steps to address Japan's wartime human experimentation. In December 1996, the U.S. Department of Justice's Office of Special Investigations announced that it had added to its watch list of atrocity perpetrators banned from entering the United States sixteen Japanese veterans of World War II, which included some participants in Unit 731. See BEIGBER, *supra* note 2, at 73.

spective involvement in human experimentation during World War II. Absent government action, civil society should pursue alternative means of obtaining official acknowledgement. Because the particular circumstances and challenges of confronting Japanese wartime human experimentation limit the appropriateness and practicality of the most common transitional justice mechanisms,<sup>18</sup> a more innovative—or at least more unusual—approach is required.

A so-called “people’s tribunal,” an ad hoc organization of private citizens, may offer the most promising method of addressing the atrocities. Beyond expressing general outrage, non-governmental actors can assemble to create a forum to register public protest about state actions. Such civil society members can draw upon their particular backgrounds and expertise in order to provide analysis and recommend remedies for violations of international law.<sup>19</sup> Undoubtedly, people’s tribunals have significant drawbacks: their history and operation demonstrate the potential pitfalls of civil society’s attempt to provide reconciliation, retribution, or restitution for past crimes. However, these institutions present the best—perhaps the only—means for addressing Japanese human experimentation in World War II.

#### A. *Background and Critique of People’s Tribunals*

It is difficult to catalogue all of the people’s tribunals, as they have taken a wide variety of forms and have been created for multifarious purposes. By some accounts, the first people’s tribunals originated during the interwar period in response to perceived inefficiencies in the rule of law at the time. Private citizens established panels to examine the 1933 fire that damaged the Reichstag, the Parliament building in Berlin in what was then Nazi Germany, as well as to confront the mid-1930s Moscow show trials, part of the “Great Purge” in the Soviet Union. In both cases, prominent Americans, including attorney Arthur Garfield Hays and public intellectual John Dewey, promoted and participated in the people’s tribunals.<sup>20</sup> Throughout the twentieth and early twenty-first centuries,

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18. See *infra* Part III.

19. See, e.g., JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005); ANNA-KARIN LINDBLOM, *NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW* (2006); Farouk Mawlawi, *New Conflicts, New Challenges: The Evolving Role for Non-Governmental Actors*, 46 J. INT’L AFF. 391 (1993).

20. ARTHUR JAY KLINGHOFFER & JUDITH APTER KLINGHOFFER, *INTERNATIONAL CITIZENS’ TRIBUNALS: MOBILIZING PUBLIC OPINION TO ADVANCE HUMAN RIGHTS* 11-101 (2002). The first people’s tribunal the Klinghoffers identify was named the Commission of Inquiry into the Origins of the Reichstag Fire, also known as the International Juridical Investigatory Commission on the Reichstag Fire. This people’s tribunal held hearings in London from September 14 through September 18, 1933, and announced its “final conclusions” two days later. KLINGHOFFER & KLINGHOFFER, *supra*, at 21-25. The second people’s tribunal the Klinghoffers identify was named the Preliminary Commission of Inquiry into the Charges Made against Leon Trotsky in the Moscow Trials, also known as the Dewey Commis-

people's tribunals have been organized to address a range of alleged violations of international law, from U.S. involvement in Vietnam to the rights of asylum seekers, psychiatric patients, and indigenous peoples.

But no matter the form, the greatest strength of people's tribunals is that, precisely because they are driven by civil society and are thus, unlike state-sanctioned courts and truth commissions, independent from political authorities, they may be more willing and better able to reveal damning information and to present critical findings and recommendations.<sup>21</sup> A report of a people's tribunal's hearings and conclusions can be disseminated either by the tribunal itself or by news agencies, thus raising public awareness about the tribunal's operations and the subject matter of its inquiries.

A people's tribunal may therefore provide compelling shaming pressures,<sup>22</sup> much like other features of international law and politics.<sup>23</sup> As political scientist Andrew Moravcsik argues in a case study of the European human rights regime, shaming

seeks to enforce individual human rights and promote democracy by creating an international and domestic climate of opinion critical of national practices. Shaming exploits the symbolic legitimacy of foreign pressure and international institutions . . . [and] is instigated through the dissemination of information . . . and exploitation of international practical institutions . . .<sup>24</sup>

That shaming function, which Moravcsik found in E.U. institutions, is also indicative of a people's tribunal. As Arthur Jay Klinghoffer and Judith Apter

tion, after its chairman, John Dewey. This people's tribunal held hearings in Coyoacán, outside Mexico City, from April 10 through April 17, 1937; released a transcript of those hearings and summary of findings on September 21, 1937; and announced its verdict in New York on December 12, 1937. KLINGHOFFER & KLINGHOFFER, *supra*, at 72-73, 80-82, 96-97.

21. For general discussion of such tribunals created and staffed by civil society, see KLINGHOFFER & KLINGHOFFER, *supra* note 20; Arthur Jay Klinghoffer, *International Citizens' Tribunals on Human Rights*, in GENOCIDE, WAR CRIMES AND THE WEST 346 (Adam Jones ed., 2004). The Klinghoffers provide the most thorough treatment of this developing area of scholarship.
22. Professors Dan Kahan and Eric Posner define shaming as the "process by which citizens publicly and self consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions." Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368 (1999).
23. See, e.g., ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME* (2001); Lesley Wexler, *The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 ARIZ. J. INT'L & COMP. L. 561, 563-67 (2003).
24. Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT'L REL. 157, 161 (1995).

Klinghoffer state in their extensive study of people's tribunals, such institutions "can . . . serve as a corrective mechanism through which public intellectuals mobilize world public opinion against powerful countries shielded from sanctions under international law. If the absence of effective and permanent legal structures is the problem, then [people's] tribunals may offer an appropriate solution."<sup>25</sup>

To be sure, commentators have levied substantial criticism against people's tribunals. One major critique concerns their nomenclature, as the term "people's tribunal" is controversial. For some, the first word is reminiscent of "totalitarian and terrorist concepts of justice," leading the Klinghoffers, for instance, to refer to these institutions instead as "international citizens' tribunals."<sup>26</sup> The second word, "tribunal," suggests a juridical function, but, as the Klinghoffers observe, "[a]pplying legalistic terminology is often confounding,"<sup>27</sup> as these civil society initiatives employ staff and methods that depart from traditional notions of courtroom procedure.

Indeed, people's tribunals have often been criticized for their mechanics. First, they have lacked generally accepted guarantees of due process. Some tribunals, for example, have conducted hearings *in absentia* and have relied on hasty and possibly predetermined deliberations.<sup>28</sup> Second, because people's tribunals are often created, staffed, and defended by famous liberal Western professors and philosophers—Simone de Beauvoir, Richard Falk, Bertrand Russell, and Jean-Paul Sartre, for example—these institutions have been dismissed as Eurocentric, elitist, left-leaning, and radical.<sup>29</sup> Third, many people's tribunals have focused on atrocities, including genocide, allegedly committed by the United States,<sup>30</sup> leading some to criticize these institutions as politically moti-

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25. KLINGHOFFER & KLINGHOFFER, *supra* note 20, at 5.

26. *Id.* at 3.

27. *Id.* at 9.

28. *See, e.g., id.* at 5, 8.

29. *See, e.g., id.* at 1, 5-7, 10, 103-62, 163, 165, 171. For the inaugural statement to the first Russell Tribunal by Jean-Paul Sartre, who served as its executive president, see Jean-Paul Sartre, *Inaugural Statement to the Russell Vietnam War Crimes Tribunal (1966)*, in GENOCIDE, WAR CRIMES AND THE WEST, *supra* note 21, at 181.

30. For example, the first Russell Tribunal, established in 1966, charged the United States with committing war crimes, crimes against humanity, and genocide in Vietnam, and found the United States guilty of violating international law through aggression, targeting civilians, and using prohibited weapons. Later people's tribunals focused on U.S. involvement in, among other places, Guatemala, Hawaii, Iraq, Nicaragua, and Panama. *See* KLINGHOFFER & KLINGHOFFER, *supra* note 20, at 1, 4, 7-8, 103-77; CAROLINE MOOREHEAD, BERTRAND RUSSELL: A BIOGRAPHY 520-30 (1993); Sally Engle Merry, *Resistance and the Cultural Power of the Law*, 29 L. & SOC'Y REV. 11, 20-23 (1995). For Russell's views on American responsibility for the Vietnam War, which informed his decision to establish the first Russell Tribunal, see BERTRAND RUSSELL, WAR CRIMES IN VIETNAM (1967).

vated and anti-American.<sup>31</sup> Because of past people's tribunals' procedural defects and thinly-veiled political agendas, some may therefore consider people's tribunals to be kangaroo courts rather than legitimate, fair quasi-judicial institutions.

The greatest criticism of people's tribunals may be their inherent lack of an enforcement mechanism. People's tribunals share the same impotence as truth commissions, which "hold fewer powers than do courts. They have no powers to put anyone in jail, they can't enforce their recommendations . . ." <sup>32</sup> In fact, people's tribunals may be even less powerful than truth commissions, as many truth commissions have been sanctioned by the state and thus have "had the power to compel anyone to come forward to answer questions."<sup>33</sup> As Russell acknowledged of his first eponymous tribunal, "Our tribunal . . . commands no State power. It rests on no victorious army. It claims no other than a moral authority."<sup>34</sup> Because they have no teeth, people's tribunals have been largely ineffective, and they have been accused of being nothing more than political activism cloaked in legal imagery. Indeed, as even neutral commentators such as Wellesley College professor Sally Engle Merry have recognized, people's tribunals often "appropriate[] legal forms and symbols in an effort to harness the power and legitimacy of law in a movement of resistance."<sup>35</sup>

Yet proponents of people's tribunals respond that they can succeed despite—or perhaps *because of*—some of their flaws. As Arthur Jay Klinghoffer argues,

International citizens' tribunals cannot impose their decisions upon transgressing states, but this apparent weakness may be turned into an advantage, at least in theory. Such tribunals are not indebted to states, and are not influenced by them. Powerlessness may thus prove to be a virtue, and contribute to [international citizens'] tribunals' legitimacy.<sup>36</sup>

Furthermore, given that so many critiques of people's tribunals derive from their design and operation, many of those criticisms could be addressed through more careful planning, as I suggest below.

### *B. Application to Japanese Wartime Human Experimentation*

A people's tribunal was used once before to respond to Japanese wartime atrocities. In 2000, a Women's International War Crimes Tribunal (WIWCT)

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31. See, e.g., KLINGHOFFER & KLINGHOFFER, *supra* note 20, at 7, 134, 178.

32. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 16 (2002).

33. *Id.*

34. RUSSELL, *supra* note 30, at 125.

35. Merry, *supra* note 30, at 21.

36. Klinghoffer, *supra* note 21, at 347.

on Japan's Military Sexual Slavery was held in Tokyo to establish the history of, and recommend action on, Japan's use of "comfort women" during World War II.<sup>37</sup> This people's tribunal was organized and staffed exclusively by individuals acting in their private capacities, including Gabrielle Kirk McDonald, a distinguished U.S. jurist.<sup>38</sup> The WIWCT was designed to supplement the International Military Tribunal for the Far East (IMTFE), which the Allied victors of World War II held in Tokyo from 1946 to 1948 to try the perpetrators of Japan's most egregious wartime atrocities. The IMTFE was insufficient because, among other flaws, it failed to include rape, sexual enslavement, and other sexual crimes in the litany of Japanese atrocities it confronted.<sup>39</sup>

Because the IMTFE also failed to address Japan's human experimentation,<sup>40</sup> a people's tribunal should be convened for those crimes as well. Civil society should demand the declassification of documents about human experimentation, including information about which Japanese officials were involved in these activities and the Allied forces' decision not to seek the trial of Ishii or his cohorts before the IMTFE or other postwar courts. Civil society should also

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37. "Comfort women" is the euphemistic term for the tens of thousands of women, the majority of whom were from China and Korea, whom the Japanese forced into prostitution and sexual slavery during World War II. See, e.g., GEORGE HICKS, *THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* (1994); DAI SIL KIM-GIBSON, *SILENCE BROKEN: KOREAN COMFORT WOMEN* (1999); *LEGACIES OF THE COMFORT WOMEN OF WORLD WAR II* (Margaret Stetz & Bonnie B. C. Oh eds., 2001); YUKI TANAKA, *JAPAN'S COMFORT WOMEN: SEXUAL SLAVERY AND PROSTITUTION DURING WORLD WAR II AND THE US OCCUPATION* (2002); *TRUE STORIES OF THE KOREAN COMFORT WOMEN* (Keith Howard ed., Young Joo Lee trans., 1995); YOSHIMI YOSHIKAWA, *COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II* (Suzanne O'Brien, trans., Columbia University Press 2000) (1995).
38. McDonald currently serves as an arbitrator on the Iran-U.S. Claims Tribunal. She is a former judge on the U.S. District Court for the Southern District of Texas and the former president (chief judge) of the United Nations International Criminal Tribunal for the Former Yugoslavia.
39. See KLINGHOFFER & KLINGHOFFER, *supra* note 20, at 166-67; The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, Violence Against Women in War—Network Japan, <http://www.jca.apc.org/vaww-net-japan/english/womenstribunal2000/whatstribunal.html> (last visited Apr. 15, 2008); see also, e.g., Christine M. Chinkin, Editorial Comments, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335 (2001); Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326 (1994); Hirohito "Guilty" Over Sex Slaves, BBC NEWS, Dec. 12, 2000, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1066658.stm>; Stacy Sullivan, *Symbolic War Crimes Tribunal for Japanese "Comfort Women"*, Dec. 10, 2002, <http://www.crimesofwar.org/onnews/comfort.html>.
40. BEIGBEDER, *supra* note 2, at 73.

demand a full and public apology by Japan for carrying out—and by the United States for covering up—these horrendous events.

If private citizens do pursue such an initiative, the aforementioned criticisms of people's tribunals could be addressed in the process. The initiative should be referred to as a "commission of inquiry" or something similarly descriptive of its extrajudicial nature. Efforts should be made to have a fair and balanced group of panelists that, if possible, includes individuals from across the political spectrum and from several different countries, including China, both North and South Korea, and Japan itself. The Japanese government should be afforded the opportunity to present a defense. The panelists should take that defense and all other evidence into consideration *before* arriving at their conclusion. That conclusion should not be a "verdict," but rather a statement of findings and should include any dissenting views among the panelists. By virtue of its primary focus on Japan, even though the matter considered involves the United States, the institution would not necessarily be deemed anti-American.

Of course, neither Japan nor the United States would be obligated to acknowledge the findings or follow the recommendations of such a grassroots initiative. Still, a people's tribunal could help raise public awareness about Japanese wartime human experimentation, and it could pressure Japan and the United States finally to take responsibility for their actions. Indeed, Japan would be especially susceptible to the shaming function of a people's tribunal, as Japanese society is more sensitive to shame than many other cultures.<sup>41</sup> Moreover, as Japan seeks greater involvement in international affairs—for example, through its ongoing campaign to obtain a permanent seat on the United Nations Security Council (UNSC)<sup>42</sup>—Japan is likely to be increasingly concerned about its public image.

### III. A COURT OF LAST RESORT? WHY OTHER TRANSITIONAL JUSTICE OPTIONS WOULD NOT WORK

Beyond the possible effectiveness of shaming Japan and the United States into finally publicly addressing Japanese human experimentation during World War II, a people's tribunal might also be the most appropriate transitional justice mechanism in this case simply because other options would be unsuccessful or impractical. While a process of elimination is perhaps not always the most desirable means of arriving at a conclusion or recommendation, in this case it is an honest and realistic one. Implementing a people's tribunal, even with its significant controversy and weaknesses, is better than the current situation of inac-

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41. For one of the seminal works describing Japan as "a shame culture," see RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE* (1946).

42. In September 2004, Japan began actively campaigning to secure a permanent seat on the United Nations Security Council. See *Timeline: Japan*, BBC News, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1261918.stm> (last visited Apr. 15, 2008).

tion. In this Part, I discuss why transitional justice options besides a people's tribunal would be unlikely to address effectively Japanese wartime human experimentation.

International criminal tribunals, if formally and officially established by recognized authorities such as international organizations, can have large budgets and staffs, widespread legitimacy, binding judgments, and strong enforcement mechanisms.<sup>43</sup> For example, the United Nations (UN) International Criminal Tribunal for the Former Yugoslavia (ICTY) had a two-year budget for 2006 to 2007 of \$276,474,100 and, as of October 1, 2007, had 1,173 staff members representing eighty-two nationalities.<sup>44</sup> The ICTY was established by the UNSC using its Chapter VII powers as outlined in the UN Charter<sup>45</sup>—the first international war crimes tribunal so created. Consequently, the ICTY has the official imprimatur and support of the UNSC, the division of the UN charged with “primary responsibility for the maintenance of international peace and security,”<sup>46</sup> in its existence, operation, and working relationship with all state members of the UN (effectively the entire world).<sup>47</sup>

However, such international tribunals have always had limited temporal, subject-matter, personal, and territorial jurisdictions. For instance, the competence of the UN International Criminal Tribunal for Rwanda (ICTR), established by the UNSC to address the 1994 genocide,<sup>48</sup> is confined to prosecuting “persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 . . . .”<sup>49</sup> Neither the ICTR nor any other existing ad hoc war crimes tribunal could have jurisdiction over Japanese wartime atrocities.

The jurisdictional constraints on even existing *permanent* international tribunals preclude them from trying cases concerning Japanese human experimentation during World War II. The International Court of Justice (ICJ), “the principal judicial organ of the United Nations,”<sup>50</sup> can try cases only between

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43. See generally HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE (1999); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS (2000); BEIGBEDER, *supra* note 2; RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR (2000).

44. ICTY—General Information, <http://www.un.org/icty/glance/index.htm> (last visited Apr. 15, 2008).

45. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

46. U.N. Charter art. 24, para. 1.

47. S.C. Res. 827, *supra* note 45, ¶ 4.

48. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

49. *Id.* ¶ 1.

50. U.N. Charter art. 92.

states,<sup>51</sup> and thus individual Japanese could not come under its jurisdiction. It is also unclear whether the ICJ would have jurisdiction over crimes such as these, which were committed before the court was established as part of the UN in 1945.<sup>52</sup> The International Criminal Court (ICC), the world's first permanent international war crimes tribunal, would be a similarly inapplicable forum. Although Japan is a state party to the Rome Statute, the treaty that established the ICC,<sup>53</sup> and therefore the ICC could have jurisdiction over atrocities committed in Japan or by Japanese,<sup>54</sup> the ICC's temporal jurisdiction extends back only to July 1, 2002, the date on which the ICC entered into force.<sup>55</sup>

But even an ad hoc war crimes tribunal created specifically to address these atrocities would likely not be effective. Such tribunals, which establish an historical account of atrocities and impose sentences on convicted defendants, usually require alleged perpetrators of crimes to be in custody,<sup>56</sup> and often the accused choose to testify.<sup>57</sup> In the case of Japan's wartime human experimentation, most, if not all, suspected offenders are likely to have died, while old age, poor health, or the passing of six decades may cloud the memories of those who are still alive. The Extraordinary Chambers in the Courts of Cambodia, the ad hoc hybrid war crimes tribunal recently created to address the Cambodian

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51. Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1031, 1059.
  52. See generally SHABTAI ROSENNE, *THE TIME FACTOR IN THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* (1960).
  53. Japan acceded to the Rome Statute on July 17, 2007. International Criminal Court: Japan, <http://www.icc-cpi.int/asp/statesparties/country&id=109.html> (last visited Apr. 15, 2008).
  54. See Rome Statute of the International Criminal Court art. 12, *adopted and opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].
  55. See Marlise Simons, *Without Fanfare or Cases International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A3. The Rome Statute provides: "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute." Rome Statute, *supra* note 54, at art. 11, para. 1.
  56. For example, the ICTY and the ICTR both provide that the accused shall be entitled to be tried in his/her presence and to defend him/herself in person or through his/her own chosen legal assistance. Statute of the International Tribunal for Rwanda art. 20, para. 4(d), Nov. 8, 1994, 33 I.L.M. 1602; Statute of the International Tribunal art. 21, para. 4(d), May 25, 1993, 32 I.L.M. 1192.
  57. Saddam Hussein is only the latest prominent alleged atrocity perpetrator to testify at his own trial. See Edward Wong, *Hussein Urges Iraqis to Unify in War on U.S.*, N.Y. TIMES, Mar. 16, 2006, at A1. Another accused war criminal who recently testified at his own trial before he died was Slobodan Milosevic. See Gary J. Bass, *Milosevic in The Hague*, FOREIGN AFF., May-June 2003, at 82.

genocide of 1975 to 1979,<sup>58</sup> suffers from these very problems, even though the crimes it covers occurred decades *after* World War II.<sup>59</sup>

For the same reason, a truth and reconciliation commission, as most famously implemented in South Africa<sup>60</sup> (but also used elsewhere in Africa, Latin America, Europe, Asia, and even recently in the United States),<sup>61</sup> would be problematic. Priscilla Hayner, an expert on truth commissions, suggests that

a truth commission may have any or all of the following five basic aims: to discover, clarify, and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past.<sup>62</sup>

Such commissions, which sometimes offer amnesty in exchange for truthful testimony, are most successful when they are sanctioned by the state in which they operate, engage alleged perpetrators and victims of crimes over which they have

58. Professor Laura Dickinson describes “hybrid” tribunals as those for which “both the institutional apparatus and the applicable law consist of a blend of the international and the domestic. Foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. The judges apply domestic law that has been reformed to accord with international standards.” Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 295 (2003).

59. See, e.g., Editorial, *The Killing Fields*, N.Y. TIMES, July 6, 2006, at A20 (“[Because] the leaders of the Khmer Rouge are either old or dead . . . [w]e can only hope that there will be enough of a trial in the end to give Cambodia’s survivors some sense of justice done.”).

60. See generally ALEX BORAINÉ, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION (2000); HAYNER, *supra* note 32, at 40-45; TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000); DESMOND MPIOLO TUTU, NO FUTURE WITHOUT FORGIVENESS (1999); Timothy Garton Ash, *True Confessions*, 44 N.Y. REV. BOOKS, July 17, 1997, at 33.

61. See generally JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 62-66, 70-72, 196, 215 (2004); MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 3-87 (2006); HAYNER, *supra* note 32, at 32-40, 45-71; MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 52-90 (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE 69-117 (2000); 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 223-333 (Neil J. Kritz ed., 1995); Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice* 28 INT’L SECURITY, Winter 2003-04, at 5, 31-33; Jonathan D. Tepperman, *Truth and Consequences*, FOREIGN AFF., Mar.-Apr. 2002, at 128; Larry Schooler, *Truth Talks: An Exploration of America’s First Truth and Reconciliation Commission* (Mar. 18, 2008) (unpublished manuscript, on file with The Yale Law & Policy Review).

62. HAYNER, *supra* note 32, at 24.

jurisdiction, and function in the shadow of prosecution.<sup>63</sup> However, given the recent resurgence of Japanese nationalism and the dubious availability of competent witnesses to or perpetrators of these heinous crimes, none of these conditions would be likely to apply in the case of Japanese human experimentation during World War II.

#### CONCLUSION

This Comment illustrates the reality that legal responses to atrocities may not always be appropriate, practical, or effective. Political solutions, including those pursued by civil society, may be the only alternative. Even though such entities may be controversial and lack the ability or authority to investigate, prosecute, or punish, they can command the attention of the public—particularly as information-disseminating and shaming mechanisms—and possibly achieve those ends.

Justice for those who suffered Japanese human experimentation during World War II is long overdue. Though even a people's tribunal could not provide full accountability for the perpetrators or reconciliation for the victims of this atrocity, it could at least help promote greater historical awareness and acknowledgement about the respective roles of Japan and the United States in this horrific crime. A people's tribunal on Japanese human experimentation offers a means of addressing the past while promoting reconciliation among peoples and states for the future.

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63. *Id.* at 1-9, 14, 239-40.

