

THE SO-CALLED “COMFORT WOMEN” PROBLEM AND THE STATE’S RESPONSIBILITY TO PROTECT THE HUMAN RIGHTS*

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ABSTRACT

Before and during the Second World War, the Japanese army kidnapped women and girls, mostly from Korea peninsula. These women and girls, so called “Comfort Women”, were transported to the Comfort Stations, raped by an officer first, and raped by several dozens of soldiers in a queue continuously. According to the testimonies of Comfort Women Victims, when they resisted this serving or showed an unsatisfactory attitude, they were beaten or tortured by the sword, killed, or sometimes buried alive. Most of them were killed or abandoned, and only few women survived. However, after they came back home, they suffered enormous physical and psychological disease, and also lived isolated from their family and

the society.

In this article, in order to review the Comfort women's legal problems, I dealt with the responsibility of Republic of Korea, Japan and international community with respect to the duty to protect the human rights of Comfort Women Victims. In the first part, I introduced and evaluated the decision of the Constitutional Court on August 30, 2011, which ruled that a certain failure of legal obligation on the part of the Korean Government was unconstitutional. I think that in this decision the constitutional issue of the State's duty to protect the basic rights of the Comfort Women Victims was explained pretty well, but the State's duty should have been dealt with from another point of view, the responsibility for State's Absence. In the second part, the responsibility of Japan for the crime against humanity was dealt with. The last part focused on the responsibility of International Community, especially to have had to open War Crime Tribunal to punish the war criminals after World War II.

I. INTRODUCTION

1. What is the subject of this article?

The euphemistically called "Comfort Women" are the sexual slaves drafted by the Japanese Imperial Army and Navy in the Second World War. Before and during the Second World War, the Japanese Imperial Army established the Comfort Stations in the battle fields at latest since 1932 in Shanghai. The Japanese army kidnapped women and girls, mostly from Korean peninsula, but also from China, the Philippines, Indonesia, and the Netherlands and so forth. These women and girls were transported to the Comfort Stations without knowing where they are going. Once they arrived at the Comfort Stations, the girls and women were raped by an officer first, and then raped by several dozens of soldiers in a queue continuously, day and night, even at their menstruation, sickness

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and injuries. If they resisted this serving, or didn't follow their request or showed an unsatisfactory attitude, they were beaten or tortured by the sword, killed, or sometimes buried alive. During and even after the Second World War, many of them were killed or abandoned without any food and money in their comfort stations by the Japanese soldiers. The comfort Women who survived and came back home suffered enormous physical and psychological disease and lived isolated from their family and the society as well.

Asking a question, what kind of role did the international human rights law play while and after such crimes against humanity and atrocities were committed by the Japanese imperial army, as a constitutional law professor I would like to deal with the responsibility of Republic of Korea firstly, and the Responsibility of Japan secondly and the international community with respect to the human rights of the Comfort Women thirdly.

2. Why was this issue chosen?

On August 30, 2011, the Constitutional Court ruled that a certain failure of legal obligation on the part of the Korean Government was unconstitutional. The Court held that the Korean Government should have resolved the dispute between Korea and Japan as to whether the former comfort women victims' claim for damage expired under Article 2 of "the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan" (hereinafter "the 1965 Agreement"), pursuant to the dispute settlement procedure under Article 3 of the 1965 Agreement.

I think that the scope of the state's duty to protect the basic rights of the Comfort Women cannot be fulfilled merely by referring the Comfort Women issue to the arbitration board, but the duty reaches further, because the human rights of the Comfort Women need to be protected more profoundly and comprehensively.

The Japanese Government should bear the responsibility for the war crimes and crimes against humanity, because they violated the treaty and customary international law, which prohibited the trafficking in women. It should disclose all the documents regarding the comfort stations, including their establishment and operation, the

recruitment of the women, the number of Comfort Women drafted by the Japanese army, and the list of their names and personal information. It looks not so easy to disclose these documents completely, because the Japanese imperial army possibly destroyed all the documents after the Second World War. They also have the duty to apologize and compensate, prosecute the offenders pursuant to domestic criminal law, to prevent ever denying the past and to revise the history books etc. {In this regard, the Chinese Government found recently lots of documents, which can prove the involvement of the Japanese Government in establishing and operating the comfort stations and drafting the comfort women. The U.S. Government must have obtained various documents concerning the comfort stations at the battlefields, where the U.S. army occupied in the Second World War.}

We can consider the responsibility of the international community. First of all, the Allied Power who finished the Second World War with victory. They had not dealt with this Comfort Women issue from the point of view of war crimes in the Tokyo War Crime Trial, even if they acknowledged the fact that the Japanese imperial army violated the customary international law. The Batavia Trial, where 15 Japanese offenders were convicted, only in relation to the war crimes against the 35 Dutch Comfort Women in Indonesia, even though there had been much more Indonesian and Asian Comfort Women victims kidnapped by the Japanese army and raped in the Comfort Stations. This failure in the War Crime Tribunal to prosecute all the offenders against Asian Comfort Women victims could raise the question of the racial discrimination, which means that only the war crimes against the white Comfort Women victims had been dealt with. Recently in 2007, the U.S. House Resolution 121 led by Congressman Honda from California was passed, which urged the Japanese Apology and Compensation to the Comfort Women victims, and in January 2014 a document attached to a spending bill for 2014 urged the Secretary to encourage the implementation of the 2007 Resolution on the “comfort women” issue. This effort of the U.S. Congress and Government cannot be under-evaluated. However, the above raised question, why the war crimes against humanity regarding the sexual slavery were not prosecuted in the Tokyo War Crimes Tribunal, should be clarified.

I would like to deal with the responsibility of State from the constitutional law perspective and the international law perspective based on the report of UN Commission on Human Rights, the International Commission of Jurists and some precedent researches.

Many Comfort Women victims, including Ms. Kim Hak Soon, who made her testimony to the public society first, passed away without receiving the Japanese apology and compensation. Can we say that the current international law and the international human rights law offer real effectiveness regarding the protection of the human rights of the Comfort Women?

3. Testimony of the former Comfort Women Victims

I think the best way to acknowledge which atrocities and ordeals the Comfort Women experienced is to hear or read the testimony of former Comfort Women. We can hear the testimony of many former Comfort Women from Korea and the Philippines in the report of the International Commission of Jurists (1994), and two Korean former Comfort Women in the UN report of Coomaraswamy (1996) and two Korean and one Dutch former Comfort Women in the report of the Hearing before the Subcommittee on Asia, the Pacific, and the Global Environment of the Committee of Foreign Affairs of the U.S. House of Representatives. The commonness of the testimonies would be kidnapping, deceiving and coerced transportation of young girls and women to the comfort station, and the atrocities and brutalities of Japanese Soldiers. These young girls and women were not treated as human beings, but as the being under the animals, who could be killed and abandoned, if their usefulness passed away.

In the testimonies, we can hear that the soldiers demanded their all kinds of sexual desire. If the women didn't obey, they were beaten and tortured or killed. There is the testimony that some women were driven to pools which were filled with water and snakes and eventually buried alive with earth. Some woman, who rejected the demands of soldiers, was stripped of her clothes and they rolled her naked body with her bound hands and legs on the nailed board, and eventually they cut off her head before the other women.¹ There

1. UN Commission on Human Rights, Report of the Special Rapporteur on

happened so many brutalities and atrocities in these comfort stations.

II. THE STATE'S DUTY TO PROTECT THE HUMAN RIGHTS OF THE COMFORT WOMEN VICTIMS

1. Introduction

I would like to introduce a decision of the Constitutional Court of Korea on August 30, 2011, in which the 109²former Comfort Women filed on July 5, 2006 the Constitutional Complaint against the failure of the Government, to resolve the dispute between Korea and Japan regarding interpretation as to whether the former Comfort Women's damage claims have been extinguished by Article 2 (1) of "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan" in 1965 (hereinafter "the 1965 Agreement"), pursuant to Article 3 of this Agreement.

In this decision, I think, the constitutional issue of the State's duty to protect the basic rights of the Comfort Women Victims was explained pretty well, but it is dealt with only the subject matter of review, which the complainants argued in this constitutional litigation. I think, the State's duty to protect the human rights of the former Comfort Women, could and should be dealt with from the other point of view more profoundly, that is to say, "the responsibility for the State's absence" during the Japanese colonial rule in the Korean peninsula.

Anyway let me summarize the decision of the Constitutional Court first, and explain my opinion.

violence against Women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, 4 January 1996(hereinafter, UN Report, E/CN. 4/1996/53/Add1, 4 January 1996)

2. Meanwhile up to the date of announcement of the decision 46 complainants deceased.

2. *The Comfort Women Case of the Constitutional Court on August 30, 2011*³

(1) Case overview

The complainants are "victims known as comfort women" who were forced into sexual slavery by the Japanese military. The respondent is a government agency that carries out and supervises foreign and trade affairs.

The Republic of Korea signed the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (Treaty No.172) with Japan on June 22, 1965.

The complainants have argued that, as to whether the damage claims they hold against Japan as comfort women have been extinguished by Article 2 Section 1 of the Agreement, Japan refuses to provide them with compensation on grounds that the claims have expired by the aforementioned provision, while the Korean government does not believe that the claims issue has been settled by the 1965 Agreement, which represents a dispute between the Korean and Japanese governments over the interpretation of the 1965 Agreement. On July 5, 2006, the complainants filed this constitutional complaint challenging the constitutionality of the respondent's omission to act, arguing that the respondent is not fulfilling its duty to take action to resolve the interpretation dispute as stipulated by Article 3 of the 1965 Agreement.

(2) Subject matter of review

In this case, the subject matter of review is whether the complainants' fundamental rights have been violated by the respondent, who failed to act under Article 3 of the Agreement in resolving the Korean-Japanese dispute over interpreting whether the complainants' damage claims as comfort women against Japan have been terminated by Article 2 Section 1 of the Agreement.

3. 23-2(A) KCCR 366, 2006Hun-Ma788, August 30, 2011.

(3) Holding

It is unconstitutional that the respondent has failed to resolve, under Article 3 of the Agreement, the dispute over interpretation of whether the damage claims filed by the complainants, in the capacity of comfort women, against Japan have been extinguished by Article 2 Section 1 of the Agreement.

(4) Rationale

1) Review on Justiciability

A. Constitutional Complaint against the Omission to Act

The executive's omission to act can be challenged only when the governmental power in question neglects its duty derived specifically from the Constitution and thus those who had their basic rights violated are entitled to request an administrative action or exercise of governmental power (12-1 KCCR 393, 98Hun-Ma206, March 30, 2000).

The “governmental power's duty derived specifically from the Constitution” stated above comprehensively includes the duty to take action by government power (1) stipulated in the Constitution, (2) derived from interpreting the Constitution, and (3) specifically written in the statutes (16-2(B) KCCR 212, 219, 2003Hun-Ma898, Oct. 28, 2004).

B. Duty to Take Action by the Respondent

Since the constitutional complaint becomes non-justiciable if the governmental power is not obligated to act as stated above, it shall be reviewed whether the respondent has the aforementioned duty to take action.

Article 10 of the Constitution provides that “All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.” The “human dignity” herein is a supreme constitutional value as well as a goal set forth by the state that is binding on all government

institutions, which therefore indicates that the state is entrusted with the duty and task to realize human dignity. For this reason, human dignity is not only a "boundary of state power" associated with individuals' right to protection from the state, but also an objective of state power to protect people from a third party when their dignity is at stake.

Moreover, Article 2 Section 2 of the Constitution provides that "It shall be the duty of the State to protect citizens residing abroad as prescribed by Act," and the Constitutional Court has previously held that "The protection that citizens residing abroad enjoy during their stay in their country of residence under Article 2 Section 2 of the Constitution that specifies the state's duty to protect expatriates refers to diplomatic protection offered by the state in their relationship with residing countries for their fair treatment in all areas guaranteed by treaties, international laws and regulations as well as statutes of their country of residence and support in legal, cultural, educational and all other areas specifically designated by law based on political consideration for expatriates (5-2 KCCR 646, 89Hun-Ma189, Dec. 23,1993). By this holding, the Constitutional Court has already acknowledged that the state's duty to protect citizens residing abroad is derived from the Constitution.

C. Sub-conclusion

Thus, the respondent did not take action although the duty to do so is derived from the Constitution and thereby has likely infringed on the fundamental rights of the complainants.

In this context, this case will be reviewed on the merits of whether the respondent's refusal or negligence to take action infringes on the complainants' fundamental rights and whether it is therefore unconstitutional.

2) Review on Merits

A. Dispute over Interpretation of the Agreement

It is evident that the Korean and Japanese governments have dissenting views in interpretation as to whether the claims specified in Article 2 Section 1 of the Agreement involves the damage claim of

comfort women, and that this conflicting interpretation constitutes a “dispute” defined in Article 3 of the Agreement.

B. Dispute Settlement Procedure

Therefore, once the aforementioned dispute occurs, the respondent should, in principle, settle it firstly through diplomatic channels pursuant to relevant procedures under Article 3 of the Agreement and then, if this effort is exhausted, take the case to an arbitration board.

C. Whether Respondent's Omission to Act Violates Fundamental Rights

(a) Significance of the Infringed Fundamental Rights

The comfort women victims' right to claim damages from the government of Japan for its extensive anti-humanitarian crime is not just part of the property rights enshrined under the Constitution, but also implies the post-facto restoration of dignity and value and personal liberty that has been ruthlessly and continuously violated. Therefore, blocking the repayment of damage claims is not just confined to a constitutional property issue but is also directly associated with the infringement of fundamental dignity and value of human beings (20-2(A) KCCR 91, 100-101, 2004Hun-Ba81, July 31, 2008).

(b) Urgency of a Legal Remedy for Violation of Rights

In the three lawsuits filed with the Japanese courts since 1991, the comfort women victims lost their case, one of the reasons being that the damage claims of comfort women victims have been extinguished by the Agreement. It has now become virtually impossible to resort to judicial remedies from Japan's courts or expect voluntary apology and remedies from the Japanese government. It is already over 60 years since the end of WWII when comfort women were forced into sexual slavery for the Japanese Military, and more than 20 years since the victims brought lawsuits against Japan.

(c) Possibility of a Legal Remedy

Even if the infringed rights are significant and there is an urgent risk of violation, it is difficult to impose the duty to take action on the respondent if there is absolutely no chance of providing a legal remedy.

In this case, as the complainants are filing a complaint to seek the respondent's exercise of duty to take action, their intent as victims is clear. Moreover, taking into account the background of signing the Agreement and the domestic, foreign views appalled by the unprecedented violation of women's rights calling for Japan's admission of fact, apology, and compensation, the possibility of obtaining compensation from the Japanese government in case the respondent takes a dispute settlement procedure under Article 3 of the Agreement should not be foreclosed.

(d) Consistency with Critical National Interests

The respondent argues that it is difficult to undertake the duty to take concrete action demanded by the complainants, stating that taking steps for dispute settlement under Article 3 of the Agreement and claiming financial compensation from the Japanese government may cause a destructive legal dispute or strained diplomatic relations.

However, even if the nature of diplomatic actions that require strategic choices based on understanding of international affairs is taken into account, it is nevertheless hard to conclude that an extremely unclear and abstract reason such as the possibility of a "destructive dispute" or "strained diplomatic relations" qualify as pertinent reasons for disregarding legal remedies for the complainants facing serious risks of basic rights violation. It is neither a national interest to be considered seriously.

(e) Sub-conclusion

The respondent's failure to take action in this case violates the significant fundamental rights of the complainants enshrined in the Constitution.

3) Conclusion

According to Article 10, Article 2 Section 2, and Preamble of the Constitution and Article 3 of the Agreement, the respondent's duty to take steps for dispute settlement under Article 3 of the Agreement is derived from the Constitution and specifically stipulated in the statutes. Also, widely considering the possibility of serious violation of fundamental rights such as dignity and value as human beings and property rights, as well as the urgency and possibility of remedy, the respondent does not have the discretion to not take action and cannot be deemed to have fulfilled its duty of action to take dispute settlement procedures under Article 3 of the Agreement.

3. *Aftermath*

After this decision was pronounced, the Minister of Foreign Affairs and Trade demanded the Japanese Government to accept bilateral talks for dispute resolution pursuant to the 1965 Agreement twice, but the Japanese Government revealed no response until August 29, 2013.⁴ Recently before the Summit meeting for Nuclear Security between Korea, U.S.A and Japan was held on March 24 – 25, 2014 in the Hague, Korea and Japan agreed to held meeting next month to discuss this issue.⁵

Currently it doesn't look so certain that the Government will refer the aforementioned dispute between Korea and Japan to the arbitration board pursuant to the Article 3 the 1965 Agreement.

Anyway it seems evident that this decision offered the great moment to invoke the domestic or/and international interest on this issue again.

Former Japanese senator, Joshikawa Haruko introduced this decision to Japanese Society, arguing that the international society doesn't support the position of Japan and described lots of efforts of the municipal congress to pass the Comfort Women resolution.⁶

4. http://www.mofa.go.kr/news/briefing/index.jsp?mofat=001&menu=m_20_10&sp=/webmodule/htsboard/template/read/korboardread.jsp%3FtypeID=6%26boardid=237%26tableName=TYPE_DATABOARD%26seqno=347098

5. <http://www.koreaherald.com/view.php?ud=20140330000380>

6. JoshikawaHaruko(吉川春子), Former Japanese Senator, "The Decision of the

4. Evaluation and the State's duty to protect the human rights of the former Comfort Women

(1) Meaning of the Decision

The Constitutional Court has established a new test for the review of the constitutionality of governmental inaction which is very persuasive, and be applied to the similar new cases: 1) Significance of the infringed fundamental rights, 2) Urgency and 3) Possibility of a legal remedy, 4) Consistency with critical national interest.

I think this decision gave the comfort women victims their first judicial victory and the new hope that the situation could be changed through the diplomatic effort of Korean Government to resolve this issue. It can also be evaluated as a significant decision, because it will provide a turning point to the comfort women movement.

(2) Responsibility for State's Absence

a) Responsibility for State's Absence

However, I would like to add a critical opinion from the point of view of the responsibility for the State's absence.

As the Constitutional Court held⁷, the duty to protect the security and life of its people is the most important and basic duty of a State, regardless this duty is written in its Constitution or not.

From this perspective, we can raise a question of where the State was, while the foreign authorities and army kidnapped and transported its people to the military "rape camps"⁸ in the battle

Constitutional Court of Korea on the Comfort Women Problem and the Responsibility of Japan, 『前衛』 878, January 2012, pp. 161-164.

7. The Constitutional Courts states: "Meanwhile, the Preamble of the Constitution specifies that "the people of Korea uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919." Therefore, the duty to restore human dignity and worth of the victims who suffered tragic lives for a long period by being forced into sexual slavery during Japan's colonial rule in which the state failed to fulfill its most basic duty to protect safety and life of the people is, although this happened before enactment of the Constitution, the most fundamental duty that the incumbent government upholding the cause of the Provisional Korean Government holds toward the people"

fields far away, raped and tortured and killed so many young girls and women. At that period of Japanese colonial rule, the State was absent, and didn't know what happened to its people, the young girls and women, how many there were and where they were transported, under how brutal condition they had to live, and how many young girls and women were murdered after sexual abuse in the military comfort stations.

If the State came back on August 15, 1948, the State should have begun to investigate first of all, what happened to its people during its absence. I think the State was able to know the situation concerning the Comfort Women issue better than the ordinary people, before the survivor revealed her ordeal to the public after 50 years.

In this regard, I think the Comfort Women can file the suit for the State's liability, asking the responsibility of State for not protecting their safety and life. The survivor of Comfort Women victims was the tip of an iceberg, therefore the State should have investigated and searched for the victims, who vanished and didn't come back after they had been transported to the Comfort Stations.

In conclusion, the State should bear the burden of responsibility for its absence and should have made the effort to cure all their damage.

b) Duty to investigate the Comfort Women Victims

From the duty to protect the inviolable human rights is derived the duty to investigate the Comfort Women Victims during the period of the State's absence. As aforementioned, the survivor is the tip of an iceberg, the Government should investigate and figure out how many young girls and women had been drafted as sexual slaves by Japan. According to the report of International Commission of Jurists, the number of the Comfort Women was estimated to be 100,000-200,000⁸, and according to Prof. Yoshimi, 50,000-200,000 and

8. UN report by Gay J. McDougall, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1998/13, 22 June 1998, p. 9.

9. Ustinia Dolgopool / Snehal Paranjape, *Comfort Women - An unfinished Ordeal*, International Commission of Jurists, 1994, p. 7.

Korean women reaches 80% of all.

The way to investigate the victims would be the notification of the family or relatives of victims, and diplomatic cooperation with other countries like China where the comfort station had been established and like U.S.A. which found or possessed this regarding documents. This investigation could be helped by the disclosure of the documents of Japan. But Japan as offender had destroyed the documents and has hesitated to cooperate, so that the Korean Government should request diplomatic cooperation from other Asian countries and Allied Power countries. We can build the permanent international body or Institute to investigate and make efforts to resolve this Comfort Women issue.

- c) Duty to compensate the damage of the Comfort Women as a liability for the State's absence

The State should compensate or make up all the damage for the Comfort Women, because this accident resulted from its absence, so that the State should have responsibility for it.

The Constitutional Court stated that although the Korean government did not directly infringe on the basic rights of comfort women victims, it is liable for causing current disruption in settling their damage claims against Japan and restoring their worth and dignity as human beings by not specifying the substance of claims and employing a broad expression of "all claims" in signing the Agreement. The Court held that, in that sense, it is hard to deny that the respondent has the duty to take specific action to clear the disruption.

Even in the case, where the State didn't abridge the safety and the life of the Comfort Women victims directly by itself, the liability of the State is unavoidable, because such a tragedy had not occurred, if the State had had sufficient power to protect her people from invasion of foreign powers. Therefore I think, it has been more urgent to implement her duty derived from this responsibility and liability for her absence and being unable to protect her people in the period of Japanese colonial rule, rather than "liability for causing current disruption in settling their damage claims against Japan" The more profound ground of the State's liability lies in inaction of

her duty to protect the safety and the life of the people, because the Republic of Korea succeeded her precedent State, as the Preamble of the Constitution specifies that “the people of Korea uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919.”

This duty to compensate the damage of Comfort Women victims is not of legal character “as part of social security benefits”, as the Constitutional Court assumes, but it is derived from the responsibility for the State’s absence, therefore its legal character is based on the State’s liability pursuant to the Article 29 (1) of the Constitution of Korea.

Therefore I think we need to point out, that this consciousness of the responsibility and liability for State’s absence is missing from this Comfort Women decision of the Constitutional Court.

d) Duty to afford the medical care and living cost

From the responsibility for absence, is derived also the duty to support the medical care and living cost for the Comfort Women victims, who came back home. They mostly suffer severe physical disease and serious psychological trauma and they are unable to maintain the ordinary life. The State should provide them the living cost, because they are hardly able to earn with their own ability.

5. *Legislation and Reality*

On June, 1993 the legislators of Korea passed “the Act on the Support of Livelihood Stability for Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule”, for the support of livelihood of the Comfort Women victims, after this issue broke out through the first testimony of the Comfort Women victim, Ms. Kim, Hak Soon.

The Article 4 of this Act stipulates, “the State shall give support of the following subparagraphs to persons eligible for livelihood stability support: (1) Livelihood benefits under the National Basic Living Security Act; (2) Medical benefits under the Medical Care Assistance Act; (3) Payment of subsidies for livelihood stability; and (4) Nursing service. The Article 5 of this Act guarantees them also

preferential lease of Rental Housing. So when the State, a local government, or the Korea Land and Housing Corporation under the Korea Land and Housing Corporation Act leases houses built for rental pursuant to the Housing Act, it shall lease such houses preferentially to persons who do not own houses, from among the persons eligible for livelihood stability support, as determined by the Minister of Land, Infrastructure and Transport. This Act was amended on December 11, 2002 to introduce the provision of the State's Investigation regarding the Comfort Women problem and the proper education based on the true historical facts to the young generation.

The important amendment from the perspective of the State's responsibility was made on July 29, 2005, which introduced the provision of the "Responsibilities of State" and the support for the restoration of nationality of those who couldn't restore it and remain residing abroad. The Article 2-2 of the Act stipulates, "(1) The State shall make positive efforts with regard to the investigation into the truth, the education on truthful history, etc. for restoration of the honor of sexual slavery victims drafted for the Japanese imperial army and promotion of their human rights (2) The State shall find out sexual slavery victims drafted by the Japanese imperial army positively and take necessary measures so that they may maintain stable livelihood."

In the Amendment of the Act on March 24, 2014, the word "domestically and internationally" added to these aforementioned responsibilities of States, which seems as a reflection of the rationale in the Comfort Women decision of the Constitutional Court on August 30, 2011. The State should find out the Comfort Women Victims in the nation and residing abroad, and should make effort more positively for the purpose of the restoration of honor of Comfort Women Victims domestically and internationally, and should guarantee this regarding necessary budget and organization.

The legislators have made the effort to implement its responsibility to protect the fundamental rights of Comfort Women victims with the necessary amendment.

Currently (2006) the former comfort women victims received 43,000,000 Won one time, and 740,000 Won monthly from the Government. And the Korean Council for the Women Drafted for

Sexual Slavery by Japan (NGO) began to investigate the realities of the comfort women victims residing abroad since 2001 with support of the Government and found out 32 former comfort women in China until January 2006.

But the legislators made this act only 50 years after the WWII, so that the responsibility of the State during this period remains unresolved. I think this inaction or omission of the Government for 50 years long seriously infringes on their fundamental rights and is unconstitutional. The complainants should have challenged through their constitutional complaint also against this inaction.

III. STATE RESPONSIBILITY ON THE PART OF JAPAN

The reports of the International Commission of Jurists by Dolgopol/Paranjape and UN-Commission on Human Rights by Radhika Coomaraswamy has accepted the Responsibility of Japan for the establishment, operation and control of the military sexual slavery. Based on these precedent reports, I would like to deal with the responsibility of Japan for the crime against humanity.

The Report of the Special Rapporteur on violence against women, its causes and consequences by Coomaraswamy on January 4, 1996¹⁰, stated that most of the women kept at the comfort stations were taken against their will, that the Japanese imperial Army initiated, regulated and controlled the vast network of comfort stations. The Government of Japan should be prepared to assume responsibility for what this implies under international law.

1. Involvement of Japanese Government

The Coomaraswamy report pointed out that the first comfort stations under direct Japanese control were those in Shanghai in 1932, and there in first-hand evidence of official involvement in their establishment. One of the commanders of the Shanghai campaign, Lieutenant-General Okamura Yasuji, confessed in his memoirs to have been the original proponent of comfort stations for the military.

10. UN Report, E/CN. 4/1996/53/Add1, 4 January 1996, p. 22.

There had been a very high incidence of rape by Japanese troops and, in response, a number of Korean women from a Korean community in Japan were sent to the province by the Governor of the Nagasaki Prefecture. The report states that the fact that they were sent from Japan implicates not only the military but also the Home Ministry, which controlled the governors and the police, who were later to play a significant role in collaborating with the army in forcibly recruiting women.¹¹

Professor Yoshimi also explicitly said that the military comfort stations were considered essential to raising the morale of the troops, maintaining military discipline, preventing looting, rape, arson, and the massacring of prisoners; and preventing sexually transmitted diseases. The Ministry of War explicitly acknowledged that comfort stations performed those functions."¹²He suggested one of the key documents that attest to the participation of the Ministry of War is a notice entitled "Matters Concerning the Recruitment of Women to Work in Military Comfort Stations" issued on March 4, 1938 by an adjutant in the ministry of War. As a consequence of his discovery and publicizing of this document the Japanese government's stance on the Comfort Women issue changed.¹³

The International Commission of Jurists reports that documents obtained by the mission of the International Commission of Jurists contain special requests made by field officers to commanders in Tokyo for the recruitment and transportation of the comfort women to their areas.¹⁴

And many testimonies of the former Comfort Women state that they were kidnapped or recruited by deceit that they would work in the Japanese military factory, and then transported to the Comfort Stations and raped day and night, confined and controlled by the Japanese military. Such testimonies prove the involvement of Japanese Government clearly.

11. UN Report, E/CN. 4/1996/53/Add1, 4 January 1996, p. 7.

12. Yoshimi Yoshiaki, *Comfort Women*, Columbia University Press, New York 2000, p. 60.

13. Yoshimi Yoshiaki, *Comfort Women*, Columbia University Press, New York 2000, p. 58.

14. Dolgopol/Paranjape, *Comfort Women*, International Commission of Jurists, 1994, 156

2. Violation of international Law by Japan

1) Breach of Treaties Signed by Japan

In 1925, Japan was signatory of treaties as follow:

The International Agreement for the Suppression of White Slave Traffic (1904).

The International Convention for the Suppression of White Slave Traffic (1910).

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

Japan can be held responsible for breach of the International Convention for the Suppression of the Traffic in Women and Children of 1921 ratified in 1925. Under the terms of Convention, Japan was obliged to take all steps necessary to discover and prosecute persons who were engaged in the traffic of women and children.

Japan's activity of forcibly recruiting and coercing into prostitution women from the Korean peninsula, as well as women in the occupied territories, was inconsistent with the provisions of the Convention.

However, upon ratification Japan exercised its prerogative under Article 14 to declare that the territory of Chosun(now Korea) was not included in the scope *ratione territorii* of its acceptance of the Convention.

But as the International Commission of Jurists reports, Japan must be held responsible for having violated its obligations under the Convention with respect to women taken from the Korean peninsula for the following reasons:

First, 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. Secondly, the positions 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

as appropriate to attempt to solve all of these issues by means of 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. 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 issue.¹⁵

2) Breach of International Customary Human Rights Law

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

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 intent to reduce him to slavery.... and, in general, every act of trade or transport in slaves.”

Once the women concerned had been taken away from their families and villages, the military acted as if it owned the women. Thus, they treated them as slaves. In addition, the kidnapping and transportation of the women, which was condoned, authorized, or

15. Dolgopol/Paranjape, *Comfort Women*, International Commission of Jurists, 1994, 157-158.

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.

3. Whether the Compensation for damage of Comfort Women Victims was met under the Article 2 of the 1965 Agreement?

The Government of Japan states in documents handed to the Special Rapporteur, Ms. Coomaraswamy, that even if there were responsibilities under international law, these responsibilities had been met by San Francisco Peace Treaty, and other bilateral peace treaties and international agreements dealing with reparations and/or settlement of claims. And the Government of Japan argues that Article II (1) of the 1965 Agreement confirmed “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”. Basically the Government of Japan takes the firm stand that all claims have been settled under bilateral treaties and that Japan is not legally bound to pay compensation to individual victims.¹⁶

The international Commission of Jurists states that the treaties referred to by the Japanese Government were never intended to include claims made by individuals for inhumane treatment.¹⁷ It argues that the word “claims” was not intended to cover claims in tort and that the term is not defined in the agreed minutes or the protocols.

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

16. UN report, E/CN.4/1996/53/Add.1, 4 January 1996, p. 25.

17. Dolgopol/Paranjape, *Comfort Women*, International Commission of Jurists, 1994, p. 162.

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 judgment is rendered.

The word "claims" is not defined in the Agreed Minutes or in any of the protocols to the Agreement. Although Korea has attempted from 1945 onwards to have Japan recognize the sufferings and indignities it had wrought on the Korean peninsula during its colonial occupation, Japan has steadfastly refused to do so. During negotiations, Korea attempted to seek reparation, but eventually withdrew such a claim because of the strong Japanese opposition. Japan had taken the position that "she would be prepared to compensate the claims of the republic of Korea, insofar as they were based upon justifiable legal grounds", but in the end rejected all claims having to do with reparations. The outline of claims presented by the Korean representative to Japan and which 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, and the convention against the traffic in women or customary norms of international law.¹⁸

The international Commission of Jurists also argues that there is nothing in the negotiations which concerns violations of individual rights resulting from war crimes and crimes against humanity. It also holds that, in the case of the Republic of Korea, the 1965 treaty

18. Dolgopol/Paranjape, *Comfort Women*, International Commission of Jurists, 1994, p. 164.

with Japan relates to reparations paid to the Government and does not include claims of individuals based on damage suffered.

Also the Special Rapporteur Coomaraswamy is of the view that neither the San Francisco Peace Treaty nor the bilateral treaties were concerned with human rights violations in general or military sexual slavery in particular. The “intent” of the parties did not cover the specific claims made by “comfort women” and the treaties were not concerned with human rights violations of women during the conduct of the war by Japan. It is, therefore, the conclusion of the Special Rapporteur Coomaraswamy that the treaties do not cover the claims raised by former military sexual slaves and that the Government of Japan remains legally responsible for the consequent violations of international humanitarian law.¹⁹

In all process of the negotiation between Korea and Japan, including the eight provision regarding its properties and claims, which Korean government suggested at the 1st Korea-Japan Normalization Talks (Feb. 15-Apr. 25, 1952)²⁰, the Comfort Women issue cannot be found out.

When Motoka Seoji, Senator of Socialist Party of Japan, demanded in the Budget Committee of the Japanese Diet, that the government look into the matter of military comfort women, the Japanese Government responded that the comfort women issue was the work of neither the Japanese government nor the military, but rather that of private entrepreneurs. If so, I think, neither the Comfort Women issue, nor the compensation for damage could be dealt with by negotiation for the 1965 Agreement. The liability for damage resulted from the unlawful crimes against humanity, which had been not dealt with, and cannot be contained in the “claims” under Article 2 of the 1965 Agreement.

4. Whether the individual can be the subject of the right or duty in the international law?

Documents submitted to the Special Rapporteur Ms. Coomaraswamy

19. UN report, E/CN.4/1996/53/Add.1, 4 January 1996, p. 25.

20. See the reasoning of the Comfort Women decision of the Constitutional Court., 23-2(A) KCCR 366, 2006Hun-Ma788, August 30, 2011, in: The Constitutional Court, Decisions of Constitutional Court of Korea, 2012, p. 131.

by the Government of Japan or the Japanese Supreme Court argue that according to a conventional theory of international law, an individual cannot be a subject of rights or duties in international law, as international law regulates, in principle, the relations between States, unless recognized by treaties.

However, not only the Special Rapporteur Coomaraswamy²¹, but also Theo van Boven, who submitted the final report "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", in 1993²² and the International Commission of Jurists²³ accepted that the individual can be the subject to claim reparation and compensation under international law. Article 1 of the Charter of the United Nations, for example, includes as one of the purposes of the United Nations cooperation in "promoting and encouraging respect for human rights and fundamental freedoms". The universal Declaration of Human Rights, as well as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, define the rights of the individual vis-à-vis the State and therefore, are further evidence that the individual is often the subject of international law and entitled to its protection.²⁴

5. Responsibility of Japan accepted by UN Commission on Human Rights

The Special Rapporteur Coomaraswamy, in the proposed basic principles and guidelines concerning reparation to victims of gross violations of human rights, states that "every State has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to the obligation to ensure respect for human rights includes the duty to prevent violations, the

21. UN report, E/CN.4/1996/53/Add.1, 4 January 1996, p. 25.

22. UN report, Sub-Commission on Prevention of Discrimination and Protection of Minorities of Commission on Human Rights, E/CN.4/Sub.2/1993/8, 2 July 1993.

23. Dolgopol/Paranjape, Comfort Women, International Commission of Jurists, 1994, p. 172.

24. UN report, E/CN.4/1996/53/Add.1, 4 January 1996, p. 25.

duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims”

(1) Responsibility to provide restitution

Restitution implies the re-establishment of the situation that existed for the victim prior to the violations of human rights requiring, *inter alia*, restoration of liberty, citizenship or residence, employment and property.

(2) Responsibility to compensate

Compensation applies to any economically assessable damage resulting from human rights violations, such as physical or mental harm; pain, suffering and emotional distress; lost opportunities, including education; loss of earnings and earning capacity; reasonable medical and other expenses of rehabilitation; harm to property or business; harm to reputation or dignity; and reasonable costs and fees of the legal or expert assistance required to obtain a remedy;

(3) Responsibility to rehabilitate

Rehabilitation implies the provision of legal, medical, psychological and other care, as well as measures to restore the dignity and reputation of victims;

(4) Responsibility of Satisfaction and non-repetition

Satisfaction and guarantees of non-repetition include the cessation of continuing violations; verification of facts and full and public disclosure of the truth; apology. Including public acknowledgement of facts and acceptance of responsibility, bringing to justice the persons responsible for the violations; commemorations and paying tribute to the victims; inclusion of an accurate record of human rights violations in educational curricula and materials.

6. Responsibility to prevent the Japanese from denying their war crime in WW II.

I think we should add the responsibility to prohibit the Japanese from denying their war crime in WW II. As Professor Yoshimi states, when Japanese people deny the Japanese state's responsibility in the Comfort Women issue, as in instances like former Minister of Justice Nagano's statement, the women's dignity is violated and it causes them pain. We should learn from Germany, which punishes those who deny every acts of the Nazi-rule (the so-called "Aussch-witzlüge"²⁵).

The Special Rapporteur added that reparations may be claimed by the direct victims and, where appropriate, the immediate family dependents or other persons having a special relationship to the direct victim. Also, in addition to providing reparations to individuals, States shall make adequate provision for groups of victims to bring collective claims and to obtain collective reparation.

The problem of retroactivity?: The basic claim by the Government of Japan that any attempt at asserting legal responsibility would imply retrospective application is met by the argument that international humanitarian law is part of customary international law. In this regard, it may be appropriate to note article 15 (2) of the International Covenant on Civil and Political Rights, which states: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

The argument that there must be a statute of limitations and that nearly 50 years have passed since the end of the Second World War is also inappropriate. Criminal law, policy and practice do not recognize statutes of limitation in deference to victims' rights. In this connection, the Special Rapporteur Coomaraswamy on the right to restitution states in her report that "statutes of limitations shall not

25. § 130 Abs. 3 StGB (German Criminal Code): Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 220a subsection (1), in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.

apply in respect to period during which no effective remedies exist for human rights violations. Claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitation”²⁶

IV. RESPONSIBILITY OF INTERNATIONAL COMMUNITY TO OPEN WAR CRIME TRIBUNAL REGARDING COMFORT WOMEN VICTIMS

After the Second World War, the International Military Tribunal for the Far East was established in Tokyo; however, not even one person was tried for crimes against humanity. Professor Yoshimi pointed out that this was not because Japan had not committed these types of crimes; it was because the American and European prosecutors and judges did not attempt to confront the issue of the large-scale crimes Japan had committed against other Asian peoples, and had no intention of pursuing the matter.”

In this regard Yuki Danaka criticized as follow:

“Two short US military government reports are available which give numbers for Korean women who were repatriated to Korea from Okinawa after the war. According to these reports, a total of 150 Korean women (40 women captured on the main island and 110 women from other islands) were gathered in Naha, the capital of Okinawa, and then sent back to Korea in November 1945. The passenger boarding list on the repatriation ship to Korea made by SCAP contains 147 names of Korean women from Okinawa, many of whom had typical names of Japanese geisha in addition to their own Korean names. Only a few Korean women stayed on in Okinawa after the war. Thus it is presumed that more than half of the Korean comfort women sent to Okinawa died during the fighting.

However there is no documentation to prove that the US force conducted interrogation of these 150 women. There is also no documentation to show whether crimes committed by the Japanese forces in Okinawa were investigated in order to prosecute Japanese officers who were responsible for violating the human rights of these Koreans.”²⁷

26. UN report, E/CN.4/1996/53/Add.1, 4 January 1996, p. 27-28.

Also in Batavia Trial, only the responsibility of 15 Japanese offenders regarding the 35 Dutch Comfort Women was dealt with. The international Commission of Jurists reports that "The plight of some of the Dutch women who had been victimized in Indonesia was brought into the open by the Batavia Trial held in Indonesia and several Japanese military men were tried and convicted for these crimes. Sadly, the local Indonesian women, who had been similarly victimized, were ignored at the Batavia trial."²⁸

If Japan will not fulfil this responsibility, to prosecute the offenders pursuant to Japanese national criminal law, the War Crimes Tribunal for crimes against humanity, including this Comfort Women issue, should be established again, to make the responsible for the crime against humanity stand before the historical tribunal. It is justified on the following ground:

First, in order to prevent crimes against humanity from occurring repeatedly in armed conflict, such a gross violation against international humanitarian law should never be passed over without being tried.

Second, also in the international law, the criminal justice should be guaranteed. One of the essential elements of criminal justice lies in the equal execution of the law. In order to avoid the criticism that the exclusion of this Comfort Women issue from the International Military Tribunal for the Far East is caused by the racial discrimination, the International War Crimes Tribunal should be established even now.

V. CONCLUSION

What kind of role did the international humanitarian law play for the restoring of the infringed human dignity of the former Comfort Women victims? In my opinion it seems hard to say "yes", if we consider whether the international humanitarian law has its

27. Yuki Tanaka, *Japan's Comfort Women, Sexual slavery and prostitution during World War II and the US occupation*, 2002, 86.

28. Dogopol / Paranjape, *Comfort Women*, International Commission of Jurists, 1994, 17; Joshimi, *Comfort Women*, 2000, 175

effectiveness. Even though Japan and the Japanese imperial army were aware that kidnapping and trafficking in the women violated the 1921 Slavery Convention or the customary international law, they had reserved the application of this 1921 Slavery Convention to the colonial area, and supplied young girls and women mainly from the Korean peninsula. If the international community will close their eyes on the wrongful acts committed by the Japanese army in the WW II, it is very likely for such violations to occur repeatedly in the future.

I think the reason why we can hardly say “yes” to the above mentioned question lies in the reality in the international Society, where the rule of power rather than the rule of law still governs.

In order for the international society to be the international community, where the rule of not power, but law and the norm governs, there should be needs to have the strong will and consciousness to respect and implement international humanitarian norms. In other words, international humanitarian law can develop its effectiveness, only when the international community calls the offender to account for his crimes and carries out the implementation of international norms thoroughly.

Even though over 23 years already passed away since the former comfort woman victim Ms. Kim, Hak Soon testified of her ordeal to the public and the comfort women movement took the step, Japan adheres to the stance that the apology was already done by the Kono statement and that the problem of compensation for damage expired under Article 2 of the 1965 Agreement. Even this apology, only with the mouth, has been often threatened to be reviewed new by the governing political leader just like Japanese prime minister Abe. Recently, before the summit meeting of nuclear security on March 24 and 25, 2014 in the Hague, he stated that the Kono statement, which recognized the involvement of Japanese authorities in coercing the women to work in the military comfort stations, will not be altered.²⁹ However, the contrary opinion was released by the Minister of Education, Shimomura Hakubun³⁰ on the next day of summit meeting, so that the credibility of the interview of Abe is

29. <http://www.reuters.com/article/2014/03/14/us-japan-korea-idUSBREA2D04R20140314>.

30. http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201403272224255&code=970203.

being doubted in Korea. Seeming reflected by the worrying opinion in Korea, more than 1,600 scholars have signed a joint petition calling on the Abe administration to uphold the Kono statement and show greater sincerity on the issue of wartime "comfort women on March 31, 2014.³¹

On the contrary, the international community urges the Japanese Government to apologize formally, to prosecute the offenders, to compensate the damage, revise the history, and etc. unanimously.³²

As mentioned above, Japanese regional congresses have made efforts to pass the resolution to resolve the comfort women issue.

We will be able to achieve permanent peace and common prosperity in Asia, only when Japan as a democracy will acknowledge the wrongful past, investigate and expose the documents, apologize formally in the level of the congress and government, provide compensation for the victims, revise the history, and educate the young generation properly, prohibit every denial of the wrongful history and guarantee the non-repetition. In this way, Japanese Government can pronounce the discontinuation of the wrongful past. At that moment, the international humanitarian law will be able to prove its complete effectiveness for the comfort women victims.

KEYWORDS

Comfort Women, Comfort Station, Duty to Protect the Human Rights, Responsibility for State's Absence, Japan's Responsibility to Apologize and Compensate the Damage, Coomaraswamy Report, Responsibility to Open the War Crime Tribunal.

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31. http://ajw.asahi.com/article/behind_news/social_affairs/AJ201403310099

32. In detail see The Constitutional Court, Decisions of Constitutional Court of Korea, 2012, p. 138.