IS JAPAN'S RESPONSIBILITY OF WAR OVER?

---A STUDY ON THE POSSIBILITY OF PROSECUTION AGAINST JAPANESE WAR CRIMES AND CRIMES AGAINST HUMANITY ---

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CHAPTER 1. INTRODUCTION

1-1.Punishment of Japanese War Criminals After World War II and the Policy of Reparation for the Victims

(1) Brief Analysis of the Japanese War Criminal Trials

The idea of the International Military Tribunal for the Far East (IMTFE) was first considered by the Cairo Declaration of December 1, 1943. Further references were made in the Declaration of Postdam of July 26, 1945 and in the Moscow Conference of December 26, 1945. Finally, it was established on January 19, 1946, by Article 1 of a Proclamation issued by General McArthur who was then the Supreme Commander for the Allied Powers in the Pacific.[1] The Tribunal was created to ensure the just and prompt trial of major war criminals in the Far East.

Approximately six months after the start of the International Military Tribunal at Neuremberg and prior to its close, the IMTFE initiated its hearings in Tokyo. Twenty eight people who once ruled Japan as Prime Ministers, high cabinet officials or as heads of the military, were brought to the Tribunal.

The Tokyo Tribunal can be viewed as the oriental counterparts to the Tribunal and Charter which were established for the Neuremberg Trial, although it also had striking contrasts to them in some aspects.[2]

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[1] John Alan Appleman, Military Tribunals and International Crimes, The Bobbs-Merrill Company, Indiana polis, p.238.

[2] The uniqueness of the Tokyo Tribunal is well described in Joseph Berry Keenan & Brendan Francis Brown's, Crimes Against International Law, Public Affairs Press, Washington.D.C, 1950, pp.1-2,4.

In several other countries, there were tribunals to punish 'B.C class' war criminals who were regarded less important in their responsibility of war. The government of Philippines tried 169 Japanese criminals and convicted 133. General Yamashita, Homma and 90 others were sentenced to death by U.S tribunals. Other trials were conducted by the U.S military in the Marianas and other Pacific Island battlegrounds which resulted in a total of 113 convictions. Other Allied Poweres in the Pacific War also held war crimes trials outside of Japan. During 1945-1946 Nationalist Chinese courts convicted 504 Japanese as war criminals. In the same period, the French convicted 198, the Dutch 969, the British 811, and the Australians 644.[3]

The situation of Japanese war criminals can be compared to that of Nazi war criminals. The most conspicuous contrast is that Japanese war criminals were not fully investigated and prosecuted.[4] The Tokyo Tribunal did not even generate as much attention as Nazi war criminals trial. Those who involved in Nazi could not escape from the prosecution both as a member of an organization and also as an individual. But a single crime or crime against humanity was not punished by the Japanese own hands. Most cases, especially in 'B.C. class' war criminal trials, concentrated on the punishment of atrocities against prisoners of war who came from the Allies. On the other hand, the

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[3] Arnold C. Brackman, The Other Neuremberg, Collins, London, 1989, p.57.

[4] For example, it is undeniable fact that late Emperor Hirohito himself was the most important war criminal. As his death lifted a taboo on discussing his role in history, memoirs and study which showed the Show Emperor's war leadership appeared.(See Herbert Bix, "Emperor Hirohito's War", Histroy Today Vol.41, December 1991, pp.12-19.)

procedure for the trials was led and conducted by the initiative of the Allies, as we see later, while the interests of the victimized Asian countries was ignored.

(2) Reparation by the Japanese Government

The policy of reparation for the responsibility of World War II acts by the Japanese government has apparently been carried out towards victimized Asian countries.[5]

It is said, however, that the policy has several distinct features.[6] First, the amount of reparations was decided in consideration of Japanese government's ability. This is totally different dimension, reflecting the situation of the countries defeated after World War I, which went bankruptcy owing to the heavy burden of reparation. Secondly, reparation was carried out in consultation with the recipient countries. Thus, the conditions, including amount, time and method of payment, were set by agreement between the Japanese government and the recipient country, not by unilateral imposition. Thirdly, the

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[5] The catalogue of the treaty of reparation between Japan and other recipient countries is as follows;

Date of Sign	Recipient Country
Nov.5, 1952	Burma
May.9, 1956	The Philippines
Jan.20,1958	Indonesia
Oct.15,1958	Laos
May.13,1959	Vietnam
Jun.22,1965	Republic of Korea

[6] See The Group for Study of Reparation Problem (The Baisho Mondai Kenkiugai), The Reparation of Japan, Sekai Journal, Tokyo, 1963 , p.22-25.

required method of reparation was not confined to only cash payment, but could be made by products and services including training of technicians in recipient countries.

Given these distintive features, it is clear that the reparation policy was made to the advantage of Japan. For example, allowing reparation to be made by products or services has caused the recipient countries to be subordinate to Japan's economic order. Inevitably, the victimized countries had to reach a reparation agreement with Japan quickly because of their difficulties in budget and finance.

Furthermore, in almost all of the countries concerned, such agreement was made without the consent of its people. For example, the Basic Agreement made in 1965 between the Korean and Japanese government, which contained the final abandonment of claims for compensation, was signed after crushing the violent protest prevailed across the country. Both the process and the contents of the agreement left the issues of surrounding reparation unsettled.

Lastly, the policy of reparation had been executed on the basis of government, but disregarded compensation for individual victims. It left the seeds of dispute and conflict among countries concerned.

1-2. Recent 'Comfort Women' Issue and Dependency on Civil Procedure

(1) Voice of Suffering Which Still Haunts Japan And Asia

"I have puzzled over the fact that hardly anyone today remembers it or attaches much importance to it. The names of the war criminals are for the most part forgotten. So are their deeds. Some people dimly recall a handful of Japan's atrocities during World War II : the Rape of Nanking, the Bataan Death March, the POWs, and other slavery labourers building the Siam-Burma Death Railway, including the bridge over the River Kwai."[7]

Has the world already forgotten all the incidents and atrocities committed by Japan in the past? Instead of the tragic past, does the brilliant prosperity of Japan blinded us? Still, it is hearbreaking to hear pain-filled voices from every part of Asia today.

"The Chinese government dropped all compensation claims against Japan in 1972, but an estimated 300,000 Chinese are prepared to demand up to $200 billion for wartime atrocities, including forced labour, use of Chinese 'comfort women', medical experiments and the destruction of property. A non-government Chinese Popular Committee for Japanese Reparations has been formed, and individual Chinese have said they would stage demonstrations against the visit [of the Emperor Akihito]"[8]

"The Korean Council, organized by the leaders of the

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[7] Supra note 3, p.19.

[8] The Times, October 23, 1992.

women's movement in the Republic of Korea in November 1990, is demanding from the Japanese government an appropriate solution for such a gross violation of human rights, in accordance with the international convention. Their first and major demand is for a thorough investigation and admission of the involvement of the Japanese military and the government's responsibility. It was as late as this January, after half a century, that Japan first admitted the involvement of its government, when the crucial government documents were discovered and exposed by a university professor."[9]

(2) What Is the 'Comfort Women' Issue?

We can still hear clearly the voices of suffering which remain in Asia and haunt the Japanese government. Among them, the 'comfort women' issue has recently become public. The Japanese government had not publicly admitted even the existence itself until the revelation of a few decisive documents that showed systematic involvement of the Japanese army in the draft and run of 'comfort women'. Naturally, the victims felt ashamed and did not want to reveal their experiences as 'comfort women'. This silence made it possible for the tragedy to be kept buried underground for a long time. But, once the issue was raised, a

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[9] Oral intervention by the Commission of the Churches on International Affairs of the World Council of Churches at the Forty-fourth Session of Sub-Commission on Prevention of Discrimination and Protection of Minorities, August 21th, 1992.

number of 'comfort women' in several countries have spoken out.[10] Despite the outcry of the victims and attempts of pursuit for compensation, Japanese government kept silence. The issue was brought to the U.N by the International Educational Development during the meeting of the Commission on Human Rights in 1992.[11] [12] The Commission has adopted the issue and designated Mr.van Boven as *special rapporteur* for the research of the problem. Many 'comfort women' and activists for the issue are waiting for the results.

The-called 'comfort women' are almost 20,000 Asian girls and women who were abducted or compulsorily displaced by the Japanese Imperial Forces during World War II and used as 'sex slaves'[13] Documents have shown that the Japanese Imperial Forces took 'the comfort women' not only from Korea but also from China, Taiwan and the Philippines.[14]

Even though there has been no outcome, it is undeniable that

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[10] There is a case where a Phillipino woman named Maria Rosa Luna Henson revealed her 50 year old secret of her 'comfort women' past unknown to even her husband, fifty years after her ordeal. (New York -New Jersey Philippine News, October 5, 1992)

[11] U.N. Doc. E/CN.4/1992/SR.30/Add.1 , p.3.

[12] This is not the unique case which was brought to the U.N, seeking compensation for the damage made by Japan during World War II. Another example was made by the War Amputations of Canada and Hong Kong Veteran's Association of Canada in May 1987. They submitted a document of appeal to the U.N Commission on Human Rights by means of ECOSOC Resoultion 1503, claiming $ 13,592,600 as compensation for the gross violations committed during their captivity as POWs in Hong Kong. (See 'Compensation to Canadian Hong Kong Prisoners of War by Government of Japan', May 1987)

[13] Statement of International Educational Development to Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Contemporary Forms of Slavery Seventeenth Session 4-13 May 1992,p.1

[14] The Mainichi Shinbun, April 12th, 1992

the 'comfort women' issue has attracted international public attention at once for its bizzare and cruel forms of violation of human rights and has become motivation to reconsider the responsibility of Japan for its war crimes and crimes against humanity, which habe been left unsettled for nearly fifty years.

(3) Rush of Litigation And Its Possible Outcome

The items of request made by a Korean NGO for the solution of the issue are as follows;[15]

"1.That the Government of Japan and the Emperor recognize and take full responsibility for their violation of the internationally-recognized standards of human rights in this issue and make a full, strong and complete public apology, to the individual victims, to Korea, and to the women of other Asian nations likewise drafted into sexual service. Japan should make not only charitable gifts of money to the few women who have come forth, but in light of the many who have long-since died, should make country to country financial reparations as an acknowledgement of its crime against Korean women.

2.That the government of Japan actively cooperate with the Korean Government and concerned international groups to pursue further study in order to obtain the fullest

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[15] Appeal to U.N in February 1992, presented by the 'Korean Council for Women Drafted for Sexual Service by Japan'.

information possible on all aspects of the issue ; and that the results be made public to the world community, with the goal of preventing any further such tragedy.

3.That the Japanese Government encourage and assist its citizens who want to testify about the issue to do so without threat of reprisal.

4.That the Japanese Government pay full and adequate compensation to all 'comfort women' survivors.

5.That an appropriate monument be erected in Japan by the Japanese Government, to honour and memorize all 'comfort women' and to educate future generations about respect for the human rights of all people, including women and all citizens of another country.

6.That the Japanese Government revise all textbooks to include reference to this issue as a part of colonial oppression against the Korean people.

7.That the United Nations Commission on Human Rights thoroughly investigate this planned and organized sexual subjugation of women towards the end of censuring Japan internationally both for its perpetration of a massive and long-term violation of human rights and for its ongoing cover-up of all relevant facts."

However, the Japanese government would not admit nor acquiesce to even one of the demands listed above.

Finally, Korean victims of World War II and of the Japanese occupation of Korea, including 'comfort women' survivors, have begun to bring the cases to the Japanese Court because of the

Japanese government's refusal in admitting its responsibility for compensation. The following chronology shows recent list of civil lawsuits and demands filed by Korean victims since 1990.[16]

Oct. 1990 The victims and their families associated with the Korean Association of Bereaved Families During Pacific War brought a lawsuit in the Tokyo District Court demanding confirmation of responsibility, official apology and investigation of the disappeared.

Jan. 1991 Mr.Chung San Keun filed a lawsuit with the Osaka District Court on the grounds that he was entitled to receive the pension provided by the Law of Relief for the Bereaved Families of the Fallen Soldiers and Injured.

Jan. 1991 Mr.Suk Sung Ki brought a lawsuit against the Japanese Minister of Social Welfare arguing that he was also entitled to receive the pension of the injured by the law above.

Apr. 1991 Mr.Chin Suk Il brought the same lawsuit as Mr.Suk Sung Ki.

Jul. 1991 Bereaved families of the Che Am Li Case sued in Tokyo District Court in order to confirm the legal duty of compensation and apology.

Aug. 1991 The Korean Association of Victims of Atomic Bomb filed a lawsuit against Mitsubishi Heavy

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[16] Kitagawa Kenzo, "The Present Situation of the Movement for Compensation And the Problems of Liquidation After the War", Reksi Hyoron Vol.508, August 1992, Azekura Shobo, Tokyo, p.61

Industries demanding unpaid wage and compensation caused by bombardment of Atomic Bomb.

Aug. 1991 Bereaved families of Loenid Massacre Case in Sahalin litigated to be compensated in the Tokyo District Court.

Nov. 1991 Korean B.C class war criminals who compulsorily served during the second world war also went to the Tokyo District Court seeking apology and compensation.

Dec. 1991 Korean soldiers, army civilian employees and the comfort women brought a case to the Tokyo District Court.

Apr. 1992 Six Korean comfort women sought compensation in the Tokyo District Court.

The first one among 'comfort women' cases came in December 1991. The most typical and significant case was made by six Korean comfort women including Ms.Shim Mi Ja, who had recounted her vivid tragic experience as a 'sex slave' in Fukuoka on February 28, 1992, after 47 years of silence.[17]

In conclusion, the most important question to ask is whether there is a real possibility of compensation or reparation through these kinds of civil procedure. To our disappointment, the answer is in the negative. The Japanese courts have already dismissed such petitions many times. For example, the Japanese Supreme Court has rejected the appeal of lawsuit brought by Taiwanese

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[17] See the petition document of lawsuit raised by lawyer Takaki Kenichi on behalf of Ms.Shim Mi Ja and six others.

served as Japanese Imperial soldiers during the War, in April 1992, 15 years after it was begun in August 1977.[18] Furthermore, regrettably, "there is no prospect of swift and effective remedy within the framework of the Japanese domestic legal system for the individual victims of serious violation of human rights mentioned above, in particular plight of enslaved victims by the Japanese Imperial Forces even 47 years after the violation".[19]

It is true that the victims and activists for them have mainly depended on arguments of financial compensation. However, even though compensation is important element to console them, it is not sufficient to cure their broken hearts and satisfy their hunger for justice[20]. Sometimes it caused the Japanese to misunderstood that the purpose of protest by the victims and

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[18] A very striking fact is that the Japanese Government has already finished the compensation for Japanese victims. For instance, approximately 99.1 billion Yen was paid for the Japanese atomic bomb victims in 1984. (Tanaka Hiroshi, "Unfinished Business", AMPO Japan-Asia Quarterly Review Vol.23 No.2, p.19)

[19] The Statement of International Educational Development to the Sub-Commission on Prevention and Protection of Minorities Working Group on Contemporary Forms of Slavery Seventeenth Session, May 4-13, 1992.

[20] The fact that what the victims really want is not the money was well expressed in the following scene;

> *"But what set off Sim's hysteria was an inquiry by a Japanese reporter, a young man who with a poker face asked the women how much they sought to gain in compensation money. 'It is not money!' Sim snapped back in the Korean language. 'We want our bodies and souls back!' She and the other former comfort women present, Whang Kum Joo, couldn't restrain their rage at the interrogator, who may well have reminded them of a Japanese soldier. As the other Korean women tried to calm them and Sim collapsed into her chair, the turmoil seemed to symbolize the complicated issue of the comfort women - - - -. The former comfort women are nearing the ends of their lives, they are increasingly moved to seek justice."* (The Japan Times Weekly International Edition, August 3-9, 1992)

their countries were the affairs of money. Another point to emphasize is that compensation by means of money sometimes bring anger to the Asians who has strongly been influenced by Confucianism. That is just the reason why we should try to formulate another way for the compensation and for bringing about the justice in this area.

1-3. The Necessity and Possibility of Current Prosecution Against Japanese War Crimes and Crimes against Humanity

(1) The Necessity of Punishment

A. Western Context

Those who were involved in war crimes and crimes against humanity during World War II have been getting older and they do not have many years left before dying. It is true that a significant portion of the public in European countries is attracted to the sentiment that it is time to stop the procession of prosecution against the war crimes and crimes against humanity.[21]

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[21] The day after *the Chambre d'Accusation of the Paris Appellate Court* denied that there were grounds for bringing *Paul Touvier* to trial for crimes against humanity, there arose a severe debate of pros and cons. But a poll in *Le Parisen* did in fact show that some 70% of the French were shocked by the ruling on April 13,1992. See the description of an article seen in a newspaper(The European, April 23-26, 1992):

"Why must we always dig into the past?" One 48-year old

It is, however, an undisputable fact that there have been searches for Nazi war criminals across the globe and they have been indicted persistently both within and outside the German territory. We can still see examples of prosecution everywhere in Europe. In Israel, France, and the United Kingdom, searches and trials are going on.[22] The United Kingdom[23] and Australia[24]

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housewife asked. "Why not let it all rest in peace?" Another listener pleaded for Touvier, "this old man of 77", to be "left alone at last." But most long-time Gaulist as well as left-wingers were against the ruling.

[22] In France, as mentioned above, *Paul Touvier* who was the Lyons *Vichy Milice Chief* is waiting for the next trial in the Supreme Court. In Israel, the trial against *Demjanjuk* is going on with the charge that he was the Nazi death camp guard known as *"Ivan the Terror"*(International Herald Tribunal, December 24-25, 1991)

On the other hand, when the United Kingdom received a list of 17 alleged war criminals said to be living in London on October 22, 1986 from the Simon Wiesenthal Center, it began to trace those named and confirmed that 7 may be alive in the United Kingdom.(Home Office, Official Report; Col.32)

[23] The United Kingdom has enacted *War Crimes Act 1991*, motivated by the presence of war criminals in the territory as mentioned above. The reason why it needed a new law was put forward as follows:

> *"The British courts have jurisdiction over British citizens who have jurisdiction over people who may now be British citizens, or who may now live here and have done so for some time, if the allegations relate to events before they became British citizens or before they came to live here."* (Her Majesty's Stationary Office, War Crimes: Report of the War Crimes Inquiry,1989, p.1,p.92)

[24] No action has been taken by Australia against war criminals since its participation in Tokyo war crimes trial. The Australian policy changed by allegations raised in an *ABC radio* series on April 1986 which alleged that significant numbers of Nazi war criminals entered Australia after the war. Even though there were many procedural legal difficulties, Australia concluded that " those alleged to have committed serious war crimes should be tried because it was injustice in itself to allow those responsible to remain unpunished." This conclusion led Australia to amend the *War Crimes Act* to ensure the possible prosecution against war criminals alive in the country. (Gillian Triggs, "Australia's War Crimes Act: justice delayed or denied?",

newly enacted or amended domestic laws against war crimes and crimes against humanity. It is not out of date or an anachronistic job. In the United Kingdom where the *War Crimes Act* was introduced just in 1991, the legitimacy of the legislation was justified as follows:

> *"Arguments based on the overwhelming gravity of the alleged crimes, the moral case for bringing people to look for such outrages have been weighed against the repugnancy to the Rule of Law of retrospective legislation, the age of both the alleged offenses and the potential defendants, the evidentiary difficulties with the remoteness in time and distance of the material events."* [25]

B. Japanese Context

In addition to these general reasons and justifications seen in western countries, the Japanese context has more. In the case of Japan and its victimized countries in Asia, the situation is totally different.

First of all, Japan has not proved that it sufficiently liquidated and cleared up its horrible past enough to ensure its neighbouring countries and the world that Japan has given up all

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Law Institute Journal, March 1990, p.153.)

[25] Ronald Cottrell," The War Crimes Act and Procedural Protection", The Criminal Review, March 1992, Sweet & Maxwell, London, p.173.

of its intentions to repeat the same experience.

The most visible means of the purification of its crimes in the past would be the official apology, compensation for the victims, perpetual punishment against the criminals and the education of the next generation not to repeat the same wrong.[26] However, Japan has not taken any concrete and practical steps to purge its remaining remnants of militarism and expansionism. Furthermore, despite the clear commitment of its Constitution that Japan not to have any kind of army and armaments, Japan have already has a strong army and has recently sent it abroad under the flag of the U.N Peace Keeping Force. All these situations make the neighbouring countries afraid of Japan's potential military threat.

Secondly, Japan and its victimized countries have never conducted prosecutions against war crimes and crimes against humanity since the Tokyo Trial and subsequent war crimes trials

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[26] It is interesting to contrast the story of the Japanese American wartime cases in which the United States Supreme Court in 1943 and 1944 upheld the military orders that forced more than 110,000 Americans of Japanese ancestry from their West Coast homes into ten internment camps scattered from the California desert to the swamps of Arkansas. (See Peter Irons, Justice at War, Oxford University Press, Oxford, 1983). However, in 1980, the U.S Congress organized an *ad hoc* committee on Japanese American Reparations. For the next two years, they held 20 public hearings and heard testimony from 750 witnesses. The committee made a final report on the issue in 1983 recommending that the government apologize formally and pay $20,000 to each of about 60,000 living victims. On October 9th, 1983, 107-year-old Mamoru Eto and nine other Japanese Americans were invited to the Department of Justice where Attorney General Richard Thornburg handed each of them a check for $20,000 and a letter from the former President. (Tanaka Hiroshi, supra note 18, p.19.)

by the Allies.[27] It is a well-known fact that Nazi war criminals have been chased and prosecuted in every part of the world and even by the hands of German themselves.[28] But we do not know of any such cases among Japanese war crimes and crimes against humanity. On the contrary, we cannot deny the fact that in postwar Japan down to the present day there has prevailed a tendency to reject even the Tokyo trial as unfair and to assert the legitimacy of the war waged by Japan.[29]

Even the legal systems which make prosecution possible are not seen in Japan.

> *"The laws of Japan have no specific provisions relating to the punishment of war crimes and crimes against humanity.- - -The system of prescription has traditionally*

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[27] On the contrary, "from 8 May 1945 to 1 January 1968, 77,044 investigations of persons suspected of major Hitler-era crimes were conducted by the West German Authorities. A total of 6,192 were sentenced during this period, 12 of them to the death penalty, 90 to life imprisonment, 5,975 to shorter terms of imprisonment and 114 to pay fines. At present, 19,933 cases of persons suspected of National Socialist crimes are before the West German Courts." Quotation from 'Statute of Limitations: Controversial Problem of German Policy', Federal Republic of Germany Information Center, New York, October 15, 1968.

[28] Only in the German Democratic Republic, 16,572 persons were indicted from 8 May 1945 to the end of 1964 for war crimes and crimes against humanity. 12,807 persons have been sentenced, of whom 118 were sentenced to death, 231 to life imprisonment and 5,088 to prison terms. 1,578 persons were found not guilty. Legal proceedings were discontinued with regard to 2,187 persons because of the death of the defendants, etc. (The remark of Poland to the draft of the Convention on Non-Applicability of Statutory Limitation, U.N Doc. A/7174, p.28)

[29] The typical case which prove such a tendency is that the minority opinion of Justice Pal has been used as a powerful weapon to reinforce its position. (Ienaga Saburo, "The Historical Significance of the Tokyo Trial", The Tokyo War Crimes Trial: An International Symposium, C.Hosoya, N.Ando, Y.Onuma, and R.Minear etc., ed., Kodansha Ltd.,Tokyo, 1986, p.167.)

been established in Japan regarding all kinds of crimes, and, from the standpoint of domestic laws there exists no special circumstances calling for abolition of,or provision of exceptions to, application of the prescription system."[30]

As we will see later, neither Japan nor its victimized countries in Asia signed or ratified the Convention on Non-Applicability of Statutory Limitations.

Thirdly, Japan's victimized countries, as a whole, could not participate in the IMTFE and its subsequent Japanese war crime trials. China conducted a comparatively wide range of its own war crime trials in a few regions of its territory. India and the Philippines were included as nations having the right to submit names a few months after IMFTE was set out.[31] However, it is an undeniable fact that the prosecutions and trials against Japanese war criminal were carried out by the Allied Powers which consisted of the western countries, especially the United States. Almost all of the contents of the indictments, including the Tokyo Tribunal and other military tribunals which tried 'B.C class' war criminal, consist of the violation of human rights and

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[30] U.N Document E/CN.4/906, p.63.

[31] Joseph Berry Keenan & Brendan Francis Brown , Crimes Against International Law, Public Affairs Press, Washington.D.C., 1950, p.2. According to this book, India and the Philippines were included with the amendment of the original Charter of the Tokyo Tribunal on April 26, 1946, by General McArthur. And original judges appointed by General McArthur came from the United States, China, United Kingdom, Soviet Union, Australia, Canada, France, the Netherlands, and New Zealand. It should be noted that these eleven judges represented their respective nation, or peoples.

damage of property against the Allies. The interest of colonized Asian countries which suffered longer and more severe than the Allies was made light of.[32] In relation to Dutch comfort women, many Japanese military servicemen were punished[33] while no one was tried concerning Korean and Chinese comfort women. The victimized countries had lost the opportunity to try Japanese notorious criminals who committed serious crimes against humanity.[34]

The following table supports the argument.[35] It shows that 2,116 known hearings took place before military commissions or corresponding tribunals of each country apart from the International Military Tribunal at Nuremberg ,the IMTFE, and the subsequent Neurembrg trials.

Country	Number of Tribunals
United States	950
United Kingdom	541
Australia	275
France	271

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[32] Kitagawa Kenzo, supra note 16, p.64.

[33] Zugamo Committee of Legal Affairs, The Real Phase of War Trial, Tokyo, pp.39-152. Many cases which dealt with Dutch comfort women can be found through the documents seen in this book. And the documents of the trial in Batabia of Indonesia was made public by the report of Asahi Shimbun, dated July 22nd, 1992.

[34] It was extremely striking irony to find that not a few Koreans and Taiwanese, who had been drafted forcibly in Japanese POW camps, was prosecuted as class B and C war crimes by the Allies. The failure of prosecution against the forced mobilization in colonial countries led such a historical irony.

[35] John Alan Appleman, supra note 1, p.267

Netherlands	35
Poland	25
Norway	11
Canada	5
China	2
Greece	1

And as mentioned above, Korea, Taiwan, Indonesia, and some other Asia- Pacific countries which had been devastated by the Japanese invasion and occupation were totally excluded from the international event.[36]

(2)The Possibility of Current Punishment Against Japanese War Crimes and Crimes Against Humanity

About 47 years since Japan had already passed since Japan unconditionally surrendered. At this point, the argument that Japanese war criminals should still be punished may be regarded as very strange and ridiculous.

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[36] Japanese scholars also admit the point. For example, see the opinion of professor Onuma.

> *"As a result of World War II, Japan's leaders were brought to judgement at the Tokyo Trial. And at the same time, our status as the colonial ruler of Korea and Taiwan, which was a result of Japan's post-1868 policy towards Asia, was negated. We had to pay reparations to Korea and the countries of Southeast Asia. These facts were not addressed directly at the Tokyo Trial."* (Onuma Yasuaki," The Tokyo Trial:Between Law and Politics", supra note 29, p.52.)

However, we have confirmed the misery that the victims of the war and occupation during World War II were still suffering. Innumerable victims need desperately the compensation, reparation, and rehabilitation physically as well as mentally. Their feelings have been so hurt that they could never forgive Japan. In this sense, the prosecution against remaining war criminals and criminals of inhumanity would have a great symbolic meaning: not only would it satisfy the feelings of justice but it would also to normalize the relations of Asian countries ,and particularly their peoples.

There must be some legal or institutional obstacles in bringing the war criminals before the court after such a passage of time. Time limit and non-retroactivity are the principal subjects of debate. However, the international community has already established the principle of no time limit in grave human rights violations through the Convention of Non-Application of statutory limitation which was a significant contribution to the historical development of international criminal law,[37] and other international instruments, regulations. and agreements. Another important thing to remember is that the crimes in question are basically international, differing from the general run of municipal law offenses. It means that the theory in support of the statutory limitation in municipal law cannot be applied to the international crimes under discussion.[38]

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[37] Robert H. Miller, "The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity", American Journal of International Law, Vol.65, 1971, p.477.

[38] Secretary General of U.N made an exclusive and special research on this issue. (U.N Doc.E/CN.4/906, pp.87-99.)

Sufficient theory and practice have been accumulated to show that war crimes and crimes against humanity were punishable under international law prior to and independently of the Convention.

Review of the motivation, the procedure and the contents of the Convention, and the short summary of other sources of international law on the issue will be extremely helpful to prove the possibility of current prosecution against Japanese crimes in discussion . After that, this paper will deal with the Japanese domestic legal system which proves that Japan is also not exempt from accepting the principle of non-applicability of statutory limitation.

After the confirmation of the possibility of punishment against war crimes and crimes against humanity, we will move next to the more more specific issues such as punishable crimes, the tibunals, extradition, the procedure of prosecution and trial.

It would be better from the outset to make it clear that this paper is only a beginning to suggest the possibility of current punishment over Japanese war crimes and crimes against humanity. The logical background and practical matters imaginable should be elaborated and specified from now on.

CHAPTER 2. A REVIEW OF THE CONVENTION ON NON-APPLICABILITY OF STATUTORY LIMITATIONS

2-1.The Background in the Creation of the Convention

(1) Arguments By Non-Governmental Groups

As the date after which prosecution for the war crimes and crimes against humanity would be barred by the German domestic criminal system drew nearer, there arose a strong public opinion across the world calling for measures to prevent such a bar to presecution. Around 1965, some officials in Germany insisted that there were 30,000 to 35,000 former Nazis whose crimes and identities are not yet known[39]. At least half of these, they claimed, would be convicted if brought to trial.

The argument that crimes against humanity should not go unpunished was raised from many parts of the world. In the countries which were the principal victims of war crimes and crimes against humanity, the reaction was especially vehement and had taken the form not only of protests in the name of justice and humanity, but also of fundamental objections to the legal discussion of the issue; that is, many people challenged the

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[39] The New Republic Vol.152 No.10, March 6th 1965, p6

very legality of such statutory limitations.[40] In September 1964 in Belgium, le Bureau du Comite d'Action de la Resistance Judiciaire Francais and l'Association Internationale de la Resistance had adopted a resolution and urged action against the application of statutory limitations to Nazi war crimes anc crimes against humanity.[41]

In June 1964, the Committee for International Studies and Research in Warsaw held a conference on the issue. Two East-German scholars proposed to the Committee was given below [42];

1.Both German governments and Senate of West Berlin should be invited to submit Bills to be enacted by their legislatures, in which, in conformity with the international obligation of Germany to eliminate German fascism and militarism, it would be declared and provided that crimes against peace, war crimes and crimes against humanity, committed by German fascism, have not been and will not be subject to any internal rules of German law concerning prescription or serving of sentence.

2.In these laws, or in some other form, the Federal Republic and the Democratic Republic could declare their

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[40] Doc.1868, Report of the Legal Committee of the Council of Europe, p.15. and A.Sottile, "La prescription des crimes contre l'humanite et le droit penal international", Revue de droit international No 1 , Geneva, 1965, p.5.

[41] Jounal des Tribunaux, Septembre 27, 1964, Bruxelles.

[42] John Lekschas & Joachim Renneberg, "A Time Limit for Punishment of War Crimes ?" (Translated from the original German paper entitled "On the Necessity and Obligation to Prosecute and Punish Certain Grave Crimes"), International and Comparative Law Quarterly Vol. 14 April 1965, p.632.

intention that joint efforts and arrangements would be made for the solution of the problem presented by these grave crimes, so that the way might be prepared for a definitive solution through a German peace treaty, the function of which would be to write the final word on the Second World War.

An important momentum was added by the Declaration issued at the International Conference of Jurists, which took place at Warsaw from June 5 to 7, 1964 and was attended by jurists from sixteen European countries. Paragraphs from that Declaration read as follows;[43]

The Conference notes - - - that the crimes committed by the Nazis are crimes against humanity and that the nature of those crimes is entirely different from the legal nature of ordinary crimes. The former are subject to public international law, the latter to the municipal law of States. Where such municipal law provides for a period of limitation in respect to ordinary crimes, it does so by an express provision to that effect. This does not apply to crimes against humanity, which are subject to

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[43] U.N.Doc. E/CN.4/906, p107, footnote 36 (J.Graven, "Les crimes contre l'humanité peuvent-ils beneficier de la pescription?", Revue Penale Suisse, T.81, Fasc.2, 1965, p.128. "These conclusions of the Warsaw Conference", says the author, "appear to be fully in accord with the principle of international law and consistent also with the intentions of the international Convention of 1948 on the punishment of genocide, pursuant to which the Warsaw Committee of Experts calls on signatory States to remind all countries 'that crimes against humanity are crimes under international law and are therefore not subject to statutory limitation.")

international law, as has just been stated.

In international law, there is no principle establishing periods of limitation in general and a period of limitation for the prosecution of war crimes and Nazi crimes in particular. The rules of international law permit the prosecution of such crimes before the courts and their punishment, so that mankind may be forever safe from a recrudescence of Nazi tyranny and cruelty.

In accordance with this legitimate wish of the peoples as recognized by international law, the prosecution and punishment of these crimes should not be considered to fall exclusively within domestic jurisdiction of States but should be regarded as an international and universal obligation imposed on States by international law.

States may discharge this international obligation in various legal ways, according to their principles of law, their national traditions and their constitutions. However, it would be a violation of international law if a State refused to discharge these obligations on the ground that such action would be at variance with a provision of its municipal law such as statutory limitation.

The Conference therefore considers that it would be a violation of international law if a country, referring to the established rules concerning statutory limitation applicable to ordinary crimes, refused to prosecute Nazi crimes on the pretext that the crimes in question were merely individual homicide punishable under ordinary law."

As pressure from non-governmental groups grew, it began to affect the attitude of national, regional and international governmental organizations. Among them, the recommendation and decision within the Council of Europe is notable.

(2) Council of Europe

Despite the clear principle of *"nullum crimen, nulla poena sine lege"* embodied in the Convention for the Protection of Human Rights and Fundamental Freedoms,[44] at its twenty-third sitting held on 28 January 1965, the Consultative Assembly of the Council of Europe, adopted recommendation 415 on statutory limitation as applicable to crimes against humanity. The recommendation reads as follows[45]:

" Whereas, in our time, the gravest crimes have been

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[44] In relation to the principle, Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, provides as follows (European Commission of Human Rights, Documents and Decisions 1955-1957, Hague, 1959, p 4) :

> *"(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
> *(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations."*

[45] Doc. 1868, Report of the Legal Committee (Rapporteur: Mr.Pierson)

systematical perpetrated on a large scale for political, racial and religious motives, thus endangering the very foundation of our civilisation;

Whereas such crimes, described as crimes against humanity, were committed in particular during the second world war in violation of the most elementary human rights;

Whereas, in regard to the protection of human rights, the Council of Europe has statutory responsibilities which can not leave it indifferent to such grave infringements of those rights as are presented by crimes against humanity;

Whereas the laws of several member states contain statutory limitations which will soon make it impossible in those countries to prosecute persons responsible for crimes against humanity;

Whereas the United Nations have commenced work on codification of international penal law which it would be desirable to see concluded;

Having noted that several member states have amended or intend to amend their legislation, so that the rules of ordinary law relating tp statutory limitation for ordinary crimes shall not apply to crimes against humanity,

Recommends the Committee of Ministers:

(a) to invite member governments to take immediately appropriate measures for the purpose of preventing that, by the application of statutory limitation or any other

means, crimes committed for political, racial and religious motives before and during the second world war, and more generally crimes against humanity, remain unpunished;

(b) to instruct a Committee of Governmental Experts to draw up a Convention ensuring that crimes against humanity shall not be subject to statutory limitation."

(3) National Legislation

Many countries currently have special legal frameworks to penalize war crimes and crimes against humanity. Only legal steps in relation to war crimes, taken by Germany and Israel, which are most deeply involved in the issue, will be introduced here.

A. Federal Republic of Germany

It was generally accepted that the Federal Republic of Germany had provisions such an Article as 220(a) of the German Penal Code which specifically punished genocide. The German Penal Code included provisions to punish such acts as murder, manslaughter, bodily injury, unlawful deprivation of liberty and duress.

However, they had no retroactive effect. The provisions for time limitations in the Penal Code were valid for all offenses to which the Penal Code could be applied. Those provisions related time limitations are as follows[46] :

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[46] U.N Doc. E/CN.4/906, P.72

Article 66 (Time limitation a bar to penal proceedings)

Prosecution of an offence and the execution of a sentence shall be barred by the time limitation.

Article 67 (Time limitation a bar to prosecution)

1.Prosecution shall be barred by time limitation after twenty years in the case of serious offenses (Verbrechen) punishable by confinement in a penitentiary for life; after fifteen years of serious offenses for which the maximum penalty is deprivation of liberty for a term of more than ten years; after ten years in case of serious offenses punishable by deprivation of liberty for a shorter term.

2.Prosecution shall be barred by time limitation after five years in the case of less serious offenses (Vergehen) punishable by imprisonment for a term of more than three months and after three years in the case of other less serious offenses.

3.Prosecution for petty offenses(Ubertretungen) shall be barred by time limitations after three months.

4.The period of limitation shall begin on the date on which the act was committed, irrespective of the date the occurrence of the effects.

5.The power to impose measures of safety and

rehabilitation by reason of the offence shall cease on the same date when prosecution is barred by time limitation.

With pressure coming from all over the world[47], the Federal Republic of Germany took an interim measure to suspend the period of time limitation. The Act for the Calculation of the Periods of Limitation under criminal law was adopted in order to prevent the period of limitation for offenses of the most serious kind committed by or against Germans from expiring in the Spring of 1965. Owing to this Act, the prosecution of previously undetected offenses of the most serious kind could be conducted beyond May 8, 1965, until December 31, 1969. The relevant provisions are as follows;

Article 1 (Suspension of the period of time limitation)

1.The period May 8, 1945 to December 31, 1949 shall be excluded from the calculation of the period of time limitation for the prosecution of serious offenses subject to imprisonment for life.

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[47] The complaints from European countries were especially severe. The Polish government criticized the Federal Republic of Germany as follows;

> *"Since 1965, the Federal Republic of Germany has not worked out and put into effect such provisions of the penal law which would ensure the prosecution and punishment of perpetrators of Nazi war crimes and crimes against humanity in keeping with the requirements of international law and provisions of the legal acts adopted by the U.N and which would be retroactive in regard to the crimes committed during the second world war against Polish people and other European peoples."* (U.N. Doc. A/7174, p.33)

The time limitation for prosecution of these serious offenses for that period shall be suspended.

2. Paragraph 1 shall not apply to acts for which the period of limitation has already expired on the entry into force of this law.

Article 2 (Adaptation of the Act to the First Law Repealing the Law of Occupation)

Where the period of limitation for criminal proceedings under Article 1 is suspended, article 5, Paragraph 1 of the First Law Repealing the Law of Occupation of 13 May 1956 shall not apply.

A more drastic step to remove the time limitation was made by the Bundestag on June 26, 1969 and the Bundesrat on July 10, 1969. Thanks to this legislation, no period limitation could exist for the crime of genocide. As to simple murder, the previous period of limitation was extended from 20 to 30 years. Such an extension allowed the German authorities to interrupt the prescriptions of such crimes before the end of 1979 and prescriptions would virtually, by official investigations, come into effect only in 2009.[48]

B. Israel

Israel had enacted the Crime of Genocide Law to give effect

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[48] Natan Lerner, "The Convention on the Non-Applicability of Statutory Limitations to War Crimes", Israel Law Review Vol 4, 1969, Jerusalem, p.516

to the Genocide Convention. However, a new law titled the Nazis and Nazi Collaborators Law was enacted in 1950 because the Crime of Genocide Law was not retroactive.[49] Section 1(a) of the law states:

> *"A person who has committed one of the following offenses---*
> *(1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;*
> *(2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;*
> *(3) done, during the period of the Nazi regime, in an enemy country, an act constituting a war crime.*
> *is liable to the death penalty."*

Israel's law is a kind of extension of the precedent set by the Neuremberg trials. The definitions of war crimes and crimes against humanity are very similar to those of the Charter of the International Military Tribunal. Both the law in Israel and the Charter have retroactive effect.

2-2.The Process of Enactment of the Convention

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[49] George R. Parsons,Jr., International Law: Jurisdiction Over Extraterritorial Crime: Universality Principle: War Crimes: Crimes Against Humanity: Piracy: Israel's Nazis and Nazi Collaborators Law, Cornell Law Quarterly Vol 46, New York, 1961, p.334.
This Law was amended in 1963, clarifying the rules relating to prescription of ordinary crimes are not applicable to offenses under the law. (U.N Doc. A/7174/Add.3, 1968, p.3)

The discussion moved, at last, to the stage of U.N. The first document mentioning the issue was the Commission on Human Rights resolution of 9 April 1965 entitled "Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity."[50] Through this resolution, the Commission urged all States to continue their efforts to ensure the punishment of criminals responsible for the war crimes against humanity, and requested the Secretary-General to undertake a study on the problems raised in international law.

The study was conducted and submitted by the Secretary-General on February 15, 1966. Subsequently, the Commission on Human Rights discussed the issue at its 21st and 22nd sessions. During its 23rd session, the Commission organised a working group which commented on certain articles of the draft convention. At its 42nd session, the Economic and Social Council unanimously adopted resolution 1220 transmitting to the General Assembly the preliminary draft convention prepared by the Secretary-General and the report of the Commission's working group. At the 22nd session of the General Assembly, a joint working group of the Third and Sixth Committees was established to prepare a draft convention.[51]

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[50] Generally speaking, the communist bloc was more active in the enactment of the convention, from the beginning stage to the vote, and both outside and inside the U.N. The first motive was set by the proposal of the delegation from Poland on March 5, 1965, which urged the Commission on Human Rights to include the agenda of punishment of war crimes and crimes against humanity. (U.N. Doc. E/CN.4/S/733)

[51] The process of enactment of the Convention is well summarized in the introduction of U.N Doc. A/7174, pp.2-3

During those debates, the opinions of delegates were seriously divided on the definition of the crimes concerned, the scope of the convention, the articulation of the doctrine of non-applicability of domestic limitations and other issues. However, states finally gave universal recognition and acceptance to the principle that these should be no limitation to the period when the criminals responsible for war crimes and crimes against humanity may be tracked down and tried for ever.[52] It should be noted that even the countries voting against the approval of the convention did not oppose the principle of non-applicability of statutory limitations itself. They found fault only with the wording of some abstract articles.[53] In fact, the United Kingdom

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[52] Heated debate during the discussion resulted in the final vote to adopt the convention. The convention was approved be 58 votes in favour and 7 against, with 36 abstentions, as follows:

For: Algeria, Bulgaria, Burma, Byelorussian S.S.R, Central African Republic, Ceylon, Chad, Chile, China, Cuba, Cyprus, Czechoslovakia, Dahomey, Ethiopia, Gabon, Ghana, Guinea, Hungary, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Kenya, Kuwait, Lebanon, Liberia, Libya, Malaysia, Maldive Islands, Mauritania, Mexico, Mongolia, Morocco, Nepal, Niger, Nigeria, Pakistan, Philippines, Poland, Rumania, Rwanda, Saudi Arabia, Senegal, Singapore, Southern Yemen, Sudan, Syria, Togo, Tunisia, Ukrainian S.S.R, U.S.S.R, United Arab Republic, United Republic of Tanzania, Upper Volta, Yugoslavia and Zambia.

Against:Australia, El Salvador, Honduras, Portugal, South Africa, United Kingdom, United States.

Abstentions: Afghanistan, Argentina, Austria, Belgium, Bolivia, Brazil, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Greece, Guatemala, Guyana, Haiti, Iceland, Ireland, Italy, Jamaica, Japan, Laos, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Peru, Spain, Sweden, Thailand, Turkey, Uruguay and Venezuela.

[53] The United Kingdom, which opposed the convention only because its request for amendment, had not been accepted, stated as follows;

> *"The United Kingdom wishes to be able to support a Convention covering the non-applicability of statutory limitations to war crimes and crimes against humanity. As was made clear by the United Kingdom representative in the*

and Australia, which declined to adopt the Convention, have recently enacted laws which allowed punishment for war crimes and crimes against humanity, as mentioned above.

At last, on November 26, 1968, the General Assembly of the United Nations adopted and made avaliable for signature, ratification and accession a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

2-3. The Contents of the Convention

(1) Structure of the Convention

The Convention consists of a Preamble and 11 articles. Article I and II deal with the definition of crimes to which no statutory limitation will apply and persons to which provisions of the Convention will be applicable. Article III imposes the legal duty to extradite persons referred to in Article II on the State Parties. Article IV requests the State Parties to undertake a measure of legislation to comply their domestic legal system into the Convention. Article V to XI are concerned with procedural

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Third Committee at the twenty-second session of the General Assembly the draft text submitted by the Joint Working Group is unsatisfactory in a number of respects and would require amendment before it could be supported by the United Kingdom. In particular the United Kingdom wishes to make the following observations on certain provisions. - - -" (U.N. Doc. A/7174/Add.1, p.2)

The United States of America also expressed that 'war crimes' was a broad category and the exceptions should be considered for only the most serious crimes.(U.N Doc. A/7174, p.46)

aspects.

(2) The Preamble

In the Preamble, the State Parties have recognized "that it is necessary and timely to affirm, in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application." In terms of preventive aspect of the principle, the Preamble emphasizes that "effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes." The Preamble further notes that the "application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitations for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes."

(3) Crimes to Which No Statutory Limitations Apply

According to Article I, no statutory limitation shall apply to the acts mentioned in its two paragraphs, irrespective of the date of their commission.

"(a) War Crimes as they are defined in the Charter of the International Tribunal of Neuremberg of 8 August

1945[54] and confirmed by resolutions 3(I) of 13 February 1946 and 95(1) of 11 December 1946 of the General Assembly of the United Nations, particulary the 'grave breaches' enumerated in the Geneva Conventions of 1949 for the protection of the victims of war;

(b) Crimes against humanity whether committed in time of war or in peacetime as they are defined in the Charter of the International Tribunal of Neuremberg of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of *apartheid*, and the crime of genocide as defined in the 1948 Convention on the

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[54] The definitions of *War Crimes* and *Crimes Against Humanity* in the Charter of the International Military Tribunal, commonly known as the Nuremberg Charter, are as follows (United Nations International Law Commission, The Charter and Judgement of the Neuremberg Tribunal, New York, 1949, p.4) ;

> *War crimes*: Namely, violation of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
>
> *Crimes against humanity*: Namely, murder, extermination, enslavement, deportation , and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.