

2023

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Recommended Citation

Madison P. Bingle (2023) "The Forgotten Sexual and Gender-Based Violence of the Vietnam-American War: Is Justice too Late for Vietnamese Victims and Survivors?," *Human Rights Brief*. Vol. 26: Iss. 2, Article 1.

Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol26/iss2/1>

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THE FORGOTTEN SEXUAL AND GENDER-BASED VIOLENCE OF THE VIETNAM-AMERICAN WAR: IS JUSTICE TOO LATE FOR VIETNAMESE VICTIMS AND SURVIVORS?

by Madison P. Bingle*

Introduction

“The past, far from disappearing or lying down and being quiet, has an embarrassing and persistent way of returning and haunting us unless it has in fact been dealt with adequately.”

—Desmond Tutu¹

The Vietnam-American War ended nearly fifty years ago. However, the atrocities committed during the war have had a devastating impact on the lives of persons

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¹ Desmond is a South African Nobel Peace Prize Laureate that lived through the South African apartheid. Desmond Tutu, DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 28 (1999).

involved long after the conflicts’ end.² A particularly marginalized group within survivors and victims of the Vietnam-American War is Vietnamese women who experienced sexual and gender-based violence.³ And given the specific tactics of warfare employed during this war, including the use of poisonous herbicide, the sexual and gender-based violence inflicted on women spans far beyond customary forms of sexual violence during conflict—it has also led to reproductive violence that has most affected Vietnamese women.

Despite the prominence of sexual and gender-based violence during the war, Vietnamese women have yet to obtain any form of justice for these atrocities.⁴ However, in recent years, international human rights advocates and Vietnamese survivors and victims of sexual-gender have begun to speak out about their enduring trauma.⁵ Notably, in April 2020, Trần Thị Ngải,

² See generally, Fred A. Wilcox, SCORCHED EARTH: LEGACIES OF CHEMICAL WARFARE IN VIETNAM (2011) (discussing at length the legacies of the Vietnam-American War, such as the effects of Agent Orange); Eliza Martha Hess, THEN THE AMERICANS CAME (1994) (providing in-depth narratives on how the Vietnam-American War has affected Vietnamese people, and how it affected Vietnamese women who were subjected to sexual and gender-based violence throughout the war).

³ I want to acknowledge that many men experienced sexual and gender-based violence during the Vietnam-American war; however, for the scope of this Article, I am choosing to focus on the experiences of women. See Ly Truong, 1968 – The Year that Haunts Hundreds of Women, BBC NEWS (Mar. 27, 2020), <https://www.bbc.co.uk/news/extra/lhrjrs9z9a/vietnam-1968>; Wayne David, It’s Time South Korea Recognized Allegations of Sexual Violence in Vietnam, INDEPENDENT (Feb. 28, 2021), <https://www.independent.co.uk/voices/south-korea-vietnam-war-sexual-violence-women-b1806764.html>.

⁴ See Choe Sang-Hun, Vietnam War Victims Wanted Justice. They Were Given ‘30 Bags of Rice., N.Y. TIMES (Aug. 21, 2021), <https://www.nytimes.com/2021/08/21/world/asia/vietnam-war-south-korea-massacre.html> (describing how there was not justice for Vietnamese victims of atrocities committed by South Korea); Christopher J. Levesque, The Truth Behind My Lai, N.Y. TIMES (Mar. 16, 2018), <https://www.nytimes.com/2018/03/16/opinion/the-truth-behind-my-lai.html> (noting that after the American perpetrated My Mai Massacre, several officers were brought to trial, but a U.S. court only convicted Second Lieutenant Calley, who was released on house arrest shortly after); Sharon Ungerfeld, The Lingering Killer: Agent Orange, 2 RSCH. J. JUST. STUD. & FORENSIC SCI. 127, 128 (2014) (noting that “spraying a harmful chemical over a country with ample civilian populations constitutes a war crime because the individuals affected receive no justice, and groups responsible for the wartime atrocities take no responsibility.”).

⁵ I want to acknowledge that Vietnamese on both sides of the

a woman raped by a South Korean soldier during the war, sued the South Korean government for this atrocity.⁶ These efforts by advocates, survivors, and victims, now beg the question: is justice too late for Vietnamese women?

This Article argues that the time for justice for the Vietnamese people, and particularly for Vietnamese victims and survivors of sexual and gender-based violence, is now. While the Vietnamese government previously resisted reconciling with the numerous atrocities committed during the war, more recently, it has signaled its willingness to acknowledge the “barbarous” atrocities committed during the war that have led to insufferable pain by its population.⁷ The Vietnamese government’s shift in tone has opened the door for the offending states—namely the United States and South Korea—to grapple with their brutal military history in Vietnam. This Article further asserts that under international humanitarian law and international customary law, the United States and South Korea committed grave offenses of the Geneva Conventions and international customary law. Thus, the United States and South Korea have a residual obligation to rectify their past atrocities.

Given the breadth of atrocities committed by the

conflict perpetuated sexual and gender-based violence against Vietnamese women; however, for the scope of this Article, I am choosing to focus on the atrocities committed by the Americans and the South Koreans, because they are more documented than those committed by the Vietnamese, and there has been renewed movement to highlight the acts of Americans and South Koreans in the war. See e.g., Lin Taylor, *Yazidi survivor demands justice for women raped in Vietnam War*, REUTERS (Jan. 16, 2019, 4:56 PM), <https://www.reuters.com/article/us-vietnam-war-rape/yazidi-survivor-demands-justice-for-women-raped-in-vietnam-war-idUSKCN1PA2YV> (demonstrating that Vietnamese women are starting to advocate for justice for sexual-gender based violence during the Vietnam-American War).

⁶ See Travis Vincent, *K-Dramas Resurrect Long-Buried Memories in Vietnam*, DIPLOMAT (May 10, 2022), <https://thediplomat.com/2022/05/k-dramas-resurrect-long-buried-memories-in-vietnam/> (stating that “In April 2020, Tran Thi Ngai . . . became the first woman to sue the South Korean government for past crimes.”).

⁷ See Adam Taylor, *Vietnamese Leader Says U.S. Committed ‘Countless Barbarous Crimes’ During the War*, WASH. POST (Apr. 30, 2015, 12:35 PM), <https://www.washingtonpost.com/news/worldviews/wp/2015/04/30/vietnamese-leader-says-u-s-committed-countless-barbarous-crimes-during-the-war/>.

United States and South Korea during the Vietnam-American War, in this Article I chose to focus on those atrocities that fit within the context of sexual and gender-based violence, in part because it provides a narrower lens for finding liability for those states, but also because these crimes have been underwhelmingly discussed in the context of accountability for atrocities committed during the war.

To begin, Part I of this Article provides a brief outline of the Vietnam-American War by delving into the perpetrators of sexual and reproductive violence during the war and briefly describing the experiences of survivor and victim groups. Part II then outlines the applicable international humanitarian law and customary international law that the United States and South Korea violated. Finally, Part III summarizes the previous and ongoing efforts for justice for and with Vietnamese women, and additionally, Part III provides recommendations on how the United States and South Korea could provide meaningful justice for Vietnamese women, such as through individual and community reparations and a truth and reconciliation commission. By finally providing Vietnamese victims justice for the sexual and gender-based violence they experienced during the war, the United States and South Korea would be fulfilling their international legal obligations toward those victims and survivors and would be taking an important step in helping to prevent and bring to light sexual and gender-based violence in both conflict and in its own militaries.

I. Background

A. Context of the Vietnam-American War

In 1954, the United States began officially providing military backing to the Southern Vietnamese government, with the assistance of other countries, such as South Korea who joined the war in 1964.⁸ In response to the division of the country, the Northern Vietnamese government began fighting the South Vietnamese, Americans, and South Korean troops, in an effort

⁸ See generally Daniel Oh, *The Two Koreas and the Vietnam War*, WILSON CTR. (last visited May 3, 2021), <https://digitalarchive.wilsoncenter.org/resource/modern-korean-history-portal/the-two-koreas-and-the-vietnam-war>.

to reunite the country and expel foreign occupants.⁹ The Northern Vietnamese military comprised of the Northern Vietnamese Army (NVA) and the Northern Liberation Front—colloquially known as the Viet Cong—which operated as a more informal militia.¹⁰ In total, over 2.7 million U.S. troops served in the Vietnam-American War, and approximately 300,000 thousand South Korean troops assisted.¹¹ While other countries were involved, these two states bear a majority of the responsibility for the sexual, gender, and reproductive violence perpetrated against Vietnamese women.

A unique component of the Vietnam-American War that contributed to the widespread sexual and gender-based violence felt by Vietnamese women was their widescale involvement in near all facets of the war. During the war, an estimated 1.5 million Vietnamese women served in the regular NVA and Viet Cong.¹² Additionally, thousands of other women supported the NVA and Viet Cong by supplying food, working in administrative positions, gathering intelligence, and more.¹³ Bolstered by the efforts of Vietnamese women, the NVA and Viet Cong forces possessed vast knowledge of Vietnam's topography that allowed them to evade more advanced American weaponry.¹⁴ Meanwhile, the American and South Korean troops struggled to distinguish between Vietnamese combatants, "sympathizers," and civilians, especially amongst the thick jungle canopy. When the war escalated, the United States' military, with the assistance of the South Vietnamese military, implemented Operation Ranch Hand from 1961–1970 to clear the thick forest canopy, which led to the spraying of an estimated 19 million gallons of herbicide defoliants containing the chemical compound dioxin, such as Agent Orange, across Viet-

⁹ *Geneva Conference to Resolve Problems in Asia Begin*, HISTORY (last visited May 3, 2021), <https://www.history.com/this-day-in-history/geneva-conference-begins>.

¹⁰ *See The U.S. Army in Vietnam*, AM. MIL. HIST., 627–28 (2001), <https://history.army.mil/books/amh/AMH-28.htm>.

¹¹ KAREN GOTTSCHANG & PHAN THANH HAO, *EVEN THE WOMEN MUST FIGHT: MEMORIES OF WAR FROM NORTH VIETNAM* 20 (1998).

¹² *See id.*

¹³ *Id.*

¹⁴ *See generally Viet Cong Fighters*, PUB. BROAD. RAD. (last visited May 3, 2021), <https://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-viet-cong-fighters/>.

nam, Cambodia, and Laos.¹⁵

Exposure to Agent Orange is extremely harmful to human health.¹⁶ In undetectable amounts dioxin exposure can alter a human's metabolism, but more significant amounts, such as experienced by those Vietnamese during the war, can cause ailments ranging from neurological disorders, skin diseases, cancers, and severe reproductive harm.¹⁷ Vietnamese people have been chronically exposed to Agent Orange through various hotspots that remain contaminated in Vietnam, which has led to continued environmental exposure years after the war.¹⁸ Some estimates state that between 2.1 million and 4.8 million Vietnamese were directly exposed to Agent Orange, and as many as 3 million Vietnamese are currently suffering from health conditions related to exposure.¹⁹

B. Atrocities Committed Against Vietnamese During the Conflict

In 1968, global news outlets reported broadly on the My Lai massacre. During this atrocity, U.S. soldiers brutally murdered over 500 hundred unarmed Vietnamese civilians.²⁰ However, U.S. military records demonstrate that My Lai was far from an anomaly. After My Lai, the Pentagon put together the Vietnam War Crimes Working Group (VWCWG), which found that throughout the war, U.S. soldiers committed over 320 substantiated atrocities of various magnitudes.²¹

¹⁵ There were various types of herbicides sprayed in Southeast Asia, but Agent Orange was the most used herbicide mixture used. *The U.S. Military and the Herbicide Program*, in VETERANS AND AGENT ORANGE: HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM 74 (Inst. of Med. ed., 1994).

¹⁶ *See id.*; see also PETER SILLS, *TOXIC WAR: THE STORY OF AGENT ORANGE* 45–46 (2014).

¹⁷ *See* Pamela King, *The Use of Agent Orange in the Vietnam War and its Effects on the Vietnamese People* 37 (Oct. 13, 2010) (Master's thesis, Georgetown University) (on file with Georgetown University Library), at 15.

¹⁸ *See id.*, at 15–16.

¹⁹ MICHAEL F. MARTIN, *CONG. RSCH. SERV. RL34761, VIETNAMESE VICTIMS OF AGENT ORANGE AND U.S.-VIETNAM RELATIONS* 18 (2008).

²⁰ *See* Christopher J. Levesque, *The Truth Behind My Lai*, N.Y. TIMES (Mar. 16, 2018), <https://www.nytimes.com/2018/03/16/opinion/the-truth-behind-my-lai.html>.

²¹ Jon Wiener, *Beyond My Lai: Revelations of Vietnam Atrocities*, NATION (Aug. 7, 2006) <https://www.thenation.com/article/archive/beyond-my-lai-new-revelations-vietnam-atrocities>; Nick

South Korean soldiers also contributed to these atrocities. Post-war investigations reveal that South Korea committed an estimated eighty massacres of Vietnamese civilians, amounting to approximately 8,000 to 9,000 Vietnamese civilian deaths.²² The most infamous atrocity committed by South Korean soldiers is the massacre of Ha My, where South Korean troops reportedly killed over 135 Vietnamese civilians.²³ What is less clear from these reports is the way in which U.S. and South Korean troops incorporated and systematically perpetuated sexual and gender-based violence, both during conflict and outside of it.²⁴

1. Sexual and Gender-Based Violence Against Vietnamese Women

Narratives from Vietnamese women, testimony from organizations, such as Vietnam Veterans Against the War, and reports from internal U.S. military investigations, demonstrate that sexual and gender-based violence was commonly carried out against Vietnamese women and girls.²⁵ The widescale sexual violence against women ranged “from tormenting and humiliating women by tearing their clothing so as to expose their breasts or by conducting body ‘searches’—barely obscured rapes—to outright raping done by either single men or groups of soldiers” as well as horrific accounts of “sexual butchery.”²⁶

Many U.S. troops reported that sexual violence was considered “standard procedure” and was often encouraged by peers.²⁷ Corroborating the widescale in-

stitutionalization of sexual and gender-based violence practices during the war was the development of coded language, which was used to describe specific sexual and gender-based acts.²⁸ For instance, U.S. soldiers referred to a soldier as “a double veteran” if they raped and subsequently killed a Vietnamese woman, and this title was considered a badge of honor.²⁹ Investigations into sexual and gender-based violence practices by the U.S. military were only initiated after the media began reporting on the infamous My Lai massacre.³⁰ As previously noted, the global widescale attention generated from My Lai led the U.S. military to create the VWCWG, which then found “scores of acts of rape, sexual torture and mutilation, and other sexual abuse” committed by the U.S. military.³¹

Despite Article 120 of the American Uniform Code of Military Justice criminalizing rape, the crime went widely unpunished and unprosecuted throughout the Vietnam-American War.³² During the post-My Lai investigations, investigators found that few soldiers were prosecuted for rape, in part, because when peers reported rape, “commanders almost always failed to pursue charges.”³³ For example, men from the C-Company, the platoon responsible for the killing and gang raping of children and women in My Lai, had previously participated in the mistreatment, rape, and possible murder of Vietnamese civilians, but received no punishment for it.³⁴ Military justice data demonstrates that between 1965–1973, only fifty-eight percent of U.S. soldiers prosecuted for rape were actually convicted, and sentences for these crimes were minimal and often reduced by half.³⁵

Turse & Deborah Nelson, *Vietnam Horrors: Darker Yet*, L.A. TIMES (Aug. 6, 2006, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2006-aug-06-na-vietnam6-story.html>.

22 See Hoang Do, *The Forgotten History of South Korean Massacres in Vietnam*, DIPLOMAT (May 15, 2020), <https://thediplomat.com/2020/05/the-forgotten-history-of-south-korean-massacres-in-vietnam/>.

23 See *id.*

24 1968 My Lai Massacre, CENTER FOR STRAT. INT’L STUD. (Mar. 16, 2018) (testimony of Professor Gary Solis) (discussing how the sexual violence that coincided with the atrocities is not discussed enough), <https://www.c-span.org/video/?442602-1/1968-lai-massacre>.

25 Gina Marie Weaver, “Already Bullet” in, IDEOLOGIES OF FORGETTING: RAPE IN THE VIETNAM WAR 47, 54 (2010).

26 See *id.*

27 Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE 31 (1975).

28 Robert J. Barsocchini, *American Rape of Vietnamese Women was Considered “Standard Operating Procedure”*, COUNTERPUNCH (Oct. 3, 2017), <https://www.counterpunch.org/2017/10/03/american-rape-of-vietnamese-women-was-considered-standard-operating-procedure/> (discussing the use of the term “double veteran”).

29 See *id.*

30 See Weaver, *supra* note 25, at 54–57.

31 See *id.*

32 See *id.*; see also Uniform Code of Military Justice art. 120(b), 10 U.S.C. § 920 (1950).

33 See Brownmiller, *supra* note 27, at 101, 105.

34 U.S. DEP’T OF THE ARMY, REPORT OF THE DEP’T OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT 8–14 (1970), https://www.loc.gov/rr/frd/Military_Law/pdf/RDAR-Vol-I.pdf.

35 See Brownmiller, *supra* note 27, at 101.

South Korean soldiers also committed sexual and gender-based violence during the war on a widespread basis. Numerous accounts from Vietnamese women, many who were only twelve or thirteen at the time, illustrate that South Korea utilized sexual and gender-based violence against Vietnamese civilians as a tactic of war.³⁶ Determining exactly how systematically the South Korean troops used sexual and gender-based violence throughout the war is difficult, because unlike the My Lai massacre, there was no “whistle blower or international press coverage” over South Korean atrocities, and the killings were usually not conducted through a documented chain of command.³⁷ Further, the South Korean government stated that “it has no record of any civilian killings carried out by its military in Vietnam” and it has failed to answer investigation requests and requests for apologies from Vietnamese rape survivors.³⁸

Beyond the systematic rape of civilian women and children by American and South Korean soldiers, women suspected of sympathizing, assisting, or serving the Northern Vietnamese were often subjected to arbitrary detention, rape and torture by both Americans and South Koreans, which often ended in brutal murder.³⁹ While no public records demonstrate precisely how prevalent the practice was, testimony from individuals who served in the Phoenix Program, a special Central Intelligence Agency organization, in addition to testimony from individuals from other parts of the U.S. military, corroborates the narratives of many Vietnamese women about the specific techniques used to inflict sexual violence and torture on Vietnamese women.⁴⁰ For example, testimony from formerly detained Vietnamese women indicate that American soldiers often gang raped Vietnamese women, used objects or animals, such as reptiles or bugs to sexually assault them, and reportedly used devices to

36 See Truong, *supra* note 3.

37 See Do, *supra* note 22.

38 See Truong, *supra* note 3.

39 See Weaver, *supra* note 25, at 57.

40 Edward Miller, *Behind the Phoenix Program*, N.Y. TIMES (Dec. 29, 2017), <https://www.nytimes.com/2017/12/29/opinion/behind-the-phoenix-program.html>; see MARTHA HESS, THEN THE AMERICANS CAME: VOICES FROM VIETNAM 78 (1993); Dang Hong Nhut, *Agent Orange Has Given Me a Death Sentence*, THE GUARDIAN (Apr. 12, 2010, 4:00 EDT), <https://www.theguardian.com/world/2010/apr/12/vietnam-weaponstechnology>.

electrocute women’s sexual organs.⁴¹ These women all reported being subjected to beatings and other methods of torture for their role or suspected role as combatants or for assisting the NVA and Viet Cong.⁴²

Given the limited documentation available from the practice of South Korean troops, the degree to which they tortured and raped prisoners of war remains unknown. However, testimony from American soldiers on their interactions with allied South Korean soldiers allows for the inference that sexual violence in the form of torture was regularly carried out by South Korean troops. Notably, Senator John Kerry testified in 1970 during hearings before Congress about instances where South Koreans troops raped captured female NVA nurses.⁴³ He stated that when the Americans handed over Northern Vietnamese nurses to the South Korean soldiers, these troops would brutally gang rape these women, mutilate their sexual organs, and murder them by placing explosives in their bodies.⁴⁴

The legacies of this pervasive sexual- and gender-based violence has had irreversible effects on Vietnamese victims and survivors. Personal accounts of Vietnamese women establish that those who were raped, or who gave birth to children from rape, experience extreme thought isolation, harassment from family, friends, and diminished prospects within Vietnamese society.⁴⁵ Many survivors contemplated suicide, and some have discussed how their bodies, including their

41 Robert J. Barsocchini, *American Rape of Vietnamese Women was Considered “Standard Operating Procedure,”* COUNTERPUNCH (Oct. 3, 2017), <https://www.counterpunch.org/2017/10/03/american-rape-of-vietnamese-women-was-considered-standard-operating-procedure/>.

42 See *id.*

43 See *Transcript: Kerry Testifies Before Senate Panel, 1971*, NAT’L PUB. RADIO (Apr. 25, 2006), <https://www.npr.org/templates/story/story.php?storyId=3875422>.

44 See Weaver, *supra* note 25, at 58.

45 Jo Griffin, *Women Raped by Korean Soldiers During Vietnam War Still Awaiting Apology*, GUARDIAN (Jan. 19, 2019), <https://www.theguardian.com/global-development/2019/jan/19/women-raped-by-korean-soldiers-during-vietnam-war-still-awaiting-apology>; see also Justice for Lai Dai Han, *Justice for Lai Dai Han - Event on Wartime Sexual Violence*, YOUTUBE (Jan. 16, 2019), <https://www.youtube.com/watch?v=JooFvLVnWc> (showing the narrative a Vietnamese woman discussing how sexual and gender-based violence impacted her life and the lives of her children long after the initial violence).

reproductive organs, endure chronic pain as a result of the sexual- and gender-based violence committed against them.⁴⁶ While many women became pregnant by American and South Korean soldiers through transactional sex, there were thousands of other women who were impregnated by American and South Koreans as a result of rape.⁴⁷ Mothers and children alike faced extreme discrimination and harassment from their local communities for having children with men in the military.⁴⁸ In response to this, the United States enacted legislation that allowed these children and their mothers to immigrate to the United States; however, mothers of children who were half Korean were not afforded the same privilege.⁴⁹ Beyond the direct acts of sexual- and gender-based violence, Vietnamese women experienced during the war, they also suffered from reproductive injustices as a result of exposure to dioxin-Agent Orange.

2. Agent Orange's Legacy on Vietnamese Women

Exposure to Agent Orange, whether through the environment or by the consumption of contaminated food, has had a devastating impact on the reproductive abilities of thousands of Vietnamese women.⁵⁰ As a result of Agent Orange exposure, thousands of Vietnamese women have given birth to children with congenital disabilities, and have had high rates of miscarriages and premature births.⁵¹ Later in life, these women are at high risk of different diseases that may cause additional pain, suffering, or early death.⁵²

Scientists have determined that exposure can have a detrimental impact on the ability of women to reproduce because dioxin can alter “the expression of genes

46 See Hess, *supra* note 39, at 89.

47 See Griffin, *supra* note 45.

48 *Id.*

49 See e.g., David Lamb, *Children of the Vietnam War*, SMITHSONIAN MAG. (June 2009), <https://www.smithsonianmag.com/travel/children-of-the-vietnam-war-131207347/>.

50 Le Thi Nham Tuyet, and Annika Johansson, *Impact of Chemical Warfare with Agent Orange on Women's Reproductive Lives in Vietnam: A Pilot Study*, 9 REPRODUCTIVE HEALTH MATTERS 18, 156 (2001).

51 Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 COLUM. HUM. RTS. L. REV. 1, 11 (2000).

52 See e.g., Nhut *supra* note 41.

relevant to ovarian follicle growth and maturation, uterine function, placental development, and fetal morphogenesis and growth.”⁵³ Agent Orange also affects men's reproductive health, because dioxin can be stored in seminal fluid; this subsequently affects women, as dioxin can be passed on to women through sexual intercourse, which can then be absorbed in the vaginal walls.⁵⁴ This process may affect a woman's existing pregnancy, and may have an effect on her future reproductive health, such as heightening the risk of rare vaginal cancers.⁵⁵

While more research is needed to fully understand the intergenerational effects of Agent Orange, the Vietnamese government's data demonstrates that exposure to Agent Orange lasts well into the third generation.⁵⁶ Moreover, despite the war ending in 1975, for the Vietnamese, and especially Vietnamese women, the risk of dioxin exposure remains an ongoing issue. While the United States cleaned up the former-air base in Da-nang, other hotspots in Vietnam have not been cleaned up and continue to expose people to Agent Orange.⁵⁷ Since Vietnam is an agrarian and fishing society, the opportunity for exposure increases from eating fish caught in contaminated lakes near hotspots, or when food is cultivated from areas where Agent Orange was once sprayed or stored.⁵⁸ Recently, scientists have stated that Vietnam may see six to twelve more

53 National Academies of Sciences, Engineering, and Medicine, *Reproductive Health Effects and Effects on Descendants*, 11 VETERANS AND AGENT ORANGE UPDATE 366, 365 (2018).

54 See *id.* at 388.

55 See *id.*

56 Matti Viluksela and Raimo Pohjanvirta, *Multigenerational and Transgenerational Effects of Dioxin*, INT'L J. OF MOLECULAR SCIENCES (June 17, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6627869/>.

57 *Maps of Heavily Sprayed Areas and Dioxin Hot Spots*, ASPEN INST. (Feb. 13, 2023), <https://www.aspeninstitute.org/programs/agent-orange-in-vietnam-program/maps-of-heavily-sprayed-areas-and-dioxin-hot-spots/#:~:text=Over%203.5%20million%20liters%20of,or%20150%20ppt%20in%20sediment>).

58 See *Residents Keep Fishing in Contaminated Lake in Dong Nai*, VIETNAM NEWS (Mar. 12, 2015), <https://vietnamnews.vn/society/279388/residents-keep-fishing-in-contaminated-lake-in-dong-nai.html>.

generations of Agent Orange victims.⁵⁹

Agent Orange's effect on women is amplified by the cultural and social context of Vietnam. In traditional Vietnamese religious beliefs, health often correlates with fate, and fate often correlates with the actions of an individual's past life.⁶⁰ In interviews with Vietnamese women on their experiences related to having children with disabilities as a result of Agent Orange exposure, women often express sorrow for their past life's mistakes and how those have affected their children's health or their abilities.⁶¹ A majority of the women impacted by Agent Orange exposure come from lower-socio economic statuses.⁶² These conditions become heightened by the need to provide care to children with disabilities, and potentially provide care to their husbands if they have poor health caused by Agent Orange exposure.⁶³ In Vietnam, many women who have children with disabilities as a result of Agent Orange make a living by harvesting rice, street vending, working at the market, or by working at some other type of flexible job that allows them to return home to care for their children.⁶⁴

Overall, the use of herbicides containing the poison dioxin has had detrimental effects upon women and their reproductive rights. In the case of Vietnam, the reproductive effects of exposure to Agent Orange, coupled with the barriers women face in society for having children with disabilities—some practical, some cultural—has left the wounds of the Vietnam-American War open well beyond the American and South Korean troops' departure from Vietnam in 1975. While the applicable international humanitarian law in 1975 does not comprehensively cover all of the atrocities committed against women in Vietnam, international humanitarian law certainly provides some protection,

59 See Dewey Sim, *Vietnam War: 44 Years On, Birth Defects from America's Agent Orange Are Increasing*, SOUTH CHINA MORNING POST (Jun 8, 2019), <https://www.scmp.com/week-asia/geopolitics/article/3013636/vietnam-war-44-years-birth-defects-americas-agent-orange-are>.

60 Madison Bingle, *Change in Season*, WORDPRESS BLOG (Apr. 30, 2017), <https://madisonbingle.wordpress.com/2017/04/30/change-in-season/> (interviewing a victim of Agent Orange).

61 See *id.*

62 See Tuyet, *supra* note 49.

63 See *id.*

64 See Bingle, *supra* note 58.

and international law definitely calls for remedy for Vietnamese women.

II. International Humanitarian Law Protections

Before delving into the applicable international humanitarian law, it is important to establish that the Vietnam-American War was of an international nature, rather than an internalized non-international armed conflict (NIAC).⁶⁵ This distinction sets the groundwork for the binding legal obligations of the United States and South Korea and the legal protections for women during the conflict. In the spring of 1965, the International Committee of the Red Cross (ICRC) attempted to settle any controversies about the nature of the war by stating that “[t]he hostilities raging at the present time in Vietnam both North and South of the 17th parallel have assumed such proportions recently that there can be no doubt it constitutes an armed conflict to which the regulations of humanitarian law as a whole should be applied.”⁶⁶ By doing so, the ICRC reaffirmed the legal obligations of the United States and South Korea to abide by the principles of international humanitarian law.⁶⁷

Since the Vietnam-American War met the threshold of an internationally armed conflict, the United States and South Korea had certain obligations under international humanitarian law. The operative international humanitarian protections for internationally armed conflicts can be found under the First Geneva Convention (and apply to NIACs also), the Fourth Geneva Convention of 1949, the Third Geneva Convention of 1949, as well as the 1925 Geneva Protocol prohibiting the use of chemical weapons. The obligations

65 See generally George Aldrich, *Entitlement of American Military Personnel Held by North Viet-Nam to Treatment as Prisoners of War Under the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War*, WHITEMAN'S DIG. § 12:25, 231-235 (Jul. 13, 1966) (noting that “[a]lthough there have been no declarations of war, the present conflict in Vietnam is indisputably an ‘armed conflict’ between parties to the Geneva Conventions of 1949).

66 *Letter of June 1965*, 5 INT'L REV. OF THE CROSS 417 (1965) (addressing the governments of the Democratic Republic of Vietnam, the Republic of Vietnam, and the United States and to the National Liberation Front of South Vietnam).

67 Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287, 306 [hereinafter Fourth Geneva Convention].

stemming from these international humanitarian law treaties, in addition to observance of international customary law, serve as the basis for the legal protections available to Vietnamese women who suffered during the war.

A. Sexual and Gender Based-Violence

In the context of the Vietnam-American War, international humanitarian law prohibited sexual and gender-based violence in the form of rape, torture, and other forms of inhumane treatment against women and children who were either civilians or prisoners of war. Under Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention of 1949), grave breaches included: “willful killing, torture or inhuman treatment” and “willfully causing great suffering or serious injury to [a women’s] body or health.”⁶⁸ The legal obligations of the United States and South Korea are also implicated under the Common Article 3 of the First Geneva Convention. The convention mandates a duty to refrain from conduct that included “outrages upon personal dignity” against women who took no part in the hostilities, including members of the armed forces, and those who laid down their arms.⁶⁹ Under this provision, women were required to be given “basic humane treatment, including respect of life and physical moral integrity, particularly forbidding coercion, corporal punishment, torture, collective penalties, reprisals, pillage and the taking of hostages.”⁷⁰

The legal protections available to Vietnamese women who experienced sexual violence is overt under Article 27 of the Fourth Geneva Convention of 1949, which details that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form

of indecent assault.”⁷¹ Similarly, for prisoners of war, the Third Geneva Convention enshrines the right of Vietnamese women to be “respect[ed] for their persons and their honour.”⁷² Under Article 17 of the same Third Geneva Convention, the United States and the South Korean troops were prohibited from causing “physical or mental torture, nor any other form of coercion” to secure information from women accused of being associated with the NVA or Viet Cong.⁷³

Under these international humanitarian law provisions, the conduct of both South Korean and the U.S. troops amounted to grave violations of Common Article 3, the Fourth Geneva Convention, and Third Geneva Conventions, and hence are judicially actionable war crimes. Common Article 3 of the First Geneva Conventions does not explicitly mention rape or other sexual and gender-based crimes experienced by Vietnamese women. However, the widespread use of rape, mutilation, and torture against civilian women and prisoners of war who stopped fighting are grave violations, as the crimes violated women’s personal dignity and could be characterized as torture under Common Article 3.⁷⁴ Under the Fourth Geneva Convention, both South Korean and the United States caused great bodily suffering and committed acts of torture against women, including rape, which violates Article 27 of the Fourth Geneva Convention.⁷⁵

For Vietnamese women taken as prisoners of war, the Third Geneva Convention afforded them humane living conditions and protection from torture, including during interrogations. The use of various sexual assaults by gang rape and objects to sexually violate women were violations of these rights. Moreover, South Korea and the United States demonstrated the use of torture and mutilation of women’s bodies in violation of both States’ legal obligations under international humanitarian law.

68 *See id.*, art. 147.

69 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, common art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention].

70 *See id.*; see also Francoise Krill, *The Protection of Women in International Humanitarian Law*, INT’L COMMITTEE OF THE RED CROSS (last visited May 6, 2021), <https://www.icrc.org/en/doc/resources/documents/article/other/57jmfj.htm>.

71 Fourth Geneva Convention, *supra* note 67, art. 27.

72 Geneva Convention relative to the Treatment of Prisoners of War, art. 14, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter the Third Geneva Convention].

73 *See id.*, at art. 17.

74 *See* Krill, *supra* note 70.

75 *See* Fourth Geneva Convention, *supra* note 67, art. 27.

B. Toxic Poisoning

Unlike the international humanitarian law protecting women from sexual and gender-based violence, the legal protections available for women suffering from reproductive effects of herbicide exposure is more nuanced.⁷⁶ That is because international legal protections on the prohibition of herbicide poisoning during war, and its resulting gendered violence, were less established at the time of the Vietnam-American war. Regardless of the nuance, the then-existing customary international law on the topic validated that the U.S. military violated customary international legal principles by spraying dioxin Agent Orange, which caused reproductive harm to Vietnamese persons, and particularly women.

A tribunal finds that customary international law exists by looking at state practice, and whether there are instances where states either act, or refrain from acting in a certain way out of a sense of moral obligation.⁷⁷ In this context, there is evidence of both. For example, dating back to 1863, when the United States enacted the Lieber Code, which placed a ban “the use of poison in any way” even in the face of claims of “military necessity.”⁷⁸ Again, in 1925, the United States and thirty other countries, signed the Geneva Protocol of 1925 (the Protocol), which prohibited “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices” as well as

76 See e.g., Madison P. Bingle, *Codifying Ecocide as an International Atrocity Crime: How Amending Ecocide into the Rome Statute Could Provide Vietnamese Agent Orange Victims Access to Justice*, 45 UNIV. HAWAII L. REV. (2022) (providing analysis on the nuances of the international law that existed at the time of spraying Agent Orange).

77 To determine whether something is a concept of international customary law, a tribunal would look to determine whether there is general and consistent state practice as well as *opinion juris*, or that a state is acting out a moral sense of obligation that it should do so). See e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (1987) (outlining what is necessary for finding customary international legal principles).

78 See e.g., General Orders No. 100: Instructions for the Government of Armies of the United States in the Field art. 16 & 70 (Apr. 24, 1863) (stating that “the use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare).

“the use of bacteriological methods of warfare.”⁷⁹

While the United States failed to ratify the Protocol, this treaty was indicative of the codification of customary law that had begun to emerge and had history in state practice.

This trend continued on until WWI, when the United States helped to develop of the Convention with Respect to the Laws and Customs of War on Land, which placed strict limits on the use of chemical weapons during war.⁸⁰ During post-WWI, States that used weapons containing mustard gas challenged the norm on the use of weapons containing poison.⁸¹ In response to the use of mustard gas, there were several treaties formed to ensure that poisonous weapons were not used in war. For example, States, including the United States, drafted and ratified the Washington Treaty in 1922 which prohibited “in [t]he use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world.”⁸² Later, the United States signed a similar treaty with Central American nations, which confirmed that use of chemical weapons was “contrary to humanitarian principles and to international law.”⁸³

Based on these examples, states came together to draft the Geneva Protocol of 1925, the prohibition of weapons containing poisonous material was already codified, and it had already emerged as an international customary norm. In the history of wars that followed the codification of this principle, there have been few instances where states have used poisonous material as a weapon of war, demonstrating that most states

79 Treaty Relating to the Use of Submarines and Noxious Gases in Warfare art. 5, Feb. 6, 1922, 25 L.N.T.S. 202.

80 Convention with Respect to the Laws and Customs of War on Land, annex, art. XXII, Jul. 29, 1899, 32 Stat. 1803.

81 See DAVID ZIERLER, *THE INVENTION OF ECOCIDE: AGENT ORANGE, VIETNAME, AND THE SCIENTISTS WHO CHANGED THE WAY WE THINK ABOUT THE ENVIRONMENT* (2011).

82 See *id.* (citing the Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare art. V, Feb. 6, 1922, 16 AM. J. INT’L L. 57-60 (Supp. 1922)).

83 THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE, A STUDY OF THE HISTORICAL TECHNICAL, MILITARY, LEGAL, AND POLITICAL ASPECTS OF CBW, AND POSSIBLE DISARMAMENT MEASURES, VOL. III, CBW AND THE LAW OF WAR 24, SIPRI (1973).

refrain from using the weapons because of an understanding that there is an obligation to refrain from doing so. In instances where violations of the norm occurred, states reacted with more treaties and public outcry. For example, during WWII, there was only one instance of chemical warfare, and states reacted negatively. This demonstrates the establishment of an international customary norm.⁸⁴ Later, the Nuremberg Charter and the Nuremberg principles, which criminalized the use of chemical weapons by the German Nazis, affirmed the prohibition on the use of poisonous materials as a weapon of war.⁸⁵

Solidifying that the United States violated international customary law is the international response to the United States using poisonous herbicide during the war, which arguably again exemplifies *opinio juris*.⁸⁶ In 1969, when the United States delegates went before the UN General Assembly to defend its use of Agent Orange in Southeast Asia, the General Assembly passed Resolution 2603. The resolution officially recognized the Geneva Protocol as “chemical agents of warfare as a ‘chemical substance—whether gaseous, liquid or solid—which might be employed because of the direct toxic effects on man, animals or plants,” meaning that the existing treaties included a prohibition on the use of herbicides as well.⁸⁷ On a more practical level, this move exemplified the moral sentiment of the international community, and the resolution’s nearly universal passage supports the case that states believed that the use of herbicide during war violated international law, and that existing treaties should interpret herbicide as a prohibited chemical weapon.

Finally, when the prohibition emerged, the United States did not invoke its persistent objector right, which would allow a claim of immunity from follow-

84 See ZIERLER, *supra* note 81, at 508.

85 See SIPRI, *supra* note 83, at 40.

86 PAULO BORBA CASELLA, CONTEMPORARY TRENDS ON OPINIO JURIS AND THE MATERIAL EVIDENCE OF INTERNATIONAL CUSTOMARY LAW, 13 https://legal.un.org/ilc/sessions/65/pdfs/2013_amado_lecture_casella.pdf (noting that *opinio juris* “ascertained through the action of institutional bodies already existing and operating for decades, the Intergovernmental organizations, especially since world wars I and II, or more than a century, considering the first initiatives adopted in that sense, during the second half of the nineteenth century . . .”).

87 See ZIERLER, *supra* note 81.

ing the international customary norm of not using weapons containing poisonous chemicals during war — rather, the United States claimed that the use of herbicides did not have a poisonous effect on humans.⁸⁸ Additionally, the United States took efforts to steer the development of treaties that prohibited the use of these types of weapons in war.⁸⁹

Opponents of this interpretation of the law pointed to herbicides differing from the use of gases and other chemical weapons during war, because at least overtly, the United States targeted plants and not people. Additionally, the United States purportedly was unaware of the adverse effects of Agent Orange on persons and denied the development of the herbicide with that specific intent.⁹⁰ Yet, during war, the U.S. military could not solely target plants without affecting people, it also targeted their food and water sources. Additionally, the United States was well-informed that Vietnam was an agrarian-based society. By poisoning plants, and other sources of food, the United States effectively poisoned people. The United States also had constructive notice that Agent Orange adversely affected the reproductive health of Vietnamese based on evidence collected by

88 The persistent objector rule provides states the ability to exclude themselves from being obligated to follow a specific law that is becoming generally accepted in the international community; however, to invoke this rule, a state must clearly and consistently object to the emergence of a legal norm in order not to be bound when it’s crystallized into customary law. See generally JAMES GREEN, *THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW* (2016).

89 See ZIERLER, *supra* note 81, at 503.

90 Some scholars argue that did not violated international customary law see e.g., Anderson, Kenneth, *Declaration on Issues of the Laws of War, Corporate Liability and Other Issues of International Law in Agent Orange Ats Litigation*, (2004). *Congressional and Other Testimony*. However, these arguments are void of the reality that these herbicides intentionally included dioxin, a poisonous chemical, that that the U.S. military has constructive knowledge of this poisonous harmful effects.

the military shortly after usage.⁹¹

The United States' military used herbicide poison during the Vietnam-America war in contravention of international customary norms, and as a result, it impacted the lives of thousands of Vietnamese. This has caused reproductive violence that particularly effected the lives of women as a result.

III. Efforts Toward Justice and Pathways Forward

In response to the atrocities committed against the Vietnamese women have sought justice in various international and domestic forums. Despite these efforts, there has seldom been a focus of narratives highlighting the plight of Vietnamese women during the conflict. While the United States and South Korea have yet to contribute to justice in a meaningful way, both states have an obligation under international humanitarian law to take steps to rectify their wrongs. Ideally, this justice would consist of individual and community-based reparations as well as provide a truth and reconciliation commission for victims and survivors.

A. Previous and Ongoing Efforts

Before the Vietnam-American war's end in 1975, in 1967, Bertrand Russel created the Stockholm International War Crimes Tribunal.⁹² The Tribunal served as an "indictment of the United States" by documenting the various war crimes committed.⁹³ The tribunal was not a product of an international treaty and held no legally binding authority, and comprised of twenty-one various anti-war activists who served as panelists. The panelists asked questions to those testifying and made

91 The Promise Institute of Human Rights, *Redefining Ecocide: Addressing Mass Damage and Destruction*, YOUTUBE (Apr. 15, 2021), <https://www.youtube.com/watch?v=huxgGXSulzo>; see David Burnham, *Dow Says U.S. Knew Dioxin Peril of Agent Orange*, N.Y. TIMES (May 5, 1983), <https://www.nytimes.com/1983/05/05/us/dow-says-us-knew-dioxin-peril-of-agent-orange.html>; see also Brief for Center for Constitutional Rights, Earth Rights and the International Human Rights Law Clinic at the University of Virginia School of Law, as Amici Curiae Supporting Petitioners, *VAVA v. Dow Chemical et al, Inc.*, MDL No. 381, No. 04-CV-400 (E.D.N.Y. Mar. 28, 2005), <https://earthrights.org/wp-content/uploads/publications/amicus-brief-agent-orange.pdf>.

92 Weaver, *supra* note 25, at 49.

93 *See id.*

legal determinations. Despite the well-meaning intentions of the Tribunal, the Tribunal not only neglected to include descriptions of American sexual violence against Vietnamese women, but the panelists actively sidestepped revealing instances of sexual and gender-based violence against Vietnamese women.⁹⁴ For example, when a former U.S. prisoner of war interrogator testified about the American perception of Vietnam as a giant "whorehouse," the panel failed to inquire more about the specifics acts of sexual violence that the veteran alluded to. Instead, the panel moved along in their questioning of other atrocities.⁹⁵

More recently in South Korea, the organizations Minbyun, the Korea-Vietnam Peace Foundation, and the Korean Council for the Women Drafted for Military Sexual Slavery by Japan, set up the 2018 People's Tribunal on War Crimes by South Korean Troops during the Vietnam War.⁹⁶ The purpose of the tribunal was to hear testimony from survivors of atrocities committed in Vietnam by South Korean troops, specifically pertaining to those atrocities committed in central Vietnam.⁹⁷ Like other efforts, the Tribunal did encompass testimony from sexual and gender based violence victims. However, the court found that under South Korean domestic laws, the states must compensate atrocity victims and also recommended the government facilitate investigations into other crimes such as rape.⁹⁸ The tribunal has no legal authority but managed to garner widespread attention in South Korea and in Vietnam, and has sparked some legal action in South Korean courts.⁹⁹ Notably, a South Korean District Court is currently reviewing a claim for compensation in a case brought by Nguyễn Thị Thanh, a survivor of another massacre perpetuated by the South Korean troops in 1968.¹⁰⁰ The organization that legally represented her

94 *See id.* at 50.

95 *See id.*

96 See Han Gil Jang, *People's Tribunal on War Crimes by South Korean Troops During the Vietnam War*, ASIA PAC. J. (June 15, 2019), <https://apjif.org/-Han-Gil-Jang/5288/article.pdf>.

97 *See id.*

98 Hyo Jin Kim, *Evaluation of South Korea's Dealing with Its Alleged War Crimes During the Vietnam War*, 29 (2019) (Master's Thesis, Grad. Sch. Int'l Studs. Seoul Nat'l Univ) (on file with Seoul National University), <https://s-space.snu.ac.kr/bitstream/10371/150926/1/000000155600.pdf>

99 *See id.*

100 S. Korean Court Orders NIS to Disclose Details of Civilian

stated “[t]he only way to ease the pain of the victims is for the South Korean government to acknowledge its responsibility for the civilian massacres.”¹⁰¹ A year after, Nguyen and 102 other victims of atrocities submitted a petition to the government of South Korea asking for the release of reports related to the investigation. The Supreme Court of South Korea ruled in victims favor of in March 2021, which has given hope to some victims and survivors that the truth will soon come out.¹⁰²

While these efforts do not represent victims of sexual and gender-based violence, there is hope that these claims could be brought by victims. Trần Thị Ngải, a woman who was raped and impregnated by a South Korean soldier during the war, recently gained international attention for her demand of a public apology from the South Korean government for the crimes committed against her.¹⁰³ Nadia Murad, a Yazidi activist, echoed this sentiment by demanding more justice for Vietnamese women, regardless of the time passed since the war’s end.¹⁰⁴

In addition to women who experienced sexual and gender-based violence during the war, women suffering from the effects of Agent Orange have yet to see justice. A majority of the prevailing efforts toward justice have been provided solely to U.S. veterans of the war. In 1984, U.S. veterans won a class action case against the chemical companies and settled out-of-court in 1984 for \$180 million, and Congress has subsequently appropriated more than 13 billion dollars to Americans affected by dioxin as a result of the war.¹⁰⁵ For Vietnamese, U.S. federal courts have dismissed all suits.¹⁰⁶ Most cases were dismissed on the grounds that

Massacres Korean Soldiers Perpetuated During Vietnam War, HANKYOREH (Mar. 26, 2021), http://english.hani.co.kr/arti/english_edition/e_national/988399.html.

101 *See id.*

102 *See id.*

103 *See Griffin, supra* note 45.

104 *See Taylor, supra* note 5.

105 *See Charles Dunst, The U.S.’s Toxic Agent Orange Legacy*, ATLANTIC (July 20, 2019), <https://www.theatlantic.com/international/archive/2019/07/agent-orange-cambodia-laos-vietnam/591412/>.

106 Most suits were brought under the Alien Torts Statute on behalf of the Vietnamese Association for Victims of Agent Orange filed under the Alien Torts Statute. *See Sim, supra* note 59; Anthea Roberts, *Vietnam Ass’n for Victims of Agent Orange/Dixon v. Dow Chemical Co.*, 99 AM. SOC’Y INT’L. L. PROC. 380 (2005); *see*

there was not a connection to disabilities and Agent Orange, failing to state a claim under international law, or simply being barred from suing the government based on sovereign immunity.¹⁰⁷ Since the litigation, the U.S. Congress has appropriated about 390 million dollars towards environmental clean-up in Vietnam, but there remains a gap in available funding available to victims already suffering from the effects of exposure.

In France, there have been additional efforts at justice for Vietnamese. In recent years, Trần Tố Nga, brought a claim in a French court against fourteen multinationals who made and sold Agent Orange.¹⁰⁸ She sought damages in recognition of her and her children’s health problems, and also to broadly open the gate for the nearly 6,000 Vietnamese children born with congenital disabilities each year caused by Agent Orange exposure.¹⁰⁹ The trial court ruled that the court had no jurisdiction over the wartime actions of the U.S. military; however, Tran has appealed the case in hopes to bring justice for victims.¹¹⁰ These efforts, and the lack of justice stemming from the efforts, demonstrate that both offending states have avoided recognizing the impact of sexual and gender based violence that occurred during the war.

B. Pathways Forward & Recommendations for Justice

Under international humanitarian law and international customary law, the United States and South Korea have failed to reconcile the wrongs committed by their militaries during the Vietnam-American War against Vietnamese women. State practice and international customary law mandate the right to a remedy

also Marth Graybow, *Court Upholds Dismissal of “Agent Orange” Suit*, REUTERS, (Feb. 25, 2008), <https://www.reuters.com/article/us-agentorange-lawsuit/court-upholds-dismissal-of-agent-orange-suit-idUSN2257383520080225>.

107 *See Roberts supra* note 106, at 381.

108 *French Court Hears Agent Orange Case Against Chemical Firms*, COURTHOUSE NEWS SERV. (Jan. 25, 2021), <https://www.courthousenews.com/french-court-hears-agent-orange-case-against-chemical-firms/#:~:text=A%20French%20court%20will%20on,effect%20in%20the%20Vietnam%20War>.

109 Charles Pierce, *Agent Orange Won’t Go Away—In Vietnam, or the Courts*, ESQUIRE (Jan. 25, 2021), <https://www.esquire.com/news-politics/politics/a35307904/agent-orange-manufacturers-lawsuit-monsanto/>.

110 *See* Fourth Geneva Convention *supra* note 67, art. 14.

when gross violations of international humanitarian law have been committed. Article 146 of the Fourth Geneva Convention of 1949 implies that neither state can absolve themselves from liability that is incurred.¹¹¹ This is also supported by the Article 34 of the Draft Articles of State Responsibility, which provides Vietnam the power to vindicate their citizens' rights by seeking reparations for the harmed women.¹¹² Additionally, the UNGA has declared through Resolution 60/147 on the Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights and Humanitarian law, that a violation of international humanitarian law must be remedied by "adequate, effective and prompt" action, and it must seek to include an "accurate account of the violations that occurred."¹¹³ However, given intricacies surrounding the Vietnam government's general avoidance of unearthing history and focus on bilateral relations, it is unlikely that the Vietnamese government would resort to international mechanisms of reparations for victims of these atrocities. In both the United States and South Korea, a lack of political will to criminally prosecute military personnel is likely to prevent efforts at individual criminal liability. Thus, the most effective and survivor-centered approach toward addressing these atrocities against women would be to establish a combination of a truth commission as well as subsequent individual and community reparations.

Reparations would serve as emblematic of both state's legal obligation to reconcile the wrongs of their international humanitarian law violations, and as an acknowledgement to the global community that these

atrocities will not happen again.¹¹⁴ Reparations coupled with a truth commission by each state would provide survivors a platform to express the systematic effects that sexual and gender-based violence and Agent Orange exposure has had on their life.

1. Reparations from South Korea

While South Korean organizations have made strides to provide a space for victims to testify about their experiences, the efforts thus far have lacked an emphasis on the Vietnamese women who experienced sexual, and gender based violence as a result of the South Korean troops. Similar to what South Korea asked from the Japanese government for the widescale sexual violence and sexual enslavement of South Korean women during WWII, South Korea must provide reparations to Vietnamese women for the atrocities its soldiers committed against Vietnamese women during the war.¹¹⁵ To do so, the South Korean government must actively work with Vietnam to investigate the individuals harmed and provide reparations to those whose children endured trauma throughout their life as a result of the abuse. South Korea must also provide community reparations to areas where their troops were once stationed and committed atrocities—specifically in Central Vietnam—as this is where some of the poorest provinces in Vietnam remain today. These community reparations should pertain to ensuring that these provinces get access to reproductive health clinics, funding for children's education, the memorialization of atrocities, and have a formalized apology to Vietnamese women.

In addition to reparations, South Korea should also establish a truth and reconciliation commission. Vietnamese women would be provided a space to air their grievances and discuss their life's suffering caused by the sexual and gender-based violence. This principle ensures that South Korea is made aware of the breadth of acts that took place during the war—something the South Korean government has yet to acknowledge. Furthermore, the South Korean government would be forced to confront its military past, and the continual

111 See Fourth Geneva Convention, *supra* note 67, art 146.

112 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), art. 34, November 2001 (providing that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation or satisfaction, either singly or in combination").

113 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, UN GAOR, 60th sess, 64 plen mtg, Agenda Item 71(a), Supp No 49, UN Doc A/RES/60/147 (21 March 2006) annex paras 15-16.

114 *Reparations*, INT'L CENT. TRANSITIONAL JUST., <https://www.ictj.org/our-work/transitional-justice-issues/reparations> (last visited Nov 6, 2021).

115 See David, *supra* note 3.

cover up of the historical atrocities.

2. Reparations from the United States

The United States must provide reparations for both the countless victims of sexual and gender-based violence and the victims of Agent Orange. By establishing a truth and reconciliation commission for those who have experienced sexual and gender-based violence, the United States military would be presented with reconciling its own deep cycles of sexual and gender-based violence—both in wars, and for women serving in the military. Moreover, for countless Vietnamese women, a truth and reconciliation commission would be an opportunity to express decades worth of pain and suffering that they have potentially been unable to express in Vietnamese society or in diaspora communities. Like South Korea, the United States would be able to approach the systematic causes that led to the widescale violence. It could do so by providing reparations through compensation and funding to organizations. The reparations could work to combat ongoing issues with sexual and gender-based violence in Vietnamese society, as well as the current issues surrounding reproductive health services in Vietnam. The United States should provide individual reparations to victims, and also intentionally provide reparations to communities in Vietnam who suffer from the systematic gender inequality.

With respect to Agent Orange victims, the United States must take drastic steps to identify a strategic reparation plan and clean up the remaining hotspots in Vietnam, instead of focusing on just a few of the majorly contaminated areas. Additionally, reparations should be provided on an individual basis, as was provided to U.S. veterans through settlements and through U.S. Department of Veterans Affairs. Reparations should be provided to women who suffer from the reproductive health issues as a result of dioxin exposure, as well as their children. These types of reparations should compensate individuals for the hardships they have endured. The reparations would be meaningful in providing education and proper healthcare to women's children—something most children with disabilities are unable to obtain in the current Vietnamese system. There are several communities in Vietnam that noto-

riously have high rates of children affected. To remedy this, the United States could provide reparations through creating health clinics by providing disability resources such as wheelchairs, and proper technical equipment to these families.

IV. Conclusion

The impact of the Vietnam-American war continues to be felt by the Vietnamese people; particularly women, as the injustices committed during the war have yet to be fully addressed. The use of sexual- and gender-based violence by the United States and South Korea against Vietnamese women constitutes a grave violation of international humanitarian law. Additionally, the use of Agent Orange by the United States resulted in violations of established international customary and customary law, causing significant harm to the Vietnamese people; particularly Vietnamese women. The harm caused by these actions has not diminished and the legal responsibility to address and rectify these wrongs persists. Reparations for these injustices have the potential to bring about healing for Vietnamese women and bring closure to the ongoing legacy of the Vietnam-American war.