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Alternate report

Submitted jointly by Japan Fellowship of Reconciliation (JFOR) and
Research Institute of International Human Rights Law Policies (RIIHRLP)¹

**I. Legal responsibility of Japanese government to compensate for
the victims of the Military Sexual Slavery euphemistic called “Comfort Women”**

The subject matter is concerning the Arts. 7 and 8 of the Covenant

**II. Discrimination against Foreign Children on the Rights to
Compulsory Education**

The subject matter is concerning the Arts. 2(1), 2(2), 24, 26 and 27 of the Covenant

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I. Legal responsibility of the Japanese government for the victims of Military Sexual Slavery euphemistic called “Comfort Women”

A. Concluding observations and recommendations on this issue adopted by the relevant Committees from the examination of the fifth periodic report of Japan

1. The Human Rights Committee (HRC) considered the fifth periodic report submitted by Japan (CCPR/C/JPN/5) and made recommendations on this Issue in regard to Arts. 7 and 8 of the Covenant in 2008. The Committee urged Japanese government to recognize its legal responsibility on this issue as below.

22. The State party should accept legal responsibility and apologize unreservedly for the “comfort women” system in a way that is acceptable to the majority of victims and restores their dignity, prosecute perpetrators who are still alive, take immediate and effective legislative and administrative measures to adequately compensate all survivors as a matter of right, educate students and the general public about the issue, and to refute and sanction any attempts to defame victims or to deny the events.

2. According to the general comment No.2 of the CAT, since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. Article 2, paragraph 2 of the convention against torture provides that the prohibition against torture is absolute and non-derogable. It emphasizes that ***no exceptional circumstances whatsoever*** may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention against torture identifies as among such circumstances a state of war or threat thereof, internal political instability or any other public emergency. The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations. The provisions of article 2 reinforce this peremptory ***jus cogens*** norm against torture and constitute the foundation of the Committee’s authority to implement effective means of prevention².

3. The Committee of the CAT mentioned the dismissal of cases filed in the domestic court by victims of military sexual slavery during the Second World War, and made the following recommendations in the concluding observation of its first periodic report (2007):

The State Party should review its rules and provisions on the statute of limitations and bring them fully in line with its obligations under the Convention, so that acts amounting to torture and ill-treatment, including attempts to commit torture and acts by any person which constitute complicity or participation in torture, can be investigated, prosecuted and punished without time limitations³.

4. The Committee against Torture (CAT) has also made recommendations on this issue in the concluding observation of the second periodic report of Japan adopted in 2013 (CAT/C/JPN/2).

² General comment No. 2 (2008), CAT/C/GC/2.

³ Paragraph 12 of the concluding observation (2007), CAT/C/JPN/CO/1.

Victims of military sexual slavery

Recalling its general comment No. 3 (2012), the Committee urges the State party to take immediate and effective legislative and administrative measures to find a victim- centred resolution for the issues of “comfort women”, in particular, by:

- (a) Publicly acknowledging legal responsibility for the crimes of sexual slavery, and prosecuting and punishing perpetrators with appropriate penalties;*
- (b) Refuting attempts to deny the facts by government authorities and public figures and to re-traumatize the victims through such repeated denials;*
- (c) Disclosing related materials, and investigating the facts thoroughly;*
- (d) Recognizing the victim’s right to redress, and accordingly providing them full and effective redress and reparation, including compensation, satisfaction and the means for as full rehabilitation as possible;*
- (e) Educating the general public about the issue and include the events in all history textbooks, as a means of preventing further violations of the State party’s obligations under the Convention.*

B. Relevant information on this issue in relation to the examination of the sixth periodic report submitted by the government of Japan (CCPR/C/JPN/6)

5. According to the summary of the 6th Periodic Report of Japan (CCPR/C/JPN/6), the Japanese government holds a view that it is not appropriate for the so-called comfort women issue to be brought up in the review of the country report for the Treaty signed in 1979 long after the incidents took place. Although the Government acknowledges that the issue known as “wartime comfort women” is one that severely injured the honour and dignity of many women, the Government has steadfastly maintained that “the Government of Japan has signed the San Francisco Peace Treaty and various bilateral agreements between Japan and other nations, and have been sincere about the issues of reparations for the damage caused by war accordingly. Thus, the Government has settled all post-war claims of compensation with the countries involved with which Japan has ratified the Treaties”. In addition, the governments established the Asian Women’s Fund (AWF) in 1995, implementing “medical and welfare support projects” with the support of JPY 4.8 billion from the Government, and providing six hundred million Japanese yen “atonement money” funded by public donation to offer relief directly to former “comfort women”. It is reported that the Asian Women’s Fund was dissolved in March 2007 with the co-ordination with the countries involved⁴.
6. The CCPR urged the State Party to take immediate and effective legislative and administrative measures to adequately compensate all survivors as a matter of right. Thus, there has been hardly any progress for the resolution of the problem, despite the recommendations issued from various international bodies for over a decade⁵.
7. The CCPR adopted the List of Issues (CCPR/C/JPN/Q/6) on this matter as follows:

⁴ Paragraph 104-108 of the sixth government report. This summary is stated in the alternate report submitted by the Japan Federation of Bar Associations, p.62.

⁵ *Ibid.*, Japan Federation of Bar Associations, p. 62.

Elimination of slavery and servitude (art. 8)

22. In light of the Committee's previous concluding observations (CCPR/C/JPN/CO/5, para. 22), please provide information on whether the State party considers acknowledging any legal responsibility for the abuses against victims of the military's sexual slavery practices during the Second World War, the so-called "comfort women" system. Please inform the Committee if the State party intends to take legislative and administrative measures to provide victims with full and effective redress, investigate the facts and prosecute perpetrators, educate the general public about the issue and take measures against recent attempts to deny the facts by Government authorities and public figures.

8. At the Replies of Japan to the list of issues submitted on 6 March 2014, Japanese government stated almost same things with its sixth periodic report or assertions that the government has stated before. We cannot recognize any new efforts to address its legal responsibility and obligation of compensation as acceptable measures for the victims. As of the legal responsibilities on this issues, particularly the matter with the Republic of Korea, Japanese government mentioned the 1965 agreement between Japan and Republic of Korea stated the following assertion:

235. In particular, the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea stipulates that "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... [has been] settled completely and finally." (Article II (paragraph 1)).

As for the "**problem concerning property, rights, and interests**" stipulated in the art.2 (1) of the Agreement above, we will carefully examine later.

9. Regarding the compensation for the inhuman treatment made to the victims of the military sexual slavery, Japanese government has mentioned the establishment of the Asian Women's Fund (AWF) and stated that "**the AWF provided "atonement money" (2 million yen per person) to former comfort women in the Republic of Korea**". However, the AWF has recognized that "**atonement money**" and "**medical and welfare support**" had not been accepted by most of the victims and the government of the Republic of Korea.
10. According to the following statements posted in the website of the AWF⁶, only 11 victims received "**atonement money**" from the AWF, and other services from the AWF were also rejected by the victims and the government of Republic of Korea. And the AWF decided to halt its projects of atonement in the Republic of Korea at the beginning of 1999. So the measures made by the AWF were entirely insufficient and unacceptable as compensation for the inhuman treatment suffered by the victims of military sexual slavery. It was also pointed out by the many international communities and the human rights treaty bodies that the projects done by the AWF were insufficient and unacceptable as the measures of compensation for the damage of the victims.

However, the position of the Government of the Republic of Korea did not change. Realizing there was no change in the project situation, the Fund decided to halt its projects of atonement in the Republic of Korea at

⁶ *Ibid.*

the beginning of 1999, and change the project objective to group medical care. At the same time the Fund decided to issue payments to victims who had already begun the application process. The Fund began negotiations with the Korean side. However, it eventually became clear that the Fund would be unable to obtain the cooperation of the Korean side, even with a new project objective. As a result, the Fund gave up hope of pursuing a new project objective, and placed the projects in the Republic of Korea in a state of suspension, in July 1999.

(Asian Women's Fund, <http://www.awf.or.jp/e3/korea.html>)

11. At the second Universal Periodic Review of Japan by the Human Rights Council in 2012, several countries have made recommendations to the government of Japan concerning this issue. These countries were China, Republic of Korea, Democratic People's Republic of Korea and Costa Rica. Many of these countries are the countries that many survivors of the Japanese military sexual slavery system are still alive. The recommendations made by these countries were as follows⁷:

147.145. Recognize its legal responsibility for the issue of the so-called „comfort women“ and take appropriate measures acceptable to the victims, as recommended by the relevant international community (Republic of Korea);

147.146. Face up to and reflect on its past and present a responsible interface to the international community by making apologies on the issue of comfort women and giving compensation to its victims (China);

147.147. Acknowledge its responsibility for the issue of "comfort women" used during World War II, and take steps to restore the dignity of victims and compensate them adequately (Costa Rica);

147.148. Accept legal responsibility for and address, once and for all, the Japanese military sexual slavery and other violations committed in the past in other Asian countries including Korea (Democratic People's Republic of Korea);

However, Japanese government rejected above recommendations and stated its reasons as below:

147.145-148. Not accept: The issue of reparations, property and claims concerning the Second World War has been legally settled with the countries that are parties to the San Francisco Peace Treaty, bilateral treaties, agreements and instruments⁸.

12. Japanese government has held its ground that the legal responsibility and obligation for compensation to the victims has been legally settled by the bilateral treaties and agreements. But as we can see from the recommendations made by countries above, these countries never recognized that such responsibility and obligation for compensation have already been settle. In this regard, Japanese government has only insisted stating that compensation for the victims during World War II have already been settled among the East Asian countries. Therefore, it is very much instructive to investigate into the concerning treaties and agreements adopted between Japan and the East Asian countries. We would like to investigate into an agreement adopted between Japan and Republic of Korea in 1965 from the following paragraphs.

⁷ Paragraph 147.145-148 of the recommendations made by UPR, A/HRC/22/14.

⁸ A/HRC/22/14/Add.1.

C. “Treaty defense” of Japanese government against the legal responsibility
of compensation for the victims of the military sexual slavery

*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.*

International Commission of Jurists (ICJ), Report of a Mission, 1994

13. The Japanese government has mentioned the issue of the military sexual slavery in the paragraph 129 of the sixth report (CCPR/C/JPN/6), it was stated that the government of Japan “***carried out payment of reparations and other damages in good faith by the San Francisco Peace Treaty, bilateral peace treaties, agreements and instruments with countries concerned***”. However, the government of Japan has not carried out any compensation for the damages and sufferings caused by colonial rule by the bilateral agreement adopted with the Republic of Korea.
14. In 1965, Japan and the Republic of Korea adopted *the Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation* (1965 Agreement). Article 2 (1) of the 1965 Agreement has stated that the agreement has settled “***the problems concerning property, rights, and interests***” of both countries and their peoples and “***the claims***” between both countries and between their peoples. Although article 14 of the Peace Treaty with Japan (1951) mentioned obviously the words of “***reparations for the damage and suffering***”, the 1965 Agreement adopted with Republic of Korea has not mentioned any words such as “***reparation***” or “***damage and suffering***” at all. At that time, Japan provided the Republic of Korea with economic assistance in the form of 300 million dollars in grant aid and 200 million dollars in loans “***without expressing remorse or apologies for the damage and suffering caused by colonial rule***”⁹.
15. The 1965 Agreement has adopted between Japan and Republic Korea in order to deal with such “***property, rights, and interest***” between both countries and between their peoples. According to the provision of the 1965 Agreement, such “***property, rights, and interest***” have been defined as the things concerning to the economic and financial interest and cannot be considered as the measures of compensation for the damage and suffering made under inhuman treatment by Japanese army. Article 2 (1) of the 1965 Agreement has not mentioned any words of reparation, damage and sufferings as below.

*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 finally¹⁰. (emphasis added)*

It is considered that the 1965 Agreement had dealt with the disposition of property between two

⁹ Website of the AWF, <http://www.awf.or.jp/e3/korea.html> (hit on 27 May 2014).

¹⁰ United Nations Treaty Series Vol.583, No. 8473, p.258: Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea, signed at Tokyo on 22 June 1965.

countries and their peoples. As the victim's claims are equivalent to claims in tort, it cannot be said that they have a property value as the Report of a Mission made by the International Commission of Jurists in 1994.

D. "Comfort Women: an unfinished ordeal"

Report of a Mission made by the International Commission of Jurists in 1994

<http://www.icj.org/comfort-women-an-unfinished-ordeal-report-of-a-mission/>

16. The International Commission of Jurists (ICJ) is headquartered in Geneva, is a non-governmental organization in consultative status with ECOSOC, UNESCO, the Council of Europe. The ICJ sent a mission in April 1993 to the Philippines, the Republic of Korea, the Democratic People's Republic of Korea and to Japan.
17. The mission consisted of Ms. Ustina Dolgopol, Lecturer, School of Law, The Flinders University of South Australia and Ms. Snehal Paranjape, an Advocate of the Bombay High Court, India. The mission interviewed over 40 victims, three former soldiers, government representative, representatives of non-governmental organizations, lawyers, academics and journalists¹¹.
18. Regarding the 1965 Agreement adopted by Japan and the Republic of Korea, the ICJ has considered that the 1965 Agreement does not and was never intended to include claims made by individuals or on behalf of individuals for inhuman treatment suffered during the period of Japanese colonial rule of Korea.
19. According to the Report of a Mission made by the ICJ, Japan's position concerning to the 1965 Agreement relies on the language used in Article 2, which reads as follows:

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 finally¹². (emphasis added)

20. Japan has chosen to rely on the word "claim" in the first paragraph, as it could not rely on the phrase "property, rights and interest", as that phrase is defined in the Agreed Minutes to the agreement as "all kind of substantial rights which are recognized under law to be property value". As the women's claim 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 rendered¹³.
21. 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

¹¹ Ustina Dolgopol and Snehal Paranjape(1994), *Comfort Women an unfinished ordeal*, International Commission of Jurist: Geneva, p.7. The website of the ICJ <http://www.icj.org/comfort-women-an-unfinished-ordeal-report-of-a-mission/>

¹² United Nations Treaty Series Vol.583, No. 8473, p.258: Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea, signed at Tokyo on 22 June 1965.

¹³ The Report of a Mission by the ICJ, *supra* note 11, p.163.

it had wrought on the Korean peninsula during its colonial occupation, Japan had steadfastly refused to do so. During negotiations Korea attempted to seek reparation, but eventually withdrew such a claim because of the strong Japanese opposition¹⁴. 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 grounds¹⁵,” but in the end rejected all claims having to do with reparations¹⁶.

22. The outline of the claims presented by Korean representatives to Japan and which we believe are being referred to in Article 2 are in respect of bullion transferred to Japan for the period 1909- 1945, savings deposited at post offices in Korea by Korean worker, 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 ore 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 Korea¹⁷. It is quite clear from this individual rights resulting from war crimes, crimes against humanity, 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 on over an eighteen year period.
23. Treaties are to be interpreted according to the logical construction of their provisions, using the ordinary meaning of the words contained in the treaty as well as the intention of the parties. All of the provisions in the 1965 Agreement concern either the disposition of the 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 “claim” in the context of this treaty cannot be given as broad a reading as Japan would urged. 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.
24. By contrast, under Article 4 of the Treaty on Basic Relations Between Japan and Republic of Korea¹⁸, 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 “guide by the principles of the Charter of the United Nations in (her) relations” as well as to “cooperate in conformity with the mutual welfare and common interests” of the two countries¹⁹. Article 1, paragraph 3 of the purpose of developing and encouraging respect for 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

¹⁴ Shigeru Oda, “*The Normalisation of Relations Between Japan and the Republic of Korea*”, (1967)61 Am. J. of Int’l Law. Shigeru Oda was born 22 October 1924, Sapporo, Japan. He was a former vice-president (1991–1994) of the International Court of Justice. He earned his law degree from the University of Tokyo in 1947 and his doctorate in law from Yale Law School in 1953.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Of 22 June 1956, United Nations Treaty Series, Vol.583, No.8471, p.44.

¹⁹ Oda, supra note 17.

grievances.

II. Discrimination against Foreign Children on the Rights to Compulsory Education

The subject matter is concerning the Arts. 2(1), 2(2), 24, 26 and 27 of the Covenant

- A. Concluding observations and recommendations on this issue adopted by the relevant Committees from the examination of the fifth periodic report of Japan

With regard to children of foreign nationality residing in Japan, the Committee notes that elementary and lower secondary education is not compulsory.

Concluding observation of CERD in 2001 (CERD/C/304/Add.114)

The Committee noted with concern that a large number of foreign children do not attend school. The Committee urged the State party to apply the monitoring of compulsory education to all children in the territory of the State party, including non-nationals, irrespective of their legal status.

Concluding observation of CESCR in 2013 (E/C.12/JPN/CO/3)

25. In the Consideration of the third periodic report (CCPR) of Japan in 1993 (CCPR/C/78/Add.28). The Committee notes with concern the exclusion of Koreans from the Government's concept of minorities. **This is not justified by the Covenant, which does not limit the concept of minority to those who are nationals of the State concerned.**
26. In the Concluding observations of the fourth periodic report (CCPR) of Japan in 1998 (CCPR/C/79/Add.102). The Committee is concerned about instances of discrimination against members of the Japanese-Korean minority who are not Japanese citizens, including the non-recognition of Korean schools. The Committee draws the attention of the State party to **General Comment No. 23 (1994) which stresses that protection under article 27 may not be restricted to citizens.**
27. In the paragraph 31 of the Concluding observations of the fifth periodic report (CCPR) of Japan in 2008 (CCPR/C/JPN/CO/5). The Committee is concerned that state subsidies for schools that teach in the Korean language are significantly lower than those for ordinary schools, making them heavily dependent on private donations which are not exempted or deductible from taxes, unlike donations to private Japanese schools or international schools, and that diplomas from Korean schools do not automatically qualify students to enter university (arts. 26 and 27). The Committee recommended that the State party should ensure the adequate funding of Korean language schools, by increasing state subsidies and applying the same fiscal benefits to donors of Korean schools as to donors of other private schools, and recognize diplomas from Korean schools as direct university entrance qualifications.
28. In the concluding observation of the Convention on the Elimination of all Forms of Racial Discrimination in 2001 (CERD/C/304/Add.114). The Committee noted that “*with regard to children of foreign nationality*

residing in Japan, the Committee notes that elementary and lower secondary education is not compulsory” (para.15). The Committee has further noted the position of the State party that “since the purpose of the primary education in Japan is to educate the Japanese people to be members of the community, it is not appropriate to force foreign children to receive that education”. **The Committee was concerned that different standards of treatment in this respect may lead to racial segregation and the unequal enjoyment of the rights to education, training and employment.** It was recommended that the State party ensure that the rights contained in article 5(e) of the Convention on the Elimination of All Forms of Racial Discrimination are guaranteed without distinction as to race, colour, or national or ethnic origin.

29. In the paragraph 32 of the concluding observation of the second periodic report (CESCR) of Japan in 2001 (E/C.12/1/Add.67). The Committee expressed its concern about the fact that there are very limited possibilities for children of minorities to enjoy education in their own language and about their own culture in public schools. The Committee was also concerned about the fact that minority schools, such as Korean schools, are not officially recognized, even when they adhere to the national education curriculum, and therefore neither receive central government subsidies. The Committee has urged the State party to review its position towards its legal obligations arising under the Covenant and that its provisions be interpreted as being directly applicable in practice, as outlined in the Committee’s general comments, including general comments No. 13 and 14, at least in relation to the core obligations (para.33). The Committee has requested the State party to take note of its position that the principle of non-discrimination, as laid down in article 2 (2) of the Covenant, is an absolute principle and can be subject to no exception, unless the distinction is based on objective criteria. The Committee strongly recommended that the State party strengthen its non-discrimination legislation accordingly (para.39).
30. In the concluding observations on the third periodic report (CESCR) of Japan in 2013 (E/C.12/JPN/CO/3). The Committee was concerned at the exclusion of Korean schools from the State party’s tuition fee waiver programme for high school education, which constitutes discrimination (arts. 13 and 14). Recalling that the prohibition against discrimination applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination, the Committee called on the State party to ensure that the tuition fee waiver programme for high school education is extended to children attending Korean schools (para.27). **The Committee noted with concern that a large number of foreign children do not attend school** (arts. 13 and 14). **The Committee urged the State party to apply the monitoring of compulsory education to all children in the territory of the State party, including non-nationals, irrespective of their legal status** (para.28).

B. Relevant information on this issue in relation to the examination of the sixth periodic report submitted by the government of Japan (CCPR/C/JPN/6)

31. According to the 6th Periodic Report of Japan (CCPR/C/JPN/6), Japanese government states that “***the Government is going to willingly accept foreign nationals who could revitalize Japanese society***” (para.28). Regarding the education for the children without Japanese nationality, government states that they can “***receive all compulsory education at Japanese public schools free of charge if they wish to***

do so. If they do not wish to receive Japanese school education, they can receive education at foreign schools such as Korean schools, American schools, German schools, etc.”(para.35). But in fact, non-national children attending public school are only about a half of them. **The Ministry of education mentioned that non-national children at compulsory school age were 117,286 persons, among them, the children attending public schools were 63,509 persons at the end of 2011**²⁰. According to the statement of the Ministry of education about a half of non-national children at compulsory school age did not attend Japanese public school. Therefore, it is very much instructive to investigate the situation of school attendance of the children not attending public schools.

32. However, the Ministry of education has not controlled the situation of education for non-national children at all, we could not receive any statistical data of the school attendance of non-national children not attending public schools from the Ministry of education. The children without Japanese nationality have not received compulsory and free education if they do not attend the Japanese public schools and many of them have been abandoned from public services for school attendance as compulsory educational measures, the regular Fundamental Investigations of Schools²¹ and policies to guarantee for the primary education in free of charge. It is obviously discriminatory treatment between Japanese children and non-national children based on the distinction of “**national or social origin**”.
33. The List of Issues questioned on this issue in the paragraph. 21 as “***please clarify what progress has been made in ensuring adequate education for minority children***”. In the paragraph 224 of the Replies of Japan to the list of issues, the government states that “***all children of Japanese nationality are guaranteed the opportunity to receive sufficient education without discrimination (para.224)***”. But the matter is how the government has treated the children with non-Japanese nationality when they did not receive Japanese public school education. In fact, although the government states “**they can receive education at foreign schools**”, Japanese government has not ensured compulsory and free education for them at all, and the government has entirely not controlled the situation of the children who are not attending public schools. Non-national children not attending public schools have entirely been abandoned by the educational policies made by the central government, the treatment and measures for them have mostly left up to the educational staff and teachers in the provincial government and volunteer work of teachers. Japanese government has not mentioned such matters about non-national children at compulsory school age in the Replies of Japan to the list of issues. The replies of the government on this issue is as follows:

224. Article 26 of the Constitution of Japan provides that all people shall have the equal right to receive an education, and that all people shall be obligated to have all boys and girls under their protection receive ordinary education, as provided by law. Based on this, the School Education Act obliges guardians to have children under their care go to elementary school and lower secondary school under the nine-year compulsory education system. The meaning of the term “minority” is not

²⁰ The number of foreign children was mentioned by Mr. Norihiko Shimizu of the Ministry of education in the CESCR 50th Session on 30 April 2013 in Geneva, and it was also mentioned at the meeting between the Research Institute of International Human Rights Law Policies (RIHRLP) and the Ministry of education on the 1 March 2014 at Ministry of education in Tokyo, Japan.

²¹ “Gakko Kihon Chosa” in Japanese.

necessarily clear, but in Japan, all children of Japanese nationality are guaranteed the opportunity to receive sufficient education without discrimination.

34. This is a proof of unlawful discriminatory treatments of foreign children by Japan in violation of Articles 2 (1) and 26 of the ICCPR, Article 2 (2) of the ICESCR, Article 2 (1) of the CRC. This lack of interest, in part of the Japanese government, in the status of foreign children of ages for compulsory education symbolically shows that the government of Japan does not understand the nature of their obligations under international law that they must guarantee the right to compulsory education not only to the Japanese children but also to the foreign children.

C. Facts: Denial of the right to compulsory education and discriminatory treatments of the foreign children by Japan

35. According to the research made by MOTOOKA²², the following facts were revealed: MOTOOKA estimates that about 12,000 foreign children of ages for compulsory education in Japan are not attending school²³. MOTOOKA also points out that, according to the investigations made by 14 local cities, 26% of the foreign children of the age for compulsory education are not attending school²⁴. This figure is much higher than that (nearly 0%) of the Japanese children of the same age and is very similar to those in some developing countries.

36. MOTOOKA points out that the local governments responsible for compulsory education treat the foreign children in discriminatory manners and that they do not send orders²⁵ to the parents of the foreign children to attend school²⁶, although they send orders to the parents of the Japanese children on the legal basis of the duties of the Japanese parents to send their children to school. These administrative practices became habitual on the assumption that foreign parents do not have duties to send their children to school²⁷. This is based on the interpretation of education laws by the responsible officials of the Ministry of Education and Science²⁸. Minister of Education and Science endorsed such legal interpretation at the National Diet²⁹.

37. According to the research made by TOTSUKA³⁰, the following facts were revealed: The regular Fundamental Investigations of Schools are made by the Ministry of Education and Science. In them,

²² See: MOTOOKA, Shoji, *Jireikenkyu 2: Gaikokujin no Kodomo no "Kyoiku wo ukeru Kenri"*, In: Kokusai Jinken-ho Seisaku Kenkyu-sho (ed.) *Chushaku Kodomo no Kenri-Jyoyaku 28 jyo: Kyoiku nitsuite no Kenri*, Gendai-Jinbunsha, 2007, pp. 1-183.

²³ *Ibid.*, p. 148.

²⁴ *Ibid.*, pp. 149-150.

²⁵ The order is called as "Shugaku-tsuchi".

²⁶ Instead, the parents of the foreign children receive a letter of invitation (Shugaku-annai) to school. There shall be given no punishment in case of the refusal of this invitation on the assumption that the parents of the foreign children have no legal duties to send their children to school. The duties for the parents to send their children to school is called as "Shugaku-gimu".

²⁷ *Ibid.*, p.153.

²⁸ *Ibid.*, pp. 154-155.

²⁹ *Ibid.*, pp. 156.

³⁰ TOTSUKA, Etsuro, *The Right to Education of Foreign Children and the Japanese Education Law System – Reviewing the "Reform" of the Fundamental Education Law*, Ryukoku-Hhogaku, Vol.40 No. 1 (June 2007), pp. 38-71.

the Investigations of Non-attendance of Children and Students to School³¹ are conducted and that, in these investigations, the government explicitly instructs to exclude the foreign children³². The above mentioned treatment of the foreign children made by local administrations as regards the discriminatory treatment, namely the invitation to school (Shugaku-annai) instead of the orders to school (Shugaku-tsuchi) for the Japanese children is based on the instruction of 31 January 1991 given by the Ministry of Education³³. The reasoning of such discriminatory treatments is given by the authoritative interpretation of law in a Handbook³⁴ published by the responsible officials of the Ministry. The Handbook³⁵ clearly says that foreigners do not have the duties to send their children to school (Shugakugim). The Handbook is of the view that it is the Japanese nationals, who have the duties to send their children to school based on the Article 26 of the Constitution of Japan.

38. The Article 26 of the Constitution states “All people shall have the right to receive an equal education correspondent to their ability, as provided for by law. 2) All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.” “All people” are “Kokumin”, namely the Japanese nationals in the Japanese provision, which does not include foreigners. Although we proposed to treat the foreigners on the same footings as the Japanese in relation to the rights to compulsory education, the Fundamental Education Act was amended in December 2006 to just strengthen the nationalistic aspects with no change in treatment of foreign children.
39. As for the Article 13(2) (a) of the ICESCR, the officials of the Ministry, in the Handbook mentioned above, asserted the disturbing interpretation and claimed that the Article should not be interpreted as it is written, so that the foreigners are to be relieved from the duties to send their children to school in Japan and they are said to be free to choose schools for foreigners³⁶. This is because that the schools under the Japanese law, according to the officials of the Ministry, are to educate only the Japanese nationals and not to educate human beings including foreigners.
40. The government of Japan has not clearly reported to any treaty bodies concerning such discriminatory treatments³⁷. Then Minister of Education and Science, Mr. Kosaka said, on 22 March 2006, at the Committee on Education and Science of the House of Councilors of the National Diet “Such (foreign) children have no duties to go to school”³⁸.

D. Japan’s obligations under international law:

41. Under Articles 2 (1) and 26 of the ICCPR, Article 2(2) of the ICESCR as well as Article 2 (1) of the CRC,

³¹ Hushugaku Gakurei Jido Seito Chosa.

³² *Ibid.*, note 15, p.61.

³³ *Ibid.*, p.42.

³⁴ *Ibid.*, p.47. Shugaku-jimu-kenkyukai, *Kaiteiban Shugaku-jimu Handbook*, Daiichhoki, 1993.

³⁵ *Ibid.*, p.50.

³⁶ *Ibid.*, p. 52.

³⁷ *Ibid.*, pp.54-57.

³⁸ *Ibid.* p.58.

not only the discrimination against foreign children is prohibited but also equality before the law and equal protection of the law is guaranteed. The foreign children shall be treated in the same manner as the Japanese children in relation to the right to compulsory education, which is guaranteed under Article 13(2) (a) of the ICESCR and Article 28(1) (a) of the CRC, which are based on Article 26 of the UDHR. “**Education for all**” is the obligatory principle for the Japanese government. There should be no discrimination against the foreign children on the basis of nationality. One may confirm this principle in the General Comment 13 of the CESCR, which writes in its para. 34 as follows:

“The Committee takes note of article 2 of the Convention on the Rights of the Child and article 3 (e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.”

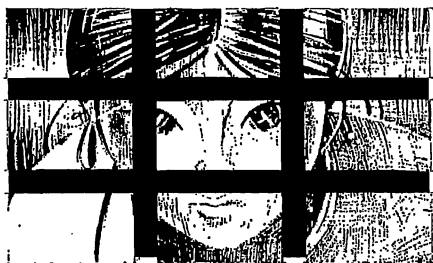
42. One may find that the discrimination against foreign children in Japan is a symbolical trait of the structural and traditional nationalism inherited from the prewar Imperial Japan, which militarily invaded many Asian countries³⁹. Japan, which was trying to catch up the progressive countries in Europe and the North America, seems to be losing its energy to reform it. Totsuka⁴⁰ could not find the similar discriminations of landed foreign children as for the right to compulsory education in his comparative researches of the UK, Finland and Canada.

³⁹ TOTSUKA, Etsuro, The Right to Education of Foreign Children and the Japanese Education Law System – Reviewing the “Reform” of the Fundamental Education Law, *Ryukoku-Hhogaku* (4), Vol. 43 No. 4 (March 2010), pp. 197-231.

⁴⁰ TOTSUKA, Etsuro, The Right to Education of Foreign Children and the Japanese Education Law System – Reviewing the “Reform” of the Fundamental Education Law, *Ryukoku-Hhogaku* (5), Vol.44 No. 1 (July 2011), pp. 92-141.



Comfort Women *an unfinished ordeal*



Report of a Mission

International Commission of Jurists
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liable on this additional ground to make reparation to the Filipino women.

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

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

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

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

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

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

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

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

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

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

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

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

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

²³ Oda, *supra* n. 20 at 46.

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

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

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

25 *Id* at 47.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. War Crimes

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

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

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

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

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

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

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

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