

# Could Systematic Sexual Violence against Women during War Time Have Been Prevented? – Lessons from the Japanese Case of “Comfort Women”

*Etsuro Totsuka*

## Introduction

The author wishes to stress the importance of his recent findings to be made public at this conference for the first time relating to whether the Japanese Empire in 1930s could have reversed its practice of military sexual slavery.<sup>1</sup>

## General Background to the Issue of the “Comfort Women”

Despite the criticisms and actions of the United Nations (UN), the International Labour Organisation (ILO) as well as non-governmental organisations (NGOs), the Japanese Government has refused to take the necessary steps towards reconciliation with the victims of military sexual slavery, namely the “comfort women”.<sup>2</sup>

The term “comfort women” was first used by the military of the Japanese Empire before and during World War II. It is a euphemism for the enslaved women victims of sexual slavery by the Japanese military.

The author delivered an oral statement on “comfort women” as “sex slaves” to the 48<sup>th</sup> Session of the UN Commission on Human Rights on 17<sup>th</sup> February 1992 that included the following observation:<sup>3</sup>

One example was the situation of Korean girls and women abducted by Japanese forces during the Second World War for use as sex slaves. ... The former Vice-

1 The authors' two articles in Japanese on these judgments were published after the International Law Conference in Adelaide: See Totsuka, Etsuro, Senji jyosei ni taisuru boryoku eno nihon shiho no taiou, sono seika to genkai (jyou), *Sensou-Sekinin-Kenkyu Quaterly – The Report on Japan's War Responsibility*, published in Japan, no. 43, March 2004, pp. 35-45, 67; and Totsuka, Etsuro, Senji jyosei ni taisuru boryoku eno nihon shiho no taiou, sono seika to genkai (ge), *Sensou-Sekinin-Kenkyu Quaterly – The Report on Japan's War Responsibility*, published in Japan, no. 44, June 2004, pp. 50-63. The publication of these articles was reported by the mass media in Japan based on the news articles circulated by Kyodo News Agency on 15 June 2004. They include Wartime 'comfort women' rulings uncovered *The Japan Times*, Wednesday, June 16, 2004: <<http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040616a8.htm>>.

2 This represents the situation as of February 2004.

3 UN Doc. E/CN.4/1992/SR.30/Add1, para. 14-18.

*Ustina Dolgopol and Judith Gardam (eds.), The Challenge of Conflict, pp. 499-513.*

© 2006 Koninklijke Brill BV. Printed in The Netherlands. ISBN 90 04 14599 0.

Chairman of the Japanese House of Representatives had alleged that 57.9 per cent, [totalling] 143,000 young girls and women, had died in enslavement. In January 1992 the Government of Japan had made an apology to the Korean People but had offered no compensation or other effective remedy to the victims as required by article 8 of the Universal Declaration of Human Rights. ...”

Since then, this issue has been widely discussed by international lawyers. Not only the International Commission of Jurists<sup>4</sup> but also two UN Special Rapporteurs,<sup>5</sup> the ILO Committee of Experts<sup>6</sup> and the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery<sup>7</sup>(WIWCT) have recommended that the Japanese Government take concrete action, including fact-finding, admission of responsibility and the payment of compensation to the women victims. The UN special rapporteurs as well as the WIWCT pointed out that Japan still has a duty to punish perpetrators of war crimes and crimes against humanity including wartime military violence against women.

Let me briefly summarize the current situation.

- 4 DOLGOPOL, Ustina & PARANJAPE, Snehal, *Comfort Women: An Unfinished Ordeal, Report of a Mission by the International Commission of Jurists* (1994): <<http://www.comfort-women.org/Unfinished.htm>>, visited on 8 February 2004.
- 5 The Addendum (UN Doc. E/CN.4/1996/53/Add.1) of the first report in 1996 to the Commission on Human Rights made by Ms. Radhika Coomaraswamy the Special Rapporteur on Violence Against Women, focused on military sexual slavery by Japan. In the appendix to the Final Report on systematic rape, sexual slavery and slavery-like practices during armed conflict (UN Doc. E/CN.4/Sub.2/1998/13.) submitted by the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict to the UN Sub-Commission of Human Rights, Ms. Gay McDougall found that the acts committed by the Japanese military against the “comfort women”, constituted violations of international law, war crimes and crimes against humanity. She recommended the following actions by the Japanese Government: investigation of the facts, punishment of the perpetrators, admission of the facts, a formal apology, direct compensation to the individual victims and other measures. <<http://www.comfort-women.org/resources.htm>> visited on 8 February 2004.
- 6 The ILO Committee of Experts on the Application of Conventions and Recommendations, which found violations of ILO No. 29 Forced Labor Convention, in its observations in 1996, 1997, 1999, 2001, 2002 and 2003, recommended that the Japanese Government pay compensation to the victims irrespective of the Japanese Government’s treaty defense. <<http://www.ilo.org/ilolex/english/newcountryframeE.htm>> visited on 8 February 2004.
- 7 WIWCT was a people’s tribunal organized by Asian women and human rights organizations and supported by international NGOs. The WIWCT was held in Tokyo on 8-12 December 2000. On 12 December 2000, the Tribunal issued its preliminary judgment, which found Emperor Hirohito guilty, and the State of Japan responsible, for the crimes of rape and sexual slavery as crimes against humanity. <<http://www1.jca.apc.org/vaww-net-japan/english/>> visited on 8 February 2004.

- First, the Japanese Government continues to refuse State compensation and to opt for payment from private funds such as the “Asian Women’s Fund”<sup>8</sup> on unjustifiable grounds such as the “treaty defense”.<sup>9</sup>
- Second, the Japanese courts, with one exception, the famous judgment of the Yamaguchi District Court,<sup>10</sup> have refused all demands for compensation that have been filed by the victims. The single exceptional victory was reversed by the Hiroshima High Court,<sup>11</sup> the judgment of which was then upheld by the Supreme Court on 25<sup>th</sup> March 2003. The offers of Korean women victims to settle the dispute through international arbitration, an initiative strongly supported by United Nations human rights bodies, were refused by the Japanese Government.<sup>12</sup>

8 As for critical views of the Asian Women’s Fund, see the web site of the Korean Council for the Women Drafted into Military Sexual Slavery by Japan, <<http://www.k-comfort-women.com>> visited on 10 February 2004 (English page as yet unavailable). As for the views of the leading Japanese historian, see: YOSHIMI, Yoshiaki, *The Emergence of the Issue*, in: YOSHIMI, Yoshiaki, translated by O’BRIEN, Suzanne, *Comfort Women Sexual Slavery in the Japanese Military During WW II* (Columbia University Press, 2000) pp. 23-40. As for the claim of the AWF, see <<http://www.awf.or.jp/english/index.html>> visited on 10 February 2004.

9 Since 1992 the author has been criticizing the attitude of the Japanese Government as follows: 1. As for the private fund policy, see: TOTSUKA, Etsuro, ‘Military Sexual Slavery by Japan and Issues in Law’ in: Keith Howard (ed.), *True Stories of the Korean Comfort Women* (Cassell, London & New York, 1995), pp. 193-200; 2. As for the victims from the Republic of Korea, see: TOTSUKA, Etsuro, ‘International Legal Issues between ROK and Japan concerning Comfort Women’, In: Lee, Jang-Hie (ed.), *International Legal Issues between the Republic of Korea and Japan*, (ASRI Press, Seoul, 1998), pp. 65-88; 3. As for the victims in China, see: TOTSUKA, Etsuro, ‘Peace Treaty and Japan’s Wartime Responsibility: Breaking the Treaty Defense’, *Humaniores Volkerrecht Informationsschriften*, 1 /2002, pp. 43-46.

10 TOTSUKA, Etsuro, ‘Commentary on a Victory for “Comfort Women”: Japan’s Judicial Recognition of Military Sexual Slavery’, (1999) 8 *Pacific Rim Law & Policy Journal* pp.47-61.

11 Reuters=CNN.Com.news, Japan court rules against ‘comfort women’, March 29, 2001, Web posted at: 10:36 AM EST (1536 GMT) visited on 14 February 2004.

12 The author, representing NGOs such as the International Fellowship of Reconciliation, requested the United Nations to recommend that the Japanese Government and the victims agree to international arbitration. For example, the author submitted a written statement on behalf of IFOR to the Fiftieth session of the UN Commission on Human Rights. See: E/CN.4/1994/NGO/19, 4 February 1994, Written statement submitted by the International Fellowship of Reconciliation, a non-governmental organization in consultative status (category II), “Comfort women”: a case of impunity, which stated “IFOR wishes to point out the existence of the Permanent Court of Arbitration which can offer its services in cases where one party is not a State.” This was taken up by the UNWGCFs. See: E/CN.4/Sub.2/1994/3313 June 1994, the Report of the Working Group on Contemporary Forms of Slavery on its nineteenth session, Chairman-Rapporteur: Mr. Ioan Maxim, that recommended: “Noting the information received concerning the sexual exploitation of women, as well as other forms of forced labour, during wartime, Taking note of Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1993/24 of 25 August 1993 on slavery and slavery-

- Third, the proposals made by Diet Members of the opposition parties for a state apology by legislation and for state payment were successfully submitted to the House of Councilors. The accompanying documents established that such legislation would not violate international law or the Constitution. They have been, however, blocked by the conservative Diet Members supporting the Government.<sup>13</sup>

---

like practices during wartime, 1. Decides to transmit the information received concerning the sexual exploitation of women and other forms of forced labour during wartime to the Special Rapporteurs on the question of the impunity of perpetrators of violations of human rights; 2. Recommends the Special Rapporteurs on the question of the impunity of perpetrators of violations of human rights to take into consideration the information received by the Working Group during its nineteenth session; 3. Welcomes the information that the Permanent Court of Arbitration is available to victims of violations of human rights, including various forms of slavery, and to States, should the parties wish to submit any matters to arbitration; 4. Draws the attention of the parties concerned to the possibilities of making agreements on voluntary submission to the jurisdiction of the Permanent Court of Arbitration as a way of assisting victims of violations of human rights, in particular practices akin to slavery.” This was supported by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in August of that year. See: E/CN.4/Sub.2/1996/26, 16 July 1996, Preliminary report of the Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict, Ms. Linda Chavez, pointing out the role of the Permanent Court of Arbitration was as follows: “The Permanent Court of Arbitration was established in 1899 at The Hague by the International Convention for the Pacific Settlement of International Disputes. Originally created for arbitration between States, the Permanent Court of Arbitration enlarged its capacity of arbitration in 1962 to conflicts between individuals and States. Victims of violations of human rights, as well as States, may now submit matters to arbitration.” NGOs, however, reported the subsequent refusal by the Japanese Government, to accept the UN recommendations, although the victims in the ROK agreed to do so. See: E/CN.4/Sub.2/1996/24, 19 July 1996, Report of the Working Group on Contemporary Forms of Slavery on its twenty-first session, Chairperson-Rapporteur: Mrs. Halima Embarek Warzazi as follows: “88. The observer for the World Council of Churches denounced what he described as manoeuvres on the part of certain members of the Japanese Government. They had knowingly misled the members of the Japanese Parliament by asserting that the Commission on Human Rights had rejected the report submitted by the Special Rapporteur after his visits. Speaking also on behalf of other non-governmental organizations in the Philippines, Indonesia and Japan, he expressed his opposition to the establishment of the Asian Women’s Fund financed out of private capital so as to allow the Japanese Government to evade its legal obligations. He launched an appeal for no contributions to be made to that Fund. Lastly he regretted that the Japanese Government was persisting in its refusal to attend the Permanent Court of Arbitration and to grant compensation to the victims individually.”

- 13 The author, on behalf of the Japan Fellowship of Reconciliation, has been reporting to the UN on the slow but steady development of the legislative movement as follows. In 2001: see E/CN.4/Sub.2/2001/NGO/24, 24 July 2001, written statement submitted by Japan Fellowship of Reconciliation, a non-governmental organization with consultative status (Special), “Comfort women”: Current negative reactions and positive developments, to Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session, stating: “Three opposition parties succeeded, for the first time, in submitting to the House of Councilors a united Bill for “Promotion of Resolution for Issues concerning Victims of Wartime Sexual Coercion Act”. In 2002: see E/CN.4/Sub.2/2002/NGO/23,

- Fourth, the legislative proposals submitted by the Diet Members of the opposition parties to the House of Representatives for state investigation of the sufferings during wartime also have been blocked by the conservative Diet Members supporting the Government.<sup>14</sup>
- Fifth, the government has not admitted that the Japanese Imperial Military committed any crimes under Japanese domestic law.<sup>15</sup>
- Sixth, no admission of any violation of international law was offered by the Government.<sup>16</sup>
- Seventh, no further investigation by the Government is being conducted.<sup>17</sup>

---

25 July 2002, Written statement submitted by Japan Fellowship of Reconciliation, to Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fourth session, which stated 'For the first time in history, on 18 July 2002, the Committee on Cabinet Affairs of the House of Councilors of the Diet of Japan started its substantial deliberation on a Bill, "Promotion of Resolution for Issues concerning Victims of Wartime Sexual Coercion Act".' In 2003: see E/CN.4/Sub.2/2003/NGO/46, 30 July 2003, Written statement submitted by Japan Fellowship of Reconciliation: Systematic rape, sexual slavery and slavery-like practices, to the Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, which stated 'Members of the House of Councilors of the Japanese National Diet, Ms. OKAZAKI, Tomiko; Ms. MADOKA, Yoriko; Ms. CHIBA, Keiko; Ms. KAWAHASHI, Yukiko; Ms. YOSHIKAWA, Haruko; Ms. HATTA, Hiroko; Mr. YOSHIOKA, Yoshinori; Ms. OWAKI, Masako; Ms. FUKUSHIMA, Mizuho; Mr. KUROIWA Takahiro; Mr. SHIMABUKURO Soko; Ms. TAJIMA, Yoko; and Ms. TAKAHASHI, Kiseko with support of other 73 Members of the House, on 31 January 2003, re-introduced a Bill, "Promotion of Resolution for Issues concerning Victims of Wartime Sexual Coercion Act" to the House at the 2003 Ordinary Diet Session. The Bill is the same as the previous bill, see E/CN.4/Sub.2/2001/NGO/24 and E/CN.4/Sub.2/2002/NGO/23, which was abolished at the end of the last Diet session in December 2002. The National Diet of the Republic of Korea, a major victimized nation, passed a resolution supporting the Bill mentioned above on 26 February 2003 at the opening of President ROH Moo-hyun's era

- 14 Information in relation to the movement to pass the legislation for the fact-finding is available in Japanese at the web site of "Senso-Higai-Chosakai-Ho wo Jitsugensuru Shimin-Kaigi" <<http://www.geocities.co.jp/HeartLand-Keyaki/5481>> visited on 10 February 2004.
- 15 As for the Japanese Government attitude in relation to an apology and the fact-finding conducted by it, see: O'BRIEN, Suzanne, Translator's introduction, YOSHIMI, op. cit. pp. 1-21. See: YOSHIMI, Yoshiaki, The Emergence of the Issue, YOSHIMI, op. cit. pp. 23-40. As for the attitude of the Japanese Government at the Diet, see: (In Japanese) MOTOOKA, Shoji, "Ianhu" Mondai to Watashi no Kokkai-Shingi, Shoji Motooka's Tokyo Office (April 2002), pp. 1-194. As for the attitude of the Japanese Government and the UN activities, see: TOTSUKA, op. cit.
- 16 Ibid.
- 17 Ibid.

This stagnation may delay achieving not only women's human rights, as it will slow down the prevention of further systematic violence against women, but also peace in the world.<sup>18</sup>

The author of this paper wishes to review the history of the Japanese case of military "comfort women" and to discuss whether Japan could have prevented such systematic violence against women by relying on legal measures.

### Development of International Law in the 20<sup>th</sup> Century

In the early stage of the Meiji Era, namely in the second half of the 19<sup>th</sup> Century, Japan showed strong willingness<sup>19</sup> to abide by international law and ratified or acceded to some important treaties.

The three following international instruments are relevant for the purpose of this paper. All were major multilateral treaties that the international community devised to suppress the slave trade in women and children, specifically the use of white slaves for prostitution, after having made some progress in suppressing international trade in black slaves:

- (1) *The International Agreement for the Suppression of the White Slave Trade*, signed at Paris, on 18th May 1904.
- (2) *The International Convention for the Suppression of the White Slave Trade*, signed at Paris on 4th May 1910. Article 1 of the Convention is explicit that those who solicited, enticed or abducted juvenile women with the purpose of prostitution should be punished, even if the consent of the women was obtained. Article 2 is explicit that those who solicited, enticed or abducted adult women using deception or any means of violence, coercion, abuse of authority or any other coercive measures, should be punished. Article 3 obliges the state parties to take necessary measures in order to ensure punishment of the perpetrators of the crimes defined by Articles 1 and 2.
- (3) *The International Convention for the Suppression of the Traffic in Women and Children*, concluded at Geneva on 30th September 1921.

18 This author, being invited to give opinions concerning the bill for apology to the victims of sexual coercion during war time on 12 December 2002 by the Committee of the Cabinet Affairs of the House of Councilors, supported the purpose of this bill, which was to achieve friendly relationship with Asian countries. <<http://www.jca.apc.org/~fsaito/sexslave.html>>.

19 One of the examples is the firm response of the Japanese Meiji Government, that liberated all the Chinese slave trade victims of a Peruvian vessel, the Maria Luz at Edo Bay or Port of Yokohama in 1872. See the following web sites, visited on 11 February 2004: Bill Mihalopoulos, What is a Contract?: Law Meets the Doctor, the Migrant, and the Prostitute. <<http://www.aasianst.org/absts/1999abst/inter/i-173.htm>>. Juan del Campo, Treaties with Japan and China. <[http://members.lycos.co.uk/Juan39/Japan\\_China.html](http://members.lycos.co.uk/Juan39/Japan_China.html)>.

Japan ratified or acceded to these instruments in 1925.<sup>20</sup> Although Japan has not ratified the Slavery Convention, adopted at Geneva on 25<sup>th</sup> September 1926, the author believes that the prohibition against slavery and the slave trade was a norm of international customary law at the time this Convention was adopted.

*The Convention concerning Forced or Compulsory Labour* was adopted by the General Assembly of the ILO on 28<sup>th</sup> June 1930. Japan ratified this Convention on 15 October 1932.<sup>21</sup> The first sentence of Article 2 prohibits any forced labour of women.<sup>22</sup> Article 24 stipulates: 'the illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.'

On 11<sup>th</sup> March 1933, the Cabinet of the Japanese Empire decided to withdraw from the League of Nations.<sup>23</sup> This was a symbolic decision that inevitably isolated Japan from the international community and followed a series of undeclared wars waged against China by the Japanese Imperial Government and Military. Through these actions, Japan seemed to have substantially abandoned its willingness to respect international law.

The author's view is that Japan has not as yet regained a willingness to abide by international law, a view reinforced by its attitude to UN attempts to deal with the current issue of military sexual slavery.

### Creation of Military Sexual Slavery by Japan

The leading historian, Professor Yoshiaki Yoshimi wrote:<sup>24</sup>

When were the first military comfort stations established, and how did the system expand? As noted above, since the materials that remain are only the tip of the documentary iceberg, it is very difficult to give a definitive answer.

According to the recollection of Okamura Yasuji, Vice Chief of Staff of the Shanghai Expeditionary Force (commanded by General Shirakawa Yoshinori), the army was schooled in the military comfort women system by the Japanese navy in

20 The 1904 Agreement was acceded to by Japan on 21st October 1925 and promulgated on 21st December 1925. As for the 1910 Convention, the instrument of accession was deposited by Japan on 21st October 1925 and it was promulgated on 21st December 1925. The 1921 Convention was ratified by Japan on 28th September 1925; its deposition was registered on 15th December 1925; and it was promulgated on 21st December 1925.

21 Ratification was made by Japan on 15th October 1932. Its deposition was registered on 21st November 1932 and it was promulgated on 7th December 1932.

22 The Japanese Government acknowledged that coercion was, in general, employed in recruitment and/or treatment of the comfort women.

23 Naikaku-Seido Hyakunen-Shi Iinkai, *Naikaku-Seido Hyakunen-Shi ge*, Naikaku-Kanbo (1985), p. 201.

24 YOSHIMI, *op. cit.*, pp. 43-44.

Shanghai. It appears, then, that the first comfort stations were constructed by the navy.

The naval comfort stations established at this time were large enough to occupy several buildings. A document from a slightly later period reveals that at the end of 1936, there were ten restaurants employing serving women (102 of those women were Japanese, while 29 were Korean). Of these ten establishments, seven were reserved exclusively for naval personnel.

The lack of official documents, that otherwise might provide the facts surrounding the birth of the military “comfort stations” and its criminality, allowed many conservative observers room to argue that the military’s behavior against the women victims constituted “no crime”, since the state regulated prostitution system “lawfully” existed. This has been one of the major reasons why the Japanese Government has been able to ignore the pressure for a state apology from the international community.

### Responses of the Japanese Legal System against Military Sexual Slavery by Japan

The author has had the good fortune to locate the earliest District Court and Appeal Court judgments<sup>25</sup> of the Japanese criminal court against ten private entrepreneurs, who deceived and trafficked 15 Japanese women from Nagasaki to a Japanese Naval “comfort station” in Shanghai, China. It was already known as early as 1997 that in 1937 the then Supreme Court had endorsed the judgments of the District Court and the Appeal Court.<sup>26</sup> The lower Courts’ judgments, however, had not been found.

As it was assumed by the researchers, including myself, that the judgments must have been destroyed by the atomic bomb dropped in August 1945 by the United States onto Nagasaki City, nobody attempted to find them. They, however, had survived.

The Nagasaki District Court Judgment<sup>27</sup> clearly shows the following facts, which, except for some information contained in the Supreme Court judgment, were not previously known.

25 These 1936 lower court judgments were in the exclusive possession of the Japanese Government, which neither submitted them to the Diet nor to the Korean government, although they publicly promised to make a thorough investigation in relation to both of them.

26 According to the leading front page article of the *Mainichi Shimbun* (Osaka) on 6 August 1997, a Korean resident researcher in Japan learned that the Supreme Court ruled on 5 March 1937 that the abduction by deception of and trafficking in 15 Japanese women from Nagasaki to a Navy comfort station in Shanghai was a violation of Art. 226 of the Penal Code. This judgment was published in the 1937 selected judgments of the Supreme Court. It is available in the Osaka Prefectural Public Library.

27 Nagasaki Chiho Saiban-sho Keiji-bu Hanketsu, Showa 11 nen, 2 gatsu, 14 nichi, Kokugai Iso Jiken, Hikoku-nin F., Minoru hoka 8 mei.



The indictment against the defendants was issued by a prosecutor<sup>28</sup> of the Nagasaki District Court. The defendants were ten Japanese, consisting of seven men and two women from Nagasaki and one man from Shanghai. The name of the defendants' legal counsel was not included in the judgment. The decision was issued on 14<sup>th</sup> February 1936 by a panel of three judges<sup>29</sup> of the Criminal Division of the Nagasaki District Court.

The Court found that all defendants under a series of conspiracies deceived and trafficked 15 Japanese women in Nagasaki to a Japanese Naval "comfort station" in Shanghai, China and that they were guilty of committing crimes defined by Article 226 (1) and (2) of the Penal Code.<sup>30</sup>

The defendants in this case were sentenced to penal servitude for periods up to three years and six months.<sup>31</sup> It is important to note the date, 7<sup>th</sup> March 1932,<sup>32</sup> when the initial conspiracy was entered into by three male defendants at an Inn in Shanghai. The defendants discussed how they could abduct by deception and traffic women from Nagasaki, Japan to a "comfort station" designated by the Japanese Imperial Navy to be newly set up in Shanghai, China. They agreed on the methods to recruit women to a Naval "comfort station", pretending that the women would be well paid for work in an ordinary workplace such as a restaurant or cafe, without telling them the truth that they were to be forced to give sexual services to the Japanese officers and soldiers. They approached the fifteen women victims during the period from 10<sup>th</sup> March to the beginning of May. The date of the first shipment of the three women victims from Nagasaki to Shanghai was 14<sup>th</sup> March 1932.

This finding, which accords with the findings<sup>33</sup> of the historian, Professor Yoshimi, strongly suggests that the Nagasaki District Court judgment was probably made in relation to one of the first cases of abductions of military "comfort women" recruited to the first Naval "comfort stations". According to Professor Yoshimi: 'It was around this time [in March 1932] that the Japanese army and navy units dis-

28 A male Prosecutor, Mr. KAWAKAMI. Isamu.

29 All were male Justices, Mr. HONGO, Masahiro, Mr. NARAHASHI, Yoshio and TAKASHIGE, Hisato.

30 Art. 226 of the current Penal Code, which is essentially the same as it was in 1936 (Kei-ho, Meiji 40 nen Ho 45). One of the minor differences is that the current provision is written in hiragana, whereas the previous one was written in katakana. Both can be translated into English as follows: 'A person who kidnaps or abducts another for the purpose of transporting the same to a foreign country shall be punished with penal servitude for a limited period of not less than two years. 2. The same shall apply to a person who buys or sells another for the purpose of transporting the same to a foreign country or who transports a person kidnapped, abducted, or sold to a foreign country.' The penal code of Japan 2002, originally translated by NAKANE, Fukio, published by EIBUN-HOREI-SHA, Japan (2002), pp. 68-69.

31 Three men were sentenced to three years and six months. Two women were sentenced to two years and six months. Two men were sentenced to two years. Three men were sentenced to a year and six months with suspension of three years.

32 It was just 40 days after the outbreak of the military attacks waged by the Japanese Forces against China in Shanghai.

33 YOSHIMI, *op. cit.*, pp. 43-47.

patched to Shanghai established the first military comfort stations. ... It appears, then, that the first comfort stations were constructed by the navy.<sup>34</sup>

The fifteen women victims were recruited from Nagasaki and appear to have been Japanese homeland citizens. As the former known “comfort women” (with a few exceptions) are not Japanese homeland citizens, this judgment adds a fresh aspect for the researchers in this area.

The pattern of recruitment is strikingly similar to the many Korean cases of the abduction of women.<sup>35</sup>

The legal basis of the judgment was Article 226 (1) and (2) of the Penal Code.<sup>36</sup> This Article substantially implements the provisions of international law, mentioned above, namely the three instruments against trafficking in women for prostitution.<sup>37</sup>

The judgment successfully punished the perpetrators of abductions of and trafficking in the women to a Naval “comfort station” by enforcing the Penal Code. This meant that the Japanese domestic judicial system effectively achieved realization of the rule of law and that Japan abided by international obligations in these instances. This success story of the then administration of justice surprised the author, as this happened at the time of rising Fascism and Militarism in Japan.<sup>38</sup> Just two weeks after this judgment, the February 26 Incident, an attempted *coup d'état* took place.

### Limitations of the Judicial System

Significant limitations on this success story should be noted which may have impeded the prevention of recurrences of similar crimes. The judgment strongly suggests that the Japanese police and prosecutors already knew that the conduct of the defendants conspiring with the military against those fifteen women victims were criminal in nature and constituted unlawful cross border abductions.<sup>39</sup> They failed, however, to

34 Ibid., p. 43. As evidence of this claim, he submits the diary that was written by OKABE, Naosaburo, a Senior Staff Officer in the Shanghai Expeditionary Force, who worked with OKAMURA, Yasuji, Vice Chief of Staff of the Shanghai Expeditionary Force. Ibid., p. 45 & p. 217. In OKABE's diary dated 14th March 1932, he wrote 'I have considered many policy options for resolving the troops' sexual problems and have set to work on realizing that goal. Lieutenant Colonel Nagami [Toshinori] will bear primary responsibility in this matter.'

35 Keith Howard (ed.), op. cit.

36 Art. 226, op. cit.

37 The author could not find any provision of the Penal Code criminalizing a person, who trafficked in a juvenile without using deception or violence, as required by Art. 1 of the 1910 Treaty, as provided in its Art. 1.

38 The Japanese military commenced the forceful occupation of Manchuria in 1931 “the Manchurian Incident”. The First Shanghai Incident was undertaken by Japan in January 1932. In that year military extremists killed senior politicians and occupied the centre of Tokyo.

39 It is interesting to note that the author has no knowledge of any “admission of guilt” made by current Japanese Government officials of the criminal nature of the involvement of the Japanese Armed Forces in the abductions of the women, despite the fact

punish any military personnel, although they clearly knew about the involvement of the Japanese Navy in Shanghai, who must have initiated a series of actions to abduct the women victims. This must have been the starting point of the *de facto* impunity in relation to the enormously large-scale later crimes accorded to the military.

These limitations on judicial power, which should be examined by researchers, suggest that domestic laws and the adoption of international treaties are not enough to prevent further violations of human rights.

If the Japanese law that incorporated international law had been more effectively implemented, it would have been possible for Japan to prevent the further recurrence of violations of women's human rights. Not only the Japanese domestic legal system but also the international law system, however, lacked the mechanisms for effective implementation.

The judgment dated 28<sup>th</sup> September 1936 of the Nagasaki Appeal Court basically supported the Nagasaki District Court Judgment, although it reduced the periods of penal servitude for five of the eight appellants. The Supreme Court judgment dated 5<sup>th</sup> March 1937 turned down the further appeal made by the seven appellants (defendants).

There is no other known case of punishment by the Japanese justice system of the crimes against the "comfort women". The only other known precedent of the punishment of perpetrators was for crimes against Dutch victims of military sexual slavery by Japan in a judgment delivered by a military war crimes tribunal constituted by The Netherlands in 1946. The Dutch military tribunals were largely indifferent towards non-Dutch Asian victims.<sup>40</sup>

---

that the Government officially admitted that the Japanese Forces were involved in the abductions.

40 UN. Doc. E/CN.4/1995/NGO/40, Written statement drafted by Attorney Mr. JUNSLAGER, Geraldine, then legal advisor to the Foundation of Japanese Honorary Debts, submitted by the International Fellowship of Reconciliation, a non-governmental organization in consultative status (category II) Slavery during wartime, submitted on 14th February 1995 to the UN Commission on Human Rights. It contains a summary of the judgment. UN. Doc. E/CN.4/Sub.2/1998/13, para. 62, which states: '62. Following the Second World War, a Netherlands court in Batavia found Japanese military defendants who had participated in enslaving 35 Dutch women and girls in "comfort stations" during the Second World War guilty of war crimes for acts including rape, coercion to prostitution, abduction of women and girls for forced prostitution, and ill-treatment of prisoners.' [DOLGOPOL and PARANJAPE, *Comfort Women: An Unfinished Ordeal, International Commission of Jurists*, op. cit., pp. 135-36.]. See also: YOSHIMI, op. cit., pp. 173-176.

See also: TANAKA, Yuki, *Japan's Comfort Women* (Routledge 2001), pp. 73-77. Prof. TANAKA is critical of "the Dutch military authorities' indifference towards Indonesian comfort women." Ibid., pp. 77-83. He also argues "Why did the US forces ignore the comfort women issue?" Ibid., pp. 84-100.

### Administrative Power and *De Facto* Impunity

How did the state of perfect *de facto* impunity arise? If the Japanese Government had seriously tried to abide by international obligations and to implement the provisions of the Penal Code in order to prevent further recurrence of the crimes against the “comfort women”, the cross border trafficking in such women would have been suppressed.

The Supreme Court judgment was followed by a series of administrative measures taken by the government. Instead of suppressing the trafficking in such women, the Home Ministry, which controlled the police decided to tolerate it, as it was regarded as a necessary evil. The Home Ministry was first involved in the issue of “comfort women” in February 1938. It issued a notice entitled ‘Matters Regarding the Treatment of Women Sailing to China’ (dated February 23, 1938). Orders were made tacitly approving the transport of ‘women whose purpose [for going abroad] was the “shameful calling” (such as comfort women), but only in cases where their destinations were northern and central China’.<sup>41</sup> It is clear from this notice that the Home Ministry was aware of the international legal position. The notice ordered that any involvement by the Imperial Forces had to be suppressed in order to maintain their honour. It was cleverly formulated, however, so that any persons who were ordered by the military to transport such women to China could do so as long as they concealed the fact that they were working for the military and that the destination was military “comfort stations”.<sup>42</sup> Thus, all women recruited to military “comfort stations” had to be deceived. As a result, all cases of trafficking in women to military “comfort station” inevitably constituted crimes of abduction by way of deception, in violation of Article 226 of the Penal Code.

These events were soon followed by one of the key military documents, 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’.<sup>43</sup> The Ministry of War, learning from the lesson of ‘people who kidnap women and are arrested by the police’, instead of banning the recruitment of women to “comfort stations”, ordered that ‘In the future, armies in the field will control the recruiting of women and will use scrupulous care in selecting people to carry out this task. This task will be performed in close cooperation with the military police or local police force of the area.’<sup>44</sup> This was ordered ‘for preserving the honor of the army and avoiding social problems.’<sup>45</sup>

There must have been many meetings for “close cooperation” in the ensuing period. ‘According to the records of the Consulate of Nanking, in April 1938 there was a gathering of relevant officials from the army, navy, and Foreign Ministry at

41 YOSHIMI, op. cit., p. 63.

42 (In Japanese) NAGAI, Kazu, ‘A Study of Japanese “Military Sexual Slavery” under the Sino-Japanese War’, *Twentieth Century Studies*, No. 1 (2000), pp. 79-111.

43 YOSHIMI, op. cit., pp. 58-59.

44 Ibid.

45 Ibid.

the Nanking Consulate. They jointly agreed on matters concerning the authority to license and regulate imperial subjects engaged in various businesses. It was decided in regard to the army’s exclusive “store” (*shubo*) and comfort stations that “consulates will not interfere with establishments managed and supervised directly by the army”<sup>46</sup> Thus, the system for *de facto* impunity was complete.

### Were “Loopholes” in International Law Responsible?

There is consensus that ‘Korean women became the primary targets of efforts to round up comfort women’.<sup>47</sup> Professor Yoshimi attributes this to ‘the loopholes in international law’, namely the exemption clauses in relation to colonies in three international treaties including the 1910 treaty (Article 11) and the 1921 treaty (Article 14) for suppression of trafficking in white slaves. He writes: ‘Thus the government and the military considered the rounding up women in Korea and Taiwan exempt from the restrictions imposed by international law and turned Korea and Taiwan into supply depots for military comfort women.’<sup>48</sup>

This author is not convinced by Professor Yoshimi’s argument for the following reasons:

- First, despite the provisions exempting application to colonies in the three treaties mentioned above, the treaties could be applied to trafficking in “comfort women”, where the victims were transported by a Japanese ship or via any port in Japan.
- Second, Japan had ratified the 1930 ILO Convention No. 29 concerning forced labour, which prohibited any forced labour of women. The ILO convention was applicable in not only the home territory but also in Japanese colonies.
- Third, the author believes that trafficking in men and women was also prohibited at that time under customary international law prohibiting the slave trade.
- Fourth, as the Nagasaki District Court judgment proved, the provisions in Chapter 33 of the Penal Code including Article 226 that prohibited abductions of and trafficking in women and children were applicable to the cases of “comfort women”. As the Penal Code of Japan was introduced into colonies of Japan, such as Korea and Taiwan, the same provisions were effective there as well.<sup>49</sup> There should be no doubt that this was common knowledge amongst all officials in colonies such as Korea and Taiwan.

Consequently, the author believes that there existed in colonies such as Korea and Taiwan, provisions of both domestic and international law, under which the abductions of and trafficking in the women victims to military “comfort stations” could

46 YOSHIMI, *op. cit.*, p. 64.

47 YOSHIMI, *op. cit.*, p. 157.

48 *Ibid.*

49 Chosen Keiji-rei (Meiji 45 nen 3 gatsu seirei dai 11 go) introduced the Japanese Penal Code into Korea in 1912. See also: Taiwan Keiji-rei (Meiji 41 nen 8 gatsu 28 nichi rit-surei dai 9 go).

have been suppressed. As a result, one may conclude that what was responsible for *de facto* impunity was not lack of legal provisions or the exemption clauses, but a lack of willingness of the Japanese Government to enforce the law.

Further research needs to be conducted to discover the reasons why the law was not effectively enforced in Japanese colonies, particularly in Korea.<sup>50</sup> The author wishes to raise a hypothesis that the major cause of *de facto* impunity in the colonies, particularly in Korea, was not deficiencies in international law but the lack of political will to apply the law. The colonization process did not go smoothly. The author believes there was personally directed coercion by the Japanese military against the ministers of the then Korean Emperor and that the 1905 Treaty between Korea and Japan did not take effect.<sup>51</sup> It was followed by a period of violent suppression by Japan, when all Governors' General of Korea were appointed from the Japanese military.<sup>52</sup> In such circumstances there would have been little political will to punish the perpetrators, who committed crimes against Korean military "comfort women". In such a situation no law could be applied, as the legal systems for effective implementation were not part of the colonial structure.

In Japan, we have a proverb: 'A thief cannot be made to twist a rope to catch a thief.'<sup>53</sup> How can we effectively enforce law to punish the perpetrators of any crimes, where those responsible for the maintenance of the legal system are directly or indirectly responsible for the crimes?

### Conclusions

The measures that could have dealt effectively with military sexual slavery were not taken by the Japanese Government. Instead, the defects in Imperial Japan's legal system resulted in a failure to effectively confront the military's demands for *de facto* impunity as regards military sexual slavery. This is one of the most probable explanations of the failure of the Japanese legal system, which allowed the rapid growth of this monstrous system of inhuman, degrading and torturous treatment of women. It is essential for research to be conducted into comprehensive legal systems that could

50 See the criticisms of many Japanese researchers and organisations made by Korean NGOs such as the Korean Council for the Women Drafted into Military Sexual Slavery by Japan, emphasizing the importance of considering the impact of colonial rule in this context. See: (In Japanese) YUN, Chung-Ok, *Shokuminchi-shihai, Sengo-sekinin, Senji-seibouryoku, 'Jyosei-Kokusai-Senpan-Hotei' wo tomoni tsukutte, Women's Asia* 21, No. 34 (2003), pp. 39-41.

51 See: UN. Doc. E/CN.4/1993/NGO/36, statement submitted by the International Fellowship of Reconciliation, written by the author on behalf of IFOR, and submitted on 15 February 1993 to the UN Commission on Human Rights.

52 In colonial Taiwan the Governor Generals appointed by Japan were civilians. The author, however, does not mean that the Japanese colonial rule in Taiwan was harmless.

53 In Japanese, "Dorobo ni nawa wo nawaseru koto wa dekinai."

effectively be implemented to cope with *de facto* impunity in order to prevent any recurrence of violations of women's human rights during any military conflict.<sup>54</sup>

The finding of the Nagasaki District Court judgment symbolizes the Japanese Government's failure in fact-finding concerning the issue of "comfort women". Despite its repeated promises before the Diet, the Government did not make public the documents it possessed, such as those in the Ministry of Justice.<sup>55</sup> This failure constitutes a substantial cover-up, although most governments wish to hide their failures. It is essential to ensure accountability of governments through freedom of information in order to protect the human rights not only of a State's own citizens but also all peoples in the world.

Finally, it also should be asked, if women had been equally represented in the judicial system as well as in the military and other governmental offices, would the result have been different?

---

54 The areas of concern in relation to impunity and violence against women during war time are as follows: Defects in Administration of Justice, Human Rights Law and Constitution; Gender and Law; Colonialism and Dictatorship; Control of Military; Violence against Women and International Human Rights and Humanitarian Law; and Peace Studies.

55 The relevant information that was not made public must be in the possession of not only the Ministry of Justice (Homu-sho) but also the National Police Agency (Keisatsu-cho), the Ministry of Public Management, Home Affairs, Posts and Telecommunications (somu-sho) as well as the Ministry of Defense (Bouei-cho).

Copyright © 2006. Martinus Nijhoff Publishers. All rights reserved. May not be reproduced in any form without permission from the publisher, except fair uses permitted under U.S. or applicable copyright law.

EBSCOhost®