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Japan:

Submitted by Japan Fellowship of Reconciliation (JFOR),
a non-governmental organization in special consultative status
Postwar responsibilities of Japan: "Comfort Women", military sexual slavery
—— Non-fulfillment of obligations for apology, compensation, and punishment and the criticism of the treaty defense by Japan
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1. The information on the issue of "comfort women" and the UN

The author representing International Educational Development (IED) made the first oral intervention before the UN Commission on Human Rights on 17 February 1992, in which Japan was condemned for its crimes against humanity onto the Korean and other Asian "sex slaves" (UN doc. E/CN.4/1992/SR.30/Add.1.).

This was followed by consistent and persistent activities made by more influential UN NGOs such as the International Commission of Jurists, the World Council of Churches, the International Fellowship of Reconciliation, the International Association of Democratic Lawyers, Liberation, World Alliance of Reformed Churches and JFOR as well as many local civil groups outside of and inside Japan for 16 years. They attended nearly all of the UN human rights meetings, in particular the Working Group on Contemporary Forms of Slavery, the Sub-Commission on Promotion and Protection of Human Rights, and the Commission on Human Rights. Thus, they succeeded in proving the capacity of the UN over the issue of "military sexual slavery" by Japan and secured some resolutions, reports, recommendations from the UN and ILO bodies against Japan.

Good evidence may make forces of persuasiveness, even if it is presented by only one person (Y. Yoshimi, *Jugun ianhu shiryousyu*, Otsuki shoten (1992).). Testimonies of the victims were well researched by Korean scholars (K. Howard (ed.), *True stories of Korean comfort women*, Cassell (1995).). Japanese historians' researches (Center for Research and Documentation on Japan's War Responsibility, *The Report on the Issue of Japan's Military "Comfort Women"* (1994)) were submitted to the UN WGCFS. Sound and well developed legal arguments can be also strong forces. A mission report by the International Commission of Jurists (U. Dolgopol & S. Paranjape, *Comfort Women an Unfinished Ordeal* (1994), ICJ. p. 205.) gave a strong impact to the UN and world public opinion. The International Fellowship of Reconciliation (IFOR) and the Japan Fellowship of Reconciliation (JFOR) submitted some new legal aspects in their written statements to the UN (UN Doc. E/CN.4./1993/NGO/36; E/CN.4./1994/NGO/19; E/CN.4./Sub.2/1994/NGO/30; E/CN.4./1995/NGO/37; E/CN.4./1995/NGO/40; & E/CN.4./Sub.2/2000/NGO/12; E/CN.4/Sub.2/2002/NGO/23; E/CN.4/Sub.2/2001/NGO/24; E/CN.4/Sub.2/2003/NGO/46; E/CN.4/Sub.2/2004/NGO/28; & E/CN.4/Sub.2/2005/NGO/35). The Japan Federation of Bar Associations clarified some vital legal issues including treaty defense of the Japanese government in their two legal opinions (*Recommendations on the Issue of "Comfort Women"* (January 1995) & *Supplementary Explanation of the Recommendations on the Issue of "Comfort Women"* (June 1995).). The Federation of Korean Trade Unions submitted a few communications including a detailed legal analysis (*"Comfort Women" Military Sexual Slavery by Japan* (1997).) concerning Japan's violations of the Forced Labour Convention to the ILO Committee of Experts.

2. The response made by Japan

The Japanese government led by then P.M. Mr. Ryutaro Hashimoto, who had been the top leader of the Japanese ex-soldier's bereaved family's association before he became Prime Minister, argued that the issue of reparation was settled by peace treaties and that the

Government would never pay compensation to the victims.

The Asian Women Fund, a private fund created by the Japanese civilians being assisted by the Japanese government did not resolve the legal state responsibilities of Japan of this issue and finished its operation in March 2007. The government has been refusing to take any other policy than the AWF.

The Special Rapporteur on violence against women of the CHR, Ms. Radhika Coomaraswamy in her report (E/CN.4/1996/53/Add.1) rejected the Japanese government' arguments as regards the AWF policy.

3. Art. 26 of the SPT and China -- Breaking the treaty defense

3-1. JAPAN'S TREATY DEFENSE

Responding to the Final Report on systematic rape, sexual slavery and slavery-like practices during armed conflict (E/CN.4/Sub.2/1998/13.) submitted by Ms Gay McDougall, the Japanese government delegation, said on August 14, 1998 at the Sub-Commission:

"The Government of Japan has sincerely addressed and settled the issues relating to the war in accordance with the San Francisco Peace Treaty, bilateral peace treaties and other relevant international agreements. ... However, we regret to say that the Government of Japan can not agree with the legal interpretations expressed in the appendix to this report nor can we accept its conclusion and recommendations which request the Japanese Government to take steps to provide redress rather than that which we are already undertaking."

In her report, the Special Rapporteur, Ms. McDougall already elaborated the logical reasons why the Japan's treaty defense was not convincing. The author warmly welcomes her legal interpretations as well as her conclusion and recommendations.

The author wishes to add another legal ground, which can break the Japan's treaty defense. One may understand the importance of this argument, as it relates to not only the "comfort women" issue but also other compensation claims in relation to the Second World War. We simplify the issue by confining itself within the right of civilians in relation to the VI Geneva Convention (1948). It must apply, however, to Prisoners of War as well (See: Articles 6 and 131 of the III Geneva Convention.).

3-2. VICTIMS' RIGHTS TO COMPENSATION

Art. 3 of the Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague, on 18 October 1907 stipulates, "A belligerent party which violates the provisions of the said Regulations [i.e., the regulations of 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." This guarantees individual victims the right to compensation according to the legal opinion made by Prof Frits Karlshoven (Legal opinion made by Prof Frits Kalshoven submitted in 1997 to the Tokyo District Court, in Fujita, Hisakazu, et al., ed., *War and the Rights of Individuals - Renaissance of Individual Compensation*, Nippon Hyoron-sha (1999). pp. 1-294.). This article of the 1907 Hague Convention was understood to have been customary international law and it was succeeded by Art. 91 of the Optional Protocol to the 1949 Geneva Conventions. Thus, the individual civilian victims violated by the Japanese Imperial Forces have the right to compensation against Japan.

3-3. VICTIMS IN CHINA

Although the Japanese government argues as mentioned above, one should first examine each case by country basis. Let us take China for example.

First, it is absurd for Japan to say "sincerely addressed and settled the issue" in the case of China, to which it paid no compensation at all for all the wrong doings including military sexual slavery and massacres of tens of millions of civilians. What are the contents of that sincerity? One may become speechless, if he/she recalls the fact that Japan invaded Korea and China and took a big sum of war reparation from China, namely JP￥ 345 million (150% of the

Japan's war cost) in 1895 on top of Taiwan as well as *de facto* control of Korea in the name of victory in war (Kiyoshi Inoue, *Nihon no rekishi (ge)*, Iwanami shoten (1966). pp. 34-40.). This money was not returned to China. Yet, Japan has been maintaining that no single yen should be paid to any Chinese victim. This denial itself must be considered as the original sin of Japan.

Second, China is not a Party to the San Francisco Peace Treaty. Therefore, it is not applicable to China.

Third, the Treaty of Peace between the Republic of China (Taiwan) and Japan of 28 April 1952 became null and void in accordance with the Sino-Japanese Joint Communique of September 29, 1972.

Fourth, there exists only one bilateral agreement relative to war claims, the Sino-Japanese Joint Communique of September 29, 1972. It includes no explicit provision, which waived the right of individual victims. According to Art. 5 of the said Joint Communique, " The government of the People's Republic of China declares that in the interest of the friendship between the Chinese and Japanese peoples, it renounce its demands for war reparation from Japan." The Japan Federation of Bar Associations made public its legal opinion that this provision did not waive the right to demand reparations for losses and damages sustained by the Chinese nationals (JFBA, *"Supplementary Explanation of the Recommendation on the Issue of "comfort women""* (June 1995). pp. 10-12.).

3-4. PROHIBITION OF RELINQUISHMENT OF THE RIGHT OF VICTIMS OF WAR

The governments of the Parties to the IV Geneva Convention relative to the protection of civilians must be aware that the Convention, under Art. 148 and Art. 7, prohibits any agreements for the relinquishment of the rights of the protected persons.

First, Art. 148 of the IV Geneva Convention reads "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article." Therefore, if any military personnel commit war crimes or crimes against humanity, which are defined as grave breaches under Art. 147, the responsible Parties could not be allowed to absolve itself from any liabilities including responsibility for compensation due to the crimes and other Parties shall not be allowed to relinquish the rights of the victims without compensation from the responsible state.

Second, the second sentence of Art. 7 (1) of the IV Geneva Convention reads, "No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them." Therefore, the guarantee under Art. 148 cannot be adversely changed by any other international agreements.

These two articles clearly prohibited China and Japan to absolve Japan of the individual rights to compensation, in particular, if it comes to the issue of grave crimes. The conducts by the Japanese Imperial Forces against the Chinese women for sexual slavery is included in grave crimes in Art. 147, as slavery was the most serious crime under international law and it constituted all or any of "torture", "inhuman treatment", "willfully causing great suffering" and "serious injury to body or health" [2].

Therefore, China must have not waived the right to compensation of the individual victims under Art. 5 of the said Joint Communique, because it is unthinkable that China intentionally violated international law. Even if we assume the hypothetical case, where China and Japan tried to waive the right of individuals, that part of the Joint Communique did not take effect, as both China and Japan "shall not be allowed" to do so by Art. 147; and as "No special agreement shall adversely affect the situation of protected persons.".

3-5. THE GENEVA CONVENTIONS RELATIVE TO CHINA AND JAPAN

The Geneva Convention was concluded on August 12, 1949 and took effect on October 21, 1950. Japan acceded to the Geneva Convention on October 21, 1953 before the said communique. The Geneva Convention bound China in 1956 well before 1972 as well, as it was a Party to it. According to the International Committee of Red Cross (SOURCE: UNTS,

Vol.260, 1957, pp.438-444.), the status of China relative to the Geneva Conventions of 1949 is: Signature on 10.12.1949. Ratif. Accession on 28.12.1956.

3-6. CONCLUSION ON THE CHINESE VICTIMS

Therefore, China and Japan could not conclude any agreement to waive the right of individual victims under the said Joint Communique. Thus, the right to demand compensation against Japan of the individual military sexual slavery victims in China was never waived[3]. Their right must exist even now.

4. THE VICTIMS IN OTHER COUNTRIES THAN CHINA -- PARTIES TO THE SPT

The second sentence of Art 26 of the San Francisco Peace Treaty (1951) stipulates as follows: "Should Japan make a peace settlement of war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty."

This could be understood as a "most favored nations" clause. The 1972 Sino-Japanese Joint Communique is the peace and war claims settlement between Japan and China, which was concluded after the 1951 San Francisco Peace Treaty. In it, China never waived its nationals' individual rights to war claims against Japan.

Therefore, under Article 26, the victims of the Parties to the San Francisco Peace Treaty are entitled to similar treatment. Thus, Japan should give the same advantages, as if there had been no waiver of the rights of these individual victims.

4-1. THE VICTIMS IN OTHER COUNTRIES THAN CHINA – NON-PARTIES TO THE SPT

First, the Democratic People's Republic of Korea is not a Party to the SPT. No peace treaty or agreement was concluded between the DPRK and Japan.

Second, for the women victims in Taiwan, there exists no treaty or agreement, which effectively denies the demands made by the victims.

Third, the Republic of Korea and Japan concluded in 1965, the Treaty of Basic Relations and the four cooperation agreements. Japan claims that they included the issue of "comfort women". However, Ms Coomaraswamy, the ICJ and the JFBA pointed out that it was not included.

Japan had made the existence of the military sexual slavery system as a top secret until January 1992, when the Government for the first time acknowledged the existence of the system. It was impossible for the both parties to conceive an agreement for nothing in 1965. How can Japan claim that Japan intended to include in the term of the treaties the system, which did not exist officially at the time?

No evidence was found yet that the issue of military sexual slavery was discussed in any part of the negotiations towards the 1965 treaties between the ROK and Japan. No human rights issues, no personal injuries, and no wrong doings by Japan during colonization were treated in any of the provisions of the said treaties[4].

It should be noted that, during the course of the negotiation towards the 1965 treaties, the Japanese chief representative, Mr. Kanichiro KUBOTA denied the existence of any wrong doings by Japan and declared to the Korean representatives, "If any wrong doings are found later, then the Japanese Government should pay compensation for them at that time." on 13 October 1953 (The testimony made by the late Foreign Minister of the ROK, Mr. Young-Shik KIM and it was reported by the Tonga Ilbo dated 16 June 1992)[5].

It should be noted that slavery is *Jus cogens*. The UN Sub-Commission on human rights debated on the military sexual slavery issue and confirmed on 26 August 1999 "that the rights and obligations of States and individuals with respect to the violations referred to in the present resolution cannot, as a matter of international law, be extinguished by peace treaty, peace agreement, amnesty or by any other means;"[6]

4-2. CONCLUSION

The victims are still entitled to demand individual reparation against the Japanese government. Not only many NGOs including ICJ, IFOR and IFOR but also the reports made by Ms. R. Coomaraswamy and Ms. G. McDougall support this view.

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[2] It was recently unearthed that Japan knew the methods of recruitment of "comfort women" were in violation of then Japanese Criminal Code. See: TOTSUKA, Etsuro, "Could Systematic Sexual Violence against Women during War Time Have Been Prevented?--Lessons from the Japanese Case of "Comfort Women"", In: Ustinia Dolgopol and Judith Gardam (eds.), *The Challenge of Conflict*, Koninklike Brill BV (2006), pp.499-513.

[3] The Supreme Court of Japan on 27 April 2007 applied "the framework of the SPT", despite no signature by China, in order to interpret the 1972 joint communiqué between Japan and China, which had no provision to relinquish the rights of individual victims, denied the Chinese "comfort women" victims access to court. The author believes that this judgment violated Art. 31(1) of the Vienna Convention of the Law of Treaties as well as Art. 148 and Art. 7 of the IV Geneva Convention relative to the protection of civilians.

[4] All 18 items discussed between Japan and the ROK were the property rights matters arising from lawful actions and no matters caused by wrong doings were discussed. See: *Grimm v. Iran*: Judgment of International Arbitration between the USA and Iran, signed 18 February 1983, Award no. 25-71-1 In: *IRAN-UNITED STATES CLAIMS TRIBUNAL REPORTS Vol. 2*, Grotius Publications Limited, 1983, p.78. It found that "Property rights" did not include the rights to the life and safety damaged by wrong doings such as assassination.

[5] This information from press is to be confirmed by the official records possessed by the Japanese government, which are still kept confidential in Japan.

[6] See UN Doc. E/CN.4/2000/2; E/CN.4/Sub.2/1999/54, p.48, para. 13.