

Chapter Seven

Position of the Japanese Government

An Overview of Japan's Statements

When the issue of comfort women was raised in the Diet in 1990, the Japanese Government's reaction was that it was the work of private persons and that neither the Japanese military nor the then government were involved.

When Professor Yoshimi of Chuo University, Japan, unearthed and made public wartime correspondence which unequivocally showed Japan's initiative and control in setting up, using and operating the comfort stations, the Japanese Government's reaction was that there was some involvement of the Japanese military. The Japanese Government appointed a Task Force to investigate the issue, and published an interim report which did not ascribe full responsibility to the Japanese military in this matter. In the most crucial area - recruitment of the comfort women - the report was non-committal. This led the Japanese Government to proclaim that the military had not used coercion to recruit the women.

When the comfort women issue was raised before the various organs of the United Nations, the Japanese Government put forward submissions as to why no action should be taken against it. These submissions were repeated from 1991 until 1993. In brief, the position of the Japanese Government has been as follows:

- i. It has stated that the purpose of the United Nations, which is clearly set out in the Preamble of the Charter of the United Nations, is to save succeeding generations from the scourge of war. The United Nations is thus not an organ for discussing past issues of particular countries, especially those which occurred before its establishment.

- ii. It claims that the mandate given to the Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms does not include in its scope recommendations on individual cases/claims for compensation.
- iii. It argues that the 1503 procedure¹, as discussed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in Resolution 1991/104, cannot be applied as a reparation or relief mechanism in respect of the claims for compensation for human rights suffering or other losses which occurred during World War II.
- iv. It seeks to argue that the claims, including the question of compensation, have been dealt with by Japan, in accordance with bilateral and multilateral peace treaties, as well as other relevant treaties, with the countries concerned. As an example, it cites the 1965 Treaty with the Republic of Korea which purportedly resolves all claims between the two countries. It states that talks are going on with the Democratic People's Republic of Korea.
- v. It argues that it is neither the understanding of the International Law Commission nor of the international community that the 1905 Agreement between Japan and Korea (by which Korea became a protectorate of Japan) is invalid.
- vi. It says that the Japanese Government is doing its utmost to ascertain the true facts of this matter. It says that apart from the legal aspects of the issue, the Government of Japan is now giving serious thought as to how it might

¹ Under the 1503 procedure, allegations concerning "situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights" are dealt with in closed sessions of the Commission on Human Rights and the Sub-Commission.

best convey its feelings of compassion to those who suffered.

The Japanese Prime Minister has also tendered an apology for what has been done to Korea and has expressed "pain and remorse" for the situation of the comfort women.²

Position Presented to the ICJ Mission by Japan

In Japan, the ICJ mission met with Mr. Takano, Deputy Director-General, Asian Affairs Bureau, Ministry of Foreign Affairs and Mr. Arata Fujii, Deputy-Director, North-East Asia Division, Asian Affairs Bureau, Ministry of Foreign Affairs.

The Asian Affairs Bureau is responsible for heading the Government Task Force on the issue of the comfort women and is overseeing the government's attempts to locate and publish all relevant documents.

At the time of the meeting, the Task Force had published one report and was intending to continue to survey all relevant documents. It is the government's intention to make public what they have learned, but during the meeting Mr. Takano was unwilling to disclose what further information had been obtained by the task force since the government's publication of its report in July 1992.

It continues to be the government's position that it is under no legal duty to compensate the Korean and Filipina victims, as treaties with each of their countries "finally and completely" settled all claims. Mr. Takano also declined to admit that the government of the day had actually sanctioned the use of the comfort stations. He did say that there was evidence of the military having constructed such houses, having bought supplies and having provided support for such facilities, including the control of sanitary conditions.

Although it is the government's position that the use of force has not been decisively concluded, it has accepted that a number of the

² *Supra* n. 2, in Chapter 2 above.

documents revealed thus far show that force was used. In its statements on this matter the Japanese Government has recognized that force and threats were directed against some women, but has not taken a final position on the matter. The government was not claiming that all of the women had entered the comfort stations voluntarily.

Having said that his government did not believe it was under a legal responsibility to offer compensation, he pointed out that the government had expressed its remorse about these occurrences, and would consider possible measures to show that remorse. No specific measures had been finalized. Although recognizing that time was a matter of great concern, given the ages of the women, he would not make a commitment to a specific date by which the Japanese Government would decide on the appropriate measures to be taken; however, he did say this would be done as soon as possible.

When asked about the possibility of using an administrative framework, he said that this would be given consideration, but there was a need to work out a process by which the credibility of all witnesses could be judged and through which a reliable assessment of the situation could be made. He also pointed out that the task was a large one and that the government had conducted an overall survey of documents so that it could assess what had happened and could obtain facts directly related to individual cases. He said that documents from both Japan and elsewhere were coming to light daily, but as these were matters that had occurred fifty years ago it was difficult to amass an accurate description of the entire picture.

When questioned about the possibility of separating the issues of research into the general situation of the comfort women and that of compensation for the individual victims who have already come forward, he indicated that he could see that those issues could logically be separated but that in reality, for political reasons, they were very closely connected. He suggested that it was difficult to deal with five separate countries and the Japanese Government faced problems in finding a solution that would be appropriate to each of these countries, given each country's culture and difference in approach.

It is the government's view that the "real facts" must be established.

At this point in the interview Mr. Takano had to leave for another appointment and Mr. Fujii took over as spokesperson.

The conversation returned to the issue of the treaties and particularly the treaty between the Republic of Korea and Japan. Although he admitted that the issue of the comfort women had not been discussed during the negotiations over that treaty, Mr. Fujii reiterated that it was his government's position that all such claims were subsumed within the treaty. He stated, as had Mr. Takano, that politically the Government of Japan recognized that it should provide some form of humanitarian compensation, which it considered to be a voluntary measure on its part. He also referred to the position of the Korean Government, which had stated that it would not require compensation from the Japanese Government. (This position was confirmed when the members of the mission spoke to a representative of the South Korean Government during its stay in Seoul, but ignores the position taken by the victims and organizations working most closely with them.) Mr. Fujii stated that it was his government's understanding that the Government of the Republic of Korea wanted a sincere investigation and a disclosure of all relevant facts. He recognized that in the discussions between governments, it was not always easy for individuals to be heard. He suggested that the victims would not be satisfied with measures such as compensation that were not accompanied by a full investigation. He seemed to be suggesting that to pay compensation while undertaking to complete the report would not be an acceptable solution.

Returning to the legal issues, he again reiterated that, in his view, it was possible that all claims, even those not being contemplated by the negotiating parties, could be settled by broad language within a treaty and that the concept of property rights and interests contained in the 1965 treaty between Japan and Korea could include issues that had not been imagined at the time that treaty was negotiated.³ He also thought that it was possible that the Koreans had not raised the issue at the time

3 See Chapter 9 for a full analysis of the legal issues.

because they thought it shameful.

He again emphasized that there was a distinction between a legal position and a moral position. The Japanese Government recognized that such behaviour and actions should not be repeated. His government also recognized the misery that had been experienced by the women both at the time and on their return to their countries of origin.

When questioned about the possibility of reopening the treaty or having its provisions interpreted before the International Court of Justice, he stated that in his view neither government wished this to occur and therefore it would not be possible. With respect to the Democratic People's Republic of Korea he indicated that "normalization talks" were taking place and that these talks did include the issue of the comfort women. As to Taiwan, there was no treaty between Japan and Taiwan as negotiations had ceased when Japan recognized the Government of the People's Republic of China and that, given Japan's relationship with China, it was difficult to find a solution. However, this issue was being considered by the Japanese Government. When questioned about the report made by Professor Theo van Boven on the right of victims to restitution, the government representative indicated that no formal view with respect to this issue had been taken on the contents of that report.

In respect of the issue of compensation, he stated that he was not convinced that traditional international law gave the right to seek compensation, saying that the area of international human rights law was new. In his view it was not clear whether a right to sue on behalf of these women could arise under international human rights law.

When questioned about some of the records that were being looked into by the Japanese Government, he stated that all departments that had had any possible connection with the establishment or operation of the comfort stations had been ordered to search for relevant documents. These included the Police Department and Department of Labour, both of which indicated that they have no documents relevant to the issue of the comfort women.

Although many lawyers and scholars in Japan have made the

comparison between the compensation paid thus far by the Japanese Government and that by the Government of Germany (most of which was paid by the Federal Republic of Germany when Germany was a divided country), he refused to engage in the comparison and would not state which programme of compensation was better or worse. Again there was no concrete information given as to when the second government report might be published.⁴ However, it was reiterated to the ICJ mission that the government did want to do something for the victims.

4 Published in August 1993.

Chapter Eight

Position of the Governments of the Republic of Korea, the Democratic People's Republic of Korea and the Philippines

The Position Presented to the ICJ Mission by the Government Representatives:

The Republic of Korea

From the government's perspective, the most important issues are that Japan undertake a thorough investigation and sincerely and comprehensively apologize. It is important to the Government of the Republic of Korea that Japan acknowledge its past mistakes and demonstrate its commitment to future peaceful and mutually beneficial relations.

The South Korean Government wants Japan to trace all those responsible for committing these atrocities and make them testify. Apparently the Japanese Government did contemplate taking the testimony of the former soldiers while conducting its investigations into this issue, but did not do so because of opposition from members of its right wing.

The South Korean Government has formed its own committee to investigate and deal with this issue. This committee has so far received 150 claims and it has announced compensation for the victims. The bill was passed by the Cabinet, and will be debated before Parliament. It will be effective from July 1993. It consists of giving each victim a lump sum of 5 million South Korean won (US \$ 6,250), an additional sum of 150,000 won (US \$ 188) per month, free medical services, priority in allotment of low-income housing, and access to the

social security system by those who have no other means of support. A screening procedure will be put in place to handle claims and victims designated as "lowest income persons" will receive an additional sum of 56,000 won (US \$ 70) per month.

The South Korean Government is not advocating strenuously for compensation; the reasons for this are varied and complex. They do not feel that money alone is a solution and do not want Japan to conclude that it can purchase goodwill. The government fears that the victims will be considered as professional prostitutes if compensation is paid without acknowledgement of the true facts. Public opinion in their country, according to them, supports their view. It is important that all Koreans share responsibility for the plight of these women.

If the Japanese Government or the Japanese people decide to pay compensation, the government will not prevent individuals from receiving such compensation. The government, however, will not allow that to be a solution of this issue. The Japanese are willing to give a small amount of money to the victims but money is not a sufficient solution. Previous Japanese payments on other issues are viewed as having been 'tied money', payments with conditions, and it is their view that 'tied money' will create problems for them and the victims. The government will assist NGOs in this issue. The representative refused to make any comment on the proposal of the Japanese, as reported in Japanese newspapers, to pay compensation by creating a Red Cross Fund for victims.

The meeting was held with Mr. Byung-Woo Yu, Director General, Asian Affairs Bureau, Ministry of Foreign Affairs, Seoul, Republic of Korea.

Democratic People's Republic of Korea

The government emphasized that Japan has not 'liquidated its shameful past'. Japan and the Democratic People's Republic of Korea have not as yet 'normalized' relations and this issue is one amongst others that must be solved through negotiations

between the two countries. Eight rounds of talks have been held between the two governments so far. The Government of the Democratic People's Republic of Korea has demanded a satisfactory solution of the issues of forced labour, comfort women, and victims of the Pacific war. Japan's proposals have centred around the payment of money without any specific recognition of the violations of human rights it perpetrated and it has proposed to solve these issues in the same way it did with the Republic of Korea in 1965.

As the 1965 treaty with the Republic of Korea does not include an apology from Japan, the Government of the Democratic People's Republic of Korea maintains that it cannot accept a solution to these problems in that way. At the bilateral talks, Japan said that the colonization of Korea was legal and denied it violated international law with respect to the comfort women issue or the use of forced labour. The Government of the Democratic People's Republic of Korea feels that these atrocities are violations of fundamental human rights norms which now have the status of *jus cogens*.

Crucial to a resolution of these matters is an apology by Japan and adequate compensation. From the outset of the talks, the government raised the issue of the comfort women. From the 1st to the 6th round of talks, Japan ignored the issue. It denied that there was any government involvement.

After the research of Prof. Yoshimi brought documents to light, Japan admitted its involvement. It has, however, evaded an honest apology and payment of compensation. There has been no progress in these talks.

The Government of the Democratic People's Republic of Korea demands a thorough investigation, publication of the results, an apology by Japan, and compensation. It demands that individuals as well as the people of the Democratic People's Republic of Korea as a whole should be compensated by Japan. This is important, as most of the victims are now dead. How do you resolve the issue for all those affected, given that 100,000 to

200,000 women were taken?

The amount of compensation finds precedent in the amounts paid by Germany for its war crimes and crimes against humanity, and the apologies made and compensation given by the United States of America and Canada to civilian internees.

They believe that Japan is recalcitrant. It took Japan half a century to admit its involvement - they hope that it will not take so long for Japan to make reparations.

Japan is talking of its contribution to world peace and security. Their self-defence corps is to be sent overseas and the Democratic People's Republic of Korea fears that there is no guarantee that the crimes will not be repeated again.

From the government's viewpoint this is not an easy issue to solve at a governmental level. They feel that the voice of international justice will have a salutary effect on Japan.

The Government of the Democratic People's Republic of Korea has formed a Measures Committee to locate any former comfort women survivors and to investigate their statements. Due to the sensitive nature of the issue within the Democratic People's Republic of Korea and the difficulty of locating survivors as well as establishing documentary evidence, the work of the Measures Committee is not as complete as the government would like it to be.

The meeting was held with Mr. Li Sam Ro, Ambassador, Ministry of Foreign Affairs, Democratic People's Republic of Korea.

The Philippines

When the issue was raised in 1992, the Aquino Government asked Professor José Ricardo to investigate the comfort women issue. Professor Ricardo in his report concluded that there were no Filipino comfort women. However, in the light of documents disclosed by the Japanese Government, the Government of the

Philippines has had to retract its initial stand. A government Task Force for Comfort Women (TFCW) was formed in response to a resolution of the Senate and it is looking into the matter.

The government regrets that it is unable to offer a compensation package similar to that of the South Korean Government. However, the government continues to engage in a quiet dialogue with Japan. Many facts need to be clarified, including the number of women involved. As Japan is likely to focus on all countries from which women were taken, numbers from each country have to be ascertained, especially the number of Korean and Chinese women. The government did not have any comment to offer about the Treaty of Peace with Japan, but candidly admitted that the comfort women issue was never raised by any side at that time.

The government has been gathering documents from Washington and Tokyo. Some of these documents contain the names of women taken by Japanese soldiers. The government representative was aware that more research was necessary with respect to files held in the Philippines and was receptive to the idea that an approach be made to the UN Advisory Services Programme in the field of human rights.

The government has also made it clear to the Japanese Government that any settlement of compensation on this issue would be outside the scope of Japan's Official Development Assistance.

The NGOs in the Philippines have asked the government for help, and the government was more than willing to cooperate. It confirms the accuracy of the information about the comfort women and comfort stations that have been unearthed by the NGO called Task Force on Filipino Comfort Women (TFFCW).

The government is willing to offer assistance to the non-governmental sector, having regard to the limits of its resources. Some social security assistance has been given to some of the

women. The government recognizes that it may have to do more to encourage women to come forward and to provide them with necessary services.

The meeting was held with Mr. Jose Zaide, Assistant Secretary of the Office of Asian and Pacific Affairs, Department of Foreign Affairs.

Chapter Nine

Legal Issues

Introduction

In the following pages the rules of international law that were applicable to Japan from the 1920s onwards will be discussed. This period has been selected as the documentary and oral evidence suggests that Japan began to recruit women forcibly for sexual slavery sometime in the early part of the 1930s.

First and foremost, Japan as a subject of international law is responsible for all the breaches of applicable rules of humanitarian law imputable to it. It is hereafter discussed which rules of humanitarian law are applicable to the occurrences described and what role the peace treaties concluded between Japan and the Republic of Korea and Japan and the Republic of the Philippines play in this connection. The next issue considered is whether the authors of the crimes can and must be prosecuted and the impact of non-prosecution of the authors of the crimes on the legal rights of the victims. Lastly, issues pertaining to the existence of individual claims for compensation are reviewed.

A. State responsibility on the part of Japan

In the first part of this chapter, the question concerning Japan's responsibility for the abhorrent acts committed by Japanese soldiers will be considered. Among those are the imputability of the acts of the Japanese soldiers to the State of Japan, the issue of breaches of obligations of public international law, and whether any claim that may have arisen has at a later stage become extinct.

1. Imputability of the acts of the Japanese soldiers to the State of Japan

The acts of the Japanese soldiers have to be attributed to the Japanese State according to the relevant rules of public international law. Documents obtained by the mission of the International Commission of Jurists contain special requests made by field officers to commanders in Tokyo for the recruitment and transportation of the comfort women to their areas. This evidence demonstrates the knowledge on the part of high-ranking members of the military of the existence of comfort stations and at the same time shows their active involvement in the recruitment and placement of women in those stations.

As those officers acted as officials, not as private individuals, their actions must be imputed to the Japanese State irrespective of the fact that they may have been *ultra vires*.¹

2. Breach of an obligation of public international law

Obligations within the field of public international law can result either from treaties or rules of customary international law.

(a) Treaty Law

First, the violation of obligations resulting from treaties are reviewed.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949² is not applicable *ratione temporis* to the acts committed by the Japanese soldiers.

1 L. Oppenheim, H. Lauterpacht, *International Law*, vol. i, (Longmans, Green and Co., London, New York, Toronto 1955), paras. 153, 153a. Article 5 of the International Law Commission's Draft Articles on State Responsibility adopts the test that the organ of the State must have acted in that capacity, See YBILC, 1976, ii Part 2 at 30.

2 United Nations Treaty Series, vol. 75 at 287.

Japan became a party to the Hague Convention Respecting the Laws and Customs of War on Land of 1907 (The Hague Regulations)³ in 1912. According to Article 2 of the Convention, the Regulations are only applicable, however, if all of the belligerents are parties to the Convention (general participation clause). Since not all belligerents of the Second World War were parties to the Convention, the Nuremberg Tribunal⁴ as well as the Tokyo Tribunal⁵ ruled that because of the general participation clause, the Hague Regulations could not be applied directly, but served as good evidence of the customary international law existing at the time of war.

Since Japan was not a signatory to the Slavery Convention of 1926⁶, it cannot be held responsible for breaching any obligations under this Convention in respect of the comfort women.

Japan can be held responsible for a breach of the International Convention for the Suppression of the Traffic in Women and Children of 1921⁷, which it ratified in 1925. Under the terms of the Convention Japan was obliged to take all steps necessary to discover and prosecute persons who were engaged in the traffic of women and children.⁸ Clearly, Japan's activity of forcibly recruiting and coercing into prostitution women from the Korean peninsula as well as women in the occupied territories was inconsistent with the provisions of the Convention. However, upon ratification Japan exercised its prerogative under Article 14 to declare that the Territory of Chosun (now Korea) was not included in the scope *ratione territorii* of its acceptance of the Convention. Nonetheless, Japan must be held responsible for having violated its obligations under the Convention with respect to women

3 *Martens, NRG (3e serie), vol. 3 at 461.

4 Judgement of the Tribunal, Cmd.6964, pp. 64, 125

5 The Tokyo War Crimes Trial, annotated and edited by R.J.Pritchard and S.M. Zaide, Vol.20, "Judgement and Annexes" (Garland Publishing Inc. New York and London, 1981) at 48, 498

6 League of Nations Treaty Series, vol. 60 at 253

7 League of Nations Treaty Series, vol. 9 at 415

8 See Articles 2 and 3 of the Convention on the Suppression of the Traffic in Women and Children.

taken from the Korean peninsula for the following reasons: Firstly, many of the women were initially taken to Japan and once they landed in that country the obligations of the Convention became applicable to them. Furthermore, the provisions under Article 14, which allowed countries to make the provisions of the Convention inapplicable in their territories, was inserted because of concern about practices which had continued as a local custom in many territories controlled by the then colonial powers. Such practices included the payment of dowry and "bride price". It was not viewed appropriate to attempt to solve all of these issues by means of the Convention. However, it was not the intent of the drafters of the Convention to allow countries to engage in the practice of creating and fostering trafficking in women. Article 14 was inserted to protect, to some extent, the economic interests of a number of the colonial powers, it was not designed to foster the future creation of a traffic in women, but served to allow a slower phasing out of the practice in certain areas of the world. Therefore Japan cannot invoke that provision to escape its liability for the treatment given by it to the Korean women under the Convention. Thus, Japan has violated its obligations under the 1921 Convention and can be held responsible for the same.

As Japan is not a party to the 1933 Convention on the Suppression of Traffic in Women of Full Age⁹, it cannot be held responsible for a violation of that treaty.

(b) Customary Law

Having established which treaty obligations Japan violated, it now has to be examined whether it as well violated its obligations under customary international law.

At the beginning of the 20th century it was generally accepted that customary international law prohibited the practice of slavery and that all nations were under a duty to prohibit the slave trade.¹⁰ In that

⁹ League of Nations Treaty Series, vol. 150 at 431.

¹⁰ H. Lauterpacht, *International Law and Human Rights*, (London, Stevens & Sons Ltd. 1950) at 334-335; A.M. Trebilock, *Slavery* in: R. Bernhardt (ed.): *Encyclopedia of Public International Law*, Instalment 8 (North-Holland, Amsterdam, New York, Oxford, 1985) at 482-483.

regard the work of the League of Nations provides evidence that the 1926 Slavery Convention was declaratory of international customary law. Article 22 (5) of the Covenant of the League of Nations required States administering a mandate to provide for the eventual emancipation of slaves, suppress the slave trade and prohibit forced labour.¹¹ In addition, in 1924 the Temporary Slavery Commission was instituted by the Council of the League of Nations. The efforts of that Commission led to the Slavery Convention of 1926. In order to monitor the implementation of that Convention, the Permanent Advisory Committee of Experts on Slavery was instituted.

Article 1 of the 1926 Slavery Convention sets out the following generally recognized definition of slavery and the slave trade:

"(1) Slavery is the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised. (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with the intent to reduce him to slavery ..., and, in general, every act of trade or transport in slaves."

Once the women concerned had been taken away from their families and villages the military acted as if it owned the women. Thus they treated them as slaves. In addition, the kidnapping and transportation of the women, which was condoned, authorized, or supervised by the Japanese military, was a form of slave trade. In that respect, Japan violated the prohibition of slavery which was already a constituent part of public international law. This violation gives rise to responsibility on the part of Japan.

By the time the Japanese soldiers forcibly recruited the Korean and Filipino women, the prohibition of traffic in women and children was part of customary international law.¹² Thus, in addition to the

¹¹ CTS, vol. 225 at 188.

¹² See Report of the Sixth Committee to the Assembly of the League of Nations in 1926, *League of Nations Official Journal*, Special Supplement No. 44 at 416.

aforementioned 1921 Treaty prohibiting the traffic in women and children, Japan was also bound by identical provisions of customary international law. Therefore, by the conduct of the Japanese soldiers, who were promoting and themselves actively engaging in the traffic and sale of women, Japan was in violation of those norms of international law as well.

Customary international law in the humanitarian sector requires the belligerents to respect the lives of civilians. In that respect, the Hague Regulations (Article 46) reflect customary international law.¹³ The treatment of the comfort women by the Japanese soldiers violated their family honour as protected by Article 46 of the Hague Regulations. The concept of family honour includes the right of women in a family not to be subjected to the humiliating practice of rape.¹⁴ There can be little doubt that the systematic raping of Filipino women by the Japanese soldiers infringed these norms.

By their way of treating the Filipino women, the Japanese soldiers revealed disregard for the women's lives, so that Article 46 of the Hague Regulations must be considered violated in that respect as well. The term "respect for the lives of persons" in Article 46 is broader than a prohibition of arbitrary killing.¹⁵ The importance of human dignity and the need to encourage respect for human dignity were also recognized by the drafters of the Hague Convention.¹⁶ Thus, the reference to "the lives of persons" is a reference not only to their life as

13 L. Oppenheim, H. Lauterpacht, *International Law*, vol. ii, 7th.ed.(Longmans, Green and Co., London 1952) at 229, 335; G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, vol. ii, (Stevens & Sons Ltd., London 1968) at 218; Judgement of the Nuremberg International Military Tribunal, Cmd. 6964 at 64, 125; Judgement of the International Military Tribunal for the Far East, War Crimes Reports, 15 (1949) at 13.

14 G. Schwarzenberger, *supra* n. 13 at 219.

15 J. Pictet, *Humanitarian Law in Armed Conflict*, (A. W. Sijthoff, Leyden, 1975) at 122.

16 See A. Mechelynck, *La Convention de La Haye Concernant les Lois et Coûtumes de la Guerre sur Terre*, (Maison d'Éditions et d'Impressions, Gand 1915) at 350 *et seq.*

such but also to their dignity as human beings.¹⁷ The continual brutality of the Japanese soldiers towards the Filipino women, including the continual rapes which they had to endure, was an affront to their human dignity. Hence, with regard to the Filipino women, Article 46 of the Hague Regulations was infringed entailing responsibility on the part of Japan.

However, as Korea was at that time a colony of Japan, Article 46 of the Hague Regulations as the basis of the relevant customary international law did not apply to it. Articles 42 *et seq.* only refer to occupied or enemy territory, whereas they do not regulate the protection of the belligerents' own inhabitants, as in the case of the Koreans. Thus, in this respect the Hague Convention cannot be invoked to prove the existence of a parallel norm of customary international law. Generally, public international law in the humanitarian field **in those days did not contain any rule** stating how governments had to deal with their own citizens. This issue was completely left to domestic law.¹⁸

As explained hereinabove, the treatment of the comfort women by the Japanese soldiers violated the women's family honour as protected by customary international law. The concept which requires belligerents to respect family honour is part of customary international law.¹⁹ It has been incorporated in various ways in almost all instruments, both national and international, concerning the conduct of hostilities, since the "Ordinance for the Government of the Army" published by Richard II of England in 1386. The respective guarantee includes as a minimum the right of women not to be subjected to the humiliating practice of rape. Thus, through the treatment by the Japanese soldiers, the victims' family honour was seriously infringed. Therefore, Japan is further

17 Pictet, *supra* n. 15 at 122.

18 K. J. Partsch, *Human Rights and Humanitarian Law* in: R. Bernhardt (ed.), *supra* note 10, Instalment 8 (1985) at 292.

19 Schwarzenberger, *supra* n. 13 at 218.

liable on this additional ground to make reparation to the Filipino women.

3. Possible Impact of The Treaties for The Settlement of Claims

a) *The 1965 Agreement on the Settlement of Problems Concerning Property and Claims Between Japan and the Republic of Korea.*

It is often said that history repeats itself and in an ironic twist of fate, Japan is now using arguments against the comfort women, similar to those they used during the negotiations leading to the signing of the 1965 Agreement, in order to prevent inclusion of any claims for reparation concerning their activities in the Korean peninsula prior to the Second World War. Contrary to Japan's assertions domestically and internationally, that treaty does not and was never intended to include claims made by individuals or on behalf of individuals for inhumane treatment suffered during the period of Japanese colonial rule of Korea.²⁰

Japan has claimed that there is no legal basis for compelling it to provide compensation to the former comfort women. This position has two prongs, one, that the 1965 Agreement resolved all claims between the two countries including their peoples; and two, that international law did not give rise to any such claims. This latter assertion has been refuted earlier. We now consider the first assertion that the treaty was intended to cover all claims.

Japan's position concerning the 1965 Agreement relies on the language used in Article II, which reads as follows:

"(1) The Contracting Parties confirm that [the] problem concerning property, rights and interests of the two

20 See Shigeru Oda, "The Normalisation of Relations Between Japan and the Republic of Korea", [1967] 61 Am. J. of Int'l Law 35.

Contracting Parties and their nationals (including juridical persons) and **concerning claims** between the Contracting Parties and their nationals, including those provided for in Article IV paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally."²¹ (emphasis added)

(There are exceptions to this statement which are relevant to the Korean women at present residing in Japan, as it excludes from the coverage of the treaty those who were residing in the other country from 15 August 1947 onward.)

Japan has chosen to rely on the word "claims" in the first paragraph, as it could not rely on the phrase "property, rights and interests", as that phrase is defined in the agreed minutes to the agreement as "all kinds of substantial rights which are recognized under law to be of property value". As the women's claims are equivalent to claims in tort, it cannot be said that they have a property value. It is generally understood that claims in tort are not considered to be property until such time as a judgement is rendered.

The word "claims" is not defined in the Agreed Minutes or in any of the protocols to the Agreement. Although Korea had attempted from 1945 onwards to have Japan recognize the sufferings and indignities it had wrought on the Korean peninsula during its colonial occupation, Japan had steadfastly refused to do so²² During negotiations Korea attempted to seek reparation, but eventually withdrew such a claim because of the strong Japanese opposition.²³ Japan had taken the position that "she would be prepared to compensate the claims of the Republic of Korea, insofar as they were based upon justifiable legal

21 United Nations Treaty Series Vol. 583, No. 8473, p.258: Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea, signed at Tokyo on 22 June 1965.

22 See Lee, Chong-sik, *supra* n. 1 of Chapter 2 of this report.

23 Oda, *supra* n. 20 at 46.

grounds,"²⁴ but in the end rejected all claims having to do with reparations.²⁵ The outline of claims presented by the Korean representatives to Japan and which we believe are being referred to in Article II are in respect of bullion transferred to Japan for the period 1909-1945, savings deposited at post offices in Korea by Korean workers²⁶, savings taken by Japanese nationals from banks in Korea and monies transferred to Korea from 1945 onward, property in Japan possessed by "juristic persons" which had their main office in Korea, debts claimed by Koreans against the Government of Japan or Japanese nationals in terms of negotiable instruments, currencies, unpaid salaries of drafted Korean workers, and the property of the Tokyo office of the Governor-General of Korea.²⁷ It is quite clear from this list of claims that nothing in the negotiations concerns violations of individual rights resulting from war crimes, crimes against humanity, breaches of the slavery convention, the convention against the traffic in women or customary norms of international law. In fact, it was the enormous gulf between the positions of Japan and the Republic of Korea with respect to Japan's colonial rule which caused the negotiations between the two countries to drag on over an eighteen year period.

Treaties are to be interpreted according to the logical construction of their provisions, using the ordinary meaning of the words contained in the treaty. In addition weight is to be given to the context of a particular article in a treaty as well as the intention of the parties.²⁸ All of the provisions in the 1965 Agreement concern either the disposition

24 Oda, *supra* n. 20 at 46.

25 *Id* at 47.

26 The work done by the Committee for Fact Finding about the Truth of Forced Korean Labour as well as the report of the JCLU demonstrate that at the close of the war, large sums of money were held by the Japanese postal service on behalf of those who had been conscripted into labour in Japan.

27 Oda, *supra* n. 20 at 46.

28 Pertusola (Decision No.95 of 8 March 1951), 13 Reports of International Arbitral Awards 174 at 179.

of property or the regulation of commercial relations between the two countries, including the settlement of debts. Bearing in mind that one of the purposes behind the treaty was to create a foundation for future economic cooperation between the two countries, it is not odd that this should have been the main thrust of the treaty. The word "claims" in the context of this treaty cannot be given as broad a reading as Japan would urge. Therefore, it is our conclusion that the 1965 Agreement cannot be relied upon by Japan to shield itself from claims by the comfort women of the Republic of Korea.

By contrast, under Article IV of the Treaty on Basic Relations Between Japan and the Republic of Korea²⁹, Japan seems in fact to have obligated itself to take all steps necessary to promote the human rights of these women. Pursuant to that article, Japan has undertaken to be "guided by the principles of the Charter of the United Nations in [her] relations" as well as to "cooperate in conformity with the principles of the Charter of the United Nations in promoting [the] mutual welfare and common interests" of the two countries.³⁰ Article 1, paragraph 3 of the Charter of the United Nations includes international cooperation for the purpose of developing and encouraging respect for human rights and fundamental freedoms. As the former Japanese Government was responsible for massive violations of the human rights of these women, it is incumbent upon the present government to take steps to make retribution for those violations and not to perpetrate further violations by denying the victims any effective redress for their grievances.

b) The Treaty of San Francisco and the 1956 Reparations Treaty

The position between the Philippines and Japan is somewhat different. The Philippines, unlike the Republic of Korea, was present during the negotiations for and the signing of the San Francisco Peace Treaty in 1951. During those negotiations the Philippines indicated its

29 Of 22 June 1956, United Nations Treaty Series, Vol. 583, No. 8471, p. 44

30 Oda, *supra* n. 20 at 42-43.

dissatisfaction with the discussions on the issue of reparations. It felt that Japan should be made to pay reparations for the damage and destruction caused by its occupation of the Philippines.³¹ For a number of reasons the issue of reparations was not dealt with in any effective way during the negotiations which led to the signing of the Treaty. Commentators have noted that the United States was concerned that its taxpayers would be funding the reparations, as it headed the Allied command in Japan, and that the Allies were keen to have Japan remain a viable economic power so as to act as a bulwark against China.³² As a consequence, an article was inserted into the Treaty to give recognition to the fact that Japan had an obligation to pay reparations but that it was at that time unable to do so. The text of Article 14, paragraph (a), starts with the following proviso:

“It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.”³³

Japan also agreed to undertake negotiations with any of the Allied Powers whose territories it had occupied during the war with a view “to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question.”³⁴

At the time the drafters understood this article to mean that Japan

31 Notes, *An Introduction to the Japanese Peace Treaty and Allied Documents*, [1951] 40 Georgetown L. J. 91 at 93.

32 See The Tokyo War Crimes Trial, *supra* n. 5, Vol I; Oda, *supra* n. 20 and Lee, *supra* n. 1 of Chapter 2 of this report.

33 United Nations Treaty Series, Vol. 136, No. 1832, p. 46, Treaty of Peace with Japan, signed at San Francisco on 8 September 1951.

34 *Id* at Article 14 (a) (1).

recognized its duty to make complete reparations, that it was in fact unable to do so but that it might in future be obliged to make further reparations.³⁵

The provisions set out in Article 14, paragraph (b) of the 1951 San Francisco Treaty, also do not specify which claims were being waived - it reads thus: “Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation”.

The Government of the Philippines remained dissatisfied with this conclusion and did not immediately ratify the Treaty of San Francisco. Further negotiations were conducted between the Philippines and Japan, which resulted in a reparations agreement signed by the two countries in May of 1956; it was at this point that the Philippines ratified the Treaty of San Francisco. The 1956 agreement obligates Japan to provide services and capital goods to the Republic of the Philippines; there is no obligation for a transfer of money.³⁶ The agreement does not set out the damage for which reparations are being paid.

In Article 6, paragraph 2, the parties agreed: “By and upon making a payment in yen under the preceding paragraph, Japan shall be deemed to have supplied the Republic of the Philippines with the services and products thus paid for and shall be released from its reparations obligations to the extent of the equivalent value in United States dollars of such yen payment in accordance with Articles 1 and 2 of the present Agreement.”

35 Sinco, V. G., (1952) 27 Phil. L. J. 367; and Oda *supra* n. 20.

36 Article 1, Philippines and Japan Reparations Agreement, United Nations Treaty Series, Vol. 285, No. 4148, p. 24.

Because of the lack of specificity in the agreement, it is difficult to determine what issues were raised on the part of the Philippines and considered to be included in the reparations agreement. It cannot therefore be assumed that the claims of the women forcibly taken and raped by the Japanese and used as comfort women are deemed to be included in the treaty. The jurisprudence created following World War I indicated that reparations could be due and owing to governments as well as to individuals. Reparations paid to governments are paid on behalf of an entire people because of damage caused to their country as a whole. Claims of individuals are based on the particular damage they have suffered.³⁷

No evidence is available to indicate that the right of individuals to seek compensation for injury intrinsic to them as human beings, was waived or given up. Hence, having regard to the context of the negotiations and the historical development of the treaty as well as the serious consequences that may ensue from a conclusion of waiver based on such inadequate evidence, it would be inappropriate to conclude that the Government of the Philippines, when signing this treaty, intended to deprive any of its citizens of a right to sue the Japanese Government in a court in Japan for violations of international law committed against them, or that it intended to prevent its citizens from seeking redress in the international arena.

This argument is strengthened by the view in international law that a treaty may be subordinate to consensual *jus cogens* laid down in other treaties. The Charter of the United Nations is considered to have created such consensual *jus cogens*.³⁸ By the time the 1956 Agreement had been signed, Japan had become a member State of the United Nations and therefore was subject to the Charter of the United Nations and the peremptory norms it contained. The Universal Declaration of Human Rights reiterated the right to an effective remedy; this document was deemed to be declaratory of international norms and its

37 Chorzow Factory (Merits) P.C.I.J., Ser.A., no.17, p.29.

38 See Schwarzenberger, *supra* n. 13 at 743. This issue differs from the general issue of *jus cogens* and treaties discussed above. Consensual *jus cogens*, that is, binding norms voluntarily agreed to, does not pose the same jurisprudential difficulties.

principles were considered to be binding on all member States of the United Nations which, by becoming members, accepted the Charter's obligation to promote human rights. Japan's commitment under the Charter to promote human rights includes a responsibility to provide an effective remedy for violations of human rights. The treaty concerning reparations should not be used nor interpreted in a manner which would undermine the human rights of Filipino women.

B. War Crimes

In addition to the above examination, it has to be considered whether persons who abducted and raped the Korean and Filipino women committed war crimes or crimes against humanity punishable under international law and should be prosecuted by Japan.

The Charter of the International Military Tribunal of Tokyo (Article 5) defines war crimes as "violations of the laws or customs of war." It was stated by the Tokyo Tribunal that the violations of the provisions laid down in the Hague Convention No. IV (being norms of customary international law) undoubtedly constituted war crimes.³⁹

Article 5 of the Charter of the Tokyo Tribunal included additionally as crimes coming within the jurisdiction of the Tribunal for which there was to be individual responsibility :

*"Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed, before or during the war, ..."*⁴⁰

When Japan signed the Treaty of Peace in San Francisco on 8 September 1951⁴¹, it "accepted the judgements of the International Military Tribunal for the Far East and of other allied war crimes courts

39 *Id.* See The Tokyo War Crimes Trial, *supra* n. 5 at 48, 437.

40 Piccigallo, P., *The Japanese on Trial* (University of Texas Press: Austin & London 1979) at 9-33.

41 United Nations Treaty Series, vol. 136 at 47.

both within and outside of Japan ..."⁴² Having expressly accepted the judgement of the Tokyo Tribunal, Japan consented both to the basis for the Tribunal's jurisdiction found in its Charter, and to the definition of crimes against humanity. The acts of Japanese soldiers can thus be examined in the light of the Charter of the Tokyo Tribunal.

The abduction and systematic raping of women and children represented inhumane acts against the civilian population. In the case of the Filipino women, these acts were at the same time war crimes in the strict sense. Since inhumane acts against any civilian population are considered to be war crimes, the abductions and rapes of the Korean women which were committed in connection with the acts against the Filipino women constituted crimes against humanity as well.

The defence of having acted according to superior orders cannot be accepted as:

"... members of the armed forces are bound to obey lawful orders only and they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."⁴³

In the Charter of the Tokyo Tribunal, superior orders did not provide absolute immunity. If, in the interest of justice, this was required, the defence was admitted solely in mitigation of guilt.⁴⁴

The Japanese soldiers who abducted or raped Korean and Filipino women and children were therefore guilty of committing war crimes and crimes against humanity. This result is reinforced by the fact that several Japanese military men were convicted for offences committed by them against 35 Dutch women who had been forced into becoming comfort women, as has been discussed in Chapter 6.

42 Art. 11 of the San Francisco Peace Treaty.

43 Oppenheim, Lauterpacht, *supra* n. 13, para 253.

44 Schwarzenberger, *supra* n. 13, at 516.

It is to be considered, however, whether the peace treaties concluded with Korea and the Philippines included general amnesties, thus preventing a prosecution of the persons responsible for the crimes. Until well into the 19th century, general amnesties were included in peace treaties explicitly or implicitly.⁴⁵ In the course of the 20th century, amnesties in peace treaties became less and less acceptable.⁴⁶ When personal criminal liability was expressly provided for in the Charters of Nuremberg and Tokyo at the end of World War Two, the concept of general amnesty was completely dropped.⁴⁷ As provisions expressly providing for amnesties do not exist in the peace treaties in question, the existence of a prohibition on prosecution cannot be assumed to exist.

Since according to the Japanese Criminal Procedure Act, a time limitation exists concerning the prosecution of the crimes in question, Japan is not able to prosecute and punish the persons responsible anymore. However, Japan cannot escape its responsibility on this count by taking advantage of its own wrongful inaction to prosecute and punish the perpetrators of these atrocities.

Liability Arising From Non-Prosecution

In addition, Japan is bound to make retribution to the victims through the Governments of the Philippines, the Republic of Korea and the Democratic People's Republic of Korea, for its failure to investigate into and initiate prosecution against the perpetrators of the atrocities committed by them during World War Two against these women and children. Precedence for such liability being fastened upon Japan can be found in the Janes' Case⁴⁸, wherein a US/Mexican Claims Commission was called upon to consider a claim of the United

45 See Oppenheim, Lauterpacht, *supra* n. 13, para 274; A-M de Zayas, Amnesty Clause in: R. Bernhardt (ed.), *supra* n. 10, Instalment 3 (1982) at 15 *et seq.*

46 A-M de Zayas, in: R. Bernhardt (ed.) *supra* n. 10, Instalment 3(1982)at 17.

47 *Id.*

48 United Nations Reports of International Arbitral Awards, Vol.IV, p.82, Laura M.B.Janes *et al* (USA) v. United Mexican States, November 16, 1925.

States of America on behalf of Laura M.B. Janes, the widow of a murdered American citizen, against Mexico. The United States of America claimed compensation on behalf of the widow and her children, against Mexico, for the failure by Mexico to take steps to investigate into the conduct of, to apprehend and prosecute the murderer of an American citizen, Byron Everett Janes. The court awarded damages in the sum of U.S. \$12,000 as there was a denial of justice, resulting from the failure to fulfil the State's own international duty to prosecute and punish the offender. Thus, the judgement proceeded on the basic principle that in such matters considerable injury was caused to the individual, rather than to the State. It is also significant that in the Janes' Case the United States of America was not making any claim other than that on behalf of the widow and children of Byron Everett Janes.

In these circumstances, Japan ought not, and cannot escape liability to individual victims in Korea and the Philippines.

C. Individual Claims to Compensation

Having established in the above sections that Japan violated its obligations under international law, it now remains to be considered whether or not individuals affected by those violations have a right to bring them to the attention of the international community and in addition to seek restitution for such violations. This question involves consideration of two issues: first, whether the individual was a subject of international law and, secondly, whether the individual, as a procedural matter, had a right to bring a claim before either a municipal or international tribunal.

Having adopted the theory of dualism, Japan has asserted both domestically and internationally that the individual is not a subject of international law. This issue has been debated by scholars, diplomats and others for several centuries. One view, taken by those who adhere to the dualism theory, is that international law and municipal law regulate different subject matters and that international law regulates relations between sovereign States whereas municipal law applies within a State

and regulates the relations between citizens and the State.⁴⁹ Adherents to the monism school believe international law dominates; where there is a conflict, municipal law must give way or, alternatively, that municipal law and international law may give rise to similar norms and that national legal norms are valid because they comport with the international legal order. There are variants on this theme, such as the "monist-naturalist theory". Other scholars take the view that the two systems usually operate in different fields, but that there is a core area where the two overlap, in which case States are responsible to the international community for practices which deviate from international norms.⁵⁰ The debates over which approach is the more appropriate and should apply in any given country continue. According to the theory of strict dualism, the individual cannot have rights and obligations under international law.

For our part, we prefer the views of scholars such as Lauterpacht, whom we believe to be more in agreement with international practice and with the greater weight of opinion. We also believe that with respect to Japan the judgement of the Tokyo War Crimes Tribunal is pertinent. As Lauterpacht has noted:

"To lay down that crimes against humanity are punishable is, therefore, to assert the existence of rights of man granted in a law superior to the law of the State. Thus, upon analysis, the enactment of crimes against humanity in an international instrument signifies the acknowledgement of fundamental rights of the individual recognized by international law."⁵¹

49 See Brownlie, I., *Principles of Public International Law* (Clarendon Press Oxford 1973) at 45-48.

50 *Id.*

51 Lauterpacht, *supra* n. 10 at 36. Although this was said in reference to the Nuremberg Tribunal, the decision of the Tokyo Tribunal as to the jurisdiction conferred by its Charter is based on the judgement rendered at Nuremberg and its opinion gives rise to the same considerations.

Furthermore, the principles of international law set out in the Charters of the Nuremberg and Tokyo Tribunals were specifically recognized by the General Assembly in 1946 when it affirmed the principles "of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal".⁵² In addition, Article 3 of the 1907 Hague Convention (IV) is another indication that the international community has recognized an individual's right to compensation.

Jurisprudence developed in the Permanent Court of International Justice also suggests that it was possible for an agreement "to create direct rights and obligations for private individuals."⁵³ Decisions taken in various national tribunals support this approach.⁵⁴

In its decision in *Danzig*, the Court stated that the objects of a particular agreement as well as the intention of the parties to that agreement must be closely considered when determining the effect of the obligations it creates. When one examines the Hague Convention and norms it sets out concerning war crimes and crimes against humanity, the Slavery Convention and the Convention on the Suppression of Trafficking in Women and Children, it is clear that in each of those agreements the object is the individual and the purpose of the agreement is the protection of the rights of the individual.

As noted by Lauterpacht, there is a difference between the creation of rights or making someone the beneficiary of rights and the giving of the procedural capacity to sue.⁵⁵ Japan has taken the position that the individual was never given the procedural capacity to sue under international law and therefore claims could not have been instituted in Japan for violations of human rights. But the practice of national and international tribunals clearly indicates that this was not so. The

52 *Id* at p.38 n. 30.

53 Permanent Court of International Justice, Advisory Opinion Number 15: Series B, No 15, at page 17-18 cited *id.* at 28-29.

54 *Id* at page 29 note 9.

55 *Id*; see also Ezejiolor, G., *Protection of Human Rights Under the Law* (Butterworth, London 1964).

Central American Court of Justice, the Mixed Arbitral Tribunals created by the Peace Treaties of 1919 and the Polish-German Upper Silesian Convention all conferred rights upon individuals to sue.⁵⁶

It would be impossible at this juncture for anyone to state definitively what the courts in Japan would have done in the period that followed World War II. We believe that this is the relevant period and not the years 1928-1945, as it was only at the close of the war that the situation of the "comfort women" would have come to light and could possibly have been made the subject of a claim. We also recognize that writers in this field differ as to whether or not an individual could be given a right to sue his/her own government. However, this issue has more to do with forum, that is whether or not an international tribunal or arbitration commission had to be established by treaty in order to vindicate the violation of the individual's rights by his own government, and therefore is also a procedural matter.

This distinction between procedure and substance is one of importance. In the domestic sphere it is areas of substantive law which give rise to concerns about retrospectivity of the law. The normal rule in the majority of legal systems is that when procedural rules change, the parties must accept the procedure at the time they appear before a tribunal.

In judging Japan's position, note must also be taken of the emerging consensus at the international level of a right to an effective remedy, as set out in Article 8 of the Universal Declaration of Human Rights. That Article states:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law."

This Article does not refer to violations of the Declaration itself but rather of violations "of the constitution or of the law". The drafters

56 See *Id* and Brownlie, *supra* n. 49 at 535 *et seq.*

must be taken to have been aware of issues concerning customary international law and in particular the resolution of the General Assembly adhering to the principles of the Nuremberg Charter and hence to an appreciation that the law included international norms. Japan became a member of the United Nations in 1956 and by doing so adhered to the provisions of the Universal Declaration of Human Rights.

It should be noted here that the decision of the Permanent Court of International Justice (1928) in the Chorzow Factory (Merits) Case, is relevant. In that case the Court indicated that both individuals and the State may have claims for reparation and compensation. The existence of an agreement for reparation between States does not negate the possibility of an individual bringing a suit on the same set of facts for violations of their rights and for payment of compensation to them. Furthermore, with respect to violations of conventions where States have undertaken specific obligations, violations of those conventions can give rise to a right of reparation which need not be stated specifically in the convention itself.⁵⁷ In this view, violations of the Convention on the Trafficking in Women and Children could give rise to the right of compensation for both the Korean and the Filipino women.

With respect to the issue of responsibility, Lauterpacht makes the following comments:

“it must be borne in mind that the State is a corporation, a juristic person, and that reasons of convenience and justice require that, in the normal course of affairs, the collective entity of the State should be the subject of responsibility. ... independent political societies function in the form of the corporate entity of the State, and it is appropriate that the general principles of law applicable to juridical personality and to the corporate capacity for action should apply also in the case of States. ... it is clear that for the purposes of redress, in terms of economic compensation, for violation of treaties

⁵⁷ Chorzow Factory (Merits), *supra* n. 37.

and of customary international law, the State as a whole is as a rule, from the practical point of view, the proper situs of attribution of responsibility.”⁵⁸

It would also be useful at this juncture to note that the International Covenant on Civil and Political Rights ratified by Japan, (hereinafter referred to as the Covenant) guarantees the following in Article 2(3) of Part II:

“Each State party to the present Covenant undertakes:

- (a) To ensure that **any person** whose rights or freedoms as herein recognized are violated **shall have an effective remedy**, notwithstanding that the violation has been committed by a person acting in an official capacity;
- (b) To ensure that **any person** claiming such a remedy shall have his right thereto determined by competent **judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State**, and to develop the possibilities of judicial remedy;
- (c) to ensure that the competent authorities shall enforce such remedies when granted.”

The Covenant also protects under Article 9 (5) the rights of a person by stating thus: “Anyone who **has been** victim of unlawful arrest or detention shall have an enforceable right to compensation”. (emphasis added).

These provisions make it clear that international law recognizes the right of individuals to seek compensation for unlawful detention, wherever it may have been committed. In addition, it also provides a right to the aggrieved person to seek redress before an appropriate forum.

It therefore follows that lawsuits can be filed by the former comfort women, wherein, the Government of Japan would be a proper defendant and would be legally bound to make full and complete

⁵⁸ Lauterpacht, *supra* n. 10 at 41.

reparation. However, it is also obvious that the remedy/forum which the Government of Japan is obliged to provide, under the norms of international law, should be one where the claims can be disposed of within a reasonable time-frame. The facility of filing lawsuits in a civil court in Japan, where ordinarily claims take upto nine years to be disposed of by a court of first instance and where the victims (who have already filed lawsuits) are faced with preliminary objections about the jurisdiction of Japanese courts being taken by the Government of Japan, cannot be considered to be the fulfilment of this obligation on the part of Japan.

Retrospective Operation of Law/Statute of Limitation

Japan has ratified the International Covenant on Civil and Political Rights. Article 15 of the Covenant binds Japan to the following:

“(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 when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

(2) Nothing in this article shall 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 the community of nations.”

Article 15(2) therefore expressly permits prosecution in respect of war criminals who were guilty of committing atrocities during World War II.

It cannot be over-emphasized that war crimes and crimes against humanity can consequently be punished at any time after their commission and that there can be no statute of limitation to curb this right

of an individual to require a State to prosecute and punish any such war criminals.

Since the present claims pertain to war crimes and crimes against humanity, it would be futile to take up the defences of retroactive law or statute of limitations, especially because the concept of reparations takes within its sweep the prosecution of the offenders.⁵⁹

The issues raised by the situation of the comfort women are unique. They are not directly analogous to the war crimes trials which have taken place in recent years in many countries of Europe, North America and Australasia. There are two avenues of redress being pursued by the women: the first is on the diplomatic front, where the women are requesting Japan to enact legislation which would provide for compensation for the injuries they have suffered, and the second is by litigation in Japan where the women allege violations of international law in the context of an international tort claim. These law suits do not involve an assertion of universal jurisdiction such as has been made in the war crimes trials. Rather, the women have gone directly to Japan to provide it with an opportunity to make adequate redress either legislatively or through its legal system.

As demonstrated earlier, the substantive areas of the law do not involve questions of retrospectivity. The only issue which is open to a claim of retrospective application of the law is the ability of the women as individuals to seek damages for violation of customary international law in a municipal court. This issue is of no importance on the diplomatic front, because Japan could enact legislation irrespective of whether the women had a right to sue. Therefore the question of retrospectivity only has importance in the context of the law suit initiated in Japan.

It is our view that under the precepts of international law prevailing at the time these facts came to light (and which would be the time

⁵⁹ See Report by Theo van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (United Nations document E/CN4/Sub.2/1993/8).

under domestic law that one would view a cause of action as having arisen), Japan was under an obligation to undertake the payment of compensation; this right of necessity includes the provision of a forum for the hearing of claims. Furthermore, as this is an issue which is similar to domestic issues of "standing", it would be possible for Japan to either waive the issue or alternatively to enact legislation to enable the victims to go to trial on merits. We are of the opinion that Japan should give serious consideration to the enactment of such a measure if it does not intend to solve the general question of compensation legislatively. (It is our belief that a legislative solution is more appropriate because it would entail a speedier resolution of the issues.)

Comments made by Professor Theo van Boven in his paper *Reparation for Victims of Gross Violations of Human Rights* before the International Symposium held by the Japan Federation of Bar Associations provide cogent reasons as to why Japan should undertake such actions. He argues that if compensation is not given for gross violations of human rights, the belief grows among the perpetrators and others that such acts can be carried out with impunity. This leads to concern that such violations will occur in future.⁶⁰

If Japan undertook to provide the victims with a rehabilitation scheme, this would be a clear recognition on its part of the harm and injustice that former government and military officials brought to innocent civilians in the pursuit of a militaristic policy. It would be a means of establishing responsibility and revealing the truth. Rather than pursuing a strategy of defending itself, Japan might give thought to setting a precedent in this area. It would be a means of demonstrating its commitment to leadership in the international arena in the areas of human rights and peace.

60 Japan should be particularly sensitive to this issue as criticism was lodged against it for providing forces to the United Nations Peace Keeping Force in Cambodia because of fears that it had not yet indicated to the international community its peaceful intentions. Japan would be aware that it remains distrusted by many countries in Asia and we believe that an action by it providing for reparation will go a long way towards demonstrating in practical terms the "sincere remorse" that it has expressed in recent years on visits undertaken by government officials to various countries in Asia.

With respect to the question of a statute of limitations, this issue again arises solely in the context of the litigation pending in Japan. There is no impediment internationally or domestically for the Japanese Diet to enact legislation giving full reparation to the women. Therefore this is not an issue which should affect debate about the question of reparations at the international level.

As to the law suits filed by the women, we understand that under Japanese law a defence of statute of limitations can be waived although there is an outside period of 20 years; after this point it would appear that the statute of limitations poses an absolute bar to a law suit. This again raises difficult issues concerning the overlap between municipal and international law. International law does not recognize statutes of limitations⁶¹ in the area of criminal jurisdiction over war crimes and crimes against humanity.⁶² We would think that, by the process of analogy, when the claim being made is a tort claim for violations of these international rights, no statute of limitations should be applicable and that in this regard municipal law should give way to international law. Again, another possibility for the Japanese Government is to enact specific legislation waiving the statute of limitations in this case so that the issue does not have to be litigated before the courts.

We do not believe that there would be any unfairness or injustice caused to Japan by taking such an action. The purpose of a statute of limitations is to prevent "stale" suits from going forward and to avoid cases being brought when the evidence pertaining to the issues may

61 See Brownlie *supra* n. 49.

62 For discussion of the war crimes legislation in the United Kingdom, Canada and Australia, see generally, Cottrell, R. *The War Crimes Act and Procedural Protection*, (1992) Crim. L. R. 173; Fenrick, W. J., *The Prosecution of War Criminals in Canada*, the Dalhousi Law Journal 256; and Triggs, G., *Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?* (1987) 16 Melb. Uni. L. R. 382. For an exhaustive discussion of the question of the non applicability of statutory limitation to war crimes and crimes against humanity, see Economic and Social Council study submitted by the Secretary General, *Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity*, E/CN.4/906 (15 February 1966).

well have disappeared. Those considerations are not present in this case. The concept of "staleness" has to do with individual defendants being able to order their affairs and the assumption that, after a certain period of time, past behaviour cannot be used against them. This has less relevance to a government, as its ordering of its economic and other affairs does not depend upon whether or not it believes a law suit will be brought against it. As to the evidence, it is clear from the contents of this report that material evidence concerning the allegations made by the women is available. There are thousands of pages of documentary evidence as well as the oral evidence of the women and the former soldiers. There is no possibility of anyone being prejudiced by proceeding with the trial of the law suit on merits at this point.

Chapter Ten

Activities of Non-Governmental Organizations

In all human rights causes where public opinion needs to be moulded, non-governmental organizations (NGOs) have been of pivotal importance. It was indeed heartening to meet representatives of such well-motivated, well-directed NGOs in the Philippines, the Republic of Korea and in Japan.

Particular mention must be made of the NGOs in Japan, as they are represented by Japanese men and women, all united in the cause of justice. Having understood the grim picture of Japan's military past, they have put in untiring effort to educate their fellow citizens in Japan about it.

Tremendous work has been done by the NGOs in these three countries in relation to identifying ex-comfort women, summarizing their memories as comfort women, helping them to come to terms with their past, generating public empathy for them by seeking the cooperation of the mass media, encouraging the women to speak out in public, generally empowering the women, improving their living conditions, and also placing their demands before national and international forums and the Government of Japan.

The Republic of Korea

In the Republic of Korea, the NGO movement for this issue is spearheaded by the Korean Council for the Women Drafted for Sexual Slavery by Japan (hereinafter referred to as the "Korean Council"). The Korean Council is a federation of individuals and organizations in South Korea and abroad.

In April 1988 an international seminar on Women and Tourism was organized in Korea by the Korea Church Women United. Professor Yun Chung-Ok, who, since 1980, had been investigating the issue of

the comfort women, addressed the seminar. Soon after the seminar when President Roh Tae Woo was to visit Japan in May 1988, three women's organizations, Korea Church Women United, Korea Women's Association United and National Council of Female University Students Representatives, issued a statement demanding an apology and reparation from the Japanese Government. It was in these circumstances that the Korean Council was formed in November 1990, to deal extensively with this issue. The Korean Council requested a response from both the Korean and the Japanese Governments.

The efforts of the Korean Council set off a chain reaction in Japan, where the question was raised in the Diet by the Opposition. The Japanese Government flatly denied any involvement of the Japanese military. This, and the campaign of the Korean Council, encouraged an ex-comfort woman, Kim Hak-soon, to publicly reveal her experiences as a comfort woman. Enraged by the Japanese Government's false denial of its involvement, she was the first ever victim to have spoken out on this issue since its occurrence.

Professor Yoshimi's research in Japan, based on official Japanese documents, and the testimony of Kim Hak-soon about the involvement of the Japanese military, was followed by a hasty apology by the Prime Minister of Japan during his visit to South Korea in January 1992.

The Korean Council was ably assisted by a Research Group for the Women Drafted for Sexual Slavery by Japan, consisting of committed young women, who sifted through all the information coming in, and compiled statements of victims who wanted to speak out. These statements have been published in the form of a book, in Korean and Japanese, and an abridged version is available in English.

The Korean Council has relied on hotlines, radio and newspaper appeals to locate the former comfort women. So far testimonies of about 170 victims have been documented.

The Korean Council also organizes weekly demonstrations, on Wednesday afternoons, of the former comfort women and individuals and organizations supporting them outside the Japanese embassy in Seoul. The 50th such demonstration was held on 20 December 1992.

Eyewitness accounts of these demonstrations make special mention of the spontaneous expression of anger by the participants, of the emotional upheaval experienced by the women and their hope for justice.

The Korean Council is an interesting blend of young and not-so-young volunteers sharing a common zeal and dedication to bring justice to these women. It is supported by the World Council of Churches. The Korean Council has made a list of demands on behalf of these women. They are :

1. The Japanese Government should reveal the crime of *Jungshindae*, i.e. comfort women;
2. The Japanese Government should formally apologize;
3. The Japanese Government should erect a memorial for these victims;
4. The Japanese Government should pay reparations to these victims/their bereaved families;
5. The crime of *Jungshindae* must be accurately recorded in Japanese school text books and history books;
6. The Japanese Government must punish such offenders, as are alive today.

The Philippines

On 10 March 1992, the Philippine Daily Inquirer, a local Manila newspaper, reported that among the thousands of World War II comfort women were 19 Filipino women from Iloilo. The Bayan Women's Desk (an NGO) received a document dated March 1942, which was a medical report by a Japanese Army doctor on 19 Filipinas. The report included the names of 13 of them. The document also contained a sketch of the location of a comfort house near the plaza in Iloilo city.

Gabriela, a women's organization with a chapter in Iloilo, conducted a preliminary investigation together with Bayan Women's Desk and the Asian Women Human Rights Council (AWHRC) in July

1992. The investigation led to the identification of a former kempeitai, Sikitchi Nossimoto, aged 70, who was living near Iloilo city under the Filipino name of Nonito Santillan. He confirmed that the comfort house was indeed in Iloilo, near a certain Paris Hotel at Dela Rama Street. This was corroborated by a former G-2 Intelligence member. Testimonies of old women in Rizal, Incore New Site and Incore Proper were also gathered. These revealed that truckloads of women were brought to the Paris Hotel for Japanese soldiers; some were found dead only days after arrival. Some of these women were Korean and some Taiwanese.

Bayan Women's Desk began looking for more survivors and further information, and pressed a list of demands.

It called upon the Philippine Government, then under President Aquino, for an investigation. The Presidential Commission on Human Rights requested a professor at the University of the Philippines, Professor José Ricardo, to make an enquiry report on forced prostitution in the Philippines during the Japanese occupation. Professor José Ricardo submitted his report on 26 June 1992 to the Presidential Commission, containing his finding that there were no major instances of forced prostitution in the Philippines, and there were no Filipino comfort women. However, in July 1992, the Japanese Government published the preliminary report of its own enquiry, making public some 127 documents and setting out its finding that the Japanese military was involved in the comfort women issue. Some of these documents clearly established that several Filipino women had been victims of sexual exploitation by the Japanese military.

On 13 July 1992 the Task Force for Filipino Comfort Women (TFFCW) was formed under the AWHRC-Philippines network to coordinate the campaign. At present it has 14 member organizations, and the AWHRC-Philippines and Bayan Women's Desk serve as the lead agency and secretariat of the TFFCW.

The TFFCW has opened local chapters in Pampanga, Iloilo, Bacolod, Antique and Capiz since August 1992 in order to gather more information.

Having heard that the Japanese Government was denying that the women had been taken by force, a greatly distressed ex-comfort woman, Rosa Luna Henson (popularly known as Lola Rosa, Lola meaning grandmother in Tagalog), contacted the TFFCW and narrated her bitter experiences. This was a major breakthrough for TFFCW, as she was the first ex-comfort woman to speak out in the Philippines. She also told her story in public on 18 September 1992. She has since been the inspiration for many other victims to reveal their stories. The TFFCW have located 50 such victims so far.

The TFFCW has been organizing public meetings, investigations, radio broadcasts, hotlines and newspaper campaigns with considerable success. Lola Rosa has herself participated in these activities, giving courage to women to speak out.

In April 1993, at the end of a public meeting in Davao, when Lola Rosa was at the airport, she was approached by a tearful woman who shared with her the agony that that woman had suffered as a former comfort woman.

After Lola Rosa went public with her narration on 18 September, the Philippine Government, then under President Ramos, was forced to react to the issue, Professor Ricardo's report was ignored, and the President directed the Department of Foreign Affairs, the Department of Justice, and the National Commission on Women to conduct a deeper study into the issue. A government task force has since been formed.

The TFFCW also holds weekly demonstrations of former comfort women, members of the public and sympathisers before the Japanese mission in Manila.

The demands of the TFFCW are:

A. Against the Japanese Government:

1. to apologize to the Filipino people, especially to women victims/survivors and their families;
2. to pay adequate compensation to the women victims and their families;

3. to include references in textbooks of the reality of women's human rights violations by forcing them to work as comfort women, and that this is a war crime of Japan, so that wars, militarism, and the consequent abuses against people, especially women and children, may not be repeated;
4. to admit that the Japanese military used force and violence in the taking of comfort women and that the Japanese Government's assertion to the contrary is false.

B. Against the Philippines Government:

1. to undertake an official investigation and search for surviving comfort women and/ or families;
2. to demand compensation and a formal apology from the Japanese Government for the victims, survivors and families;
3. to record the fact in text-books and history books;
4. to formally demand the United Nations Commission on Human Rights to conduct a thorough investigation and to censure Japan for its human rights violations and cover-up of information for 50 years.

C. For a repeal of the peace-keeping operations law (PKO Law) of Japan which opens up, once more, the possibility of dispatching Japanese troops to Asian countries and the rest of the world.

D. To forge a strong solidarity network for all Asian women drafted for military sexual service by Japan.

The TFFCW has been actively assisting Japanese lawyers in the filing of lawsuits by Filipino former comfort women against Japan for damages and other reliefs in the Tokyo District Court. The first such case was filed in April 1993 by Lola Rosa and others.

The TFFCW has also started a campaign of "adopt one Lola" so as to ensure that the former comfort women who have spoken out are "adopted" or looked after by families, thereby also ensuring public sympathy for the plight of these unfortunate women.

The Korean Council and the TFFCW have placed their respective demands before the Japanese Government and have also voiced them before national and international forums, including the United Nations.

Japan

This section includes the efforts being undertaken by non-governmental organizations within Japan as well as the law suits filed on behalf of the Korean and Filipino comfort women. There is support both for the women and for their claims for reparation within Japan itself. It was the impression of the ICJ mission, on the basis of those organizations with which they spoke, that a significant percentage of the Japanese population believe that the comfort women and those men and women forcibly conscripted for work in civilian industries or the military during the war should be compensated. Many organizations are devoting themselves to educating the public about Japan's actions in Korea and other parts of Asia in an effort to foster better relations between Japan and the countries of northern and South-east Asia. These organizations believe that issues of social justice are at stake, as they perceive the root cause of Japan's behaviour prior to and during World War II to be racism. They consider it crucial that this issue be addressed so that an ethos of equality can be established in Japanese society.

The work which has been undertaken by these organizations is of enormous significance. Through their efforts as well as the efforts of the Korean Council and the TFFCW, this issue has become one of international concern within a space of 5 years. The non-governmental organizations in the various countries have worked together closely and give support to one another. Their efforts have created a climate which has allowed the former comfort women to come forward and to feel that they will be believed and accepted. In addition, as a result of their

work, the Japanese Government has had to admit its involvement in the creation and maintenance of the comfort stations.

The following pages outline the activities being undertaken by the Coalition of NGOs working for Women Drafted into Sexual Slavery by Japan, the Report on Compensation made by the Japanese Civil Liberties Union, the Public Hearings, the international meeting held by the Japan Federation of Bar Associations and the various law suits.

The ICJ mission met with representatives from the Coalition of NGOs Working for Women Drafted into Sexual Slavery by Japan. Included at the meeting were representatives from the following organizations:

- The Association of Anti-Prostitution Activity;
- Matsushiro Korean "Ianfu" (Women in Slavery for Sex) Association (Japan);
- The Investigation Group on the Truth About Forced Korean Labourers in Japan;
- The National Christian Council;
- The Forum to Ponder on the War Victims in the Asian-Pacific Region and Engrave it on Our Mind;
- The Japanese Committee for the Filipino "Comfort Women";
- Association to Clarify the Japanese Responsibility in Post World War II;
- The Comfort Women Hotline (an umbrella group of ten non-governmental organizations);
- The Working Group on the Settlement for Compensation of War Victims;
- The Foundation for Human Rights in Asia - Filipino Support Group (this is an umbrella organization for 15 non-governmental organizations).

Although the groups differ in the focus of their work, they agree that restitution should be made to all those who were taken by Japan either

as comfort women or as forced labourers. Their definition of restitution encompasses the need for a full investigation of the facts, including the taking of testimony from former comfort women and conscripted labourers, the payment of compensation to individuals and the making of a full and complete apology by the Japanese Government. Many of these groups have expressed their concern that the former Japanese soldiers are being rewarded in the form of pension benefits, while at the same time compensation is denied to those who were forcibly taken from their homeland and coerced into providing services for the Japanese Imperial Army. All of the organizations the mission spoke with believe that negotiations should take place between the Japanese Government and the individual women or organizations representing the women; they do not believe government to government negotiations will be useful.

Several organizations have collected records showing the names of those Koreans, men and women, conscripted as civilian labourers, and have revealed the names of corporations which utilized the services of such labourers. Others are attempting to compile information on the comfort women, tracking down documents which contain names and which will allow a more complete count to be made. Records have been obtained from within Japan as well as Korea, the Philippines, the United States of America and the United Kingdom.

In addition, these organizations have raised money to sponsor visits by Filipino and Korean women to Japan for the purpose of conducting public education campaigns. They have also organized public meetings and have educated the media about their work.

By and large these organizations were critical of the efforts being undertaken by the Japanese Government. They do not believe enough is being done to conduct a full-scale investigation of the matter, and are worried that certain government departments are withholding documents. Furthermore, they are critical of the government's failure to take testimony from the comfort women. One organization, the National Christian Council, reprinted a transcript of an interview they had had with the Japanese Government, where this issue was raised. In response to a question about the taking of testimony, the government

indicated that the time and expense involved in such an exercise would be enormous and the government was not willing to undertake it. The government indicated that it believed that in order to conduct interviews of the comfort women, they would also have to conduct interviews of former soldiers, and stated that many former soldiers were reluctant to give testimony. Neither the non-governmental organizations nor the members of the mission consider this to be an adequate response.

These organizations have also suggested that temporary emergency relief be given to the women because of the poverty in which they are presently living. The government has not accepted this suggestion. In addition, many of them would like to see the former Allied Powers do more to release pertinent records; although a number of organizations have received copies of some documents through contacts in other countries or through ministries of foreign affairs, they are convinced that additional relevant documentation exists.

What was done by the Japanese had to be understood as a violation of the human rights of women. This issue was discussed with the coalition; we asked whether there was a relationship between what had occurred with respect to the Korean women and the attitudes displayed towards women in Japanese society during the 1920s and 30s. Those organizations which have worked specifically on women's issues believe there is a strong connection. During the 1930s Japan had a system of licensed prostitution. Although the conditions in the comfort houses were far more appalling than in houses of prostitution (and there were obvious differences in the way women were "recruited" for those two institutions), the existence of licensed prostitution in Japan created an atmosphere in which men saw it as their "right" to have women to gratify their sexual pleasure. This attitude no doubt influenced those officers who initially suggested that brothels be created for Japanese soldiers stationed in China. It was also pointed out that the system of licensed prostitution led to the exploitation of poor women, particularly women from rural areas, a pattern which we saw repeated when women were taken from the Korean peninsula.

At the close of the meeting, those present indicated their frustration with their government's failure to respond adequately to these events and voiced their concern that the government would continue to "go slow" with respect to this issue. The coalition was also critical of members of Parliament, believing they had not done enough with respect to the issue; it was suggested that the Diet could put pressure on the government to move more quickly and to respond in a more positive fashion. All of those present expressed their hope that the international community would put pressure on the Japanese Government to take decisive action.

The international public hearing held in Tokyo

In 1992 a number of individuals and organizations came together to organize a public hearing "concerning the post-war compensation of Japan"; the hearing was held in Tokyo on 9 December 1992. The public hearing was widely reported in the international and local media. During the hearing a number of former comfort women came forward to testify; the women were from the People's Republic of China, Taiwan, the Republic of Korea, the Democratic People's Republic of Korea, the Philippines and Australia (originally from the Netherlands). In addition, testimony was given by those conscripted as labourers for the Japanese war effort. A report of the public hearing is about to be published, and a video of the hearing is available.

Symposium held by the Japan Federation of Bar Associations

In conjunction with the public hearing referred to above, the Japan Federation of Bar Associations held a symposium on 10 December 1992, "Human Rights Day", on the subject "War and Human Rights - Legal Analysis of Post-War Reparations."

Report by the Japan Civil Liberties Union

The Japan Civil Liberties Union (JCLU), an affiliate of the International Commission of Jurists, issued a report in April 1993 concerning the post-war responsibility of Japan for reparations and compensation. The articles in the report were prepared by the

members of JCLU and include an introduction, which presents an overview of the reparations issue, a report on military comfort women, a report on the problem of restitution to non-Japanese soldiers and civilians, a report on the issue of compensation to the Korean people, and excerpts from the decision of the Supreme Court concerning a claim for damages brought by relatives of Taiwanese soldiers who died whilst serving for the Japanese Imperial Army. The various authors highlight the amount of compensation paid by Japan to its own military personnel, pointing out that immediately after Japan regained its independence it reversed the position that had been taken during the Allied Command, enacted a series of laws which provided for compensation to families and war invalids, and ultimately enacted laws authorizing pensions for all former soldiers. These laws contained nationality clauses which excluded Koreans, Taiwanese and others who had been forced to serve in the Japanese military. The authors argue that these exclusion clauses violate Japan's international obligations, as they discriminate against those who were under the colonial rule of Japan. In this regard they point to a decision of the Human Rights Committee concerning France and its former soldiers from Senegal, which holds that payments of differing amounts is discriminatory. They argue that if this decision were applied to Japan, any Korean or Taiwanese who fought in the Japanese military should be entitled to exactly the same pension benefit as that being paid to former Japanese soldiers.

In addition, they argue that steps taken by the United States and Canada to pay restitution to nationals of Japanese extraction interned during World War II should be emulated by Japan and compensation should be paid to those who were unjustly treated in the Korean peninsula and Taiwan. In their view the measures taken by the German Government to pay reparations to citizens of the various States affected by the activities of the Nazi army as well as to Jews who suffered under the Nazi holocaust also provide an appropriate model.

The report has been published in English.

The law suits

During their stay in Japan, the members of the mission met with the coalition of lawyers who are handling the various claims filed by the Filipino and Korean women. As of May 1993 there were 18 cases pending against the Japanese Government. Some of the cases concern only forced labour either within the Korean peninsula or within Japan, while others involve both forced labour and comfort women. Some of the cases are concerned solely with the comfort women; one involves women who are now residing in the Republic of Korea, another, Filipino women and the third, a Korean woman at present residing in Japan.

The first case involving comfort women was filed in December 1991, nine of the plaintiffs were "used" as "comfort women" by the Japanese military from the period 1938 to 1945. The plaintiffs alleged that they were taken against their will, some being abducted and others being taken under the pretext of "nurse recruitment". They were taken to "comfort facilities operated by the Japanese military at Fukuoka, Shanghai, Taiwan, Kahoku (North China), Rabaul and Rangoon, where they were confined and forced to have sex with many men for some years."¹

It is alleged that these acts of the Japanese Government were crimes against humanity, violated customary norms of international law, including prohibitions on the traffic of women and the slave trade. Reference is also made in the complaint to the Cairo and Potsdam Declarations, which were statements issued by various Allied governments during World War II and which recognized that the Korean people had been living under conditions of virtual servitude and should regain their independence at the close of the war. These

1 Description of the Case for Compensation for Korean Victims of the War in Asia and the Pacific, provided by the coalition of lawyers in both Japanese and English. The complaint details the conditions under which the plaintiffs were forced to live, the "systematic, organized and continual gang rape" committed by the Japanese military and the abandonment of the women at the close of World War II.

declarations are relied on in order to demonstrate that Japan had enslaved the Korean people and therefore committed crimes against humanity (enslavement of a people is an aspect of a crime against humanity).²

In response to this complaint, the Japanese Government has stated that the claims are without foundation, as the notion of crimes against humanity was used solely in the Nuremberg trials against European defendants³, and is not applicable against Japan. Although it admits that it was involved in the maintenance of the comfort houses, it has not admitted that it either established them or ran them on a day-to-day basis. Furthermore, the Japanese Government challenges the assertion that the women were recruited involuntarily. It also denies that these activities amount to a crime against humanity.

The government has strongly resisted the attempt of the lawyers to have testimony taken from the various plaintiffs;⁴ the lawyers argue that the women are old and therefore their testimony should be made a matter of record as soon as possible.

Although Japan has raised the issue of the bilateral treaty between itself and the Republic of Korea in the international arena, this issue has not been raised in this law suit.

With respect to the claim filed during April 1993 on behalf of a Korean woman now residing in Japan, the allegations are similar to those in the complaint detailed above. The legal basis of the claim as it presently stands is principally that the acts of Japan amounted to crimes against humanity and violated customary norms of international law. In response Japan has asserted that there was no municipal law which gave individuals a right to sue for violations of

2 See Chapter 9 for a more detailed discussion of crimes against humanity.

3 This assertion is not correct, see Chapter 9.

4 See Japan Christian Activity News, February/March 1993, in which a dialogue between the members of the Japan Christian Council and the government is reported. In that dialogue the government claimed that the taking of testimony would be enormously difficult because it would involve not only the women themselves but also former soldiers.

international norms at the time these events occurred, and therefore no suit can be brought at present. The complaint in this law suit also relies on violations of the ILO Forced Labour Convention and international norms prohibiting slavery.

The lawyers the mission met stated that the government has consistently taken the position on the domestic front that war damage, having been caused to so many people, must be tolerated. Its public attitude towards these claims is similar; it has justified its stance to the Japanese population by pointing to all the injuries they had to endure. Only victims of the atomic blasts have received compensation.

As noted above, a claim was filed in April 1993 on behalf of 18 Filipino women who were taken and used as comfort women by the Japanese. A description of the claim provided to the mission recounts the history of the Japanese occupation of the Philippines, discusses the relationship between the institution of comfort women and sexual discrimination, in particular the way in which women are deprived of their dignity by being perceived as a sexual tool of men. The following statement forms part of the complaint:

“what differentiates “comfort women” from other war victims is the factor that the victims of sexual violence share. It is the difficulty that they face in speaking out the whole truth. They tend to catch public attention and curiosity, even though they are not responsible for their experiences. Moreover, there exists a social structure that makes them feel ashamed. The same goes for rape victims.”

The lawyers argue that because of this it is more difficult for the judicial system to grasp the realities of the damage done to such victims. Details are given as to the way in which the women were captured, raped and maltreated. Various documents are referred to, including: “The Regulations of Authorised Restaurants and Comfort Stations in Manila”, published by Lieutenant General Oonishi of the Quarter Master Corps in Manila, a report on venereal examinations undertaken in Iloilo by the Military Police, the diary of a member of the 35th Infantry Battalion and a report from the military station at Santa Cruz Sanatorium, Laguna, concerning the contracting of venereal disease by comfort women.

The legal grounds for the claim are as follows:

1. Violations of the Hague Convention (No 4) of 1907, in particular Article 46 of the regulations, which provides for respect of family honour and Article 3 of the Convention, which recognizes the right to compensation for violations of the regulations;
2. Crimes against humanity;
3. The Paris Peace Conference of 1919 and the Treaty of Versailles, in which it was recognized that crimes against peace, which would include what are now considered to be crimes against humanity, could give rise to claims for compensation; and
4. The Charter of the Tokyo War Crimes Tribunal, in particular Article 5, which defines crimes against humanity as including "murder, extermination, enslavement, deportation, and other inhumane acts... or persecutions on political or racial grounds..."; and in addition it is also alleged that an individual's right to seek compensation cannot be affected by the failure of a government to protect her claims.

The Japanese Government has stated in its defence that domestic law at the time did not provide for a right to sue for violations of international law and without such a law there was no possibility of bringing a claim within Japan prior to World War II; therefore any claim as to such a right is seeking retrospective application of the law. The government also asserts that the Treaty of San Francisco and the Bilateral Treaty between Japan and the Philippines settled all issues of compensation.

Unfortunately copies of the defences lodged by the government in these actions were not available in English either from the plaintiffs' lawyers or from the government; it is possible therefore that other issues have been raised by the government.

Conclusions & Recommendations

Conclusions

1. The Japanese Imperial Army and Navy initiated the setting up of a vast network of comfort stations for the exclusive use and "enjoyment" of the Japanese Imperial Army and Navy, before and during the Second World War. The Japanese military planned and executed the provision of comfort facilities to its troops, wherever they were located. Chinese, Korean, Taiwanese, Filipino, Malaysian, Indonesian and Dutch women and girls were put into these comfort stations and sexual services were extracted from them under duress.
2. The taking of these women, even where it was done initially by private persons, was soon handled by the Japanese military itself. It appointed recruitment agents who were given special permits for travel to and from military establishments. These recruiters were actively assisted by the military (kempeitai) and local police, to ensure that the girls and women "volunteered".

It is indisputable that these women were forced, deceived, coerced and abducted to provide sexual services to the Japanese military.

3. Detailed regulations were framed by the Japanese military for the setting up, use, operation and control of the comfort stations. The regulations were so detailed that they reduced the women to mere commodities.
4. Life at these comfort stations was living hell for the women. They were beaten and tortured in addition to being raped by 15, 20 or 30 soldiers a day and officers by night, day after day, for periods ranging from 3 weeks to 8 years. Living conditions were cramped and shabby. The lives of those who had to follow troops around at battlefronts were put at risk, day after day. Food was usually of

poor quality and in short supply. Although medical check-ups by army doctors sometimes took place, many women were afflicted by sexually transmitted diseases. When they were brought to the comfort stations they were virgins, healthy in body and spirit. They left the comfort stations diseased in body and crippled in spirit.

5. As transportation within all areas controlled by the Japanese military was strictly regulated, it is obvious that the military was aware that thousands of Korean women were being transported within Korea and from the Korean Peninsula to places such as China, Burma, the Philippines, the South Pacific, and the Ryuku Islands (Okinawa). Even when passage was arranged on passenger ships, passage had to be authorized by military officials. The witnesses have testified to the fact that many of them were actually transported on military ships, trains and road vehicles. As these were under the control of the then Japanese Government, it bears responsibility for trafficking in women. This responsibility should be accepted by the present government.
6. From 1942 onwards, Japan occupied and controlled the Philippines. It is clear that Filipinas were being kidnapped and forcibly detained within military camps. There is sufficient evidence to show that military officials in the Philippines were aware of the fact that Filipinas were being kidnapped and placed in comfort stations.
7. Documents obtained by the ICJ mission contain special requests made by field officers to commanders in Tokyo for the recruitment and transportation of comfort women to their areas. This again demonstrates the knowledge on the part of high-ranking members of the military of the existence of the comfort stations and demonstrates their active involvement in the recruitment and placement of women in those stations. It could not have been otherwise, as Japan was at war and it is clear that any area controlled by the military, and in particular a military camp, would be under tight security regulations.
8. It also emerges from the testimony of the witnesses that, in some

camps, Japanese soldiers attempted to kill women who had been in the comfort houses when they realized they were about to lose the war. As these soldiers were under the command of the Japanese military, it remains responsible for their actions.

9. An extremely tragic consequence of the confinement of these women was that their suffering did not end after the war. Faced with untold difficulties, after being abandoned by fleeing Japanese soldiers, some of them reached home, only to live lives of isolation. Typically, it has been a trial of the victims who have had to pay the price of the violations inflicted upon them.
10. Estimates of historians that 100,000 to 200,000 women were made to serve as comfort women are consistent with the large number of Japanese troops stationed throughout the Asia-Pacific region. The vast scale on which these atrocities were perpetrated is truly appalling. Although women were not treated equally in any society at this point in time, they had never been humiliated to this degree, in such vast numbers, for so long.
11. The grinding poverty they were living in, and their social framework, made these girls and women extremely vulnerable to force, fraud, deceit, coercion and abduction. In the context of the Philippines, the Japanese atrocities and wanton acts of brutality caused many of the women to be doubly victimized. A number were arrested on suspicion of being guerrillas or guerrilla sympathisers, subjected to acts of torture, then confined in military camps as comfort women. Others were forced to watch relatives being killed or tortured.
12. Even if it could be established that some of the women did agree to go "voluntarily" to the comfort stations, under no circumstances could they have ever imagined what they were letting themselves in for. Further, there was no way they could have known that the military would kill or attempt to kill them or abandon them after the war.
13. The then Government of Japan was directly or vicariously responsible for all that happened to these women. Its actions

violated customary norms of international law concerning war crimes, crimes against humanity, slavery and the trafficking in women and children. These acts should have been made a part of the trials which took place at the close of the war. Unfortunately the focus of those trials was on acts committed against nationals of the Allied powers. Japan should take full responsibility now, and make suitable restitution to the victims and their families.

14. The investigation conducted by the Japanese Government is inadequate and appears calculated to placate sentiments rather than being focused on a solution to the issue. A fuller and more complete investigation by Japan is necessary.
15. Regarding the Japanese Government's investigation, although it is important to uncover as many documents as possible, it is equally important to interview witnesses. Former soldiers and officers of the military are alive and should be interviewed with respect to this issue.
16. Questions have been raised within Japan as to whether the government is in fact making public all documents available to it. It has been said that many documents were burned or destroyed in other ways at the end of the war and hence the complete picture may never emerge from documentary evidence. In saying this, we do not mean to undermine in any way the obligation of the Japanese Government to continue to search for all records relevant to this matter. It is difficult to believe that there are no existing police documents with respect to the "recruitment" of women from the Korean Peninsula. The police were often given instructions as to the number of people that needed to be recruited from a specific area and it is difficult to believe that all of these documents were destroyed. Furthermore, recruiters had to be licensed by the local police and, again, it is difficult to believe that all documents authorizing these individuals have been lost or destroyed. The Police Department is the only department other than the Department of Labour to say that there were no documents in its files concerning this issue. We find it hard to accept that this is an accurate statement.

17. In addition, more effort should be made to uncover the diaries of soldiers and officers. Where such materials have been made public, they have been useful in documenting the establishment and operation of the comfort stations. Serious efforts should be made by the Japanese Government to locate all existing diaries.
18. The Allied Powers had full knowledge in 1945 of the fact that these atrocities had been committed. They did nothing to bring those offenders to trial or to obtain reparations for the victims. Clearly they owe a duty to explain this, and to make public all records in their possession, pertaining to this issue.
19. Neither the 1965 Agreement on the Settlement of Problems Concerning Property and Claims Between Japan and the Republic of Korea, nor the 1956 Philippines and Japan Reparations Agreement, present an impediment to the women's claim against Japan. The former was never intended to and did not include "claims" involving the violations of human rights. The latter agreement was for reparations to the "people" of the Philippines because of the devastation wrought on their country. The issue of compensation for individuals was not part of the negotiating process, therefore the treaty was not intended to and should not be interpreted as having settled this issue.
20. Some mechanism should be established quickly to determine the case of each of the women who have come forward so far. It is not sufficient to rely on the court cases in Japan; these may take up to ten years to resolve. Given the age of the victims, this is not an adequate means of redress for the violations of human rights which have been perpetrated against them.
21. As there was no attempt made to hold Japan responsible for its treatment of the comfort women at the close of World War II, the international community, and particularly those countries that were members of the Allied forces, have an obligation to these women to put pressure on the Government of Japan to ensure that it takes adequate measures to rehabilitate and provide full restitution to the women, as those terms are used in the report of Professor Theo van Boven, Special Rapporteur for the study on the Right to

Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms. Many of the victims have been surviving at the mercy of friends and relatives. They are beyond the age where they can be expected to work. Many need constant medical attention and care. Some of them are heavily indebted having taken loans for their bare subsistence. Their rehabilitation will therefore ensure them adequate shelter, medical aid and a decent standard of living. Having regard to the years of neglect already suffered by the women, an immediate interim payment of US \$40,000 per victim is warranted.

Recommendations

- 1(a) Japan should make a full and complete disclosure of all information it has in its possession concerning the operation and maintenance of the comfort stations, including the methods by which women were taken to those stations, the manner in which they were transported, and the ways in which they were treated at the comfort stations.
- (b) Japan should expeditiously provide and set up an administrative forum where the claims of the victims can be heard and disposed of within a time-frame of six months or so. Alternatively, Japan should enact appropriate legislation enabling disposal of the pending law suits expeditiously on merits waiving preliminary technical objections of jurisdiction and limitation.
2. If no action is taken as suggested in 1(b), Japan should take steps to fully rehabilitate the victims. This would include making full restitution, as also providing rehabilitative measures such as medical coverage, a decent shelter and other similar measures. Japan has an obligation to fully rehabilitate the victims for the harm they have suffered.
3. In the event of Japan's refusal to rehabilitate the women a tribunal or an arbitration panel, consisting of international law experts from countries not directly concerned with this issue, should be formed as soon as possible. NGOs and individuals should also be permitted to

appear in their own right as parties. All parties must agree in advance to abide by/accept the opinion of the tribunal/panel.

4. Pending action under (2) and (3) above, the Japanese Government should pay, as a purely interim measure, without prejudice to its rights and contentions, the sum of US \$40,000 for the rehabilitation of each woman who has come forward. For this, the NGOs representing the women should submit lists of victims to the Japanese Government.
5. If the Japanese Government persists with its present policy on this issue, the NGOs representing the women should pursue the matter with appropriate organs and specialized agencies of the United Nations, with the aim of seeking the advisory opinion of the International Court of Justice, so as to have the legal issues authoritatively clarified.
6. The Governments of the Republic of Korea and the Philippines must immediately move the International Court of Justice for interpretation of the respective treaties.
7. Those countries that were members of the Allied forces must make a public disclosure of all information in their possession which pertains to this issue and ensure that Japan does take adequate measures to provide full rehabilitation and restitution to the victims.

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