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لجنة حقوق الانسان
الدورة الثانية والخمسون
البند ٩(أ) من جدول الأعمال المؤقت

مواصلة تعزيز وتشجيع حقوق الانسان والحريات الأساسية، بما في ذلك مسألة برنامج وأساليب عمل اللجنة

النهج والطرق والوسائل البديلة التي يمكن الأخذ بها داخل منظومة الأمم المتحدة لتحسين التمتع الفعلي بحقوق الانسان والحريات الأساسية

مذكرة شفوية مؤرخة في ١٤ آذار/مارس ١٩٩٦ موجهة من البعثة الدائمة لليابان لدى مكتب الأمم المتحدة في جنيف الى مركز حقوق الانسان

تهدي البعثة الدائمة لليابان لدى المنظمات الدولية في جنيف تحيتها الى مركز الأمم المتحدة لحقوق الانسان ويشرفها أن ترسل رفق هذه المذكرة* آراء حكومة اليابان بشأن الاضافة ١ لتقرير السيدة راديكا كوماراسوامي، المقررة الخاصة المعنية بمسألة العنف ضد المرأة (E/CN.4/1996/53/add.1) المقدم الى الدورة الثانية والخمسين للجنة حقوق الانسان.

وترجو البعثة الدائمة لليابان من مركز حقوق الانسان التفضل بتعميم هذه الآراء كوثيقة رسمية من وثائق الدورة الثانية والخمسين للجنة حقوق الانسان، في إطار البند ٩(أ) من جدول الأعمال المؤقت.

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* ترد الآراء في المرفق باللغة التي وردت بها فقط.

ANNEX

Views of the Government of Japan on the addendum 1 (E/CN.4/1996/53/Add.1) to the report presented by the Special Rapporteur on violence against women

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Chapter 1 Summary

I. Efforts by Japan with respect to the Issue of Violence against Women

Violence against women, which includes sexual abuse or harassment in the family and community, and systematic rape, of the kind perpetrated in the course of the current armed conflicts, for instance, in the former Yugoslavia and Rwanda, is a serious problem in modern society. It is a problem the Government of Japan is committed to cooperating with the rest of international community to confront, mindful of the lesson it has learned from history on the issue of "comfort women," which the Government and people of Japan have made sincere efforts to address. Japan feels profound remorse for the fact that, with the involvement of the former Japanese military, the honor and dignity of many women were injured. Last year, at the fiftieth session of the United Nations General Assembly, it therefore, introduced a draft resolution, subsequently adopted, to establish a trust fund on violence against women within the UN Development Fund for Women (UNIFEM). Japan is determined to take the lead and make an appropriate financial contribution to this fund and it will continue to enter into joint action with the rest of the international community to bring an end to violence against women.

II. Duties of the Special Rapporteur of the UN Commission on Human Rights

In light of the critical importance of the issue of violence against women in the world today, the Government of Japan welcomed the visit to Japan from July 22 to 27 last year of the Special Rapporteur of the UN Commission on Human Rights, Ms. Coomaraswamy. The Government has high regard for the Special Rapporteur system, which utilizes objective and independent experts to establish the status of an issue and precisely for this reason, it is of the view that the manner in which Special Rapporteurs fulfill their responsibilities affects the credibility of the UN Commission on Human Rights and indeed the entire UN system. A Special Rapporteur must therefore present a report that commands the respect of the international community as a whole, one that is neutral and objective, and is based on reliable sources, and any legal opinions that may be offered must be based on a correct understanding of international law.

III. Problems with the Addendum 1. to the Report by the Special Rapporteur

It would be difficult to maintain that the addendum 1. on the issue of "comfort women" presented by the Special Rapporteur meets these criteria. The Government of Japan strongly hopes that, for the following reason, the Commission will reject this document explicitly and arrive at a more accurate understanding of what Japan has undertaken to do in this area.

1. Mandate of the Special Rapporteur

The resolution adopted by the UN Commission on Human Rights at its fiftieth session clearly states that the Special Rapporteur's mandate is to prepare a report on "Violence against Women, and its Causes and Results." In the international community, today, the serious problem of violence against women, for example in the former Yugoslavia and Rwanda, is intensifying, and effective steps have yet to be taken to bring it to an end. Nevertheless, in the first document she chose to make public, and even before issuing the main body of her report, the Special Rapporteur took up only the fifty-year-old issue of "comfort women," as if it were the most important current manifestation of violence

against women and despite the fact that Japan has sincerely fulfilled its obligations according to the relevant treaties and other agreements.

2. Problems with the Methods Employed in the Study and its Contents

The Special Rapporteur devotes 34 of the 140 paragraphs that make up the addendum 1., to Chapter 3 entitled "Historical Backgrounds." However, most are based on publications such as the book written by G. Hicks, the neutrality of which is questionable, and there is little indication that the Special Rapporteur herself has made any efforts to corroborate this information. Moreover, several testimonies focused in Chapter 4 "Testimonies," are not the product of the Special Rapporteur's own interview, but of the staff's of the UN Human Rights Center. She uses them without proper distinction with what she herself listened to. In sum, it is fair to say that the "facts" provided in the addendum were gleaned from a very limited range of sources and are unconfirmed.

It should be added that the situation varied for "comfort women" in different places and at different times, and the facts are difficult to ascertain. The Special Rapporteur nevertheless chose to generalize and to present the very limited information available in a one-sided manner, while she disregards objective materials which do not suit her conclusion, such as the report of interviews to former "comfort women" by the U.S. Army. The addendum therefore clearly fails to meet the standard of neutrality and objectivity that a document submitted by the Special Rapporteur to the Commission on Human Rights is expected to meet.

3. Problems with the Arguments on Legal Questions Put Forward in the Addendum 1.

(1) The arguments on legal questions in the addendum 1. are simply not based on established international law. For more than fifty years, the former Allied Nations, neighboring Asian countries, and Japan, operating within the international legal framework established subsequent to the end of the Second World War, have sincerely endeavored to settle issues arising out of the last world war. The personal view that the Special Rapporteur put forward in the addendum is that neither this legal framework nor any of the other legal frameworks that individual countries have established for the settlement of issues arising out of past wars, provides a means of arriving at a final resolution of these issues. The international community must reject such an argument, based as it is on misinterpretation of international law.

(2) The Special Rapporteur argues that *the system of "comfort stations" set up by the Imperial Army of Japan was a violation of Japan's obligation under international law, and that the Government of Japan has a duty under international law to provide compensation to each former "comfort woman."* * However, it is common to include in agreements to settle issues arising out of past wars such as peace treaties a provision called a "completed compensation article," under which a defeated country pays a victorious country a lump-sum reparations in an agreed-upon amount and the two then waive all war-related claims. It is not common practice in the international law to calculate the war-time losses and damages of each individual and add them up. The San Francisco Peace Treaty and other bilateral treaties that Japan concluded after the last

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* The Special Rapporteur's arguments or assertions are highlighted in italics.

world war provided for final settlement of all war-related claims between Japan and the other States concerned, including the losses and damages of individuals, in accordance with the "completed compensation article." The Special Rapporteur insists that *the San Francisco Peace Treaty and the other bilateral treaties did not cover compensation for the former "comfort women," since there was no reference to that issue during the negotiations on those treaties.* However, this argument entirely ignores the above-mentioned provisions of those treaties as well as the intent of the Parties in agreeing to them. Moreover, under international law, for an individual to claim compensation directly from a nation, the individual's right to do so must be expressly provided for in a treaty and the procedure for exercising that right must be guaranteed under international law as well. Despite the Special Rapporteur's quotations, instrument such as the Universal Declaration of Human Rights, and the International Covenants on Human Rights have nothing to do with an individual's right to claim compensation under international law.

In addition, in order to know whether or not an action taken by Japan at a certain point in time was a violation of international law, it is necessary first to determine to what treaties Japan was a signatory and what customary international law was in force at that time. The Special Rapporteur, however, insists that Japan violated a treaty to which it was not a party at the time (para 98), and asserts that a certain rule was an established customary international law without offering any grounds for doing so (para 102). The Special Rapporteur also argues that Japan's acts during or before the war violated international law, citing treaties which came into effect afterwards such as the Geneva Conventions of August 12, 1949. It is confirmed, however, in Art. 28 of the Vienna Convention on the Law of Treaties and it is also obvious from the theory of "intertemporal law" that any judgment as to whether Japan violated international law at any time in the past must be judged on the basis of international law in force at the time.

(3) The Special Rapporteur further maintains that *those who were involved in the recruitment of "comfort women" and the establishment of "comfort stations" should be punished as war criminals.*

In the first place, war crimes are to be dealt finally and completely with through peace treaties concluded between victorious and defeated countries unless otherwise expressly stipulated in those treaties. With regard to the last world war, the Allied Powers determined the punishment to be meted out against the Japanese war criminals through trials conducted at the International Military Tribunal for the Far East and other Allied War Crimes Courts, and the Government of Japan accepted the judgments of those courts and carried out the sentences they imposed in accordance with the San Francisco Peace Treaty.

(4) The Special Rapporteur's arguments, although put forward in a legalistic manner, are in fact political statements based on arbitrary and groundless "interpretations" of international law. Should the international community accept such arguments, serious damage would be done to the rule of law in the international community.

IV. Efforts by Japan on the Issue of "Comfort Women"

1. Because of the deep remorse it feels over the issue of "comfort women," which, with the involvement of the Japanese military of the time, severely injured the honor and dignity of many women, the Government of Japan has officially expressed its profound apologies to the former "comfort women" through statements by several successive Prime

Ministers and Chief Cabinet Secretaries. In addition, in order to accurately convey the historical record to future generations and promote mutual understanding with related countries, the Government has undertaken projects such as the "Peace, Friendship and Exchange Initiative." Because it attaches the utmost importance to ensuring that the leaders of the next generation understand the recent history of their country, Japan is also reinforcing its efforts in the field of education.

2. In response to an appeal drafted by a group of twenty persons representing academic circles, lawyers, labor unions, the press and other groups in Japanese society, and after a very thorough discussion , the "Asian Women's Fund" was inaugurated last year. Its purpose is to give form to the Japanese people's wish to atone to the former "comfort women" for what they experienced, and to finance projects that address current issues affecting women such as the violence they suffer, mindful of the lesson history has taught.

The Fund has been engaged in raising consciousness with regard to the issue of "comfort women" and inviting donations to enact their atonement for the former "comfort women." As of March 14, 1996, 211 million yen (increasing daily) has been contributed to the Fund. In order to promote a better understanding of its purposes, the Fund is engaged in dialogues with the former "comfort women," as well as with the governments and groups concerned. It is also in the process of formulating projects that address issues of concern to women today.

3. The Government of Japan has provided all possible assistance to enable the Fund to attain its goals. In addition to the contribution of the Japanese people, it appropriated 638 million yen to the budget for FY 1996 (from April 1996 to March 1997) as a subsidy to the Fund for medical and welfare projects for the former "comfort women," and, more generally, for projects to protect the honor and dignity of women. The Fund will formulate specific projects, in close cooperation with NGOs in Japan and other Asian countries.

V. Conclusion

The Government of Japan desires to contribute to the elimination of violence against women in general, and to find a genuine solution to the issue of "comfort women" through sincere and earnest undertakings of the kind described above. It therefore reiterates its strong hope that the Commission on Human Rights will reject this addendum 1., which presents an inaccurate account of the facts and "legal" arguments based on misinterpretation of international law, and that it will duly recognize the action Japan has taken on the issue of "comfort women" and violence against women in general.

VI. Structure of This Document

Chapter 2 of this document introduces the actions that the Government of Japan has taken on the issue of "comfort women," because the addendum 1. fails to describe them with sufficient objectivity and accuracy, despite the fact that the Government had explained them in detail to the Special Rapporteur. Chapter 3 points out shortcomings in the description of facts in the addendum, and Chapter 4 presents the established views on international law concerning legal aspects of this issue. Chapter 5 contains brief responses by the Government of Japan to the recommendations presented in the addendum.

The Asian Women's Fund

The Fund will conduct the following activities.

○ADDRESSING WOMEN'S PROBLEMS TODAY

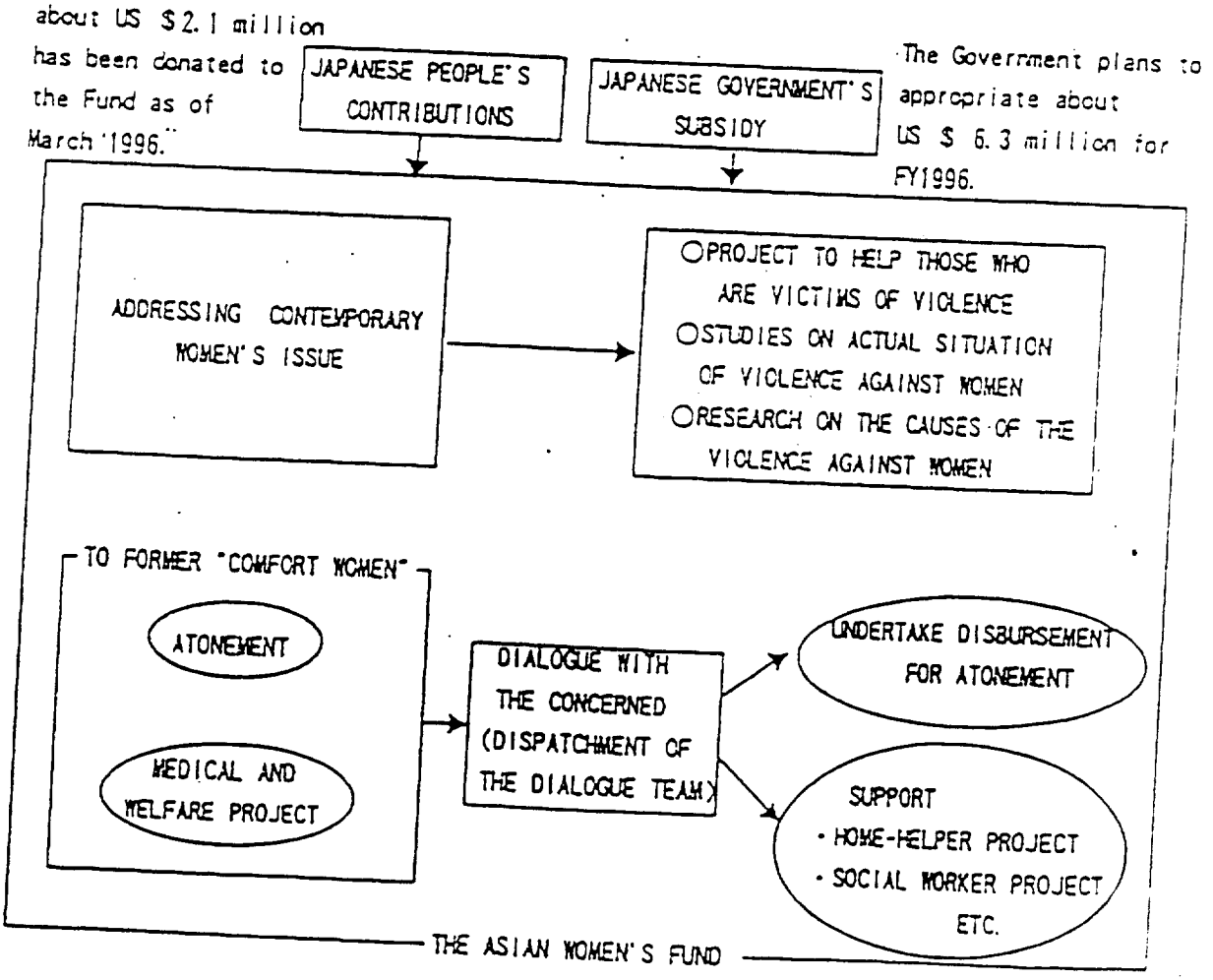
The Fund, through the use of Japanese Government funding, plans to address current issues such as the eradication of violence against women.

○ATONEMENT

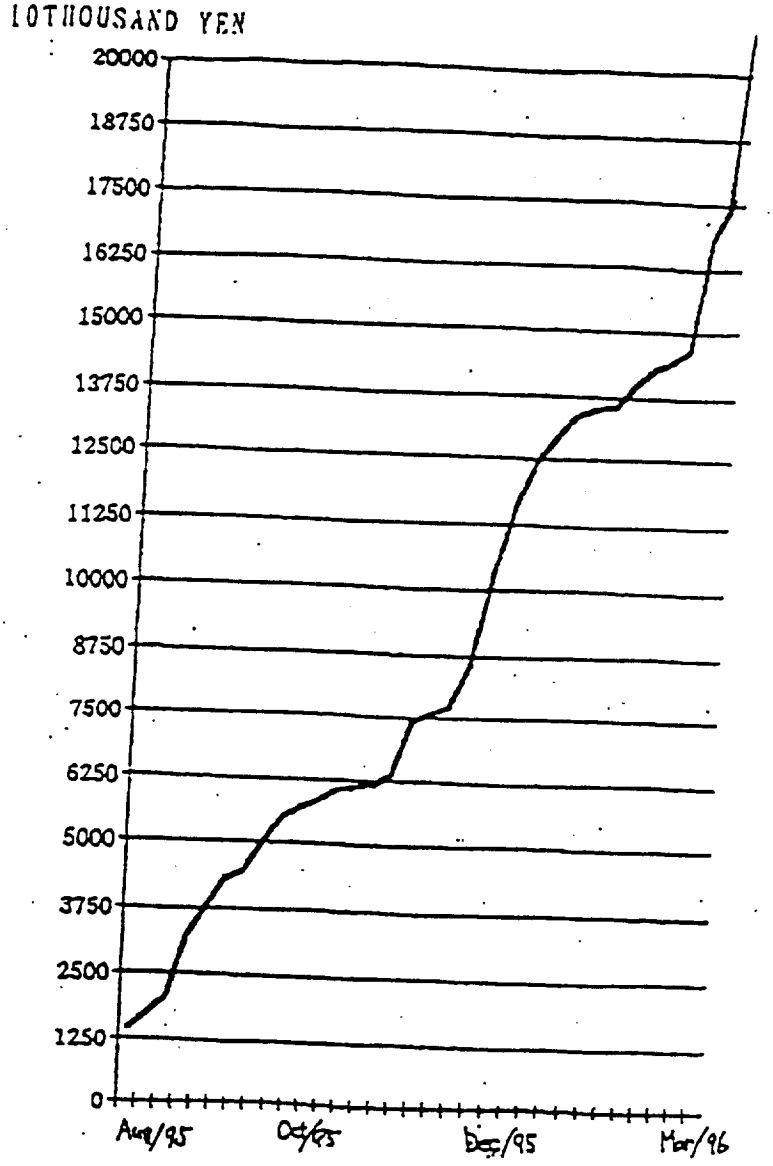
The Fund intends to undertake disbursement to each victim, former wartime "comfort women" as an expressing of Japanese people's atonement. The resource for this activity is funded by the Japanese people's donation.

○MEDICAL and WELFARE ASSISTANCE

The Fund supports medical and welfare projects which are of service to former wartime "comfort women." The resource for this activity shall be funded by the Government of Japan.



JAPANESE PEOPLE'S CONTRIBUTIONS



Chapter 2 Efforts made by Japan on the issues of violence against women and "comfort women"

I. Efforts made by the Government of Japan

1. Undertakings with Respect to the Issue of Violence against Women

(1) Since the International Women's Year of 1975, the Government of Japan has promoted policies for women in accordance with those taken by the United Nations. It has especially been one of the Government's important policies to make efforts to eliminate all forms of violence against women, and the Government has so far taken measures as follows.

(2) First, as for measures taken at home, "the New National Plan of Action Toward the Year 2000 (first revision)," formulated by the Headquarters for the Promotion of Gender Equality in the Government of Japan, has taken up "the Elimination of Violence against Women" as one of its most important goals. Under the Plan, the Government has been exercising strict control over such cases with women victims as assault and sex crimes, and promoting related policies.

(3) Second, since "the Violence against Women," including violence in the course of the armed conflicts as in the former Yugoslavia and Rwanda, and domestic violence, is a matter of great concern of the international community, the Government of Japan has been actively contributing to the undertakings by the international community in this area.

(4) For instance, in the Fourth World Conference on Women, Japan contributed to the adoption of "the Platform for Action," which declares "the Respect for Human Rights of Women" and "the Elimination of Violence against Women." At the fiftieth session of the United Nations General Assembly in 1995, the Government of Japan, with 46 other cosponsor States, introduced a draft resolution to establish a trust fund on violence against women within the UNIFEM (United Nations Development Fund for Women). This resolution was adopted by consensus, and the Government of Japan will make an appropriate financial contribution to this fund.

(5) The Government of Japan, together with the rest of international community, will continue undertakings on the issue of Violence against Women.

2. Study on the Issue of "Comfort Women" and the Publication of Materials

(1) In December, 1991, the Government of Japan started a fact-finding study on the issue of "comfort women."

(2) The Government of Japan investigated whether or not the materials on this issue are kept in ministries and government offices of Japan, the National Diet Library, and the U.S. National Archives, and made thorough examination of more than 230 relevant materials found through the investigation. At the same time, the Government of Japan, dispatching missions at home and abroad, conducted a wide range of hearing investigation from former "comfort women," former military personnel, ex-officials of the Government-General of Korea, former operators of "comfort stations," residents of the areas where "comfort stations" were located, historians, etc. Furthermore, the Government studied not only the study report compiled by the Government of the Republic of Korea, collections of testimonies by former "comfort women," which were compiled by the related organizations including the Association of Pacific War Victims

and Bereaved Families and the Korean Council for the Women Drafted for Sexual Slavery by Japan, but also numerous publications related to this issue.
(3) The Government of Japan examined and analyzed the materials and testimonies collected through this study, and announced the result on August 4, 1993. The main points of the result are as follows.
* "Comfort stations" were established and operated at the request of the Japanese military authorities of the day.
* The then Japanese military was, directly or indirectly, involved in the establishment and management of the "comfort stations" as well as the transfer of "comfort women."
* The recruitment of "comfort women" was conducted mainly by private recruiters who acted at the request of the military. However, in many cases they were recruited against their own will, through such means as coaxing and coercion, and at times administrative / military personnel directly took part in the recruitment.
(4) This finding are based on the study which the Government conducted with utmost and wholehearted efforts. However, there still is a possibility of new materials to be found, and the Government of Japan has paid a close attention to the possibility, following private studies on this issue as well.
(5) Public documents found as the result of the investigation conducted so far on this issue are kept in related ministries and government offices respectively, and are open to the public with appropriate measures to protect the privacy of the people concerned. Copies of the documents, arranged in order, are also open to the public at the Cabinet Secretariat with appropriate measures to protect the privacy as well.

3. Expression of Apologies and Remorse on the Issue of "Comfort Women"
(1) As it became clear that the then Japanese military had been involved in the issue of "comfort women," the highest authorities of the Government of Japan have expressed their sincere apologies and remorse in many opportunities.
(2) First, in January 1992, at the Japan-Korean summit meeting held in the Republic of Korea, the incumbent Prime Minister Kiichi Miyazawa expressed his profound apologies and remorse on the issue of "comfort women."
(3) In August 1993, upon announcing the result of the study described above, the incumbent Chief Cabinet Secretary Yohei Kohno announced his statement on this issue. The main points of the statement are as follows.
* The Government of Japan recognizes that this was an act, with the involvement of the military authorities of the day, that severely injured the honor and dignity of many women.
* The Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as "comfort women."
* The Government will continue to consider seriously how Japanese people and Government can demonstrate this sentiment best.
(4) In August 1994, anticipating the fiftieth anniversary of the end of the war, the incumbent Prime Minister Tomiichi Murayama announced his statement. In this statement, the Prime Minister said: "On the issue of 'comfort women,' which seriously injured the honor and dignity of many women, I would like to take this opportunity once again to express my profound and sincere remorse and apologies."

(5) Furthermore, at the inauguration of "Asian Women's Fund" in July 1995, the Prime Minister Murayama delivered the following address, which appeared in most of the Japanese major newspapers.

* The issue of "comfort women," with the involvement of the Japanese military forces of the time, seriously injured the honor and dignity of many women. This is entirely inexcusable. I offer my profound apology to all those who suffered incurable physical and psychological wounds as "comfort women."

(6) As regards the further demonstration of apologies and remorse as a nation, which is to be done together with implementation of the projects by "Asian women's' Fund," the Fund has requested the Government of Japan to send letters by the Prime Minister to former "comfort women." The Government is now seriously considering the request.

4. Peace, Friendship and Exchange Initiative

(1) The Government of Japan considers that it would be an expression of the sentiment of apologies and remorse to the issue of "comfort women" to face squarely the facts of history, including the issue of "comfort women," to convey them to the future generation correctly, and to make efforts to promote better mutual understanding with related countries. The Government of Japan, therefore, based on the "Statement by the Prime Minister" (August 1994) mentioned above, inaugurated "Peace, Friendship and Exchange Initiative" which consists of the following two pillars.

* One pillar consists of the collection of historical documents and materials, and the support for historical researchers, to enable everyone to face squarely the facts of history.
* The other consists of international exchange projects to promote dialogue and mutual understanding in all walks of life through the exchange of intellectuals, youth and so on.

(2) This Initiative will develop new projects which call for the Government's disbursement of approximately 100 billion yen over the next ten years. In the first fiscal year (from April 1995 to March 1996), the Government of Japan has operated a broad range of projects to support for historical research and to promote international exchanges, at the total budget of 8.2 billion yen. In the second fiscal year (from April 1996 to March 1997), 8.6 billion yen is appropriated in the budget for these projects.

(3) In addition, the Government of Japan is considering the establishment of an "Center for Modern Japan-Asian Relations" (tentatively called). The fundamental goals of the Center shall be to collect, in an unbiased manner, diverse historical materials, and information about materials, regarding the modern history of relations between Japan, its Asian neighbors, and others, and to make these materials and this information widely available to researchers and the general public.

II. Asian Women's Fund

1. Undertakings toward the Inauguration of Asian Women's Fund

(1) In the Statement by the Prime Minister (August 1994) mentioned above, the Government expressed the idea that in order for the Japanese people to share the feelings of apology and remorse for the issue of "comfort women," the Government, together with the people, seek for ways of their wide participation.

(2) Following this statement, Japan's Ruling Parties seriously considered how Japan should address the issue of "comfort women," and made the following report.

* An expression of the Japanese people's atonement toward former "comfort women," based on the people's sentiment of apology and remorse, will be a significant act not only in restoring the stained dignity of former "comfort women," but also in demonstrating at home and abroad the strong resolution of Japan to respect women;
* Problems concerning the dignity and honor of women still exist throughout the modern world. It is important that we, the Japanese people, take a strong interest in these problems and make efforts to eliminate them from the entire world;
* Establishment of a "fund" with the participation of the Japanese people should be studied from the above consideration;
* The "fund" will take appropriate measures for former "comfort women," who suffered unbearable hardship;
* In addition, the "fund" will conduct such projects as support for activities to address contemporary issues related to the dignity and honor of women.
* The Government should provide all possible assistance, including financial contributions, to the "fund."

(3) Receiving the above report by the Ruling Parties, the Government of Japan intensified its study for the materialization of the proposal concerning the "fund," including consultations with those groups interested in the issue. In June 1995, the incumbent Chief Cabinet Secretary Kozo Igarashi made the result of the study public announcing that, in the remorse for the past, on the occasion of the fiftieth anniversary of the end of the War, the "Asian Women's Fund" would conduct the following projects.
* The projects below will be conducted for former "comfort women," through the cooperation of the Japanese people and the Government:

(i) The Fund will raise funds from the private sector as a means to enact the Japanese people's atonement for former "comfort women."

(ii) The Fund will support those who conduct medical and/or welfare projects and other similar projects which are of service to former "comfort women," through the use of government funds and others.

(iii) When these projects are implemented, the Government will express once again the nation's sentiment of sincere remorse and apology to the former "comfort women."

(iv) The Government will collate historical documents on "comfort women," a source of the lesson of history.

* In addition to the support for the projects mentioned in (ii)above, the Fund will, using government funds and others, support those who undertake projects that address such contemporary problems as violence against women, as part of its projects addressing issues concerning the honor and dignity of women.

2. The Activities of Asian Women's Fund

(1) "Asian Women's Fund" was formally inaugurated in response to an appeal drafted by proponents in July 1995. These proponents consist of men and women representing academic circles, lawyers, labor unions, the press and other groups in Japanese society. The appeal addressed by the proponents to the Japanese people received nation-wide reverberation.

(2) Currently, Asian Women's Fund is, actively being engaged in enlightenment on the issue of "comfort women," as well as inviting donations for enacting the people's

atonement for "comfort women," by means of public relations via mass media, distribution of brochures and holding meetings. As of March 14, 1996, 211 million yen has been contributed to the Fund by a wide range of people who support this initiative. This spread of people's participation is now promoting contributions from private companies, trade unions and other various private groups which agree with the purpose of the Fund.

(3) In addition, Asian Women's Fund is engaged in dialogues with former "comfort women" and those at home and abroad who will be involved in the Fund's projects, so that they will accept the Japanese people's atonement and other related projects which are to be undertaken through the Fund. In January 1996, the Fund dispatched dialogue teams for following purposes to the Philippines and Chinese Taipei. The Fund sent a preliminary mission for the same purposes to the Republic of Korea as well:

* To explain aims of the Asian Women's Fund to the former "comfort women" and the related organizations for their better understanding of the Fund,
* To obtain support for the Fund and cooperation with the Fund by related organizations.
* To share information with former "comfort women" on their past experiences and current living conditions.

(4) The "Asian Women's Fund," through such dialogues, is making efforts so that the views and opinions of former "comfort women" and related organizations be reflected in its projects as far as possible. The Fund intends to continue the dialogues .

(5) In addition, "Asian Women's Fund" is currently preparing for the initiation in April 1996 of the projects addressing such contemporary women issues as violence against women, which are another pillar of the Fund's projects. Specifically, the Fund plans to hold international conference on such issues as violence against women and to conduct researches on them, as "preventive projects," and to assist the activities of rescue institutions for women who face the urgent problems such as violence and prostitution, as "rescue-victims projects."

3. The Government of Japan's Cooperation and Assistance to Asian Women's Fund

(1) Following the inauguration of the Asian Women's Fund, the Government of Japan, at the Cabinet meeting in August 1995, confirmed its policy to provide needed cooperation for the activities of the Fund, and has been making its utmost efforts for the Fund to attain its aims.

(2) For instance, based on the resolution of the Diet, the Government contributed 480 million yen (approximately US$4.8 million) to the Fund for its administrative expense in the fiscal year of 1995. Furthermore, to FY 1996 budget, the Government appropriated the same amount as a subsidy for the Fund's administrative expense and the expense to address the issues such as violence against women, and, in addition to it, US$1.5 million to support medical and welfare projects which will be of service to former "comfort women."

(3) Further, the Government has provided various forms of cooperation to the Fund, such as authorizing it as a non-profit foundation and exempting the contribution to it from taxation, to facilitate its activities.

(4) In December 1995, 40 (currently 46) members of the National Diet who belong to the Ruling Parties, have organized "Diet Members' Association for Asian Women," the

purpose of which is to support the overall projects of "Asian Women's Fund" including enlightenment activities. The association is to provide cooperation to the Fund from the standpoint of lawmakers.

Chapter 3 Objections to the Description of the Facts

1. The Government of Japan has serious questions regarding the description of the facts in the addendum 1., on which the Special Rapporteur based her arguments.

2. A good-faith effort was not made to establish the facts.

(1) A Special Rapporteur is expected to collect objective materials, including original texts, from a range of sources on the matter in question, examine and analyze those materials from an impartial and expert position, and then make a report based on that examination and analysis.

(2) In the "Historical Backgrounds," Chapter 2 of the addendum 1., the history of the then Japanese military's involvement with "comfort stations," the recruitment of wartime "comfort women," and their lives in the "comfort stations," is described. However, that description is largely a verbatim quotation from a book by G. Hicks, the neutrality of which is highly questionable. Moreover, the Special Rapporteur seems to have been highly selective, extracting only those parts which supported her argument.

(3) When a general publication of that nature is relied on as a primary source, it is the usual practice to conduct a careful corroborative examination of its content. However, it is not apparent that such an examination was undertaken.

3. The addendum 1. relies uncritically on questionable materials.

(1) For example, it contains quotes from a book written by Seiji Yoshida, in which he confessed that he engaged in slave raids to recruit "comfort women" (para.29). However, the credibility of the confession has been questioned by researchers of history (para. 40), including In Search of the Mysteries of Showa History [vol.1], by Ikuhiko Hata (1993, p. 334). The inclusion in a report of a Special Rapporteur of the UN Commission on Human Rights of Yoshida's "testimonies" without first examining their veracity is inappropriate.

(2) In addition, the "testimonies" by women living in North Korea, which are given primary importance in Chapter 4, "Testimonies," are hearsay accounts and were not elicited in the course of interviews conducted by the Special Rapporteur, but were recorded by the staff of the UN Center for Human Rights. It would be fair to say that the credibility of those testimonies should have been verified by the Special Rapporteur herself before they were

included in the Report.

4. In the view of the above, the description of the facts in the addendum is one-sided and misleading.

(1) The issue of "comfort women" was extremely complicated: the situation varied in different places and at different times. Furthermore, after fifty or sixty years, it is difficult to establish the facts.

(2) Unfortunately, the addendum does not address the complexity of this issue but is based on limited range of materials and questionable "testimonies," from which it makes broad generalizations. This creates the misleading impression that the description in the addendum is applicable to all "comfort stations," regardless of the place or time.

(3) For example, "Report by the Psychological Warfare Team of the U.S. Office of War Information, No.49," a summary of the interviews of twenty Korean "comfort women" aged from 19 to 31, conducted by the Team in Burma in 1944, reveals a different aspect of the situation regarding "comfort women." A Special Rapporteur is expected to analyze as many documents as possible to arrive at a balanced view of his or her subject, and to bear in mind that to generalize is often to distort.

5. Greater attention should have been paid to the results of the study conducted by the Government of Japan on the issue of "comfort women."

(1) The Government of Japan conducted a comprehensive study of the issue from December 1991 through August 1993.

(2) In this study, the Government thoroughly investigated more than 230 related documents stored in the ministries and government offices of Japan, the National Diet Library, and the U.S. National Archives. In addition, the Government conducted a wide range of investigative hearings at which it questioned former "comfort women," former military personnel, former officials of the Government-General of Korea, former operators of "comfort stations," residents of the area where "comfort stations" were located, historians, and other concerned persons.

The Government also studied the report compiled by the Government of the Republic of Korea, collections of testimonies by former "comfort women" compiled by such organizations as the Association of Pacific War Victims and Bereaved Families and Korean Council of the

Women Drafted for Sexual Slavery by Japan, and numerous publications relating to this issue.

(3) The Government of Japan announced the result of this investigation in the form of the statement by the Cabinet Secretary, on August 4, 1993 (see Annex I). A copy of the statement (English translation) was conveyed to the Special Rapporteur by the Government of Japan. Although the existence of this study by the Government of Japan is mentioned by the Special Rapporteur (para 129), there is no clear indication of how it has been evaluated.

6. Conclusion

(1) For the reasons above, the factual description contained in this addendum cannot be regarded as accurate, and it is difficult for the Government of Japan to accept the Special Rapporteur's argument that is based on unconfirmed facts.

(2) The issue of "comfort women" is now fifty to sixty years old and proper research is therefore difficult. The Government of Japan accordingly is unable to understand the reason for issuing a report based on unconfirmed information.

(3) The Government of Japan regrets that the addendum that has been presented to the UN Commission on Human Rights, is incomplete and inadequate. It is deeply concerned that not only the system of Special Rapporteurs, but also the Commission itself might lose the confidence of the international community if the addendum 1. is accepted as it stands.

Chapter 4 Rebuttal on Legal Issues

I. Fundamental Misinterpretation of the International Law by the Special Rapporteur

Prior to Japan's specific comments on concrete legal arguments by the Special Rapporteur, it may be useful to review elementary theories of international law in relation to the addendum 1. to the report in question. Although the theories discussed in the subsequent sections are common sense or the elementary knowledge of international law, they call for attention as blind spots where jurists not so well-versed in international law could often be trapped into an error.

1. Sources of International Law and Its Application

(1) Since international law is the law regulating the relationships between states which are the subjects of international law, it is always enacted, applied and enforced pursuant to an agreement between the states concerned. Treaties and customary international law are the major sources of international law. In general, a treaty, which is enacted by the explicit agreement between or among the relevant states and is only applicable to these states, exists as particular international law. Customary international law, meanwhile, is considered to be enacted on the basis of practices in states and exists as general international law which is binding upon all states constituting the international society.[1]

(2) Arguing her position from the legal point of view in the addendum 1. to her report, the Special Rapporteur seems to argue time and again that certain norms have been established in international law on the assumption that some treaty or customary international law exists. However, the argument whether the treaty or customary international law assumed by the Special Rapporteur was actually in force as something binding upon Japan should be put to careful study in the light of the following principles of international law:

(a) With regard to treaties, it should be examined first of all whether the state in question is a party to the treaty; in other words, whether it is "a State which has consented to be bound by the treaty and for which the treaty is in force" (Article 2.1(g), the Vienna Convention on the Law of Treaties).[2] If the state is a party to the treaty, then, it is necessary to examine whether the provisions of the treaty is applicable to a certain act or acts in the light of the content of the agreement reached between or among the parties thereto.

(b) Customary international law is "international custom, as evidence of a general practice accepted as law" (Article 38.1.b, the Statute of the International Court of Justice), and it is

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[1] Dionisio Anzilotti, Kokusaiho-no-Kiso-Riron (Corso di diritto internazionale)(1927), Japanese version translated by Masao Ichimata (1942), pp. 96-101.

[2] Needless to say, some treaties have reaffirmed existing rules of customary international law. It might also be possible that some provisions of a treaty will be considered to be new rules of customary international law by subsequent practices of states. Such treaties or rules are binding even to parties not bound by these treaties, in a subsequent section pertaining to customary international law.

binding on all states which constitute the international society.[3] Customary international law therefore is distinguished from some legislative policy or international comity of a state and it is considered that it needs, as a prerequisite for its enactment, the presence of continuous practice and opinio juris sive necessitatis of States.[4] This prerequisite was confirmed in the decision by the Permanent Court of International Justice on the Lotus Case in 1927 and the decision by the International Court of Justice on the North Sea Continental Shelf Cases in 1969.[5] Such being the case, in order to qualify norms as an established rule of customary international law, the presence of "continuous practice and opinio juris sive necessitatis of States" has to be proved.

(3) In reference to the above-mentioned theory, we must point out that the arguments maintained by the Special Rapporteur concerning legal issues are nothing but the expression of her subjective opinion without legal logic.

(a) Although we would like to revert to each argument by the Special Rapporteur in detail in the subsequent sections, as regards her argument about treaties, for instance, she rebukes Japan for its violation of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War (para. 98). Japan, however, was not a party to this convention at all. Moreover, she has failed to verify that the norm prescribed in the convention had been established as customary international law at the time of the alleged violation. She also argues that Japan violated the International Agreement for the Suppression of White Slave Traffic in 1904 (para.102). She connects the "comfort women" issue to this agreement too hurriedly to review its provisions and stresses Japan's alleged violation of the agreement.

(b) Her argument concerning customary international law also lacks evidence. She maintains, for example, that it is argued that the International Convention for the Suppression of the Traffic in Women and Children in 1921 "was evidence of customary international law in existence at that time" (para.102) without examining "continuous practice and opinio juris sive necessitatis of States" or showing from whom she has quoted that argument.

2. Theory of intertemporal law

(1) As Ian Brownlie wrote in his book, 'Principles of Public International Law', "in one sense, law is history."[6] This means that law reflects history and that it may change as history changes. In this sense, it is also said that where there is society there is law (ubi societas, ibi jus). Therefore, the legal appraisal of a certain act or fact in a given period of history should always be performed on the basis of the contemporary law which was in force at that time.

(2) This can also be said of international law. The rules of international law may be

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[3] translated by Masao Ichimata, op. cit., pp. 96-101.

[4] Ian Brownlie, Principles of Public International Law, 4th edition, pp. 4-11.

[5] ibid., pp. 4-11.

[6] ibid., p. 128.

changed in the passage of time because states, the subjects of the law, continue to exist over a long period of time. This often presents one question: whether an act or fact which had arisen before the law was changed should be ruled by the old law or the new law. The rule which aims to resolve such conflict of laws is generally called intertemporal law. The general principle of intertemporal law is that any fact which occurred under the old law should not be ruled by the new law. Regarding the acquisition of a right, for instance, its legitimacy is determined by the international law which was in force when the right was allegedly acquired. Any retroactive application of the current law should not be accepted without agreement between the parties involved.[7] This norm is clearly set forth in Article 28 of the Vienna Convention on the Law of Treaties, which will be discussed later. This norm is based on the consideration that the retroactive application of a new law denying an established right or entitling a right which was not established under an old law would damage the stable rule of law. To put it more concretely, in those days when war was legally accepted as a means to resolve international disputes, subjugation was accepted as a legitimate title to acquire a new territory. Today, however, it cannot be considered a legitimate title because use of force has been prohibited in principle. If the argument that the present international law be applied to all territories which were acquired by subjugation in the past and that they be returned to previous owners because they were acquired through international wrongful acts would be accepted, it would result in complete break-up of the current international territorial order.[8]

Also, the Special Rapporteur seems to argue that international law be applied retroactively to the victims whose human rights were infringed and their family dependents to entitle them to claim compensations from the wrongdoing states (para. 122). In addition, the Special Rapporteur maintains that such claims for compensations "shall not be subject to a statute of limitations" (para.124). These arguments can induce a conclusion that any victims of human rights violations and their family dependents in any wars in the past world history may be entitled to make compensations claims to the wrongdoing states. Needless to say such an argument would throw the present international relations into substantial confusion. It is irrational to assume that many states in the international society have agreed to or allowed the establishment of such norm as international law, since it may induce the confusion mentioned above.

(3) The theory of intertemporal law has been established in international law, which is evident in the remark of Fitzmaurice, the jurist specialized in international law. He wrote in the British Year Book of International Law (1953), "It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today." [9] Moreover, Oppenheim's

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[7] Jutaro Azuma, Jisai-ho (Intertemporal law), in Kokusaiho-Gakkai (Japanese International Law Association) (ed.), Kokusai-Kankeiho-Jiten (InternationaRelations Law) (1995), pp. 379-380.

[8] ibid., pp. 379-380.

[9] Fitzmaurice, General Principles, XXX British Year Book of International Law, pp. 5-8.

'International Law' (9th edition, 1992), clearly states that there is "the general principle that a juridical fact must be appreciated in the light of the law contemporary with it."[10] (4) This general principle naturally applies to treaties which are a source of international law. Article 28 of the Vienna Convention on the Law of Treaties stipulates, "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

This reaffirmed the principle of the non-retroactivity of treaties which had been established as customary international law. In relation to the article of the convention, the International Law Commission of the United Nations has issued the following commentary: "There is nothing to prevent the parties from giving a treaty, or some of its provisions, retroactive effects if they think fit. It is essentially a question of their intention. The general rule, however, is that a treaty is not to be regarded as intended to have retroactive effects unless such an intention is expressed in the treaty or is clearly to be implied from its terms. This rule was endorsed and acted upon by the International Court of Justice in the Ambatielos case (Preliminary Objection), where the Greek Government contended that under a treaty of 1926 it was entitled to present a claim based on acts which had taken place in 1922 and 1923. Recognizing that its argument ran counter to the general principle that a treaty does not have retroactive effects, that Government sought to justify its contention as a special case by arguing that during the years 1922 and 1923 an earlier treaty of 1886 had been in force between the parties containing provisions similar to those of the 1926 treaty. This argument was rejected by the Court, which said: To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier."[11] The commentary, mentioning relations with the human rights convention in reference to its foregoing statement, declared, "In numerous cases under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Commission of Human Rights has held that it is incompetent to entertain complaints regarding alleged violations of human rights said to have occurred prior to the entry into force of the Convention with respect to the State in question."[12]

(5) Even if certain norms based on a treaty or customary international law have been established, it may occur from time to time that concrete norms of such criteria and

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[10] Jennings & Watts (eds.), Oppenheim's International Law, 9th edition, Volume I (1992), pp. 1281-1282.

[11] United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference, United Nations (1971), pp. 31-32.

[12] ibid., p 32.

procedures to realize rights are changed or sophisticated with the passage of time. Such a trend is often seen with respect to treaties on human rights and humanitarian issues. This occurs because subjects would grow to be increasingly concrete and procedures to realize rights improved and sophisticated, through atrocious experiences in war. One typical example of subject sophistication is a series of conventions for the suppression of the traffic in women.

The International Agreement of 18 May for the Suppression of the White Slave Traffic only set rules for the exchange of information among parties thereto about the traffic in women for indecent business purposes. However, provisions to penalize those trafficking women for indecent business purposes were introduced in the International Convention for the Suppression of the White Slave Traffic of 1910 and the International Convention for the Suppression of the Traffic in Women and Children of 1921. The scope of the subjects of penalties was expanded to include those operating brothels and renting places for prostitution in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1950. Attention should be paid to the fact that the contents of these conventions were gradually defined in detail. -- All through the period, however, provisions for procedures to realize individual rights were not improved at all. -- And, here again, the said theory of intertemporal law may apply to the above-mentioned issues involving substantive law. In "IX. Recommendations" in the addendum 1. to her report, the Special Rapporteur argues that the comfort station system set up by the Japanese Imperial Army was in violation of its obligations under international law. Putting aside the argument whether or not such comfort stations were intended for prostitution, it should be noted in relation to the conventions to suppress women trafficking for indecent business that it was the convention of 1950 that defined for the first time the management of a brothel and providing a place for prostitution as a subject to be punished under the convention. It is unreasonable to apply the norm instituted in the Convention of 1950 retroactively to the situations under which the preceding conventions were enacted in 1904, 1910 and 1921. It is necessary to examine one by one the contents of the norms contemporary with the acts to which they are to be applied. In this connection, Oppenheim's International Law, mentioned above, stated, in relation to the said general principle of intertemporal law, "A treaty's terms are normally to be interpreted on the basis of their meaning at the time the treaty was concluded, and in the light of circumstances then prevailing."[13] Such principle was also reaffirmed in the decision by the International Court of Justice for the Ambatielos case, which was quoted in the commentary of the International Law Commission of the United Nations concerning Article 28 of the Vienna Convention on the Law of Treaties. Needless to say, it would seriously impede the stable rule of law in general if an act of a party to a treaty which had been determined legitimate in the light of the treaty's relevant provisions was later held to be unlawful as a result of the sophistication of the contents of the provisions with the passage of time.

(6) The Special Rapporteur, as part of her argument, maintains that the acts of Japan before and during the Second World War violated international law by basing her theory

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[13] Jennings & Watts (eds.), op. cit., p. 1282.

on post-war international law including the Geneva Conventions of 1949 and holds Japan to be responsible for the violation of international law (para. 96 and 97). Also, the Special Rapporteur, as reviewed above, inappropriately invokes conventions for the suppression of the traffic in women for indecent business purposes (para. 102). Further, she decides that Article 46 concerning family honor and rights of the Hague Regulations concerning the Laws and Customs of War on Land of 1907 "has been interpreted to include the right of women in the family not to be subjected to the humiliating practice of rape" (para.101) and seems to argue that based on that right, individual women should be entitled to a claim for compensation. However, all these arguments of the Special Rapporteur lack reasonable ground in the light of the said theory of intertemporal law, which will be explained in detail in the subsequent sections.

II. Comments on each legal arguments raised in the Addendum 1. to the Report of the Special Rapporteur

Based on the elementary theories of international law reviewed in the preceding Section I, we would now like to comment in this section on each legal arguments raised in the Addendum 1. to the Report of the Special Rapporteur.

1. Concerning "I. Definition"

(A) Arguments by the Special Rapporteur

Although the Government of Japan maintains that it is inaccurate under existing international law to apply the term "slavery" defined in Article 1 (1) of the 1926 Slavery Convention (the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised) to the case of "comfort women," the phrase "military sexual slaves" represents a much more accurate and appropriate terminology in view of the argument at such U.N. forums related to human rights as the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Working Group on Contemporary Forms of Slavery, and the fact that the phrase "comfort women" does not reflect the suffering that women victims had to endure.

(B) Comments

(a) It is true that, as pointed out by the Special Rapporteur, the recent U.N. forums on human rights have had discussions on slavery. Such forums, however, only touched the issue of "comfort women" in the course of discussion about the contemporary forms of slavery and considered that practice "treatment akin to slavery." In other words, even in such forums, it is not considered at all that the "comfort women" system was "slavery" in terms of international law at the time on the conduct in question. Further, as we mentioned in the theory of "intertemporal law" in the preceding section, "the situation in question must be appraised . . . in the light of the rules of international law as they existed at the time, and not as they exist today."[14] Therefore, there is no legal foundation to hold the "comfort women" system to be "slavery" by basing the judgement on today's arguments on "treatment akin to slavery."

(b) It is considered that the definition of "slavery" in Article 1 (1) of the Slavery Convention had generally been accepted under international law at the time. On this, the Max Planck Institute clearly pointed out in its Encyclopedia of Public International Law: "Since the conclusion of the 1926 Slavery Convention, the term 'slavery' as used in international law has been defined as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. (Article 1(1))"[15] However, concerning "comfort women," the result of the fact-finding study which the Government of Japan issued in August 1993 and submitted to the 45th Session of the U.N. Sub-Commission on Human Rights, did not prove that such "status or condition" had been identified, and it is therefore difficult to assert that the "comfort women" system falls under the definition of "slavery" under international law.

(c) As seen above, it is extremely inappropriate from a legal viewpoint to define the "comfort women" system as "slavery." It is not appropriate therefore to use the term

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[14] Fitzmaurice, supra n. 9.

[15] A.M. Trebilcock, Slavery, in: R. Berhardt(ed.), Encyclopedia of Public International Law, Instalment 8 (1985), p. 481.

"slavery" for whatever reason since one may associate it with unnecessary legal implications.

(d) Even on the assumption that the "comfort women" system comes under the "slavery" definition, it cannot be said that the prohibition of "slavery" had been generally established under customary international law and under international law at the time. For example, Oppenheim's International Law, quoted as authoritative in the report of the International Commission of Jurists which is quoted by the Special Rapporteur in her report, stated in its 8th edition published in 1955, namely after the Second World War, "It is difficult to say that customary International Law condemns two of the greatest curses which man has ever imposed upon his fellow-man, the institution of slavery and the traffic in slaves."[16]

(e) In addition, Japan is not a party to the 1926 Slavery Convention. Moreover, primarily, this convention was not intended to impose the abolition of "slavery" on the parties thereto but make them "undertake . . . to prevent and suppress the slave trade and to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms." (Article 2). This means that the existence of "slavery" in a party thereto does not directly constitute its violation of the convention by that party.

2. Concerning "VII. Position of the Government of Japan - Legal Responsibility"

(1) Absence of an international wrongful act

(A) Arguments by the Special Rapporteur

(a) *Although the Government of Japan feels itself to be under no legal obligation, it has both a legal and a moral obligation in this case. The Government of Japan maintains that the 1949 Geneva Conventions and other international instruments did not exist during the Second World War and that therefore it was not responsible for any violation of international humanitarian law. However, the Geneva Conventions are regarded as customary international law in the report of the Secretary-General of the United Nations relating to the establishment of the International Criminal Tribunal for the former Yugoslavia (S/25704) and also in the report on the work of the forty-sixth session of the International Law Commission.*

(b) Also, Article 3 of the Geneva Convention on the Treatment of Prisoners of War of 1929 provides that women shall be treated with all consideration due to their sex. Also, the Charter of the International Military Tribunal and the Charter of the Tokyo Tribunal define as crimes against humanity enslavement and other inhumane acts committed against any civilian population before and during the war.

(c) Even if it is considered that the 1949 Geneva Conventions were not applicable to Japan at that time because of ratione temporis and the 1929 Geneva Convention was not applicable either to Japan which was not a signatory, Japan was a party to the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 1907. Although the Convention includes an clausula si omnes (general participation clause), the provisions of the Regulations had been established as the rules of customary international law at the time and the family honor and rights stipulated in Article 46 of the Regulations included the right of women in the family not to be subjected to the humiliating practice of rape.

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[16] Lauterpacht (ed.), Oppenheim's International Law, 8th edition, Volume 1 (1955), p. 733.

(d) Also, Japan ratified the International Agreement for the Suppression of the White Slave Traffic of 1904, the International Convention for the Suppression of the White Slave Traffic of 1910 and the International Convention for the Suppression of the Traffic in Women and Children of 1921. Japan exercised its prerogative to declare that Korea was not included in the scope of the Convention. However, this would imply that all non-Korean "comfort women" would have the right to claim that Japan had violated its obligations under this Convention. Also, the International Commission of Jurists argues that once Korean women were taken from the peninsula into Japan, the Convention became applicable to them. Further, it is also argued that the Convention was evidence of customary international law at that time.

(B) Comments

(a) Since the Special Rapporteur argues that Japan violated international law by quoting several conventions in the domain of international humanitarian law, we would like to examine whether "international humanitarian law" which the Special Rapporteur argues was applied as legal norm to the conduct of Japan in question.

(i) As we have explained relating to the theory of intertemporal law in the preceding section, it cannot be considered that rules of international humanitarian law which are now accepted as customary international law were automatically customary international law at the time of the commitment of the conduct in question just because they are customary international law today. In order to maintain that the said rules of international humanitarian law are applicable to the conduct in question, it is necessary to demonstrate that such rules were established as "continuous practice and opinio juris sive necessitatis of States." The Special Rapporteur quotes the report of the U.N. Secretary-General relating to the establishment of the International Criminal Tribunal for the former Yugoslavia as saying in part: "In the view of the Secretary-General, the application of the principle 'nullum crimen sine lege' requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law" and argues that the report lists as examples of "rules of customary international humanitarian law which are beyond any doubt part of customary international law," the 1949 Geneva Conventions, the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 1907, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the Charter of the International Military Tribunal of 1945. Thus quoting the report, she immediately asserts as if these conventions were codification of customary international law even before and during the war. However, the report in question, which was issued a few years ago, only purports that these conventions have been established today as rules of customary international law and that they are applicable to cases which will be judged by International Criminal Tribunal for the former Yugoslavia which has jurisdiction over acts committed in the former Yugoslavia after 1991, but nowhere in the report it is stated that these conventions were established rules of customary international law even before and during the Second World War. Also, the Special Rapporteur attaches importance to a passage in the report of the International Law Commission on its 46th session in 1994 which says that the category of grave breaches of the 1949 Geneva Convention overlaps the category of war crimes under customary international law. However, this topic was only discussed in the process of drafting a convention on State responsibility. The report certainly remarks that grave breaches of the Geneva Conventions fall under rules of customary international law today. However, nowhere it says that such breaches were

established war crimes under the rules of customary international law before and during the Second World War.

(ii) In the understanding of the Government of Japan, it cannot be asserted that all the provisions of the 1949 Geneva Convention on the Protection of Civilians, the Convention on the Prevention and Punishment of the Crime of Genocide and the Charter of the International Military Tribunal were accepted as established rules of customary international law at the time of the commitment of the conduct in question. According to the commentary on the 1949 Geneva Convention on the Protection of Civilians, for example, "this convention is a new one, . . . it provides civilians at long last with the safeguards so cruelly lacking in the past"[17] and the date for the convention to enter into force was "the date on which the Convention becomes an integral part of international law."[18] As regards the process of drafting the convention, the commentary notes: "the tragic events of which so many civilians were victim during the Second World War showed that such a vital problem (that is, the protection of the civilian persons,) could only be solved by means of special regulations, and it was recognized that a completely new and separate diplomatic instrument would have to be drawn up. (T)hose who took part in the preparatory work had such an instrument in mind."[19] Meanwhile, Iu A. Reshetov wrote in The Nuremberg Trial and International Law: "After the Second World War, the international community of states moved steadily closer toward the view that not only in the internal law of states, but in international law as well, imperative norms had to be set for the protection and respect of human rights and be forbidden in the most decisive manner such crimes as genocide, apartheid, and other similar practices. Accordingly, in addition to international law documents in the area of human rights consecrating the general duties of states to respect and guarantee them, a number of international conventions have been elaborated containing concrete norms on the suppression and prevention of crimes against humanity."[20] Also, R.S. Clark clearly noted in the same book: "The concept of crimes against humanity was, in 1945, hardly in common usage."[21]

(iii) Further, it cannot be considered that under international law of war at the time the Government of Japan should be held responsible for compensations or members of the military of Japan punished for war crimes in case the conduct in question was committed upon the Japanese nationals.

(iv) In case the conduct in question is committed upon the nationals of a belligerent, Oppenheim's International Law said that since a peace treaty was considered a final settlement of war under rules of international law at the time, unless the contrary is expressly stipulated in the treaty, war crimes which were committed by the members of

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[17] J.S.Picet(ed.), Commentary IV, Geneva Convention relative to Protection of Civilian Persons in Time of War (1958), Foreword.

[18] ibid., p. 612.

[19] ibid., p. 613.

[20] Iu. A.Reshetov, Development of Norms of International Law on Crime Against Humanity, in G.Ginsburgs and V.N.Kudriavtsev(eds.), The Nuremberg Trial and International Law (1990), p. 199.

[21] R.S.Clark, Crimes Against Humanity at Nuremberg, in Ginsburgs and V.N.Kudriavtsev(eds.), The Nuremberg Trial and International Law (1990), P. 177.

the belligerent forces, etc. before the conclusion of peace may no longer be punished after the conclusion and individuals who have committed such war crimes and have been arrested for them must be liberated, regardless of the existence or nonexistence of an amnesty clause in the treaty, as one of the effects of every peace treaty.[22] The Government of Japan has addressed in good faith the issues of reparations and claims concerning the war, including the issue of the "comfort women" in accordance with the San Francisco Peace Treaty and other bilateral instruments.

(v) The Special Rapporteur often mentions the concept of "crime" in the addendum. This can generate the misunderstanding as if the Government of Japan had committed a "crime" under international law. The concept of the crime of a State has not been established under international law even today, much less during the Second World War. This is self-explaining from the fact that this topic is being debated at the International Law Commission of the United Nations but no consensus has been reached yet.

(b) It is already clear from the above explanation that the Government of Japan has no legal obligation to inflict punishment or make compensations concerning the conduct in question under international law. Nevertheless, we would further like to examine whether the conduct in question was illegal or not in the light of rules of international humanitarian law existing at that time in the following part of this section.

(i) The Special Rapporteur argues that *the conduct in question violated Article 3 of the 1929 Geneva Convention on the Treatment of Prisoners of War*. Above all, however, Japan was not a signatory to the convention, as stated by the Special Rapporteur herself.

(ii) As regards the "family honor and rights" provided in Article 46 of the Hague Regulations respecting the Laws and Customs of War on Land, the commentary on the 1949 Geneva Convention on the Protection of Civilians remarks: "(T)he Regulations annexed to the Fourth Hague Convention of 1907 certainly contained some clauses which applied to civilians, but their protection was only considered in connection with the occupation of a territory by an enemy army."[23] In relation to the argument of the Special Rapporteur that the "family honor and rights" included the right of women to be protected from rape, the said commentary states: "(T)he Regulations confined themselves to a statement of the principle that the Occupying Power must maintain law and order, and to a few elementary rules enjoining respect for family rights, for the lives of persons and for private property."[24] In fact, the Regulations only laid down general principles which may be accepted by signatories to the convention as internal law in such forms as instructions to the armed land force.

(c) The Special Rapporteur quotes a series of conventions on the control of white slave traffic. Basically, however, the purport or objective of these conventions is to lay down measures to be taken to suppress the then rampant traffic in women, so-called traite des blanches, for indecent business purposes, as explicitly shown in their preambles. Therefore, careful study is required to determine whether these conventions are applicable to the issue of "comfort women."

Even if these conventions are considered applicable to the issue of "comfort women,"

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[22] Lauterpacht(ed.), Oppenheim's International Law, 7th edition (1952), Volume 2, p. 611.

[23] J.S. Pictet(ed.), op.cit., p.3.

[24] ibid., p. 3.

first of all, the International Agreement for the Suppression of the White Slave Traffic of 1904 is intended to stipulate information exchanges between related States on the traffic in women to make them work in foreign countries as prostitutes. But the Agreement did not aim to prohibit women traffic itself. Also, the International Convention for the Suppression of the White Slave Traffic of 1910 and the International Convention for the Suppression of the Traffic in Women and Children of 1921 laid down provisions to take punitive action against those who induced a minor with the purpose of making her work in prostitution. However, how to determine the contents of necessary measures for punishment was virtually entrusted to the signatory States and the Government of Japan took necessary measures within the internal laws and regulations at the time.

The development of the conventions for the suppression of prostitute traffic is an example that the concrete contents of norm would become increasingly specific with the passage of time, which we have explained in I-2-(5). In other words, the provisions of these conventions were initially limited to those facilitating information exchanges but later developed into clauses for the punishment of those inducing women into prostitution. And, the scope of punishment became more specific and finally included those operating a brothel or providing a place for prostitution in the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others of 1950.

Meanwhile, the Special Rapporteur argues in "IX. Recommendations" of her addendum 1. to the report that *the system of "comfort stations" set up by the Japanese Imperial Army was a violation of its obligations under international law.* Putting aside the debate on whether or not the comfort stations were intended for prostitution, it should be noted in relation to the conventions for the suppression of the traffic in women for prostitution that it was in the 1950 convention that those operating a brothel or providing a place for prostitution were included for the first time in history in the scope of punishment under international law. Therefore, as we have reviewed in I.2.(5) by calling attention to the theory of intertemporal law, it is irrational to argue as if such norm were already been present at the time of the 1904 convention.

Regarding the 1921 convention, the Special Rapporteur argues that *Japan exercised its prerogative under the convention to declare that Korea was not included in the scope of the convention and that for this reason all non-Korean "comfort women" would have the right to claim that Japan had violated its obligations under the convention.* Since this argument involves the issue of the individual claims, we will revert to this subject later.

(2) Settlement by the San Francisco Peace Treaty, etc.

(A) Argument by the Special Rapporteur

The Government of Japan argues that even if there were to exist responsibilities under international law, these responsibilities had been met by the San Francisco Peace Treaty and other bilateral peace treaties and international agreements and that all issues of reparations and claims have been settled between Japan and the parties to these agreements. However, as pointed out in the report of the International Commission of Jurists, these treaties were not intended to deal with claims on the damage suffered by individuals and the issue of "comfort women" was not debated in the process of peace negotiations. Therefore, the Government of Japan remains legally responsible for the consequent violations of international humanitarian law.

(B) Comments

(a) According to Encyclopedia of Public International Law of the Max Planck Institute, war reparations originated from an ancient custom that the vanquished peoples paid tribute to the victors. Since around the end of the 18th century, victors have almost always obtained indemnities from their defeated foes. There in the background of this practice is the concept of war cost compensation that the victorious State is entitled to recover its war costs from the defeated State. The idea of seeking State responsibility for the violations of wartime international law was not clearly established as the ground for indemnity claims at that time.[25] The First World War, different from all preceding instances, was fought as a total war, and as a result civilian nationals also suffered damage. In that context, the Versailles Peace Treaty of 1919 and peace treaties concluded thereafter use the term "reparations" instead of the conventional "war indemnity" to indicate war compensations. It has been understood that the term "reparations" does not imply war cost compensations but purports payments from the defeated State to the victorious State for all the damage suffered by the victorious State and its nationals which was caused by armed attacks by the defeated State including damage arising from violations of international law of war. The Versailles Peace Treaty listed in a protocol annexed to it reparation items including the damage of "civilian population" of the victorious States caused by the attacks and atrocities of the defeated States. Later, in the settlement of reparations concerning the Second World War, it was made the principle that all the damage suffered by the victorious States due to the military action of the defeated States should be compensated. Therefore, the San Francisco Peace Treaty provides in Article 14: "It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war."

(b) Theoretically, individual damage claims can be settled by what may be called an "accumulation" method which assesses and totals the amount for each individual. Actually, however, it is extremely difficult to establish a legal basis and factual relations for individual damage. Therefore, general practice has been for the winning and losing sides to agree on a lump-sum as the final settlement of the issue of reparations. This so-called lump-sum method has been used to settle the reparation issue of Japan in accordance with the international agreement between the Allied Powers and Japan. Using this method, the Allied Powers and the Government of Japan arrived at the final settlement of international reparation issues including the compensation of individual damages. The reparations and grant aid so far paid by the Government of Japan pursuant to reparations agreements with relevant States have amounted to as much as 486.82 billion yen, equivalent to US$1.35 billion converted at a rate of 360 yen for one US dollar.

(c) After resolving the above-mentioned issues of reparations, etc., victorious States and defeated States establish new relations by completely liquidating their past legal relationships. Under a peace treaty in general, the defeated State is unilaterally forced to waive the right to claim reparations or compensations from the victorious State. At the same time, it is not that the victorious State can make reparation claims limitlessly. Since the economy of the defeated State is extremely weakened due to the havoc it suffered during the war, realistic restrictions were gradually imposed on the victorious State's demand for reparations after the First World War. In this context, the Versailles Peace Treaty acknowledged that the resources of Germany were not adequate to make complete reparation for all the loss and damage claimed suffered by the victorious States and limited

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[25] I. Seidl-Hohenveldemm, Reparations, in: R. Berhardt (ed.), Encyclopedia of Public International Law, Instalment 4 (1982), p. 178.

the reparation to damages for the loss of the civilian population of the victorious States and their property (Article 232). The peace treaty with Italy after the Second World War provided the renunciation of claims by Italy (Article 76) and listed its obligation of reparations in such forms as the removal of industrial facilities, the disposition of Italian assets abroad and the transfer of products from Italy (Articles 74 and 79). Then, the treaty prescribed in Article 80: "The Allied and Associated Powers declared that the rights attributed to them under Articles 74 and 79 of the present treaty cover all their claims and those of their nationals for loss or damage due to acts of war, including measures due to the occupation of their territory, attributable to Italy and having occurred outside Italian territory." According to Nippon Kowa Joyaku no Kenkyu (A Study of the Peace Treaties of Japan) written by Keishiro Irie, the above-mentioned provision in Article 80 is called a "completed-compensation article" or "completed-compensation declaration" which implies that no claim shall be made thereafter with respect to other unsettled objects of reparation, if any. This amounts to the substantial waiver of all claims.[25]

(d) Clearly showing Japan's waiver of its war claims, the San Francisco Peace Treaty stipulates in part of Article 19(a): "Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war." At the same time, the treaty provides in Article 14(b): "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." The article inserts a completed-compensation clause to the effect that all claims of the Allies were to be regarded as completely fulfilled after the implementation by Japan of obligations stipulated in Articles 14 to 16 of the treaty, including reparations in service and the transfer of Japanese assets abroad. A provision of this type stipulating the waiver by the Allied of war claims against Japan, in addition to a similar stipulation on waiver by Japan, is included in all the peace treaties Japan has concluded for the settlement of war claims after the Second World War. Needless to reiterate, since these treaties were concluded based on an agreement between the Allied powers and Japan, it was also the intention of the Allied Powers to settle all issued of reparations and claims finally and completely.

(e) Similar to the said relationship between Japan and the Allied Powers, Japan liquidated its past legal relations with the States which became independent from Japan after the Second World War to construct new relations. In that process, the issues of property and claims were settled. Between Japan and the Republic of Korea, for example, the Agreement on the Settlement of Problem Concerning Property and Claims and on the Economic Cooperation between Japan and the Republic of Korea inserts a "completed-compensation clause" in Article II.1: "The Contracting Parties confirm 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 . . . is settled completely and finally." In the course of the talks for normalization of relations between the two countries, the Japanese side initially attempted to settle the claims presented by the Korean side by means of the so-called "accumulation method." However, it was difficult to demonstrate factual relations accurately because more than ten years had

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[25] Keishiro Irie, Nihon-Kowa-Joyaku-no-Kenkyu (A Study of the Peace Treaty of Japan) (1951), pp. 223-224.

passed since the end of the Second World War and particularly because material had been scattered and lost during the Korean War. Against this background, Japan, under agreement with the Republic of Korea, decided from the viewpoint of establishing friendly relations between the two countries that it would provide the Republic of Korea with economic aid in the form of grant and loan with and without consideration amounting to US 500 million dollar to help the Republic of Korea to develop its economy. And, in parallel with it, the Republic of Korea and Japan decided to settle the issues of property and claims between the two countries completely and finally. Thus, although no explicit compensation clause for the individual claims by the nationals of the Republic of Korea was included in the Agreement because of the difficulty of settlement through the accumulation method, the Republic of Korea agreed to the above-mentioned way of settlement and in the understanding of the Government of Japan, individual claims were taken care of under domestic law in the Republic of Korea.

(f) As explained in the foregoing paragraphs, the San Francisco Peace Treaty, the said Agreement between Japan and the Republic of Korea and other peace treaties, etc. concluded by Japan include in them a "completed-compensation article" which stipulates the waiver of all claims including unsettled claims. Regardless of whether the issue of "comfort women" was included or not in the course of negotiations concerning the San Francisco Peace Treaty and other above-mentioned international agreements, the Government of Japan has in good faith fulfilled the obligations of the above-mentioned agreements and all issues of reparations, property and claims in conjunction with the war, including the issue of the damages of "comfort women", have been legally resolved between Japan and the parties to the above-mentioned agreements. The Government of Japan understands that the governments of the relevant States are of the same view on this matter. In fact, the report of the Special Rapporteur points out that the Government of the Republic of Korea takes the same position as that of the Government of Japan.

(3) Individual claims

(A) Argument by the Special Rapporteur

(a) *The Government of Japan argues that unless so recognized by a treaty an individual cannot be a subject of rights or duties under international law. However, Article 1 of the Charter of the United Nations stipulates respect for human rights and fundamental freedoms as one of the purposes of the United Nations, while Article 8 of the Universal Declaration of Human Rights, Article 2 (3) of the International Covenant on Civil and Political Rights and other international instruments provide the individual right to claim remedy from the State. This proves that an individual is often a subject of international law and that the right for an individual to claim an effective remedy is included in the norm of international law. The right to appropriate compensation under international law was also upheld in the decision of the Chorzow Factory case and the Van Boven report recognized the claim for compensation of a victim of a grave human rights violation.*

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

(B) Comments

(a) According to conventional international law, international law is a law regulating relationships between States and therefore, in principle, an individual cannot be a subject

of the rights or duties under international law. Regarding this point, Oppenheim's International Law writes: "Since the Law of Nations is primarily a law between States, States are, to that extent, the only subjects of the Law of Nations."[27] Then he proceeds to argue individual rights based on treaties, saying: "Although such treaties generally speak of rights which individuals shall have as derived from the treaties themselves, this is, as a rule, not the normal position under the municipal law of States. In fact, such treaties do not normally create these rights (under municipal law), but they impose the duty upon the contracting States of calling these rights into existence by their Municipal Laws. Again, where States stipulate by international treaties certain benefits for individuals other than their own subjects, these individuals do not, as a rule, acquire any international rights under these treaties, but the State whose subjects they are has an obligation towards the other States of granting such favors by its Municipal Law."[28] He has thus explained the issue of the domestic effects of a treaty within the contracting State and the issue of the capacity based on a treaty for an individual to be a subject of international law. In other words, individual rights or duties provided for in treaties are in most cases acquired by individuals as the objects of these treaties only via municipal law.

(b) However, it is not that individuals cannot be subjects of international law in any cases. As Ian Brownlie wrote in his book, Principles of Public International Law: "In general, treaties do not create direct rights and obligations for private individuals, but, if it was the intention of the parties to do this, effect can be given to the intention."[29] For an individual to be recognized as a subject of international law, as argued by Shigejiro Tabata, professor emeritus of international law of Kyoto University, in A New Lecture on International Law, the treaty in question must provide for individual rights and obligations and guarantee the procedures under international law that the individual can directly claim and acquire his rights or can directly be claimed about a violation of his obligations, without the diplomatic protection of the State of which he is a national.[30] Also, Verdross-Simma argues that the acquisition by an individual of the capacity to enjoy rights as a subject of international law is conditioned by the presence of the procedures for a remedy by an international organ or some other special international system which enables the individual to directly acquire and exercise the rights by claiming a feasance or a nonfeasance to a State and that, in particular, an individual is granted such capacity if he is given the right to an action by and at an international court.[31]

(c) In this context, our attention is drawn to the Article 304 of the Versailles Peace Treaty after the First World War which stipulates that any individual of the Allied Powers can directly exercise his right to demand compensation against Germany and receive payment at a Mixed Arbitral Tribunal to be set up jointly by the Allied Powers and Germany, by exercising the right to claim property damages which was given to the nationals of the Allied Powers based on the provision of the treaty. In such a case, it can be said that the said

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[27] Lauterpacht (ed.), Oppenheim's International Law, 8th edition, Volume 1 (1955), p. 636.

[28] ibid., p. 636.

[29] Ian Brownlie, op.cit., p. 592.

[30] Shigejiro Tabata, Kokusaiho-Shinko (A New Lecture on International Law)1, (1990), pp. 65-79.

[31] Verdross-Simma, B., Universelles Volkerrecht: Theorie und Praxis (1976), p. 220.

individual claim is a right under international law based on a rule of international law, the Versailles Peace Treaty. However, this provision of the Versailles Peace Treaty is exceptional and even after the Second World War, international law did not evolve to enable an individual to take a civil action for damages directly into an international court against a wrongful State. Nor such development was effected with the treaties to which Japan is a signatory in conjunction with the postwar settlement. In other words, as Brownlie writes in Principles of Public International Law, "Customary international law still maintains the rule that it is the state which has the capacity to present international claims"[32] and "Broadly speaking, the procedural position of the individual has not changed very much since 1920."[33] This theory was upheld in the decision for the Mavrommatis Palestine Concessions case at the Permanent Court of International Justice (1924) and in the ruling for the Nottebohm case at the International Court of Justice (1955).[34]

(d) In an attempt to refute the above comments, the Special Rapporteur argues that *human rights documents of the United Nations, such as the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, "define the rights of the individual vis-a-vis the State" showing the possibility of an individual often becoming a subject of international law and that therefore the right of an individual to claim an effective remedy under international law is already a norm of international law.* However, Article 1 of the Charter only provides, as one of the United Nations purposes, the achievement of "international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms." The Universal Declaration of Human Rights is a proclamation adopted at the U.N. General Assembly and it has no legal binding force as a treaty does. This is clear both in its form and context; it contains no clause providing for the procedure for ratification etc. and it defines the Declaration in its foreword: "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping in this Declaration constantly in mind, shall strive . . . " Again, Brownlie writes in his Principles of Public International Law: "The preparation of the Universal Declaration of Human Rights was widely regarded as a first step toward the presentation of a Covenant, which would be in the form of a treaty. The Declaration, of course, was contained in a resolution of the General Assembly and was not intended to be binding."[35] Also, Article 2 (3) of the International Covenant on Civil and Political Rights only stipulates the obligation of a signatory State in relation to the other parties thereto that it shall secure a remedy for him in case the rights of an individual provided for in the Covenant is violated. This provision does not acknowledge individual rights to the State under international law. In addition, none of the said international instruments guarantees the procedure under international law in which an individual can claim and acquire his rights directly from a State or a violation of obligations by an individual is directly claimed, without the intermediary of the diplomatic protection of a State of which he is a national. As evident from what was mentioned above, the U.N. instruments on human rights suggested by the Special Rapporteur cannot be proofs

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[32] Ian Brownlie, op. cit., p. 592.

[33] ibid., p. 593.

[34] ibid., p. 592.

[35] ibid., pp. 571-572.

that individuals are subjects of international law nor that they have the right to claim remedies to a State on the basis of international law.

(e) The Special Rapporteur argues that *the right to appropriate compensation under international law has been established*, saying that *in the Chorzow Factory case a legal principle was acknowledged that any breach of a treaty invokes an obligation even though the precise amount of loss cannot be established.* There certainly is the passage of a judgement of the Permanent Court of International Justice on this case which reads: "... the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In Judgement No. 8, ... the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself. The existence of the principle establishing the obligation to make reparation, as an element of positive international law, has moreover never been disputed in the course of the proceedings in the various cases concerning the Chorzow factory."[36] However, this case was taken into court by Germany, as a party to the Geneva Convention, to claim damages against Poland on losses it had suffered. The judgement therefore only came as a decision with respect to the issues of violations of international law and reparation between the two States and it has nothing to do with an claim of an individual against a State under international law. Is the claim of damages for losses suffered by the nitrogen manufacturing companies directly intended for the compensation for them? Or is it for the reparation for losses suffered by Germany involving a violation of the Geneva Convention? Poland contended that Germany first argued the former standpoint and then changed its argument to the latter and that Germany thus altered the subject of the suit in the course of the proceedings. However, the judgement stated: "... the object of the German application can only be to obtain reparation due for a wrong suffered by Germany in her capacity as a contracting Party to the Geneva Convention. ... It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. This is even the most usual form of reparation; ... The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State. ... The Court therefore is of opinion that the Applicant has not altered the subject of the dispute in the course of the proceedings."[37] Commenting on this decision, Kisaburo Yokota, former member of the International Law Commission of UN, said: "The decision follows the generally accepted theory about the relationship between a State and a private individual under international

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[36] Chorzow Factory (Merits) P.C.I.J., Ser. A., n. 8-17, p. 29.

[37] ibid., pp. 27-28.

law. It has faithfully applied the theory to the definition of the character of reparation."[38]
(f) The Special Rapporteur quotes the report of Van Boven as an authority to support her argument. This report maintains that on the basis of international law, any individual whose human rights were violated by a State is entitled to claim damages against the State, that each State has the obligation to take punitive actions against its nationals who committed human rights violations and that no statute of limitation shall be applied to grave violations of human rights. However, as we have explained above and will explain also in the following paragraphs, these arguments are so irrational that they are considered far from being established in the domain of international law. Worse, the report of Van Boven proposes these arguments without showing any adequate ground of international law. The report therefore cannot be considered a broadly accepted authoritative source for the discussion of international law.
(g) As regards arguments about the right to reparations claims by the families of the victims of human rights violations or to collective claims and reparations, the concept of "family" or "collective" is rather ambiguous. "Human rights" belong to respective individuals and are not something which can be disposed of by others. Further, there is no "continuous practice and *opinio juris sive necessitatis* of States" acknowledged with respect to reparations claims by families and collective claims and reparations. To say nothing of the rules of international law at the time of the Second World War, even today's rules of customary international law know nothing about such a right.

(4) Identification, prosecution and punishment of perpetrators
(A) Argument by the Special Rapporteur
(a) *The Government of Japan has expressed concern about international human rights organizations discussing the prosecution and punishment of perpetrators. Although there is an understanding that this is not a general obligation of States, prosecution of individuals for war crimes is a possibility that still exists under international law.*
(b) *Members of the armed forces are bound to obey lawful orders only. They cannot escape liability if obeying a command, they commit acts which violate the rules of warfare and international humanitarian law.*
(c) *The case of "comfort women" is an inhumane act and constitute a crime against humanity. Although the time elapsed and the paucity of information may make it difficult, the Government of Japan should attempt prosecution wherever it is possible.*
(B) Comments
(a) Our comments on whether or not there primarily was a violation of international humanitarian law are addressed in the foregoing paragraphs. Even if there was a violation of international humanitarian law, the obligation of a State to punish those having perpetrated human rights violations is not considered to have been established under the rules of international law at that time. The Special Rapporteur does not maintain so in her report, either. It is true that some treaties concerning international humanitarian law concluded after the Second World War, such as the Geneva Conventions, of 12 August 1949, for the protection of victims of war and the Additional Protocol I thereto of 1977, impose on contracting States the obligation to take necessary measures in municipal law. However, it cannot be acknowledged that "continuous practice and opinio juris sive

[38] Kisaburo Yokota, Kokusai-Hanrei-Kenkyu (Study on International Judicial Precedents I) (1933), p. 139.

necessitatis of States" regarding such punitive action was present at that time independent from the said conventions. As earlier, Oppenheim's International Law said that since a peace treaty was considered a final settlement of war under rules of international law at the time, unless the contrary is expressly stipulated in the treaty, war crimes which were committed by the members of the belligerent forces, etc. before the conclusion of peace may no longer be punished after the conclusion and individuals who have committed such war crimes and have been arrested for them must be liberated, regardless of the existence or nonexistence of an amnesty clause in the treaty, as one of the effects of every peace treaty.[39] Needless to say again, the Government of Japan has sincerely fulfilled its obligations under the San Francisco Peace Treaty and other bilateral treaties.

(b) Japan further notes that the criminal punishment by the Government of Japan can only be done through the adjudication by Japanese domestic courts. The domestic courts may render criminal conviction only on the basis of criminal law. Since the Constitution and national law of Japan adopt the principle of nullen crimen sine lege and nulla poena sine lege in a strict sense, no one may be punished unless national law clearly provides for certain acts as a crime as well as punishment for the crime. This principle is universal as is confirmed in the Article 15 (1) of the International Covenant on Civil and Political Rights.

National law of Japan does not provide for such ambiguous crimes as "crimes against humanity": Crimes in the national law which corresponds to "crimes against humanity," are specifically provided for in the Penal Code: for instance, murder, bodily injury, assault, intimidation, robbery, kidnapping or abduction, false arrest or imprisonment, and compulsion. This is the same in national legislation of many other countries.

Whether or not acts related to the "comfort women" system constitute these crimes is to be adjudicated based upon law and evidence, on a case by case basis. In this context, the system of statutory limitation against prosecution, which prohibits criminal prosecution after a certain period of time elapses, is important as a law to be applied to this issue. With respect to the "comfort women" system, it is fair to say that in almost all the cases, the prosecution of the above crimes is prevented by the statute of limitation, and it is also prohibited as posterior punishment to punish such crimes against the statutory limitation.

(c) As regards the argument that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if they commit acts which both violate rules of warfare and international humanitarian law, it is not necessarily clear whether the so-called plea of superior orders was generally accepted under the rules of international law at the time of the conduct in question. This can be a topic of a debate judging from Oppenheim's International Law.[40]

(d) Furthermore, it is understood that with respect to the war crimes committed by the nationals of Japan during the Second World War, 5,730 persons were indicted, of which 991 were sentenced to death, 491 to imprisonment for unlimited period and 2,947 to the same for limited periods by the judgements of the International Military Tribunal for the Far East and other courts set up by the Allied Powers in Asia and other places. The Government of Japan for its part accepted these judgements between States and it agreed to "carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan" pursuant to Article 11 of the San Francisco Peace Treaty.

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[39] Lauterpacht(ed.), Oppenheim's International Law, 7th edition, Volume 2 (1952), p. 611.

[40] ibid., pp. 568-571.

(5) Retroactive application of law

(A) Arguments by the Special Rapporteur

(a) *The Government of Japan maintains that argument of the legal responsibilities of the Government of Japan implies retroactive application of law. However, international humanitarian law constitutes part of customary international law.*

(b) *Also, Article 15 (2) of the International Covenant on Civil and Political Rights provides: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."*

(B) Comments

(a) With respect to the issue of retroactive application of law pointed out by the Government of Japan, the Special Rapporteur attempts to rebut it by saying that *international humanitarian law is part of customary international law.* However, as we have reviewed earlier, the theory of intertemporal law states, "the situation in question must be appraised ... in the light of the rules of international law as they existed at the time, and not as they exist today" (Sir G. Fitzmaurice).[41] Therefore, so as to apply rules of international humanitarian law to an act committed in the past, it is insufficient only to demonstrate that such rules of international humanitarian law consist part of customary international law today but it is necessary to verify that these rules of international humanitarian law were accepted as part of the rules of customary international law at the time when the act was committed in light of the "continuous practice and *opinio juris sive necessitatis* of States." In this context, the argument of the Special Rapporteur which simply states that international humanitarian law constitutes part of rules of customary international law is far from valid as rebuttal.

In this regard, the provision in Article 15 (2) of the International Covenant on Civil and Political Rights, which states that the punishment of an act which was criminalized at the time of its commitment does not violate the provision of Article 15 (1) which prohibits posterior punishment, only stipulates the corollary of Article 15 (1). Therefore, the Special Rapporteur's quotation of Article 15 (2) of the Covenant has nothing to do with the principle of prohibiting the retroactive application of law as maintained by the Government of Japan.

(b) If the Special Rapporteur quotes the provision in Article 15 (2) of the International Covenant on Civil and Political Rights for the purpose of asserting that the "comfort women" system was considered crime at the time when it was instituted, her quotation does not serve her purpose, because the provision does not offer the norm whether or not a certain act constitutes a crime, but only provides for the above-mentioned corollary from Article 15 (1). In addition, in the drafting process of the provision, the concept "the general principles of law recognized by the community of nations" was a focus of disputes for its ambiguity. Though, the provision was finally adopted without clarifying the concept. This fact is another indication that Article 15 (2) does not support the Special Rapporteur's claim that "war crimes and crimes against humanity under international humanitarian law" were "crimes at the time when it was committed according to the general principles of law recognized by the community of nations."

(6) Statutory limitations

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[41] Fitzmaurice, supra n. 9.

(A) Arguments by the Special Rapporteur

It is inappropriate to argue the application of statutory limitations to this matter. The report of Van Boven points out that unless compensation is effected for the victims of human rights violations, no statutory limitations should be applied to their rights to claims.

(B) Comments

(a) Since the meaning of the paragraph 124 of the addendum 1 is not clear, the Government of Japan is not sure whether the Special Rapporteur asserts in the paragraph that statutory limitation against criminal prosecution does not apply to certain cases, or that statutory limitation does not apply to certain civil right of victims such as that to reparation.

(b) The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was adopted at the General Assembly of the United Nations in 1968. The Convention was put into force in 1970 and has so far been ratified by 42 countries. However, in view of the fact that many countries including Japan have not concluded the Convention, it is not considered that the non-applicability of statutory limitations is internationally accepted with respect to acts which may be held to violate international humanitarian law and the rules of human rights under international law.

In addition, as mentioned above, when the Government of Japan punishes someone in domestic courts according to national penal statutes, the system of statutory limitation against prosecution stipulated in the national code of criminal procedure applies as a matter of course, and therefore, the Government may not prosecute or punish anyone after a certain period of time provided for in the code of criminal procedure passes by.

(c) It is not also justifiable in principle to institute exceptions to the application of statutory limitations because this system has the following raisons d'etre:

In civil cases, statutory limitation is a mandatory provision for the stability of society. There is no rational reason not to apply it after it becomes possible for the victim to claim remedies.

In criminal cases, it would become increasingly difficult to prove suspect's guilt with the passage of time, as evidence may be scattered and lost. In other words, as time goes by, fact-finding would become increasingly difficult due to the loss or transformation of the memory of witnesses including the victims, the death or unavailability of witnesses and the loss of relevant documents and other tangible evidence. The prosecutor would have difficulties in establishing guilt. The accused would also face the difficulties: an innocent defendant could possibly be found guilty because he or she could not fully defend himself or herself due to difficulties in collecting enough evidence for him or her. In any event, if the case is brought to a court a long time after a commission of a crime, the possibility of erroneous conviction increases. In addition, the system of statutory limitation against prosecution is based on the ideas such as the decreasing of the necessity of punishment over time and the necessity to secure the legal stability. For these reasons, the system of statutory limitation against prosecution is justifiable from the standpoint of the safeguard of human rights, which the U.N. Commission on Human Rights pursues. It should be added that these grounds for this system are pointed out in the leading cases on this issue of the U.S. Supreme Court such as Toussie v. United States, 397 U.S. 112 and United States v. Marion, 404 U.S. 307 as well as in representative treatise in the United States, including Lafave & Israel, Criminal Procedure.

(d) Our comments on the Van Boven report have been already stated in a preceding paragraph (see, II. (3) (B) (f)).

Chapter 5 Responses to "Recommendations"

Concerning Paragraph 137

(a) As regards the issues of reparations and/or settlement of claims for the damage and suffering caused during the war, including the issue of "comfort women," Japan has sincerely fulfilled its obligations according to the San Francisco Peace Treaty, bilateral treaties and other relevant international agreements, and therefore, these issues have been settled between Japan and the Parties to the above mentioned agreements. Thus it is not necessary to discuss whether or not Japan violated international law by those acts as the Special Rapporteur does. The Government of Japan understands that the governments concerned are of the same position on this matter. In fact, the Special Rapporteur points out in the addendum 1. that the Government of Republic of Korea takes the same position as that of the Government of Japan.

In addition, the Special Rapporteur' s "legal" arguments are very problematic according to international law: For example, the Special Rapporteur insists on the Japan's violation of treaties of which Japan was not a party at the time; applies to the issue of "comfort women" some treaties, provisions of which have nothing to do with the issue; asserts without showing any grounds that certain norms were established customary international law; applies the current international law retroactively without qualifications. Therefore, there is no room for the Government of Japan to accept the "legal" arguments the Special Rapporteur develops in the addendum.

(b) As for the obligation to pay reparation to individuals, it is the established rule that an individual cannot be a subject of rights or duties in international law unless his or her right is expressly provided in a treaty and the procedure for exercising the right is guaranteed under international law as well. Therefore, the Special Rapporteur's assertion that the Government of Japan is under a legal obligation to pay reparation to an individual has no basis in international law.

On the other hand, the Government of Japan considers that it would be an expression of the sentiment of apologies and remorse to the issue of "comfort women" to face squarely with the facts of the history, to convey them to the future generations correctly, and to make efforts to promotes better mutual understanding with related countries. Based on this consideration, the Government of Japan inaugurated "Peace, Friendship and Exchange Initiative." Furthermore, "Asian Women's Fund" was inaugurated by the appeals of proponents. The Fund undertakes projects which will express the Japanese people's atonement to the former "comfort women" and other projects related to the honor and dignity of women. The Government of Japan intends to address the issue of " comfort women" through the above undertakings, and therefore neither does the Government intend to pay reparation to former "comfort women" nor to establish an "administrative tribunal" for this issue.

(c) Since December 1991, the Government of Japan has conducted the fact-finding study on the issue of "comfort women," and officially announced the results twice in July 1992 and August 1993. All the public documents and other materials found as the result of the study are open to the public with appropriate measures to protect the privacy, and total number of materials amounts to more than 230.

Before announcing the study results in August 1993, the Government has done its utmost sincere efforts to conduct the fact-finding study, enlarging the scope of the study

abroad.

The Government of Japan thus has no intention of concealing the facts of this issue, rather than that, has conducted the wholehearted study and opening of the materials. It is quite regrettable that the Special Rapporteur makes recommendations to the Government of Japan, as if the Government had concealed the existence of relevant materials, without any reliable grounds.

(d) Although the Special Rapporteur recommends that the Government of Japan should make official apologies, the highest authorities of the Government of Japan, including Prime Ministers, have so far expressed their sincere apologies and remorse to former "comfort women" in various opportunities. Furthermore, at the inauguration of "Asian Women's Fund," the Government has made public its policy to demonstrate once again its sentiment of apologies and remorse as a nation when the "Fund" undertakes its projects.

In addition, the "Fund" has officially requested the Government of Japan to express its sincere apologies and remorse in the form of letters by the Prime Minister to former "comfort women, " and the Government is now seriously considering the request. The Government has already told this to the Special Rapporteur.

(e) Hoping to an more active role in the international community, the Government of Japan attaches great importance to the school education and is intensifying the efforts in that field, through which the youth who will lead the Japan's future correctly understand the facts of modern and contemporary history. In the current official guidelines for school education, the Government takes such measures as introducing to the high school curriculums the courses of "Japanese History A" and "World History A" which lay stress on modern and contemporary history. In the above courses, for example, teachers are expected to give students understanding of the facts of history based on objective and impartial materials, under the items of "Transformation of Asian Countries and Japan" (World History A) or "Circumstances of the World during periods of the World War I & II and Japan" (Japanese History A).

The Government of Japan seriously doubts whether the Special Rapporteur has conducted a sufficient study on the above efforts by the Government, before presenting such recommendation.

(f) With regard to identification and punishment of the people involved with the issue, it is not a general obligation of States to punish them. In the first place, war crimes are to be finally settled through peace treaties concluded between victorious and defeated countries unless the contrary is expressly stipulated in the treaty. With regard to the last world war, the Allied Powers punished the Japanese war criminals through the trials at the International Military Tribunal for the Far East and other Allied War Crimes Courts, and the Government of Japan accepted the judgments by those courts in the San Francisco Peace Treaty and carried out the sentences imposed thereby.

Concerning Paragraph 140

Since long before the addendum 1. was submitted, Japan recognizes that the issue of "comfort women," with the involvement of the then military, injured the honor and dignity of many women and has so far expressed profound apologies and remorse as a nation.

As regards the issues of reparations and/or settlement of claims for the damage and suffering caused during the war, including the issue of "comfort women," Japan has

sincerely fulfilled its obligations according to the San Francisco Peace Treaty, bilateral treaties and other relevant international agreements. Based on the above recognition of Japan, the Government of Japan and its people have inaugurated the "Asian Women's Fund," in order to fulfill Japan's moral responsibility, keeping in mind that the former comfort women have reached their advanced age through the elapse of 50 years after war.

Japan is determined to enact Japanese people's sincere atonement for the former "comfort women," as well as to make efforts to eliminate and prevent violence against women in Asia and elsewhere, through further promoting the activities of "Asian Women's Fund." The Government of Japan is deeply concerned that this addendum, which does not convey the position of the Government of Japan correctly, might confuse arguments on this issue and hinder a genuine solution of this issue.

[UNOFFICIAL TRANSLATION]

Statement by the Chief Cabinet Secretary
(August 4, 1993)

The Government of Japan has been conducting a study on the issue of wartime "comfort women" since December 1991. I wish to announce the findings as a result of that study.

As a result of the study which indicates that comfort stations were operated in extensive areas for long periods, it is apparent that there existed a great number of comfort women. Comfort stations were operated in response to the request of the military authorities of the day. The then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women. The recruitment of the comfort women was conducted mainly by private recruiters who acted in response to the request of the military. The Government study has revealed that in many cases they were recruited against their own will, through coaxing, coercion, etc., and that, at times, administrative/military personnel directly took part in the recruitments. They lived in misery at comfort stations under a coercive atmosphere.

As to the origin of those comfort women who were transferred to the war areas, excluding those from Japan, those from the Korean Peninsula accounted for a large part. The Korean Peninsula was under Japanese rule in those days,

and their recruitment, transfer, control, etc., were conducted generally against their will, through coaxing, coercion, etc.

Undeniably, this was an act, with the involvement of the military authorities of the day, that severely injured the honor and dignity of many women. The Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women. It is incumbent upon us, the Government of Japan, to continue to consider seriously, while listening to the views of learned circles, how best we can express this sentiment.

We shall face squarely the historical facts as described above instead of evading them, and take them to heart as lessons of history. We hereby reiterate our firm determination never to repeat the same mistake by forever engraving such issues in our memories through the study and teaching of history.

As actions have been brought to court in Japan and interests have been shown in this issue outside Japan, the Government of Japan shall continue to pay full attention to this matter, including private researches related thereto.

[UNOFFICIAL TRANSLATION]

On the Issue of Wartime "Comfort Women"

August 4, 1993
Cabinet Councillors' Office
on External Affairs

1. Study background

The issue of wartime "comfort women" has been attracting attention from both within and outside Japan, as actions have been brought to court in Japan by those concerned and the issue has been debated in the Diet. During Prime Minister Miyazawa's visit to the Republic of Korea in January 1992, the issue was brought up in the meeting between the Prime Minister and then President, Mr. Roh Tae Woo, in which the Korean side requested strongly that relevant facts be brought to light. Other countries and areas concerned also have shown strong interest in this issue.

Under these circumstances, the Government of Japan, since December 1991, has been conducting a study by means of individual hearings of former military personnel and others concerned in parallel with a search for relevant documents. In addition, for five days from July 26 to 30, the Government of Japan conducted detailed hearings of former comfort women, with the cooperation of the Association of Pacific War Victims and Bereaved Families, in Seoul, the Republic of Korea, regarding the circumstances at the time. Furthermore, in the course of

the study, government officials were sent to the United States to search for official U.S. documents and a field study was conducted in Okinawa as well. The following gives the details of the study, and a list of the documents discovered by the study is attached.

Institutions covered by the study: the National Police Agency; the Defense Agency; the Ministry of Justice; the Ministry of Foreign Affairs; the Ministry of Education; the Ministry of Health and Welfare; the Ministry of Labor; the National Archives; the National Diet Library; and the U.S. National Archives.

People covered by individual hearings: former comfort women; former military personnel; former officials of the Government-General of Korea; former operators of comfort stations; residents in the areas where comfort stations were located; and history researchers, etc.

Domestic and foreign documents and publications used for reference: the study report compiled by the Government of the Republic of Korea; collections of testimonies by former comfort women, compiled by those concerned including the Association of Pacific War Victims and Bereaved Families and the Korean Council for the Women Drafted for Sexual Slavery by Japan; and also practically all of the numerous Japanese publications on the subject matter were perused.

On July 6, 1992, the Government of Japan announced the results of its study on this issue conducted up to that time. In view of the further progress of the study since then, the Government has decided to announce the findings reached as below.

2. Facts on the Issue of Wartime "Comfort Women"

The following has been brought to light as a result of the aforementioned search for documents and individual hearings as well as a comprehensive analysis and review of the various documents used as reference.

1) Background to the establishment of comfort stations:

The comfort stations were established in various locations in response to the request of the military authorities at the time. Internal government documents from those days cite as reasons for establishing comfort stations the need to prevent anti-Japanese sentiments from fermenting as a result of rapes and other unlawful acts by Japanese military personnel against local residents in the areas occupied by the then Japanese military, the need to prevent loss of troop strength by venereal and other diseases, and the need to prevent espionage.

2) Timing of the establishment of comfort stations

As some documents indicate that a comfort station was established in Shanghai at the time of the so-called Shanghai Incident in 1932 for the troops stationed there, it is assumed that comfort stations were in existance

since around that time to the end of World War II. The facilities expanded in scale and in geographical scope later on as the war spread.

3) Areas with comfort stations

The countries or areas where it has been possible as a result of the study to confirm that comfort stations existed are: Japan; China; the Philippines; Indonesia; the then Malaya; Thailand; the then Burma; the then New Guinea; Hong Kong; Macao; and the then French Indochina.

4) Number of comfort women

It is virtually impossible to determine the total number of comfort women, as no document has been found which either indicates their total number or gives sufficient ground to establish an estimate. However, in view of the fact, as described above, that comfort stations were operated in extensive areas for long periods, it is apparent that there existed a great number of comfort women.

5) Comfort women's place of origin

The countries or areas from which it has been possible as a result of the study to confirm that comfort women came are: Japan; the Korean Peninsula; China; Taiwan; the Philippines; Indonesia; and the Netherlands. Apart from Japanese, many of the comfort women transferred to the war areas were from the Korean Peninsula.

6) Operation and management of comfort stations

Many comfort stations were run by private operators, although in some areas there were cases in which the then Japanese military directly operated comfort stations. Even in those cases where the facilities were run by private operators, the then Japanese military was involved directly in the establishment and management of the comfort stations by such means as granting permissions to open the facilities, equipping the facilities, drawing up the regulations for the comfort stations that set the hours of operation and tariff and stipulated such matters as precautions for the use of the facilities.

With regard to the supervision of the comfort women, the then Japanese military imposed such measures as mandatory use of contraceptives as a part of the comfort station regulations and regular check-ups of comfort women for venereal and other diseases by military doctors, for the purpose of hygienic control of the comfort women and the comfort stations. Some stations controlled the comfort women by restricting their leave time as well as the destinations they could go to during the leave time under the comfort station regulations. It is evident, at any rate, that, in the war areas, these women were forced to move with the military under constant military control and that they were deprived of their freedom and had to endure misery.

7) Recruitment of comfort women

In many cases private recruiters, asked by the comfort station operators who represented the request of the military authorities, conducted the recruitment of comfort women. Pressed by the growing need for more comfort women stemming from the spread of the war, these recruiters resorted in many cases to coaxing and intimidating these women to be recruited against their own will, and there were even cases where administrative/military personnel directly took part in the recruitments.

8) Transportation of comfort women, etc.

When the recruiters had to transport comfort and other women by ship or other means of transportation, the then Japanese military approved requests for their travel by such means as regarding such women as having a special status similar to its civilian personnel serving in the military, and the Japanese Government issued certificates of identification. In quite a few cases the women were transported to the war areas by military ships and vehicles, and in some cases they were left behind in the confusion of the rout that ensued Japanese defeat.