Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed."

Although the main purpose of Article I was to punish the war crimes and crimes against humanity during Nazi the period, It had "an all-embracing temporal sweep in that it applies to all war crimes and crimes against humanity, past, present and future."[55] Therefore, Japanese war crimes and crimes against humanity are also covered by this article.

(4) The Question of Retroactivity

The next major problem in the extension of the war criminal punishment was the question of retroactivity. The debate during the enactment arose in relation to the principle of *nullum crimen, nulla poena sine lege* which was articulated in the Covenant on Civil and Political Rights of 1966 and the Convention for the Protection of Human Rights and Fundamental Freedom adopted by the Council of Europe in 1950. Article 15 of the Covenant on Civil and Political Rights provides as follows;

"Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which,

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[55] Robert H. Miller, supra note 37 , p.481.

at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations"

Even though there was a ferocious debate, a majority of the participating countries agreed that the principle of non-retroactivity could not be applied to the crimes which came under the international law.

Their opinion had been divided as to whether the convention established a new principle of international law or affirmed an already existing principle. A few countries insisted that it was a new principle which was yet to be established in international law and that the convention, therefore, would not restate existing principles but would create new rules of international law.[56] On the other hand, other countries, mostly Eastern European countries, asserted that "most countries had been of the opinion that the principle of the non-applicability of statutes of limitation to war crimes had already been recognized in existing principle of international penal law".[57] According to this view, the convention had only a declaratory character which simply restated the existing principle. In any events, there is no difference that the principle of non-applicability of statutory limitations had an universal and real legal effect .

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[56] This argument was made by Australia, France, the Netherlands, The Philippines and Sweden. (See U.N. Doc. E/CN.4/SR/875)

[57] U.N. Doc. E/CN.4/SR 873, p.5.

(5) Extradition

Article III provides that State Parties should "undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of persons referred to in Article II"

This Article deserves to be called as an essence of the Convention. If it is impossible to secure the alleged war criminals through the method of extradition, all efforts exerted for the Convention would be futile. With this Article, States can not refuse requests for extraction by the procedural reasons, or by the arguments that a political offense was involved, or by application of the more favorable law which has prevented the trial of many war criminals before.

CHAPTER 3. The Obligations of Japan for the Punishment Against War Crimes and Crimes Against Humanity Under International Law

3-1. Other Sources of International Law on the Principle of Non-Applicability of Statutory Limitations

Even before the end of World War II, there had been declarations which were promulgated to punish the atrocities. The Moscow Declaration of 1943 stated that the Allied Powers would pursue war criminals "to the utmost ends of the earth and would deliver them to their accusers in order that justice may be done."[58] In the Potsdam Agreement of 1943, the Parties decided that "war criminals and those who had participated in planning or carrying out Nazi enterprises involving or resulting in atrocities of war crimes shall be arrested and brought to judgment."

These declarations and subsequent international agreements contain no mention on the period of limitation. The London Agreement and annexed Charter, Law No.10 of the Control Council for Germany and the Charter of the International Military Tribunal have no provisions setting a time limit for prosecution and trial. Non-existence of any provisions that could be interpreted as favouring the statutory limitation reflects the

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[58] This was interpreted by R.Cassin that he did not affirm that that was a legal declaration against the application of statutory limitations, but it obviously did not support such application.(U.N Doc.E/CN.4/906, p.100, footnote 28.)

notion that all of the declarations and agreements have been made on the basis of the principle that there would be no time limit in the punishment of war crimes and crimes against humanity.[59]

But the principle of no time limit is stated more precisely in the draft Code of Offenses against the Peace and Security of Mankind, adopted by the International Commission in 1954. The Code says that "Offenses against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished." The fact that the offenses are covered under international law is evidence that they are not affected by limitations of time which may be peculiar to a particular domestic legal system. In a sense, the Genocide Convention which contains an article that regards the Genocide crime as international law can be interpreted in the same way.

3-2. The Principle of Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity As Conventional or Customary Law

(1) The Principle of Non-Applicability of Statutory Limitation As Conventional International Law

Article 38(1) of the Statute of the International Court of Justice is considered to be the most authoritative enumeration

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[59] Ibid, pp.100-101

of the sources of international law.[60] It reads as follows;

> *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
>
> *a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
>
> *b. international custom, as evidence of general practice accepted as law;*
>
> *c. the general principles of law recognized by civilized nations;*
>
> *d. - - - judicial decisions and the teachings of the most highly qualified publists of the various nations, as subsidiary means of the determination of rules of law.* [61]

Above all, the principle of non-application of statutory limitation has become international conventional law through the enactment of the Convention on Non-Applicability of Statutory Limitation. There may be an argument that Japan had not ratified the Convention, therefore, the principle cannot be applied to

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[60] Thomas Buergenthal & Harold G. Maier, Public International Law In a Nutshell, West Publishing Co, 1985, p.20

[61] International conventional law and international customary law hereby will be dealt with, because 'general principles of law' or 'judicial decisions' are less important as sources of international law. However, it does not mean that the principle of non-application of statutory limitation cannot be assisted or based on such sources as general principles of law or judicial decisions or the teachings of the most highly qualified publists.

Japan as an international conventional law. Even though Japan had not formally ratified it, however, Japan had agreed in principle to the necessity of adoption of such a principle.

It has been well understood that an international treaty binds only the states that have become parties to it, and cannot create obligations incumbent upon third parties. However, it is also widely held that the conventional norm itself now creates obligations incumbent upon all states, including those not parties to the convention in question.[62] To the extent that a very large number of states actually adhere to a convention or accept its provisions as law even without becoming parties to them, it can be viewed as an independent source of international law.[63]

Even a consensus at a conference plus signature by a vast majority of the participants, some scholars argue, creates a general norm of international law binding states from the very moment of the adoption of the international agreement.[64] It is not easy to distinguish the binding consensus from agreements that are thought to be declaratory one. But, in case of the principle of non-applicability of statutory limitation, it was confirmed and emerged through the invention of the Convention which was designed to have legal binding effect from the beginning. It is totally different from the declaratory

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[62] Well, "Towards Relative Normativity in International Law", American Journal of International Law, Vol.77, 1983, p.413.

[63] Thomas Buergenthal & Harold G.Maier, supra note 60, pp.25-26.

[64] Sohn, "The Law of the Sea Customary International Law Development", American University Law Review Vol.34, 1984, p.279.

agreement. According to this view, even though Japan is not a party to the Convention, the principle of non-applicability of statutory limitation is binding.

(2) The Principle of Non-Applicability of Statutory Limitation As Customary International Law

If the principle of non-application of statutory limitation to war crimes and crimes against humanity does not fall into the category of international conventional law, it would be the customary international law. It has generally been considered as one of the most important source of international law. It has been defined as "a general practice as law"[65] or "a general and consistent practice of states followed by them from a sense of legal obligation".[66]

The principle of non-application of statutory limitation has been prescribed in the national legislation and international dimension as well. The trend in legislation of adopting the principle has continuously been broadening and strengthening. We confirmed in Chapter 1 that the United Kingdom and Australia had enacted a new law to punish the war crimes and crimes against humanity committed during the Nazi era. Many countries across the globe has established that such a legal system has no statutory limitation for war crimes and crimes against humanity. The study

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[65] Article 38(1)(b) of the International Court of Justice Statute as mentioned above.

[66] The Restatement (Revised) § 102(2)

submitted by the Secretary-General of United Nations[67] showed that, under their ordinary law or by virtue of special legislation,the statutory limitation was barred or might be set aside either for war crimes and crimes against peace and humanity as a whole, or for one or other of those categories of crimes in the following countries, as of 1966:

Australia, Bulgaria, China, Czechoslovakia, Denmark, France, Hungary, India, Ireland, Israel, Italy, Kenya, Nigeria, Poland, Singapore, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America.

In addition, the following states, which have statutory limitations for such crimes, have taken special steps which they deemed sufficient to ensure that crimes committed during the Second World War and that fall within their jurisdiction would not go unfinished:

Belgium, Luxembourg, Netherlands, the Federal Republic of Germany

In the study, the Secretary-General of United Nations concluded that non-applicability of statutory limitations on war crimes and crimes against humanity was already an existing principle of international law.

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[67] U.N. Document E/C.4/906, P.53.

" As we have seen above, a number of States have directly or indirectly indicated that they favour a convention which would confirm or enunciate the principle that there is no period of limitation for the international crimes in question. If this principle is considered to be already established in international law, but it is desired to ensure that the principle is effectively and generally applied under national legislations, it might be advisable to make it explicit, by means either of an international convention or of a resolution by the United Nations General Assembly."[68]

Furthermore the principle has not only remained in the realm of a dead instrument, but has also thrived in practice. The prosecutions and trials against such crimes took place in every part of the world, irrespective of region and ideology. Some cases among them are undergoing. From the Neuremberg trial to the Convention on Non-Applicability of Statutory Limitation, the principle has been regarded as being a firmly established legal norm.

3-3. Analysis of the Attitude of Constitutions of Related Countries

(1) Japanese Commitment to International Law

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[68] U.N. Document E/C.4/906, pp.138-139.

After World War II, Japan amended its constitution in a democratic fashion, equivalent to the level its western partners. In particular, it declared that it shall observe earnestly the treaties which was signed by Japan and 'established international law'.[69]

'Established international law' hereby has been interpreted to mean, that which is 'generally accepted and practiced international customary law'.[70] It leaves no room for doubt that this expression includes the principle of non-applicability of statutory limitations articulated in the Convention in question as a customary international law.

The obligation of observance of the 'established international law' is not a rhetorical declaration, but a legally binding norm. Therefore, not only all the national institutions but also its people should obey treaties and established international law. In addition, this article makes it clear that Japan accepted the treaties and 'established international law' as a part of its domestic legal system. The integration of international law into domestic legal system of law should be applicable, so far as there is no other contradictory treaty.[71]

It is particulary noteworthy that the Japanese government itself did not oppose the basic idea and main frame of the Convention on Non-Applicability of Statutory Limitation during

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[69] Paragraph 2 of Article 98 of the current Japanese Constitution

[70] Y.Higuchi, K.Sato, M.Nakamura, N.Urabe, Commentary on the Constitution of Japan Vol.II, Sei-lin Syo-in, Tokyo, 1988, p.1494

[71] Ibid, pp. 1494-1495.

the discussion of the Convention. The basic position of the Japanese government was that the article of the Convention should be made more clear than the draft.[72] In the light of the attitude of the Japanese government shown at that time, we might say that Japan also agreed to accept the principle of non-applicability of statutory limitation to certain war crimes and crimes against humanity as customary law which was applicable within Japanese legal system. [73]

(2) The Relation Between Customary International Law and Domestic law

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[72] The comment by Japanese government was mainly made in relation to the wording of Article 1 of the Convention as follows (U.N. Doc.A/7174, p.22);

> *"The crimes to be excluded from the application of statutory limitations should be more clearly defined.*
> *1. It is preferable to spell out the precise and self-contained definitions of the crimes to be covered rather than refer to any specific documents.*
> *2. The terms used in the documents referred to in paragraph (a) and those used in paragraph (b) of this article, describing each act which constitute war crime and crime against humanity, are, in some cases, too general to ensure the proper application of this convention. Terms such as ill-treatment, deportation, enslavement etc., in the absence of definitions, are open to diversified interpretations, which may give rise to the arbitrary application of the convention.*
> *Such qualifications as are stipulated in paragraph (b) can not sufficiently rectify the above-mentioned difficulty.*

[73] It is clear that, "if a custom becomes established as a general rule of international law, it binds all states which have not opposed it, whether or not they themselves played an active part in its formation." In other words, "its acceptance of the custom will be presumed so that it will be bound unless it can adduce evidence of its opposition to the practice in question." (Louis Henkin, Richard Crawford Pugh, Oscar Schachter, Hans Smit, International Law; Cases and Materials, West Publishing Co, 1987, p.65)

The next problem is the question of what relation exists between international and domestic legal system. The following two aspects will be examined in this chapter. The first subject to be examined is whether the treaties or the international law have a so-called self-executing effect in the Japanese context. The term of 'self-executing' generally means the treaties or international law which is applicable directly and immediately without any further measure to transform for the enforcement through the parliament.[74] In the case of Japan, without the enactment to implement, the treaty or international law has been understood as having the obligatory effect to the public servant and the people as well.[75] Principles asserting the fundamental rights of persons has been understood as self-executing precisely because they vest personal rights, and because they express normative principles embraced generally by the world community.[76] The authorities concerned including the court and general people assume the obligation to follow the customary

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[74] See Iwaswa Youzi, The Possibility of Direct Applicability of Treaties into Domestic Law, Yuhikaku , Tokyo, 1985.

[75] The Basic law of May 23, 1949, in West Germany has strengthened the spirit of Weimar Constitution concerning the respect of international law. It declared that the general principles of international law which was superior to its domestic law became a part of Federal Law and invented the rights and obligations of the people directly (Article 25). Japanese Constitution does not have the same wording, but has been interpreted in the same way. See Irie Keishiro, The Interpretation of International Law, Seibundo, Tokyo, 1974, pp.45-46.

[76] David F. Klein," A theory for the Application of the Customary International Law of Human Rights by Domestic Courts", The Yale Journal of International Law Vol.13 No.1, 1988, p.354

international law.[77]

The second subject to be discussed concerns the order of priority as to international and domestic legal system. The Penal Code of Japan has an article which articulates limit of period for the prosecution of crimes. The following is extracted from the Criminal Procedure Act of Japan.[78]

> *The period of limitation shall be*
>
> *(a) 15 years, where the penalty incurred for the offence would be death penalty;*
>
> *(b) 10 years, where the penalty incurred for the offence would be imprisonment or forced labour;*
>
> *(c) 7 years, where the penalty incurred for the offence would exceed 10 years of imprisonment or forced labour;*
>
> *(d) 5 years, where the penalty incurred for the offence would not exceed 10 years of imprisonment or forced labour;*

According to the Japanese legal system, even the most serious crime of which the penalty is death sentence can be free from punishment with the lapse of 15 years. Of course, it is contradictory to the international law. We have confirmed, however, that the principle of non-applicability of statutory limitation was established as customary international law which

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[77] Taoka Ryoichi, International Law, Keiso Shobo, Tokyo, 1963, pp.36-37.

[78] Takada Takuzi, Criminal Procedure Act, Seilin Shoin Shinsha. Tokyo, 1971, p.342

the Constitution of Japan has declared to respect and to comply. Moreover, it has been explained that the overwhelming majority of Japanese scholars are of the opinion that the treaty and international law is superior to the domestic law.[79] According to this interpretation, the principle of non-applicability of statutory limitation should be a predominant position over the Criminal Procedure Act of Japan. It would also be appropriate to cite the comment of International Law Commission on principle II of Neuremberg principles which stated that " the principle that a person who has committed an international crime is responsible therefore and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the 'supremacy' of international law over national law."[80] So far as the legality of the Neuremberg Trial and Tokyo Trials are not reversed, the 'supremacy' of international law cannot be dismissed in this area.

Another point can be raised concerning the state of expiration of the period. As seen in the article of the Japanese Criminal Procedure Act, all the Japanese crimes committed before and during the World War became unpunishable at least from 1960, 15 years of the longest period of limitation after its unconditional surrender. The question is how the prosecution can be conducted against the criminals who have already profitted fromf expiry of the period of limitation. But it should be remembered that period

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[79] Y.Higuchi etc., supra note 70, p.1500

[80] Quoted from U.N Doc.E/C.4/906, pp.115-116

expiry is by no means an 'acquired right to impunity'.[81]

(3) The Constitution of Victimized Countries and International Law

The expression in the Korean Constitution and its interpretation by scholars are as a rule similar to those of Japan. Article 6 (1) of the Constitution provides that "treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea".

Article 141 of the Taiwan Constitution, article 51 of India, article 211 of Burma, article 2(3) of the Philippines have the same meaning as Japan and Korea concerning the attitude towards international law.[82]

These articles in their constitutions and interpretation in the victimized countries reflect the spirit of respect for international law and can be the legal basis to seek out the current punishment of Japanese war crimes and crimes against humanity.

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[81] J.Graven explains that "a statutory limitation per se is in no way a right but is governed by municipal law, together with the time limits involved and the ways in which it is acquired, as a practice of expediency - - -." (U.N Doc.E/CN4/906, p.114)

[82] Chul Soo Kim, "The Principle of Respect for International Law", Koshi Yeunku Vol.31, Seoul, 1976, p.20

CHAPTER 4. THE PROCEDURE OF THE POSSIBLE PUNISHMENT OF JAPANESE WAR CRIMES AND CRIMES AGAINST HUMANITY.

4-1. What Kind of Crimes Can Still Be Punished?

The type and scope of crimes punishable can be illustrated by such crimes as were articulated in the Convention on Non-Applicability of Statutory Limitation. As explained in Chapter 2, the attitude of the Convention was similar to that of the Charter of Neuremberg International Military Tribunal. Because there were a few countries argued that the definition of crimes punishable on the Convention was vague[83], the narrow definition and interpretation would be helpful to persuade Japan. However we limit the terms, it is not difficult to find cases, from the period of the Japanese colonial rule in the first half of the twentieth century, which can be classified under the category of

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[83] In fact, Article I of the Convention was the result of an endeavour to remove the possibility of arbitrary application after having been criticized from a few countries, including Japan. For example, sub-paragraph (b) of Article I which was criticized by Japan was replaced by stricter terms after all. Compare the paragraph of the Convention as illustrated in Chapter 2 with the original draft as follows;

> *"Crimes against humanity which, for the purpose of the Convention shall mean inhuman acts such as genocide, murder, extermination , enslavement, deportation, eviction by armed attack or occupation, or persecutions, including inhuman acts resulting from the policy of apartheid, committed in time of war or in peace-time against the civil population or certain elements of that population on social, economic, racial, religious or cultural grounds by the authorities of the State or by private individuals acting at the instigation or with the toleration of such authorities."*

war crimes and crimes against humanity as defined in the Convention and evaded the prosecution. For instance, leaders of so called Unit 731 which conducted germ warfare experiments, vivisection against thousands POW from China and other countries was not punished.

The numerous cases that were accumulated in the trial of Nazi war crimes and crimes against humanity, held on the basis of the Charter of the International Military Tribunal, Resolution 3(I) of 11 December 1946 of General Assembly of the U.N, and the Genocide Convention, can act as precedents to the work for possible prosecution and trial against Japanese criminals in future.[84]

Will it include the crimes committed during the Japanese occupation over a few Asian countries before the outbreak of the World War II? This question is closely related to the possibility of punishment for the crimes against humanity violated during peace time. However, a series of international instruments for the punishment of war crimes and crimes against humanity have solved the problem, making it clear that the punishable crimes included those crimes committed both in war time and in peace time. In the subsequent tribunals after the Neuremberg trial, even the crimes unrelated to war has been punished as crimes against humanity if the wrongs were of such magnitude and barbarity that they shocked the conscience of

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[84] In fact, Article I of the Convention consists of the definitions seen in the Charter, the Resolution and the Genocide Convention mentioned above, instead of trying to define for itself. In this sense, all the cases concerned with these international instruments can be model cases to the application of the Convention.

mankind.[85] The Convention on the Prevention and Punishment of the Crime of Genocide clarified that "the Contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[86]

In fact, the Japanese army invaded and occupied many countries in Asia including Korea, Taiwan, and Manchuria through the means of annexation, even before World War II. During the annexation and harsh reign, independence movement was severely trampled down, causing innumerable manslaughter, genocide, and other kinds of crimes against humanity which would fall within the category of war crimes or crimes against humanity as articulated in the Convention on Non-Applicability of Statutory limitation.[87] But too much time has passed since the time when those crimes ha been committed. It would be extremely difficult to see the criminals alive and to find witnesses and other proof necessary for the prosecution.

4-2. Who Will Try Them?

---The Issue of Establishing Tribunal

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[85] Benjamin B. Ferencz, Enforcing International Law: A Way to World Peace, Oceania Publications, London, 1983, p.439

[86] Article 1 of the Convention.

[87] Japanese professor Okuhara also agrees that the inhuman acts committed in occupied areas such as Korea, Taiwan and Manchuria might actually meet the definition of crimes against humanity and such things as forced labour or forced migration could become objects of prosecution. (The Tokyo War Crimes Trial, supra note 29, p.115.)

Many suggestions have been put forth in regard to establishing an international criminal tribunal to make it possible to try war crimes and crimes against humanity on the basis of international community.[88] The U.N General Assembly on December 9, 1948, adopted a resolution stating that "in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law," and therefore "inviting the International Law Commission to study the desirability of establishing such a judicial organ, in particular as a Criminal Chamber of the International Court of Justice."[89] However, attempts to establish the international criminal court have not been fruitful.

Despite the absence of such a court with general jurisdiction, there is still a possibility to establish a court with limited jurisdiction. Mr.van Boven, the *special rapporteur* for the Commission on Human Rights has already submitted a report arguing that "the establishment of courts of human rights, or criminal courts, regionally or internationally, could help in the process of making those responsible for gross violations of human rights accountable for their acts, as could legislation authorizing universal jurisdiction over such violations."[90] Even though he

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[88] Kuhn, "International Criminal Jurisdiction", American Journal of International Law Vol.41, 1947, and Vespasian V. Pella, "Towards an International Criminal Court", American Journal of International Law Vol.44, 1950.

[89] See the Report of the Sixth Committee of the General Assembly prepared by the Papporteur Mr.J. Spiropoulos in U.N Doc. A/760, December 5, 1948.

[90] U.N Doc. E/C.4/Sub.2/1992/8, 29 July 1992, p.24

did not mention such specific subjects as the jurisdiction, composition of the judicial body, procedure, and enforcement of the decision, we can imagine several kinds of tribunals. It is unimaginable for the United Nations to succeed in setting up an international tribunal with which all nations concerned are forced to comply. Japan is also not likely to succumb to the tribunal, because there has not existed any similar international tribunal since the Neuremberg Tribunal and IMTFE. On the other hand, it is highly suggestive to see the example of the *United Compensation Commission* (UNCC), even though it had not criminal jurisdiction, which was founded under the supervision of U.N for the purpose of compensation to victims of gross violations of human rights and fundamental rights resulting from the unlawful invasion and occupation of Kuwait by Iraq.[91] With the agreement of Japan, the problem will be settled easily. In this case, it is liable to take the shape of tribunal of arbitration.[92] One can find recent example which led to a full settlement in case

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[91] The UNCC was established pursuant to paragraph 18 of Security Council resolution 687 (1991) in order to administer funds to pay compensation for the victims in Kuwait. The claim was mainly allowed to be submitted on the governmental basis, but compensation was aimed to be calculated on the individual basis. [See U.N Doc. S/RES/692(1991), S/AC.26/1991/1, S/AC.26/1991/3, S/AC.26/1991/7/Rev.1 and S/RES/687(1991)]

[92] There have been *'ad hoc'* settlements through the means of arbitration, and administrative tribunals, regional tribunals and military tribunals as permanent tribunals.(See A.M Stuyt ed., Survey of International Arbitrations, Martinus Nijihoff Publishers, Dordrecht, 1990) The international Centre for Settlement of Investment Disputes may be illustrated as one of tribunals of arbitration. This Centre was established under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which articulates the jurisdiction, the panels, immunities and privileges, the procedure of conciliation and arbitration, recognition and enforcement.(World Arbitration Reporter Issue 1, 1987, pp.74-89)

of *the Iran-United States Claims Tribunal* established pursuant to the *1981 Algiers Accords*. The temporary tribunal completed its operation after a few years, resulting in release of American hostages from Iran.[93]

If all the efforts to establish international or regional court with the civil and criminal jurisdiction as well, under the decision of U.N organs or agreement between Japan and other victimized countries, fail, after all, it is inevitable that the victimized country should have the jurisdiction to try the crimes in question for themselves. Many countries proved that they had jurisdiction over the war crimes and crimes against humanity committed within their territory or committed against their nationals. The principle that such crimes should be tried in the country on the territory of which the crimes were committed, has been established as a customary law.[94] For example, the crime of piracy became the first crime recognized by the custom of States to be a concern of international law which was triable in any State in whose territory the pirate might be found. War crimes and crimes against humanity were added to the catalogue of international crimes which had the same charateristics as piracy since the Nuremberg Principle.[95]

Furthermore, the principle of *universal jurisdiction* which

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[93] See Richard B. Lillich ed., The Iran-United States Claims Tribunal 1981-1983, University Press of Virginia, Charlottesville, 1984.

[94] Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 contains the same meaning.

[95] Paul Sieghart, The International Law of Human Rights, Clarendon Press, Oxford, 1983, pp.47-48.

grants a state the right to punish a crime regardless of the place of the crime or the nationality of the criminal, has undergone considerable development.[96] *Universal principle* as established by the municipal law of several states for certain crimes has recently been recognized for a whole category of war crimes.[97] It has also been introduced into international treaty law by the Conventions of Geneva of August 12, 1949, which impose on the High Contracting Parties the obligation of punishing war crimes, regardless of where they are committed or the nationality of the authors of the crimes. After World War II, the field of application of *universal jurisdiction* was further enlarged to include crimes against humanity and the great majority of scholars on legal theory agree to submit crimes against humanity in general to *universal jurisdiction*.[98] The court established under the principle has been explained that "these courts, although national in form, are essentially interactional in character by reason of the functions they perform. They are in fact, called upon to impose punishment for international offenses

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[96] This principle of *universal jurisdiction* was also applied to the *Ichman case*. The defence councel denied the jurisdiction of Israel over Ichmann, criticizing the Law 5710 on the ground that it was contradictory to international law because it allows for the trial of acts which were perpetrated even before the creation of Israel, outside its present borders and the victims of which were persons who were not citizens of Israel. However, Israel court dismissed the opinion saying that the right of Israel to punish the genocide of the Jews proceeds directly from the universal nature of this crime and since an international tribunal does not exist for the moment, international law invests the legislative and judicial organs of each state with the power to punish them. (Peter Papadatos, The Ichmann Trial, Stevens & Sons, London, 1964, p.42, p44.)

[97] Ibid, p.45

[98] Ibid, p.46

on behalf not only of their own states but also of all other states, on behalf of the international community as a whole. They thus act as judicial organs of the international legal order, which is institutionally deficient."[99] Therefore, there can be no doubt about the jurisdiction of Korea over the war crimes or crimes against humanity committed by Japanese army.

4-2. How Can the Criminals Be Brought to Court?

--- The Problems of Deportation and Extradition

(1) Inevitability of Extradition of War Criminals and Criminals Against Humanity.

If the Japanese Government has concerns about prosecuting the war criminals and criminals against humanity within its territory and under its jurisdiction, the procedure for punishment is simple. What other countries can do is only to cooperate with the Japanese government in the trial, including investigation and obtaining witnesses. However, judging from the attitude and mentality exhibited by Japanese government, it is unimaginable that it will consider the issue of prosecution sincerely.

The next possibility is that the Japanese war criminals appear voluntarily in front of the authorities. In the past, there was the striking scene which a few conscientious war criminals appeared before the public and confessed the crimes

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[99] U.N Doc. E/C.4/906, p.116. It has similar logical background which is shared in Ichmann case.

they committed during the World War II or during the occupation of Korea.[100] When we are reminded of the fact that they can be punished through the criminal procedure, it is unimaginable for the criminals to cast voluntarily their destiny on the altar of foreign judiciary.

The last remaining way of bringing the war criminals to the court concerned is to extradite them by Japan or other countries in which Japanese war criminals retain their nationality or residence. Without efficient means of obtaining the criminals, any discussion about punishment will become useless and futile. Fortunately, the principle of extradition of those who committed war crimes and crimes against humanity has been established as a international customary law.

(2) Legal Theory and Practice of Extradition and Deportation of War Criminals and Criminals Against Humanity

Extradition and deportation constitute a legal process by which a country removes individuals involuntary. Extradition means to request a country to surrender an individual whom the requesting state want to prosecute. A formal mutual extradition treaty is needed to extradite. On the other hand, deportation

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[100] Mr.Yoshida Seiji who was a former chief of Yamaguchi district responsible for draft and hunting for 'comfort women' and forced labourers came to Korea to give witness on January 16, 1992. He confessed shockingly that he himself had hunted no less than 1,000 Korean women to send to the military camp as 'comfort women'. He had already published his *Confessions* titled 'My Confessions on War Crimes' in 1983 and was determined to act as witness wherever he was wanted. (The Hankook Ilbo, January 17th, 1992)

is a unilateral measure by which a country expels an alien. Almost all of war crimes cases have been regarded as deportation, because war criminals removed without mutual extradition treaty between the countries concerned.[101]

The United Nations have often urged Member States to cooperate in arresting and extraditing alleged war criminals many times. By the Resolution of February 13, 1946, which was unanimously adopted, the General Assembly decided as follows;

> *"Believing that certain war criminals continue to evade justice in the territories of certain States; Recommends that members of the United Nations forthwith take all the necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in the above crimes, and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries; And Calls upon the Governments of States which are not members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries."* [102]

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[101] Gregory J.Getschman, "The Uncertain Role of Innocence in United States Efforts to Deport Nazi War Criminals", Cornell International Law Journal Vol.21, 1988, p.289.

[102] U.N.Y.B. 1946-47, P66.

Next Resolution was made in October 13, 1947 to confirm the February Resolution:

> *"Recommends Members of the United Nations to continue with unabated energy to carry out their responsibilities as regards the surrender and trial of war criminals ; Recommends Member of the United Nations which desire the surrender of alleged war criminals or traitors - - -"*[103]

As far as international crimes such as war crimes and crimes against humanity are concerned, the duty of extradition has entered the domain of customary law. Since Grotius, the principle of *'aut dere aut judicare'* extradite or prosecute has been developed and included in the Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and several conventions relating to terrorism. This principle has been provided as an instrument to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world.[104]

We have already examined an article which contained the duty of countries to extradite such criminals referred in the Convention on Non-Applicability of Statutory Limitation. The Convention Against Torture and Other Cruel, Inhuman Treatment or

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[103] U.N.Y.B. 1947-48, P222.

[104] Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", California Law Review Vol.78, No.2, 1980, p.464

Punishment also contains the provision concerning extradition.[105] Even if the states in dispute have no extradition treaties, this Convention is considered as the legal basis for extradition.[106] The 1949 Geneva Conventions provide the following duties of countries concerned for the investigation and extradition against the war crimes:

> *"The high contracting parties shall be under the obligation to search for persons to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts - - - hand such persons over for trial to another High Contracting Party - - - "*

Under these Conventions and established customary international law, the duty to legislate in order to punish or extradite criminals in discussion is unconditional and without exception.[107]

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[105] Article 7 of the Convention reads:

1. *The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred in article 4 is found shall- - - if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.*
2. *These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.*

[106] See paragraph II of article 8 of the Convention.

[107] Friedel Weiss, "Time Limits for the Prosecution of Crimes Against International Law", The British YearBook of International Law, 1982, p.193

(3)The Effect of Illegal Transfer of the Criminals

It is imaginable that criminals in question are brought to the court of victimized countries by means of illegal abduction. In fact, many cases brought under the jurisdiction of a certain country in violation of international law can be found.

The most famous one, of course, is the *Ichmann Case* in which Adolf Eichmann was captured in Argentina by Israeli volunteers. The illegal means by which Eichmann was brought to Israeli territory may constitute a violation of Argentina's sovereignty. As the Argentine government submitted a complaint to the Security Council of United Nations concerning the circumstances under which Eichmann had been transferred to Israel, the Council adopted an resolution containing a demand of reparation but ambiguous attitude on the other hand.[108] The Argentine government did not ask for his return and the two governments finally reached an agreement for the case. In its judgement, the Supreme Court of Israel defended the abduction, explaining that

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[108] The Resolution reads as follows:

> " *The Security Council,*
> *Having examined the complaint that the transfer of Adolf Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentine Republic, - - - -*
> *Mindful of the universal condemnation of the persecution of the Jews under the Nazis and of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crime of which he is accused,*
> *Nothing at the same time that this resolution should in no way be interpreted as condoning the odious crimes of which Eichmann is accused, - - -*
> *Expressed the hope the traditionally friendly relations between Argentina and Israel will be advanced.*"

it was firmly established international customary law that the kidnapping of a person in no way affected the jurisdiction of the court to try him once he was before the court.[109]

In fact, the principle which states that a person brought under the jurisdiction of the country in violation of international law can not question the right of the country's court to try him has been repeatedly issued in many cases of the United States.[110]

4-4. The Problem of Investigation and Proof

Because of the elapse of long time after the war, it is extremely perplexing and burdensome problem to get the real picture of the atrocities committed by the Japanese army. With the passage of time, witnesses became unavailable, memories faded and evidence became stale. In addition, It was revealed that Japan had attempted systematically to destroy all of the documents concerning their crimes just before the end of the war, due to a fear of future public revelation of the fact.[111] On the

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[109] Peter Papadatos, The Eichmann Trial, Stvens & Sons, London, 1964, p.61.

[110] In the sense, the decisions of U.S Supreme court, such cases as Ker v.Illinois, 119 U.S. 436, 444(1886) ; Frisbie v.Collins, 342 U.S. 519, 522 (1952), was highly persuasive in Israel. See Gorney, "American Precedent in the Supreme Court of Israel", Harvard Law Review Vol.68, 1955, p.1194

[111] A former Japanese imperial soldier who has served in Tenjin, China confessed that all of the documents and photographs concerning Korean 'comfort women' had been burned by the order of Japanese Army of August 20th, 1945. (The Asahi Shinbun, January 20, 1992 and The Chosun Ilbo, January 21, 1992)

other hand, because these crimes tend to have the peculiarity of being collective, the proof of guilt may not disappear so rapidly and completely.[112] An investigation conducted by Korean officials only four months, from February 25th,1992 to June 25th 1992, revealed that 319 'comfort women' was alive in Korea.[113]

In some countries, investigations have already been launched on the governmental or non-governmental basis, as the 'comfort women' issue prevails on international scene. In South Korea, the Task Force Team for the Issue of 'Comfort Women' was organized, headed by the chief of department of Asia in Ministry of Foreign Affairs. [114] The Japanese government also pretended to inquire into the issue and publicly admitted the involvement of its army in recruiting the 'comfort women'. To our great disappointment, however, it emphasized that the investigation so far had shown no evidence that the government itself forcefully made the women serve Japanese soldiers.

The efforts of non-governmental side are more sincere and persistent. On August 12th and 13th,1992, the 14-member Japanese delegation conducted an investigation in Pyungyang and confirmed the crimes committed by Japan in inflicting all kinds of sufferings upon Korean people after whisking them away in the

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[112] U.N Doc. E/C.4/906, p.91, Consultative Assembly of the Council of Europe, Report on Statutory Limitation as Applicable to Crimes Against Humanity, January 27th 1965, Doc.1968, p.12

[113] Task Force Team of Korean Government for the Issue of 'Comfort Women', Interim Report, July 31th, 1992,p.9

[114] This Task Force Team had made public the result of its investigation on July 31th, 1992. (See Interim Report, supra note 105) The Team promises to keep on investigating and to put pressure on Japanese government to make effort in finding the truth. (The Report, p.16)

name of 'comfort girls', forced labourers, and 'draftees' during the Japanese colonial rule.[115] In addition to existing documents[116] showing the specific situation of comfort women, new proofs such as appearances of witnesses, confessions of the criminals and discoveries of documents are being gathered enough to prove the existence and scale of the crimes. But accumulation on the specific details of individual criminals is the task of future.

4-5. What Should Be Done In Both Japan And Victimized Countries

Above all, the victimized Asian countries must sign and ratify the Convention on Non-Applicability of Statutory Limitations. With the ratification of the Convention, the State Party assumes a duty to adopt all necessary measures to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the war crimes and crimes against humanity.[117]

Secondly, they should also enact a new domestic law which would make it possible to punish those who committed war crimes and crimes against humanity, including not only Japanese

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[115] The People's Korea, August 22-29, 1992, p.6.

[116] The list of existing documents was well arranged in the Group Thinking the Korean Comfort Women Issue (Chosenjin Jugun Ianfu Mondaio Kangeru Kai), Documents Vol.II on Korean Comfort Women Issue, June 1992, pp.53-55.

[117] Article IV of the Convention.

nationals but also the collaborators of their own nationals. Without the punishment of the collaborators residing inside the country, the request of extradition or punishment against Japanese criminals does not seem to take weight. Articles to solve difficulties which might be aroused from procedural and substantial problems must be provided by the law.

In legislating their national legal system, the precedents of Israel, United Kingdom, Germany and Australia, as explained above, may be extraordinarily helpful. It is noteworthy that in a few victimized Asian countries, for instance Singapore, China, there is no statutory limitation in serious crimes as war crimes and crimes against humanity.

This legislation is no more than the realization of the legal ideal of all civilized countries as well as international law . Israeli courts explained the legality of its Nazis Law of 1950 as follows;

> *"The Israeli legislature embodied into domestic law what have long been crimes under the laws of all civilized nations, including the German people, before and after the Nazi regime, while the laws and criminal decrees of Hitler and his regime are no laws and have been set aside with retroactive effect even by the German courts.- - - The extensive measures taken by the Nazis to efface the traces of their crimes, such as the disinterment of the dead bodies of the murdered and their cremation into ashes, and the destruction of the Gestapo archives before the collapse of the Reich, clearly prove that the Nazis knew well the*

criminal character of their enormities."[118]

Even without the ratification of the Convention, we have already reaffirmed that Japan assumes the duty to punish war crimes and crimes against humanity by international law and its constitution. The Japanese government should not delay the legislation which ensures punishment of the crimes in discussion and provides the procedure of extradition any longer. Negligence of meeting such a duty will be under criticism from international community.

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[118] Zad Leavy," The Ichmann Trial and the Role of Law", American Bar Association Journal Vol.48, September 1962, p.823

CHAPTER 5. CONCLUSION

--- The Implication of Suggesting Prosecution of War Criminals and Criminals Against Humanity

Through this rough research, we came to know that it was established customary international law and universal justice satisfying the legal common sense to punish the appalling atrocities committed during and before the World War II without statutory limitations. In western countries, searches and trials of Nazi war criminals have still taken place. It is one of the most conspicuous developments in international law to begin to accept limits on their absolute sovereignty regarding human rights since the World War II.[119] The Japanese government and even the victimized countries in Asia have neglected to implement all the obligations provided by conventional and customary international law.

We cannot find any other reason for Japanese war crimes and crimes against humanity to be treated differently from its western counterparts. Goddess of Justice does not have two faces. Numerous victims in several Asian countries have suffered from unabashed policy of Japan towards its past. More drastic measures, including the punishment of war crimes and crimes against humanity, should be taken not only to relieve the pains of the victims themselves but to share the lesson among Asian peoples generally and their next generation that cruel monstrosity should inevitably be punished.

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[119] Naomi Roht-Arriza, supra note 104, p.462

However, the failure of successful prosecution in the Asian context led to continuous conflict and dispute among the countries and their peoples, even though the diplomatic ties has been established and developed on the governmental basis. Japan has evaded the request of full individual compensation and the question of additional punishment against such crimes, making advantage of the weak position of the governments in victimized countries which had been badly authoritarian or in the urgent need of financial help.

For example, the South Korean Government had made an agreement with Japan on the issue of claims enumerated from the era of Japanese occupation in 1965, suppressing strong protest of its people. Furthermore, the Korean government had failed to purge Korean collaborators who had committed the same crime against their people with Japanese colonists within its territory. It removed the moral and political ground to request the Japanese government to eradicate any war criminals or to punish them. The South Korean government, in fact, has been very reluctant to be aggressive on the issue. Notwithstanding the agreement of the two governments, the question haunted from time to time and troubled them. In a recent state visit to Japan, President Roh Tae Woo expressed his wish that the relations between the two governments would be German-French style and pledged to stick to future instead of past history.[120] Do they really think Japan-Korean relations is the same as German-French which succeeded in achieving peace and stability through liquidation of their past

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[120] The Yomiuri Shinbun, November 9, 1992

and military alliance since World War II?[121] A Japanese newspaper commented afterwards that not mentioning the 'comfort women' issue reflected a 'mature relation'.[122] However, the president had to face very cold response from his people.

> " *It is doubtful that today's Kyoto meeting can be start-point of such relations as German-French. Without the clear settlement of its past, the feeling of friendship can not burgeon. Whatever the real intent of the meeting, the criticism is dominating the atmosphere of Korea.*"[123]

Political leaders in Japan should bear in mind that a true friendship and normalization of its relation with neighbouring countries would be impossible without the complete solution of its past and reconciliation between peoples. Japan is currently seeking the seat of permanent member of the Security Council of U.N and leadership in world politics, equivalent to its economic power. Who will trust and follow the leadership of Japan which has not cleared its image that was tainted with gross violations of human rights? The main reason of why Asians were not able to

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[121] A scholar called Michael Doyle argued that "relations among the Western liberal states have evolved into a situation approximating the pacific union described by Kant." (Kocs, Stepehen Anthony, France, Germany and the Politics of Military Alliance, 1955-1957, Harvard University Ph.D Dissertation, U.M.I, 1988, p.5) It goes without saying that EC whose character is supranational regional unity was established on the basis of this kind of trust and co-operation.

[122] The Asahi Shinbun, November 9, 1992

[123] The Chosun Ilbo, November 10, 1992

establish their regional unity and develop regional instrument for human rights as was common to Europe, America and Africa, originated from distrust and conflict.[124]

The real intention of this argument concerning the punishment of war criminals does not rest with the idea of paying off old scores. It is undesirable to demand and proceed the punishment with the feeling of reprisal or revenge. It can be another wrongdoing of history and cannot attract hearty consent from Japan and Japanese war criminals. Furthermore there must be few persons alive who can be brought to the court after so long a time. In the sense, the punishment of Japanese war crimes and crimes against humanity at this time has very limited but extraordinary symbolic meaning.

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[124] Won-Soon Park, The Role of NGOs for Human Rights in Asian Countries, A Thesis Submitted for the Degree of Diploma in International Law of the London School of Economics, 1992, p55-60