Wednesday, December 06, 2000/amended

The Women’s International War Crimes Tribunal

Military Sexual Slavery

Women survivors and victims of Japan’s Military Sexual Slavery
(The People of the Asia-Pacific Region v. Japan)

Re: Application for Restitution, Reparations and Satisfaction

By: The People of the Asia-Pacific Region through their representatives who seek to protect the rights of women in the Asia-Pacific Region

Against: Japan

Legal Memorandum on the Issue of State Responsibility

Gender discrimination continues to affect the lives of women around the world. One of its worst manifestations is the violence inflicted upon women during times of armed conflict. To date the international community has been unable to stem the tide of violence. One of the major concerns of women and women’s organisations is the ongoing failure of national governments and the international community to bring to justice those responsible for acts of violence against women. Connected to this is the failure to address the nature of the damage inflicted on women. States have been able to escape liability for the damage their officials have brought about either through the purposeful targeting of women or the toleration of acts of violence against women by those acting in their official capacity.

As noted by the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, there is a connection between impunity and putting in place appropriate structures for reparation, including the payment of compensation. When governments are made responsible for the acts of their officials they will do more to train them and to punish violations. For this Tribunal to find the government of Japan responsible for the payment of compensation and the giving of satisfaction will be a major step forward for women across the world.

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This Tribunal has been convened because of a particular historical denial of justice, the situation of the Comfort Women. The horrific crimes committed against the majority of women we have come to know as the Comfort Women were not punished to any substantial degree during the series of trials conducted in the Asia Pacific theatre of war. The full extent of this denial of justice can only be understood when one realises that evidence of the crimes was in existence. No one could have had any illusions about the impact the repeated rapes and torture would have on the lives of the women who endured this experience. Yet the choice of those with the ability to do something, was to do nothing.

Unfortunately it has also been the choice of the Japanese government to show its continuing disdain of all women in general and of the comfort women in particular by its steadfast refusal to offer a meaningful apology to the women and to make adequate compensation to the women. The government has ignored international opinion on this matter, including the Special Rapporteur of the UN Subcommission on Military Sexual Slavery who has called on the government to make adequate compensation. As will be demonstrated below, none of the government’s reasons for denying adequate reparations are convincing. Notwithstanding any legal arguments it is within the power of the government to decide to act with decency, humility and respect, but the government of Japan has continually refused to do so. This obstinacy is an affront to all women and demonstrates a lack of respect for the rights of women both within Japan and elsewhere in the world.

This Tribunal may very well be one of the defining events of the closing decade of the 20th century. It will undoubtedly educate all those who attend as well as many others who will hear of it or read about it. In addition the holding of this Tribunal will give impetus to groups elsewhere in the world who want to ensure that the experiences of women are not overlooked in the history of our time. It is vital that all of us work to make the lives of women in the 20th century visible to those who will come after us.

II. Sovereignty of People - Jurisdiction of Tribunal

A. The Charter of the United Nations

The Preamble to the Charter of the United Nations begins with the words “WE THE PEOPLES OF THE UNITED NATIONS.” These words were purposefully chosen. The world had witnessed a war that touched the lives of millions of people. The horrific nature of the violations committed against individuals from so many different races, ethnic backgrounds and social groups helped peoples and

governments to understand that the world had to unite for the benefit of humanity. The preambular paragraphs of the Charter attest to the fact that as of the 1940s it was understood that sovereignty resided in People. Governments were entrusted to take acts which furthered the cause of human rights. These opening paragraphs created the foundations upon which the UN and the international community were operate. Among those guiding principles was the necessity of establishing \_conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained._

The fact that many of our governments have not always acted in accordance with these principles does not make them less relevant. If we the people are the driving force for the recognition of human rights then we must reclaim aspects of our sovereignty when our governments fail to pursue the protection and promotion of human rights, including the right to equality. There is a moral duty on all of us to work towards the preservation of the rights of others and to take measures necessary to protect the dignity of other human beings. This Tribunal is one method by which the international community through the actions of its members can promote the rights of those who are most vulnerable to abuses of their human rights.

III. State Responsibility

A. Duty of the State

States have a duty to adhere to their international obligations. Such obligations can arise either through treaties or through customary norms of international law. Consequent to the breach of an obligation is the duty to make reparations for that breach.\(^3\) It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.\(^4\) The responsibility of a State is objective in nature, that is good faith is not a defence. On the other hand the desire to bring about harm can be taken into account by a Court in determining the amount of damages or the award of aggravated damages.\(^5\)

States are responsible for those acts of their officials and organs that can be imputed to them. In determining whether or not an act can be imputed to the state, a court or tribunal will take into account whether the act was officially sanctioned, whether or not the person was acting in an official capacity, whether an official even if acting outside of her or his competence gave the appearance of competence, and finally if the act was carried out by someone not an official of the state, that act was condoned.


\(^5\) See discussion of State Responsibility in Brownlie, at pages 418 to 464.
sanctioned or authorised by an official of the State. In the Caire Claim matter, Mexico was found responsible for the acts of its soldiers who killed a French national after refusing to give them the money they had demanded. The Commissioner, after setting out the relevant principles of international law and noting the ranks of the soldiers (major and capitán primero), found as follows: _Under these circumstances, there remains no doubt that, even if they are to be regarded as having acted outside their competence, which is by no means certain, and even if their superior officers issued a counter-order, these two officers have involved the responsibility of the State, in view of the fact that they acted in their capacity of officers and used the means placed at their disposition by virtue of that capacity._  

Even in situations where conduct commences without official sanction but events develop and nothing is done by the State to put a stop to the behaviour of those violating the rights of others, a State will be liable for violations of its international obligations, particularly where there is an explicit or implicit endorsement of the conduct. Further there is an expectation that the State will attempt to return matters to the status quo and offer reparations in those situations where the conduct was not carried out by agents of the state or with the official sanction of the state. 

In her report to the Subcommission on the Prevention of Discrimination and Protection of Minorities, Ms McDougall develops the point that international law prior to the Second World War made states responsible for the acts of their agents which violated the rights of aliens. Under the applicable rules of international law Japan would be responsible to make restitution to all individuals whose rights were violated on the territory of Japan; this would include all those who were brought to Japan in order to be sent to Comfort Stations elsewhere in the Asia-Pacific region. It is worth remembering that the violations were considered to be particularly serious violations of international law.

In the facts of this case women were taken from their homes and off the streets by persons acting either in their official capacity or at the behest of officials of the government of Japan. Further the facilities for sexual slavery were built,

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7 Caire Claim (France v Mexico (1929) 5 RIAA 516 as set out in Dixon and McCorquodale, supra at 405-406.

8 See United States Diplomatic and Consular Staff in Teheran Case (United States v Iran) 1980 ICJ Rep 3, as cited in Dixon and McCorquodale, supra at 407-408.


10 Id. at 41-44.
maintained, secured and otherwise controlled by officials of the Japanese Imperial Army. The behaviour of Japanese officials allowed a situation to develop where ordinary soldiers believed that it was possible to rape, torture, mutilate and otherwise treat inhumanely women in occupied and colonial territories with impunity. The State of Japan is responsible for those acts.

B. Standing to Pursue A Claim:

According to some scholars the classical doctrine of state responsibility is that individual’s must seek the _diplomatic protection_ of their country in order to pursue claims for reparation and satisfaction associated with violations of international law, whether treaty or customary law. In contrast some scholars have argued that certain violations of international law, in particular, violations of the Hague Convention on Land Warfare of 1907 allowed the individual to seek reparations in their own right. There is little doubt that since the Charter of the United Nations came into force that the individual has become a subject of international law. When adopted the Charter reflected several years of discussion on the subject of international law and the concept of human rights. Therefore by the time of its adoption, the views expressed in the Charter reflected the international communities understanding of the place of the individual in international law.

Writings of feminist and other scholars have called into question the patriarchal foundations of the state. They have noted that state sovereignty relies on a conception of power over people. The nationalism that often accompanies exercises of power is one of the major causes of war. Further the desire of those in power to maintain that power often leads to oppression.

It appears that the failure of the International Law Commission to discuss the possibility of individuals having autonomous power to bring lawsuits for breaches of state responsibility was due to the fear on the part of some states that to acknowledge the individual would diminish elements of the sovereign power of the State. The failure to discuss the role of the individual was seen as a weakness in the Draft by a number of commentators including the Subcommission’s Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of

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12 Frits Kalshoven, _State Responsibility for Warlike Acts of the Armed Forces_ (1991) 40 Int’s and Comp. Law Qldy 827 in which the author states that Article 3 had _as its core element the attribution to individual victims of a right to claim compensation for war damages directly from the responsible State. (at 837)
13 Christian Tomuschat, _supra_ note 3.
14 Id. at 4.
gross violations of human rights and fundamental freedoms.\textsuperscript{15} The draft articles on state responsibility are to be reviewed further as questions remain about their coverage and wording.\textsuperscript{16} Although helpful in defining the nature of a state’s obligation to other state’s with respect to adhering to human rights norms, the draft articles should not be given undue weight by the Tribunal.

In contrast to the above the Tribunal would derive benefit from looking to the jurisprudence of the European Union. In a landmark decision the then Court of Justice of the European Communities \textit{ruled} that any Community citizen had a right to see the law determining his or her position be respected by Community institutions as well as by member States. In particular the Court held that the way in which a rule of the Community system was framed was irrelevant; it was not a requirement that the individual be explicitly referred to as the holder of a right.\textsuperscript{17} A further development took place in 1991 in the \textit{Francovich} case, in which the Court \textit{ruled} that an individual who suffers damage as a result of a member State of the Communities not respecting its obligations resulting from Community law enjoys a right to reparation of the damage caused by such unlawful behaviour.\textsuperscript{18} The principle to be derived from these cases is one applicable to the present proceedings, that is, \textit{since} the individual is deemed to be placed at the same level as the States which have created the Community legal order, no differentiation seems justifiable, provided that the rules in issue are clearly intended to benefit the Community citizen. What applies to secondary rules (\textit{Francovich}) must also apply to primary rules (\textit{Brasserie du Pecheur})(footnote omitted). Thus, if States have the (theoretical) right to claim compensation for breach of Community law, this right cannot be denied to private citizens. (Footnote omitted.)\textsuperscript{19}

This Tribunal has an opportunity to promote an alternative vision of international law. It has the ability to say that when international political and government intransigence perpetuate the denial of justice to those who have been the victims of horrific and brutal violations of their personal dignity, the people of the international community have the right to take action to seek vindication. The important role that civil society can play in protecting and promoting human rights has been well documented. Acceptance of their status as important actors in the international arena was demonstrated by the provisions in the Rome Statute for the International Criminal Court that allows nongovernment organisations to present evidence of breaches of international criminal law to the Prosecutor of Court. At this stage of the development of international law, the People of the Asia Pacific region have the ability to bring a case in order to demonstrate the liability of the government of Japan.

\textsuperscript{16} See reference to First Report on State Responsibility in Christian Tomuschat \textit{supra} n.3.
\textsuperscript{17} Id. at 8.
\textsuperscript{18} Id. at 8 - 9.
\textsuperscript{19} Id. at 9.
IV. Breaches of Japan’s International Obligations

A. Introduction

From 1937 Japan carried out a policy of systematically taking women by coercion, deceit and force to be placed into facilities for sexual slavery. These policies resulted in the rape, torture, mutilation, murder, trafficking and inhumane treatment of women throughout the Asia-Pacific region. These acts constitute violations of Japan’s treaty and general international law obligations. In particular Japan violated its obligations pursuant to:

- The Hague Convention on Land Warfare of 1907;
- International norms prohibiting slavery and the slave trade;
- The Convention Prohibiting the Trafficking of Women and Children;
- The Convention Concerning Forced or Compulsory Labour, 1930
- Crimes Against Humanity;
- International Norms recognising the equality between women and men;
- International Norms recognising the equality among the races;
- The Geneva Conventions of 1929;
- International norms requiring the making of satisfaction and the payment of reparations;
- International norms requiring respect for the dignity of the human person (ongoing violation) and compliance with the recommendations of the human rights bodies of the United Nations;

The nature of those violations is discussed below.

B. Violations

(i) Treaty Law

(a) The Hague Convention respecting the Laws and Customs of War on Land

Japan became a party to the Hague Convention Respecting the Laws and Customs of War on Land of 1907 (The Hague Regulations)\(^\text{20}\) in 1912. According to Article 2 of the Convention, the Regulations are only applicable 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 Tribunal\(^\text{21}\) as well as the Tokyo Tribunal\(^\text{22}\) ruled that because of the general

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\(^{20}\) Martens, NRG (3e serie), vol. 3 at 461.

\(^{21}\) Judgement of the Tribunal, Cmnd. 6964, pp. 64, 125

participation clause, the Hague Regulations could not be applied directly, but served as good evidence of customary international law existing at the time of war.

(b) International Convention for the Suppression of the Traffic in Women and Children of 1921

Japan can be held responsible for a breach of the International Convention for the Suppression of the Traffic in Women and Children of 1921\(^23\), 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.\(^24\) 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 territoni of its acceptance of the Convention. This reservation did not include Taiwan.

Nonetheless, Japan must be held responsible for having violated its obligations under the Convention with respect to women taken from the Korean peninsula and or 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.

(c) ILO Convention (29) concerning Forced or Compulsory Labour

At the time of the events being considered by this Tribunal Japan was a party to the ILO Convention on Forced or Compulsory Labor.\(^25\) Pursuant to the terms of this Convention member states of the International Labour Organisation ratifying it

\(^{23}\) League of Nations Treaty Series, vol. 9 at 415
\(^{24}\) See Article 2 and 3 of The Convention on the Suppression of the Traffic in Women and Children.
undertook _to suppress the use of forced or compulsory labour in all its forms within the shortest possible period._ Forced or compulsory labour is defined as _all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily._ The Convention recognises certain exceptions and details standards to be applied in those situations where forced labor does exist. One such condition is that only males between the ages of 18 - 45 may be called upon to perform forced labor. Thus it is obvious that Japan has violated the terms of the Convention.

This view was confirmed by the brief decision issued in February 1996 by the ILO Committee on the Application of Conventions and Recommendations. A trade union of foreign nationals living in Japan filed a complaint alleging that Japan’s treatment of the comfort women amounted to forced labour and that Japan should offer compensation to the women. The Committee agreed with the union’s submission noting that wages had not been paid to the women. It then recommended to the government that it consider making payment to the women in recognition of their lack of remuneration.

It should be noted here that it is the view of the applicants that the Tribunal ought to make a finding that there was a violation of the Convention without connecting the making of reparations specifically to the payment of remuneration. The violations of the Forced Labour Convention are illustrative of the conduct engaged in by the State of Japan in its treatment of women taken into military sexual slavery. However the specific nature of those violations must be borne in mind by the Tribunal. The women were raped, put into sexual slavery, tortured, mutilated and otherwise treated inhumanely. The concept of remuneration is inappropriate to the facts of this case. The Tribunal is being asked to award reparations.

(ii) Customary Law

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20 Article 1, Convention (No. 29) concerning Forced Labour, Adopted 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session, entered into force 1 May 1932.
21 Article 2, Convention (No. 29) concerning Forced Labour, Adopted 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session, entered into force 1 May 1932.
22 Article 11, Convention (No. 29) concerning Forced Labour, Adopted 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session, entered into force 1 May 1932.
23 It should be noted that in addition to violating this fundamental condition of the Convention, Japan also violated all the provisions with respect to the conditions under which forced labour can taken place as well as those articles designed to ameliorate the conditions under which forced labour does take place. Further the Convention does not envisage that any form of forced labour will encompass crimes such as rape or sexual slavery.

24 Another petition filed by the Federation of Korean Trade Unions is still pending before the ILO.
(a) Slavery

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. In that 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. 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, authorised, 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.

This view is supported by the work of the Special Rapporteur on Contemporary Forms of Slavery, including systematic rape, sexual slavery and slavery-like practices during armed conflict, slavery had been considered to be a crime under international law since the late 1800's. Japan in reports to the League of Nations indicated that it had outlawed slavery. One can only wonder at the

33 CTS, vol. 225 at 188.
mentality of a government which in the 1990's wants to act as if it had not accepted a binding principle of international law (jus cogens) when in the early 1900's Japan saw itself as part of the "civilized" body of nations. Although the applicants do not like the connotations of that term, Japan at the time referred to itself as the only Asian country to be part of the civilised group of nations. And it was clear that this group of nations considered slavery to be a particularly outrageous violation of international law.

(b) The Trafficking of Women and Children

By the time the Japanese soldiers forcibly recruited the women throughout the Asia-Pacific region, the prohibition of traffic in women and children was part of customary international law.

Thus, in addition to the 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.

(c) Customary norms concerning international humanitarian law

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. The treatment of the women taken into military sexual slavery the Japanese soldiers violated their family honour as protected by Article 46 of the Hague Regulations. The concept which requires belligerents to respect family honour is part of customary international law. 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.

By their treatment of the 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

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38 Schwarzenberger, supra n. 13 at 218.
46 is broader than a prohibition of arbitrary killing. The importance of human dignity and the need to encourage respect for human dignity were also recognized by the drafters of the Hague Convention. Thus, the reference to "the lives of persons" is a reference not only to their life as such but also to their dignity as human beings. The continual brutality of the Japanese soldiers towards the women, including the continual rapes which they had to endure, was an affront to their human dignity. Hence, with regard to the Chinese, Indonesian, Malay, Filipino, Burmese and East Timorese women, Article 46 of the Hague Regulations was infringed entailing responsibility on the part of Japan.

However, as Korea and Taiwan were at that time colonies of Japan, Article 46 of the Hague Regulations as the basis of the relevant customary international law did not apply to them. 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 and Taiwanese. 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.

(d) Crimes Against Humanity

Japan is a member of the United Nations and considers itself to be a supporter of that organisation. By a resolution passed unanimously on 11 December 1946, the United Nations general assembly (sic) affirmed the principles of international law recognised by the Charter of the Nuremberg tribunal and the judgement of the Tribunal. The law applied in the Tokyo tribunal was the law as enunciated at Nuremberg. There is no basis for an argument in modern day Japan that the legal principles applied by the Tokyo tribunal were incorrect or inapplicable.

There will be those in Japan who will oppose this Tribunal. From time to time it has been suggested by some individuals that the law applied during the Tokyo War Crimes Trial (The International Military Tribunal for the Far East) was not

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39 J. Pictet, Humanitarian Law in Armed Conflict, (A. W. Sijithoff, Leyden, 1975) at 122
40 See A. Mechelynck, La Convention de La Haye Concernant les Lois et Coutumes de la Guerre sur Terre, (Maison d'Editions et d'Impressions, Gand 1915) at 350 et seq.
41 Pictet, supra n. 15 at 122.
the law as it stood at the time of the Second World War. Those individuals must be reminded of the fact that the treaty of peace that Japan signed at San Francisco contained a clause which stated explicitly that Japan accepted the judgment of this Tribunal as well as other allied war crimes trials.\textsuperscript{45}

With respect to the crimes of rape and sexual slavery\textsuperscript{46} these were also considered to be crimes under both international and Japanese law at the time WWII broke out. Japanese military regulations specifically outlawed the commission of assaults against women. These regulations were issued in the belief that they reflected the rules of international law.\textsuperscript{47} With respect to international law itself, the Commission on Responsibilities of the Paris Peace Commission of 1919 had drawn up a list of war crimes. That list included the crimes of rape and enforced prostitution. When the Allied Nations decided that war crimes trials would be held and had to determine the evidence to be collected they used the Peace Commission list as their starting point because Japan had been a signatory to the list.\textsuperscript{48} This means there can be little doubt the culpability under international law of members of Japan's armed forces and military leaders.

\textit{(e) Liability Arising From Non-Prosecution}

In addition, Japan is bound to make retribution to the victims for its failure to investigate into and initiate prosecution against the perpetrators of the atrocities committed by them during World War II. Precedent for such liability being fastened upon Japan can be found in the Janes' Case\textsuperscript{49}, wherein a US/Mexican Claims Commission was called upon to consider a claim of the United 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.

\textsuperscript{45} United Nations Treaty Series, Vol 136, No.1832 (Article 11), Treaty of Peace with Japan signed at San Francisco on 8 September 1951.

\textsuperscript{46} At the time the phrase most commonly used was enforced prostitution.


\textsuperscript{48} Id. at 128

\textsuperscript{49} 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.
(f) Failure to follow the recommendations of UN Human Rights Bodies

There have been several reports by UN experts in the field of international law which have concluded that Japan has a legal obligation to make reparations to the Comfort Women. The international community has been clear in its desire to have Japan take some positive steps toward resolving this issue. In all those reports it has been recognised that the actions of the Japanese government whether in undertaking research, apologising or in setting up the Asian Women's Fund have not matched the international communities expectations with respect to Japan's obligations under international law. The Human Rights structure of the United Nations is premised on the willingness of States to make good faith attempts to heed the recommendations of the human rights bodies. As one of the founding goals of the United Nations was to promote human rights, Japan's refusal to cooperate with the Commission on Human Rights and the Subcommission undermines the operation of the UN. Japan has an obligation to the international community through its acceptance of the Charter to do promote human rights. This obligation has not been met.

(g) Failure to respect the equal rights of women

Through the Charter of the United Nations the people of the world sought to reaffirm [their] faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. The reference in the Charter to equal rights must be understood as enunciating the status of women's rights at the time the Charter was adopted.

Support for this point of view can be gained from a review of Article 7 of the Covenant of the League of Nations which states in pertinent part: _All positions under or in connection with the League, including the Secretariat, should be open equally to men and women._

By continuing to ignore the nature of the crimes committed against the Comfort Women the Japanese government is saying that it does not recognise women as full citizens, it does not recognise them as deserving equal protection of the laws, it does not want them to live without fear and perhaps most astoundingly that it accepts that if it should go to war that others may rape and torture Japanese women with impunity. Further by refusing to come to grips with the past the Japanese government is indicating to women in the Asia-Pacific region that they do not regard them as equals, that they do not understand them to have suffered serious harms and that they do not wish to enter into a process of reconciliation with the women of this region.

The Applicants would like to note at this point that they are drawing a distinction between the government of Japan and the people of Japan. They do not believe that the people of Japan want their government to perpetuate discrimination against women in the Asia Pacific region.
(h) Violation of right to national, ethnic and racial equality -

Again the starting point for the discussion should be the Charter’s recognition of the dignity and worth of the human person. Equality is crucial to the preservation of human dignity. It is also necessary to the preservation of peace and security. In her 1999 address to the UN security Council, the High Commissioner for Human Rights observed:

"Conflicts almost always lead to massive human rights violations but also erupt because human rights are violated due to oppression, inequality, discrimination and poverty."

Further, at the time the Potsdam Declaration was issued, Germany had already surrendered. In determining the principles that would govern the initial period of Allied control in Germany, those nations committed themselves to ensuring that the German judicial system would be reorganised in accordance with the principles of democracy, of justice under law, and of equal rights for all citizens without distinction of race, nationality or religion. It thus follows that racial equality was considered to be a customary norm of international law.

(i) Violation of the Convention Relative to the Treatment of Prisoners of War, 1929

During the course of the Asia Pacific war the government of Japan gave assurances to the Allied countries that it would follow the provision of the Geneva Convention Relative to the Treatment of Prisoners of War, 1929. This Convention applied to all those who could be considered belligerent parties, including non-combatants. In a number of countries, such as China and the Philippines, militia forces resisted Japanese occupation of their country. Some women were taken while they were participating directly in hostilities, others were taken as they assisted the efforts of militias.

The facts as set out in the common and country indictments which will be proved at trial demonstrate that almost every article of this Convention was violated with respect to the treatment meted out to women. Some of the more egregious violations related to: Article 3 (right to respect for person and honour; women to be treated with regard due to their sex); Article 4 (maintenance of prisoners and no difference in treatment); Article 7 (evacuation to regions out of danger zone);

51 Statement By The High Commissioner For Human Rights To The Security Council At The Presentation Of The Report Of The Secretary-General On The Protection Of Civilians In Armed Conflict, New York, 16 September 1999.

Article 8 (obligation to notify of capture); Articles 9, 10, 11, 12, 13, 14, 15, 16, 17, 20 (operation of Prisoner of War Camps); and Articles 27, 28, 29, 30, 31, 32 and 34 (Labor of Prisoners of War).

Therefore Japan is responsible for the payment of compensation to those women whose rights were protected by the 1929 Geneva Convention.
(j) Violation of the Geneva Conventions of 1949 - Duty to ensure compliance

During its consideration of the rules applicable to the dispute between The United States and Nicaragua the International Court of Justice made the following observation: "The United States is under an obligation to ‘respect’ the Conventions and even to ‘ensure respect’ for them, and thus not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3. This obligation derives from the general principles of humanitarian law to which the Conventions merely give specific expression."

The concept of ensuring respect includes an obligation to take positive and specific action. This includes the training of armed forces personnel.

Although Japan is not at present engaged in a conflict, the principle being applied by the Court in the Nicaragua case is relevant here. It is vital for the operation of international humanitarian law that countries encourage due respect for the principles of such law, otherwise respect for the dignity of the human person will be undermined. It is incumbent on a State to ensure that its officials and those whose views will be understood as being officially sanctioned, not make statements that undermine the operation of international humanitarian law.

The comments made by Japanese officials were to the effect that the Comfort Women were licensed prostitutes. For example in 1994, the then Minister of Justice, Nagano Shigekado suggested that the Comfort Women were licensed prostitutes even though the government had acknowledged the true nature of the system for military sexual slavery in 1992. By suggesting that there was any similarity between licensed prostitution and the system for military sexual slavery, the Minister was implicitly condoning rape in war. The Minister’s position makes these statements even more troubling. As the Minister for Justice one could expect that he would be careful in trying to ensure that the rule of law was upheld and that Japanese society was aware of the true nature of international law.

This interpretation is bolstered by the Minister’s reference to the conduct of US and UK armies. He appears to be referring to instances of rape by US and UK armed forces personnel. Such instances have been well documented and records of both militaries indicate there were convictions for rape. This is a bogus argument and must be highlighted as such. Violations of humanitarian law can never be tolerated on the basis that others commit them as well.

Another example of the failure of the State of Japan to ensure respect for the principles of international humanitarian law occurred in 1996 when the government

54 Case Concerning The Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V. United States Of America) (Merits) Judgment of 27 June 1986

55 See, e.g., See also, Yuki Tanaka, _Rape and War: The Japanese Experience_ (1993) (paper in the personal possession of the author).
failed to contradict the statement of Diet member Sakurauchi. He suggested that the situation during the war was such that one could only expect that something like the Comfort women system would exist, saying the situation did not allow anything else. This again gives the impression that rape in war is being condoned.

It is for this Tribunal to find that the spirit of the Geneva Conventions requires that government officials indicate their support for the provisions of the Conventions and acknowledge that grave breaches of the Conventions can not be tolerated.

V. Right of the Comfort Women to Reparations

As noted in Section II A above the breach of an obligation carries with it the duty to make reparations for that breach. As Japan has violated a range of its international obligations, all of which are crucial to the protection of the human person, it is incumbent upon the government to make redress for those violations. The main forms of redress at international law are satisfaction (making an apology and giving guarantees of non-repetition), restitution, rehabilitation (making available medical and psychological services, providing assistance to return home) and the payment of compensation. It should be noted that the applicants have followed the reasoning of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms in that they consider restitution, compensation, rehabilitation and satisfaction as forms of reparations.\footnote{See Part X of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law in the Final Report of the Special Rapporteur, Commission on Human Rights, Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report of the Special Rapporteur, Mr M. Cherif Bassiouni, submitted in accordance with Commission Resolution 1999/33, E/CN.4/2000/62.}

The work of the United Nations in this field underscores the importance of countries taking seriously the necessity of putting in place meaningful structures for reparations. Not to do so suggests that violations are either not serious or that the particular country does not attach significance to the violations its officials have brought about. Although the recent efforts of the UN have focussed on trying to draw together the principles underlying international human rights law as well as international humanitarian law, the reports of the various Special Rapporteurs of the Commission on Human Rights and the Subcommission on the Prevention of Discrimination and Protection of Minorities make clear that the making of reparations has long been recognised as vital to the operation of international law.

(A) Satisfaction as a remedy - The importance of an accurate historical record.

Satisfaction includes making known the facts of the violations that have been committed. It is important that the details of these acts become known so that no one can be under any illusion about the complicity of the Japanese military
hierarchy in the commission of war crimes and crimes against humanity and extent of the planning that took place. The Japanese Imperial Army systematically and intentionally violated the rights of Asian and European women.\textsuperscript{57} Whenever atrocities are committed they are always perceived as being more heinous when they are brought about intentionally. Such crimes are considered to be of a greater magnitude and deserving of a higher level of censure.\textsuperscript{58} This makes it even more crucial that the years of impunity be brought to an end.

The Comfort Women who have chosen to come forward know they have many supporters in Japan and it has been important to them to play a preeminent role in the raising of public consciousness. We should not forget however, that it has been extremely painful emotionally for them to recount what was done to them.

It must prolong the emotional pain of the Comfort Women to realise that the Japanese government is unwilling to assist the people of Japan to come to terms with their past. It is difficult to understand the government's refusal to take steps toward real reconciliation.

The recent decision of the ICTR in the case of Kambanda lends support to the idea that one should question the motivation of those who do not explain their reasons for participating in widespread acts of atrocities and who do not express contrition, regret or sympathy for the victims.\textsuperscript{59} In determining the sentence to be imposed the Court decided that it was appropriate to interpret lack of remorse as an aggravating factor which would militate toward a longer sentence.\textsuperscript{60} Using this standard one can interpret the behaviour of the government of Japan as suspect as it has not shown true remorse.

As stated by the Secretary General of the UN:

"There can be no healing without peace, there can be no peace without justice, and there can be no justice without respect for human rights and the rule of law."\textsuperscript{61}

The Applicants believe the long term consequences for women whether emotional, psychological or physical are worse when they have to live with the knowledge that

\textsuperscript{57} U. Dolgopol, "Rape as a War Crime - Mythology and History in I. Sajor (ASCENT) (ed.) Common Grounds(Ascent Manila 1998)

\textsuperscript{58} A. Roberts, supra

\textsuperscript{59} See ICTR Update, ICTR/UPD/011 Arusha 4 September 1998

\textsuperscript{60} Id. at 3-4

\textsuperscript{61} Secretary-General of the UN, Kofi Annan in respect of the judgement in Akayesu, Press Release, Secretary General/S6/sm/668/L/2896, 2 September 1998
those who perpetrated the crimes are allowed to escape retribution while they must live with the harms inflicted on them.

Here it is important to focus on the totality of what can reasonably be expected of the government. The first aspect is a full disclosure of all relevant information and an apology which reflects the enormity of the tragedy which befell the women. The report by the government although containing many of the salient points, does not delve deeply into the activities of the various armed services nor does it explore the depth of the harm done to the women. There is no real attempt to link the activities of the military to the general structure of the government of the day nor to take full account of the impact of racist and sexist ideologies on the development of military policy. There is little doubt that the government’s failure to fully examine the historical record has subjected it to criticism nationally and internationally. Some critics have raised questions about the government’s commitment to observe the _peace_ provisions of the Japanese constitution. It is difficult to have faith in a government that is not willing to be honest about its past.

As noted by Jose Zalaquett, a member of the Chilean Commission for Truth and Reconciliation, _dealing with past human rights violations is ... a wrenching ethical and political problem._ 62 In the process of examining past human rights violations a nation may have to confront some of the most horrific behaviour that one human being or a group can direct against another human being or group. It is not easy for any nation to undertake such a task. However, if _[the ghosts of the past, [are] not exorcised to the fullest extent possible, [they] will continue to haunt the nation [in the future]._ 63

Zalaquett sets out the ethical framework necessary for a country to adopt policies which address past human rights violations. Of prime importance is the necessity that the policy be adopted _with full cognisance of past human rights violations._ 64 It must also be aimed at preventing the recurrence of abuses and, to the extent feasible, repair the damage caused by past human rights violations. 65 The Chilean Commission for Truth and Reconciliation worked for nine months with a staff of sixty; it considered more than 4000 individual complaints nationwide, interviewed several thousand witnesses and reviewed tens of thousands of pages of documents.

Neither the effort expended by the government of Japan nor the report issued by the government meet these standards. There is a lack of detail and most importantly a lack of honesty about the full scope of the government’s involvement. No effort was made to locate and interview members of the military, nor was there a sufficient search of the possible sources of documentary evidence. In these circumstances

63 _Id at 1430.
64 _Id.
65 _Id._
the report can not be considered an adequate form of restitution as it does not reveal the truth. Thus any apology based on the report can not be accepted as genuine because it is not an apology based on a candid admission of responsibility.

In addition to the Chilean example there are other examples where more complete investigations have been undertaken and more detailed reports have been issued by governments or bodies created by governments. One such example with particular relevance to the government and people of Japan, is the inquiry undertaken by the Congressional Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied (1993). That inquiry has been described as "thorough and aggressive" and as having provided the "solid factual record for reparations." The report candidly focused on the "invidious racial stereotypes" which formed the basis of the original decision to intern Japanese Americans and forced the American public and parliament to confront that racism. Although racism remains a feature of US society, the campaign to seek reparations for those interned during the Second World War led to the formation of new networks which continue to work together to combat that evil.

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67 Id. at 225.
68 Yamamoto, supra.
(B) The effect of ongoing violations on the award of damages

The concept of an ongoing violation has two prongs. The first is the toleration of a violation by a government that changes the nature of the government’s responsibility. This is the type of ongoing violation referred to by The International Court of Justice in the Iran case. The second is where a government refuses to cease violating its international obligations. This issue was discussed in the Namibia case where the ICJ noted that international responsibilities arise from continuing violations. In this case the failure to prosecute, tolerance of denials by members of the Diet and the government as well as the refusal to offer satisfaction all constitute continuing violations of Japan’s international obligations.

The available evidence indicated that the plight of the Comfort Women was known at the end of the Asia Pacific war. However it was not until the 1990’s that these issues received significant consideration. At this point in time the international community had developed a greater appreciation of the connection between ongoing violations of human rights and the elimination of impunity. Japan has portrayed itself as an active member of the UN system and has been lobbying for the enlargement of the Security Council so that it may be given a Permanent Seat. Given this context Japan should have taken actions that demonstrated its commitment to the international law of human rights and in particular the law with respect to the human rights of women.

As the High Commissioner for Human Rights has noted the major building blocks for peace building and reconciliation are good governance, the rule of law, respect for human rights, a strong civil society, and institutions which can guarantee an environment conducive to stability and peace. This Tribunal in assessing Japan’s responsibility should take into account recent developments in the fields of international human rights law and international humanitarian law.

Our argument that the Tribunal should take account of the ongoing nature of Japan’s violations is strengthened by the decision of the Yamaguchi District Court (Shimonenzeki branch). Although the court was considering the Plaintiff’s arguments that Diet members had violated the Constitution of Japan, there is a direct analogy between the Court’s statements and the issues before this Tribunal. In reaching its determination that the Japanese Constitution had been violated, the Court made the following observations:

Because the Japanese Constitution acknowledges the dignity of individuals and respect for individuality as one of its fundamental principles, and because the Constitution was in part enacted in remorse of the terrible

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69 Namibia Case 1971 ICJ Rep 16 as quoted in Dixon and McCorquodale supra at 401.
70 Statement By The High Commissioner For Human Rights To The Security Council At The Presentation Of The Report Of The Secretary-General On The Protection Of Civilians In Armed Conflict, New York, 16 September 1999.
deeds committed by the Imperial Government, Defendant Japan has a very serious duty to provide restitution. Hence, since Japan has known the facts surrounding the plight of the _Comfort Women_ for some time, by refusing to provide restitution, it compounded the Plaintiffs’ suffering. In other words, the failure to legislate the necessary law caused another violation of the humanity of the _Comfort Women_.

... Given these facts and the notion that the _Comfort Women_ system stands side by side with the Nazi war crimes in its scope of human rights violations, the failure to legislate an official apology and compensation further violates the human rights of the victims. Soon after the Cabinet Secretariat’s comment on August 4, 1993, enactment of such a law became the constitutional duty of the government. By the end of August, 1996, three years after the Secretariat’s remarks, there has been sufficient time to pass legislation. At this point, the failure to enact the law became illegal according to the State Liability Act.

Since Defendant Diet members could easily interpret the aforementioned legislative duty as their legislative goal, they have clearly committed negligence.\(^71\)

The law of State Responsibility is closely analogous to the domestic law of Torts. This Tribunal should follow the reasoning of Yamaguchi District Court (Shimonenzeki branch).

(C) **Commission of separate and further violations**

Apart from tolerating and being complicit in ongoing violations of the rights of the Comfort Women, Japan has also committed a further violation by allowing members of the government and the Diet to make statements that suggest rape in war in not a war crime or a crime against humanity. As noted above the Geneva Conventions of 1949 place an affirmative obligation on Japan to ensure respect for their provisions. During the negotiations for the International Criminal Court the International Committee of the Red Cross issued a statement to the effect that rape in war is a grave breach of the Conventions. This view was adopted by the meeting of Plenipotentiaries in Rome and was incorporated into the Statute of the International Criminal Court. Furthermore the General Assembly with Japan’s participation had adopted a resolution that specifically stated that rape was a war crime.\(^72\) In addition Japan must be deemed to be fully cognisant of developments

\(^{71}\) Quoted from the translation of the judgement in the _Draft Outline of the Law for Compensation to Victims of wartime Forced Sex_ at pages 44-45 (text in personal possession of the author). See also, judgment as translated in Pacific Rim Law and Policy Journal.

\(^{72}\) See General Assembly Resolution 51/115 which states:

3. Reaffirms that rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide,
that have taken place in international law as a result of the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

(D) General Principles Concerning Compensation

The UN Commission on Human Rights is in the process of finalising "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law." In his 1999 report the Special Rapporteur noted the connection between reparations and impunity citing the work undertaken by the Special Rapporteur of the Sub-Commission on the question of impunity of perpetrators of violations of human rights (civil and political). He also noted the attention paid to restitution, satisfaction and compensation by a range of Special Rapporteurs within the UN system, thus making the point that compensation, satisfaction and restitution serve a dual purpose of restoring the dignity of the human person as well as changing the human rights climate in a given country.

Compensation is the sum of money to be awarded for _economically assessable damage resulting from violations of international human rights and humanitarian law._ Examples of items to be included are:

- Physical or mental harm, including pain, suffering and emotional distress;
- Lost opportunities, including education
- Material damages and loss of earnings, including loss of earning potential;
- Harm to reputation and dignity; and
- Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

The final report of the Special Rapporteur also notes that the term gross violations of human rights encompasses within it violations of international humanitarian law.

and calls upon States to take all measures required for the protection of women and children from such acts and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice.

75 Id. at paras 2 and 6. Among the Special Rapporteurs mentioned in para 6 are those on Torture, Summary and Arbitrary Executions, Violence Against Women and Systematic rape, sexual slavery and slavery-like practices during armed conflict.
76 Final Report, supra.
77 Id.
The Applicants have detailed the extent and type of harm experienced by the women taken into military sexual slavery in their Application. They request this Tribunal to give consideration to all forms of harm they have suffered when making its recommendations as to Japan’s obligation to pay compensation. The Applicants also draw the attention of the Tribunal to the necessity of ensuring that compensation includes the effect that a violation has had on the reputation and dignity of the human person. As noted above, this harm continues to the present day as the government of Japan has allowed Ministers and members of the Diet to make disparaging remarks about the Comfort Women. As the government continues to harm the reputation and dignity of the Comfort Women, the award of compensation must be commensurate with the full extent of this harm.

(E) General Principles Concerning Restitution

The 1999 report of the UN Commission on Human Rights Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms canvasses the international legal principles that govern the right to restitution.78 This overview as well as the reports of the Special Rapporteur of the Subcommission on the same issue underpin the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.79 Essentially restitution is designed to return the victim to the status that she occupied prior to the violations, in particular restoration of freedom legal rights and return to one’s place of residence.80 This is not feasible in this particular case due to the lapse of time.

The Tribunal should take into account when considering the award of compensation the fact that restitution particularly in the form of a return to social status and family life is now impossible. Had remedial action been taken at the close of the Asia Pacific War it is possible that some return to normalcy might have been possible for more of the women. The inaction of the government of Japan has exacerbated the extent of the loss suffered by the women taken into military sexual slavery.

79 References to the reports of the Subcommission’s Special Rapporteur are contained in id. The Basic Principles are set out in the Final Report of the Special Rapporteur, Commission on Human Rights, Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report of the Special Rapporteur, Mr M. Cherif Bassiouni, submitted in accordance with Commission Resolution 1999/33, E/CN.4/2000/62. The Commission on Human rights has requested the Secretary General to seek government comment on the Principles and has asked the High Commissioner for Human rights to organise a seminar that would bring together all interested parties with a view to finalising and adopting the Basic Principles.
80 Id. at Article 22.
(F) Right to Rehabilitation

This right encompasses the need for medical and psychological care as well as legal and social services.\(^{81}\) Although all of the women taken into military sexual slavery are in need of such services it is doubtful that they should be provided directly by the government of Japan given its flagrant disregard of the women’s rights. It is unlikely that many of the women would be willing to have the government of Japan control such services as this might have an adverse effect on their emotional well-being. Therefore it is suggested that the cost of such services be included in the Tribunal’s recommendation for Compensation. In addition Japan has gained an economic advantage by not having had to provide these services at an earlier date. This should also be taken into account by the Tribunal.

(G) Right to compensation for violations of Hague Conventions

The Tokyo Tribunal found that the Hague Convention itself could not be used as the standard by which to measure Japan’s conduct as it could only apply where all the belligerents were a party to the Convention. However the Tribunal determined that the Convention was a good description of the rules of customary international law. This finding did not try to distinguish between the articles of the Convention or the Regulations, but rather indicated that the entire document reflected customary international law.\(^{82}\)

Although the Hague Convention does not create specific mechanisms for the enforcement of claims, it was the intention of the drafters that those who suffered as a result of violations of the provisions of the Convention were to receive compensation. Those who drafted the Statute believed it was possible for international law to be self-operating even in times of war.\(^{83}\) This provision was given some effect in the Treaty of Versailles.\(^{84}\) International law and practice at the time Japan inflicted unbearable pain and suffering on the Comfort Women was to the effect that compensation was payable for harms inflicted by belligerent armies.

Article 3 of the Convention states:

\(^{81}\) Id. at Article 24.

\(^{82}\) Support for this view is contained in Frits Kalshoven, _State Responsibility for Warlike Acts of the Armed Forces_ (1991) 40 Int’s and Comp. Law Qly 827 at 836.

\(^{83}\) A. Roberts, _Land Warfare: From Hague to Nuremberg_ in M. Howard, G.J. Andreopoulos, and Mark R. Schuman (eds) _The laws of War - Constraints on Warfare in the Western World_ (Yale University Press New Haven and London 1994) at 126. See also, Frits Kalshoven, _State Responsibility for Warlike Acts of the Armed Forces_ (1991) 40 Int’s and Comp. Law Qly 827 in which the author states that Article 3 had as its core element the attribution to individual victims of a right to claim compensation for war damages directly from the responsible State. (at 837)

\(^{84}\) Id.
A belligerent party which violates the provision of the Regulations on Land Warfare annexed to the [Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.\footnote{Convention (IV) Respecting the Laws and Customs of War on Lands, signed at the Hague, 18 October 1907 quoted in Kalshoven, id at 830.}

Japan has continually claimed that international law did not recognise the right of the individual to compensation for violations of their rights. However distinguished international scholars have reviewed the negotiations preceding the adoption of the Hague Convention and come to the conclusion that Article 3 was specifically designed to give individuals a right to compensation when they suffered harm as a result of the actions of an opposing state’s armed forces. Frits Kalshoven, Prof. of International Humanitarian Law at Leiden University in the Netherlands (now retired) has convincingly demonstrated that the delegates to the second Hague Peace Conference 1907 intended to lay down a rule... relating to a State’s liability to compensate the losses of individual persons incurred as a consequence of their direct (and harmful) contact with its armed forces,\footnote{Kalshoven, id at 830.} not a rule relating to the international responsibility of one State vis-a-vis another.\footnote{Id at 837.} He states that the Article had as its core element the attribution to individual victims of a right to claim compensation for war damages directly from the responsible State.\footnote{Id at 836.}

Although the Hague Convention itself does not set out a framework for the submission and resolution of claims, treaties negotiated subsequent to the Hague Convention often contained provisions allowing for the presentation and resolution of individual claims for compensation. One can assume that the parties to those treaties were aware of the provisions of the Hague Convention and found means to give effect to Article 3. This is not surprising because the Convention itself recognises that it would be at the end of hostilities that individual rights to compensation could be resolved.\footnote{Id at 836.}

VI. The Asian Women’s Fund is not an appropriate response

Among the recommendations adopted by the International Commission of Jurists was that full and complete restitution should be made to the victims of Japan’s deliberate war time policy of placing women into military sexual slavery. The measures envisaged by the mission included the full and complete disclosure of all information available to the government, the provision of adequate compensation and the provision of medical coverage, shelter and any other necessary steps to rehabilitate the victims. Thus far the government has done little to offer any meaningful form of reparations.
The payment of reparations can assist victims to feel vindicated and to regain a measure of dignity. The Japanese government’s creation of a foundation to collect and distribute private donations has not fostered a sense of dignity in the victims. Thus far it has had quite the opposite effect. Many of the women have expressed indignation at the idea that their harms could be compensated for by _gifts_ from private individuals or corporations. Given the serious nature of the violations they suffered at the hands of a previous government, many women are opposed to any scheme which on its face allows this government to ignore its responsibility to make adequate compensation. To channel money through a private fund is to deny that the government has any responsibility, moral or legal, to undertake to compensate the victims. Only a direct payment by the government can be considered an adequate form of redress.

The anger being expressed by many of the women should be enough to stop the government. It can not be an adequate form of redress if significant numbers of women refuse to accept any payment from the fund. If the government continues to act in ways which are insulting and which do not take into account the views of the victims, it will only serve to alienate the victims.

The government’s creation of a Private Fund has proved to be divisive. It has caused problems within the nongovernment movement as well as for the women themselves. One must question the legacy of the fund if its work caused the breakdown in communication among those individuals and groups who have worked so hard to make this issue one of international concern.

Furthermore the Fund was established without adequate consultation with the victims. It is an affront to the dignity of the survivors to establish a fund without meaningful consultation. If the government were sincere in its expression of remorse it would have put more effort into the consultative process. These actions of the government must be viewed as having undermined the cause of equality rather than furthering it. The actions of the Japanese government should be contrasted with those of the German government. It has continually worked with other governments and non-government organisations to design laws for _indemnification_ and the creation of appropriate foundations.89

Once it admitted that it had some responsibility for the forcible and deceitful taking of the Comfort Women and for the horrific acts of brutality committed against them, the government attempted to distinguish between moral and legal responsibility. Essentially the government argued that it did not have an obligation to make reparations as there was neither a specific treaty calling on it to do so nor was

89 See State payments made by the Federal Republic of Germany in the area of indemnification, Berlin, January 2000. Thus far the government of Germany has paid 79,648 billion Deutschmarks to persons who were persecuted. It estimates that it is likely to make further payments of 15,352 billion Deutschmarks. In addition some German states have made payments of their own. As of December 1998 these totaled 2,546,369,000.
there an established mechanism for the handling of claims. This distinction can not be justified. If anything having a moral responsibility should make the government want to go further than it would if it had legal responsibility. In all legal systems a line is drawn between moral and legal obligations, with legal obligations being the narrower category. This is particularly true with respect to civil wrongs or torts the area most analogous to state responsibility.

Further if the responsibility being exercised by the government is moral, then its actions and the basis of its actions should comport with modern ideas of morality. The establishment of the Asian Women’s Fund is so fundamentally connected to notions of inequality, gender discrimination and racism, that is can not be considered a moral response.

The conduct of the Japanese military in taking the women and enslaving them in militia brothels was an expression of racist notions of superiority of one group over another and was also premised on the inherent inferiority of women. As this conduct of the military government was itself racist and sexist any means of redress which does not fully compensate for that racism and sexism perpetuates violations of fundamental human rights.

(A) Racism and Colonial Domination

With respect to the first part of the argument, there can be little doubt that Japan’s decision to become the colonial power in the Korean peninsula and then elsewhere in the Asia Pacific region was premised on the belief that Japan had the right to take over these countries. Colonial occupation comes about through a desire to dominate and control the territory of another people and encompasses a willingness to use military force to achieve this objective. We are all aware that colonial rule existed in many parts of the world. Wherever it existed it fostered a sense of racial superiority in the dominant group. The policies Japan adopted in Korea were evidence of a belief in the superiority of Japanese culture; for example Koreans were forced to change their family names. Although these policies were not followed in all of the territories subject to Japanese control, the government did ensure that it had sole power over the lives and economic resources of those subject to its rule. Furthermore, the military, aware of its power over the subjugated territories, engaged in acts of brutality in order to maintain the absolute power of the Japanese government.

90 I use the term racism here in its broadest possible sense so as to encompass ethnocentrism and other forms of behaviour which are premised on beliefs which espouse the superiority of one group over another.

91 The details of Japan’s colonial policies are set out in greater detail Dolgopol, U and Paranjape, S, _Comfort Women - The Unfinished Ordeal _ (Final Report of a Mission) (ICJ, Geneva, 1994) at pages 21-25. For a more detailed analysis of this period see, Chong-Sik Lee, Japan and Korea - The Political Dimension (Stanford, California, Hoover Institution Press, 1985).

92 Details of such acts are contained in the judgement of the Tokyo War Crimes Tribunal as well as the judgements of the various satellite tribunal responsible for trying class B and C war criminals. See The Tokyo War Crimes Trial, annotated and edited by R.J. Pritchard and S.M. Zaide, Vol. 20,
The lasting negative impact of colonialism has been addressed in many United Nations resolutions and documents. Recognition of its destructive impact on human rights is the reason the two Covenants begin with the basic premise that all peoples have the right to self-determination including the right to control the resources on their territory.

(B) Sexism and Japan’s Conduct

The ICI report begins thus:

_This is the story of people everyone tried to forget._ It is inexplicable that human rights violations on such a massive scale were not discussed in any meaningful way for more than forty years. Even now, after extensive inquiries no significant action has been taken to acknowledge the victims’ pain or to provide relief to them. Perhaps the only reason for this silence and inaction is the fact that the violations were perpetrated against women._  

Mass rape in war is not new. It is the ultimate denial of a woman’s humanity; it objectifies her and turns her into an item of property to be controlled by the male soldier. _Rape attacks the integrity of the woman as a person as well as her identity as a woman._ It renders her... ‘homeless in her own body.’ _It strikes at a woman’s power; it seeks to degrade and destroy her; its goal is domination and dehumanisation._

From 1928 onwards the then military government of Japan took over 100,000 women from their homes in order to place them into military brothels where they would be repeatedly raped. These women were subjected to the most brutal horror that can befall any woman. The psychological and physical harm done to these women is almost beyond description.

Although the government of Japan has stated its remorse for these events on a number of occasions those statements seem devoid of any real understanding of the affect these events had on the women concerned. There is an unwillingness to focus on the individual humanity of the victims. The violence that was perpetrated against these women affected their bodies, their _autonomy_, integrity, selfhood,


93 Dolgopol, U and Paranjape, _S supra_ n. 2 at 15.


95 Rhonda Copelon id at 202.
security and self-esteem, as well as [their] standing in [their] communities. 96
Their conception of themselves as human beings and woman was shattered. Many
were unable to build the lives they had dreamed for themselves in their childhood.
For a great number of the women their ability to trust their fellow human beings was
destroyed. Many of the women who have been interviewed have not allowed
themselves the warmth of emotional contact with others in their community because
they feared they would reveal their _secret._ It is almost impossible to imagine what
it must have been like to live with such emotional pain for so long a period of time
without having anyone you could trust. These women have been made to pay the
price for the crimes committed against them.

(C) Concluding observations

It is crucial that we bear in mind the true impact of racism and sexism. They are
forms of exclusion which work by denying the humanity of a particular group.
Once they are defined as less human, violence against them is more easily tolerated
and may be encouraged by the State. When this is allowed to occur, we are all
vulnerable to human rights abuse. 97

VII Peace Treaties

The first part of this section will focus on more traditional arguments with respect to
the some of treaties of peace that exist between the countries from which the women
were taken or were forced or coerced or deceived into entering a facility for military
sexual slavery. The second part will address the gender discrimination and the
racism that underlies Japan’s reliance on the treaty process as an excuse not to make
full restitution and reparation.

(A) Possible Impact of The Treaties for The Settlement of Claims

(i) 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

96 Id at 201.
97 Charlotte Bunch, _Transforming Human Rights from a Feminist Perspective_ in Julie Peters and
include claims made by individuals or on behalf of individuals for inhumane treatment suffered during the period of Japanese colonial rule of Korea.\(^98\)

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 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."\(^99\) (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 so\(^100\) During negotiations Korea attempted to seek reparation but eventually withdrew such a claim because of the strong Japanese opposition.\(^101\) Japan had taken the position that


\(^100\) See Lee, Chong-sik, supra n. 1 of Chapter 2 of this report.

\(^101\) Oda, supra n. 20 at 46.
"she would be prepared to compensate the claims of the Republic of Korea, in so far as they were based upon justifiable legal grounds," but in the end rejected all claims having to do with reparations. 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 workers, 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. 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. All of the provisions in the 1965 Agreement concern either the disposition 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 Korea, 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

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102 Oda, supra n. 20 at 46.
103 Id at 47.
104 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.
105 Oda, supra n.20 at 46.
106 Pertusola (Decision No. 95 of 8 March 1951), 13 Reports of International Arbitral Awards 174 at 179.
of the Charter of the United Nations in promoting [the] mutual welfare and common interests" of the two countries. 108 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.

(ii) *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 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. 109 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. 110 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." 111

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." 112

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108 Oda, *supra* n. 20 at 42-43.
112 *Id* at Article 14(a) (1).
At the time the drafters understood this article to mean that Japan 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.\textsuperscript{113}

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.\textsuperscript{114} 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."

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.\textsuperscript{115}

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

\textsuperscript{113} Sinco, V.G., (1952) 27 Phil. L. 367; and Oda supra n. 20.
\textsuperscript{114} Article 1, Philippines and Japan Reparations Agreement, United Nations Treaty Series, Vol.285,
No.4148, p.24
\textsuperscript{115} Chorzow Factory (Merits) P.C.I.J., Ser.A., no.17, p.29.
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*.¹⁶ 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 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) The racism and sexism inherent in the treaty process

Just as racist and sexist attitudes underpinned the conduct of Japan from 1905 until 1945, they continue to form the basis of its reliance on legal arguments to defend against the payment of any form of compensation and refusal to make complete restitution. Japan has adopted an attitude toward international law which is fixed in time and which refuses to take cognisance of the developments which have taken place since 1948 in the field of human rights. Further it has attempted to hide behind the existence of treaties which are themselves the product of racism and sexism to avoid accepting responsibility for the conduct of a predecessor government. Because the present conduct of Japan is based on two sets of philosophies, racism and sexism, which have been widely and routinely condemned by the international community its use of the term _moral_ responsibility must be considered a sham. When viewed in this light the government’s arguments must themselves be considered immoral and contrary to international law.

The Applicants would like to examine this argument in a bit more detail. In putting forward its case that it has no legal obligation to pay compensation, Japan has concentrated primarily on the various treaties it entered into at the close of the War; it has argued repeatedly that those treaties set out the full extent of Japan’s obligation to pay compensation to the victim’s of its war time conduct. It is

¹⁶ 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.
therefore necessary to examine the process by which those treaties were negotiated and the interests that were represented in the negotiations.

Each time Japan relies on the various Treaties of Peace it is fostering the ideas of racism and sexism as the process by which those treaties were negotiated was inherently racist and sexist. It is the Applicant's position that the process was so fundamentally flawed that it should not form the basis for denying full restitution to the women taken into military sexual slavery. The Applicants are not arguing that the treaties are invalid under international law. Their argument centres on the use of the treaties to avoid the payment of reparations. Japan has relied on the existence of the treaties to suggest that it need not, as a government, pay any direct compensation. It is the use of the treaties for this purpose, an essentially negative use, that we are contesting. In our view a truly moral position would be one which accepted full responsibility and looked seriously at the means necessary to make restitution.

Some of these treaties such as the Treaty of Peace signed at San Francisco were the product of negotiations between Japan and the Allied countries. With few exceptions those negotiating on behalf of the Allied powers took little account of the horrors that had been inflicted on the peoples of the countries occupied by Japan. It is clear that the subject of the women taken into sexual slavery was not a part of the negotiating process. In contrast to the situation that occurred in the European theatre of war, the Allies did not insist that adequate restitution be made to the victims in the Asia-pacific theatre immediately upon the close of the War. This failure to focus on the treatment of those who were under either their colonial domination or the colonial domination of Japan was also premised on racism and sexism. The Allies were concerned by what had happened to their nationals not the local inhabitants.  

Further, although the Allies were aware of the plight of the women taken into military sexual slavery they gave very little thought to the manner in which they had been victimised and ultimately treated the women as if they were responsible for what had happened to them. Also, the armed forces of the Allied powers were guilty of raping women and used _comfort stations_ set up by Japanese authorities

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117 This view was evident in the handling of the war crimes trials. It was the Allied powers that decided what would and would not be a war crime, gathered the evidence for the prosecution, and determined who would be prosecuted. Early in the creation of the War Crimes Commission the Allies made a decision to prosecute Japanese military officials only for what had been done to their nationals. See 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) and Piccigallo, P., The Japanese on Trial (University of Texas Press, Austin and London, 1979).

118 The Allies compiled extensive reports on the women taken into military sexual slavery. Although detailing the manner of _recruitment_, the physical violence perpetrated against them and the horrific nature of the conditions they had to endure the Allies, at times, still referred the women as _camp followers_. See Report compiled by the US Office of War Information, Psychological Warfare Team, US Army, India - Burma Theatre, 10 October 1944 (copy in the personal possession of the author).
during their occupation of Japan. In these circumstances it is not surprising that the Allies did not insist that Japan pay compensation to the victims.

With respect to the 1965 Treaty between Japan and the Republic of Korea it can not be said that those negotiating on behalf of Korea were unaware of the situation that had existed on the Korean peninsula during the war, therefore I would not try to argue that the treaty was racially biased. However, it would appear that the issue of the women taken from the peninsula and put into military sexual slavery was not a subject of discussion during the negotiating process. This was hardly surprising. There is little doubt that women occupied an inferior position in Korea at that time. Those negotiating the treaty would not have emphasised violations of their rights. Further an inherent part of the position of inferiority of women was their value as property (virginal brides); any woman who had been defiled was considered to be less worthy (valuable) and would not have been easily accepted by her society. To this day there are people who refer to the woman as the _shame of Korea._ Negotiators with these attitudes would not have put forward the right of the women to compensation.

With respect to the Philippines it would appear that those negotiating with Japan directed their efforts at the property and material damage that had been done to their country rather than the impact of occupation on the individual victims. This seemed to be a common phenomenon at the close of the war.

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120 I recognise that some Scholars both Korean and others have argued that the negotiations surrounding this treaty were not conducted in a manner which served the best interests of the Korean people. As this point is not crucial to my thesis I will not attempt to analyse the relevant issues and should not be taken as expressing any views on the subject.
121 This issue is discussed in greater detail in Dolgopol, U and Paranjape, S, _Comfort Women - The Unfinished Ordeal (Final Report of a Mission)_ (ICJ, Geneva, 1994) at pages 162-164. Essentially the authors argue that the material available concerning the negotiations indicates that the Japanese government refused to consider any claims which referred to the _sufferings and indignities_ brought about by Japanese colonisation of the Korean peninsula, therefore the treaty can not have resolved these issues as they were not the subject of discussion between the parties.
122 Although the author has not undertaken any independent research into this issue it was quite clear from the conversations she had with Korean women while undertaking the mission that pre-WW II Korean society had very rigid attitudes towards women. Knowledge of these attitudes was one of the reasons so many of the women taken into military sexual slavery either committed suicide or did not return to their families; they believed they would be outcasts in their own societies.
123 While interviewing women in the Republic of Korea an incident occurred during which a member of the mission was asked why she wanted to speak with the women taken into military sexual slavery when these women were the _shame of Korea_. Although most of those the members of the mission spoke with were truly concerned about the plight of the women and were working tirelessly to ensure that their rights would be vindicated, it was of concern to the mission that such views were still being expressed.
124 The text of the treaty deals with property rights of nationals of the two countries, property rights of the respective governments, the transfer of moneys contained in bank accounts in each of the countries and the method by which the people of Japan can transfer goods and services to the people
(C) The Sexism Inherent in the Negotiating Process

Given what we now understand about the prevalence of gender discrimination in our societies it is not surprising that little was done to include the victimisation of women in the negotiating process. As has been recently recognized by the UN Commission on Human Rights, many of the degrading experiences undergone by women have not traditionally been considered human rights violations. This has been due both to purposeful and subtle discrimination against women. There is little doubt that women’s voices have been silenced in the public arena. In the vast majority of countries women were not able to vote until well into the 20th century. This effectively excluded them from participation in the government of their countries and for the vast majority of women it also excluded them from any public debate about the direction of their societies. As women had no political voice it is unlikely that their government’s would give serious consideration to the issues that affected them.

A more subtle form of silencing was also in operation, particularly in the Korean peninsula. During our interviews it emerged that many of the women had had little formal education. If women can not read and write they are excluded from knowledge about events which may affect their lives. They do not have the means to voice their concerns through the written word and often are unable to access information about their rights and forms of redress. Even if the women had been willing to tell their stories, they would not have known what avenues were open to them to influence the direction of their own government’s decision-making process. They certainly would not have known how to gain access to the Japanese media in order to influence public opinion in that country.

of Korea in order to redress the damage done to their country during the war. The treaty does not address violations of individual rights. See text of 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, UNTS, Vol. 583, No. 8473, p.258 and Dolgopol, U and Paranjape, S, supra n.2.

125 The Final report of the Special Rapporteur on _The right to restitution, compensation and rehabilitation for the victims of gross violations of human rights and fundamental freedoms_ contains the following statement:

...many observers maintained that damage to property and possessions received too favourable consideration in comparison with the less generous treatment of damage to life and health._


128 In saying this I am not dismissing the difficulties the women would have faced in the context of the values of their own society at that point in time nor the hurdles they faced in light of the lack of
Although the government has argued that individuals did not have a claim for violations of their rights prior to the Second World War events in the European Theatre as well as earlier peace treaties, such as the Treaty of Versailles, make clear that the rights of individuals were recognised. The true essence of the government’s position is that those negotiating the various peace treaties concerning the Asia Pacific Theatre of war did not insist that compensation be paid to individuals who suffered at the hands of the Japanese military. The government must be taken as arguing that this failure on the part of those responsible for the negotiations should constitute a waiver of any individual rights. For Japan to rely on the shortcomings in the negotiation process, is to then to rely on actions that were themselves racist and sexist. Any arguments which are inherently based upon racism and sexism are unacceptable at this stage of the world’s development. To continue to rely on such arguments is to continue to promote racism and sexism. Japan’s position is therefore unacceptable under international law.

VIII Conclusion

The Japanese government’s refusal to make adequate restitution for the harms caused to the women taken into military sexual slavery during the Asia Pacific War is evidence of the lack of political will to own up to Japan’s colonial past and to admit to the racism and sexism inherent in the policies adopted by the previous government. This position brings into question the government’s commitment to human rights. It is the mark of a mature nation that it is able to face the mistakes of its past, to admit them and attempt to compensate for them where appropriate. Although Japan plays a key role in world politics and the development of international economic policy it is still unwilling to confront its past in any meaningful way.

Were the Japanese government to undertake such a reconsideration of its position on this matter, it would have to accept that the denial of its obligation to pay compensation is premised upon documents which are either racist or sexist in their

democracy in their country. For a general discussion of the impact of the authoritarian rule on the development of women’s rights in the Republic of Korea see George Hicks, _The Comfort Women_ (Allen and Unwin Sydney 1995) and Chong-Sik Lee, _Japan and Korea - The Political Dimension_ (Stanford, California, Hoover Institution Press, 1985).

129 For a brief overview of the compensation laws enacted in the various sectors of Germany at the insistence of the occupying Allied Forces see Kurt Schwerin, _German Compensation for Victims of Nazi Persecution_ (1972) 67 Northwestern U. LR 479. Zaide and Pritchard argue that there were two prime motivating factors behind the Allied failure to insist that Japan pay compensation: (1) the United States believed that its taxpayers would ultimately bear the cost of such compensation as it was to be responsible for administering Japan until the conclusion of the Peace Treaty; and (2) that the Allies were afraid of the events in China and wanted to be sure that Japan would have a viable economy so as to ensure that its citizens would not be tempted by the political developments in China and so as to ensure that Japan could act as a bulwark against Chinese influence in the region. See R.J. Pritchard and S.M. Zaide, Vol. 20, _Judgement and Annexes_ (Garland Publishing, Inc. New York and London, 1981).
origin. Rather than embracing the developments which have taken place in the modern law of human rights, the government has sought to avoid any obligation which could be said to arise out of such developments, arguing that notions of a right to adequate redress for violations of human rights is a Post World War II phenomenon. This behaviour demonstrates a consistent pattern of disregard for fundamental human rights, in particular the right to equality.

This Tribunal must order the government of Japan to make full redress to the victims and survivors of Japan’s military sexual slavery.