The Women's International War Crimes Tribunal For the Trial of Japan's Military Sexual Slavery

Case No. PT-2000-1-T
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THE PROSECUTORS AND THE PEOPLES OF THE ASIA-PACIFIC REGION

v.

HIROHITO EMPEROR SHOWA
ANDO Rikichi,
HATA Shunroku,
ITAGAKI Seishiro,
KOBAYASHI Seizo,
MATSUI Iwane,
UMEZU Yoshijiro,
TERAUCHI Hisaichi,
TOJO Hideki,
YAMASHITA Tomoyuki
and
THE GOVERNMENT OF JAPAN

JUDGEMENT

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Carmen Argibay
Judge Christine Chinkin
Judge Willy Mutunga

Delivered: **4 December 2001**
The Hague, The Netherlands

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ANTICIPATED ARGUMENTS OF THE DEFENCE PRESENTED BY *AMICUS CURIAE* INVITED BY THE COURT

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The Women's International War Crimes Tribunal
for the Trial of Japan's Military Sexual Slavery

Judgement

on the

Common Indictment and the Application for Restitution and Reparation

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Judge Willy Mutunga

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ACKNOWLEDGEMENTS

PART I – INTRODUCTION AND BACKGROUND OF THE PROCEEDINGS

A. BREAKING THE HISTORY OF SILENCE

1. In the early 1990s, women broke almost five decades of painful silence to demand apology and compensation for the atrocities they and others suffered under Japanese military sexual slavery during the war in the 1930s and 1940s in the Asia-Pacific region. The courageous revelations of the victimised survivors, euphemistically called "comfort women," inspired hundreds more survivors throughout the Asia-Pacific region to speak out. Together, they have awakened the world to the horror of the Japanese military's institutionalisation of rape, sexual slavery, trafficking, torture, and other forms of sexual violence inflicted upon girls and women. Robbed of their youth and their future, they were conscripted and trafficked through force, coercion, and deception and confined to "comfort stations" or, more accurately, sexual slavery facilities wherever Japanese troops were situated, including on the front lines.

2. The courage of these survivors has inspired other victims of sexual atrocities to speak out about the crimes committed against them. Human rights advocates, lawyers, and scholars worldwide have mobilised to seek justice. In an extraordinary way, the former "comfort women" have contributed substantially to the emergence of a larger global movement to recognise and respect women's human rights, to end impunity for crimes of sexual and gender violence, and to repudiate the notion that sexual abuse of women is an inevitable consequence of war and conquest.

3. The Women's International War Crimes Tribunal 2000 on Japan's Military Sexual Slavery, convened at the very end of the twentieth century, is the culmination of nearly a decade of work by and on behalf of the victimised survivors and on behalf of the victims who have not survived. The Tribunal was established as a result of the failure of states to discharge their responsibility to ensure justice.

4. Initial responsibility for this failure rests with the World War II Allied states which did not prosecute Japanese officials for these crimes before the International Criminal Tribunal for the Far East (IMTFE),[1] in the trial held in Tokyo from April 1946 to November 1948, despite the fact that they possessed ample evidence of rape and sexual slavery in the "comfort system." That a court, especially an internationally constituted court, would deliberately ignore a systematic atrocity of this dimension is unconscionable and profoundly discriminatory.

5. Nonetheless, primary responsibility lies and remains with the state of Japan for its continuing failure over the last 56 years to prosecute perpetrators of all rank, to officially and fully apologise, and to provide reparations and other meaningful remedies for the crimes. This inaction has persisted in spite of repeated demands made since 1990 by the survivors, careful investigations of United Nations Special Rapporteurs, and exhortations of the international community.

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[1] See The Charter of the International Military Tribunal for the Far East, 19 Jan. 1946, 4 Bevans 21, annex to Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 Jan. 1946, TIAS No. 1589, 4 Bevans 20 (IMTFE Charter or Tokyo Charter); Transcripts of the proceedings, as well as document, including the Judgement, are reproduced in The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East (R. Pritchard & S. Zaide eds., 22 vols., 1981) (Tokyo or IMTFE Judgement); see also The Tokyo Judgement: The International Military Tribunal for the Far East (B. Roling & C. Ruter eds., 1977) (IMTFE Judgement (Roling)). Both sources are used as references in this Judgement.

6. This Tribunal was established out of the conviction that these failures must not be allowed to silence the voices of survivors nor allow the state of Japan to escape accountability for these crimes against humanity. It was established to redress the historic tendency to trivialise, excuse, marginalise, and obfuscate crimes against women, particularly sex crimes, and even more so when they are committed against women of subordinated ethnicities. This Tribunal was established out of the belief, expressed repeatedly by the brave yet tormented survivors now in the latter stages of their lives, that acknowledging and assigning responsibility for the crimes will help to ensure that they live out their remaining years with greater peace and security; and further, that the state of Japan will come to recognise its responsibility to seek the forgiveness of survivors and to provide them with reparations. This Tribunal is the product of an uncompromising hope that justice is still possible and that such atrocities will never be repeated.

7. The Tribunal emphasises that the Japanese people are not on trial in this forum. Individual accountability as well as state responsibility for violations of international humanitarian law excludes the ascription of collective guilt. The Tribunal has no intention of deviating from this important principle.

8. This is a Peoples' Tribunal, a Tribunal conceived and established by the voices of global civil society. The authority for this Tribunal comes not from a state or intergovernmental organisation but from the peoples of the Asia-Pacific region, and indeed, the peoples of the world to whom Japan owes a duty under international law to render account. Further, this Tribunal steps into the lacuna left by states and does not purport to replace their role in the legal process. The power of the Tribunal, like so many human rights initiatives, lies in its capacity to examine the evidence, develop an accurate historical record, and apply principles of international law to the facts as found. The Tribunal calls upon the government of Japan to realise that the greatest shame lies not in this recording of the truth about these crimes, but in its failure to accept full legal and moral responsibility for them.

9. Each of the Judges of the Tribunal participate out of profound respect for the collective will of peoples and for the fundamental role of the rule of law in civil society. This Peoples' Tribunal acts out of the conviction that the cornerstone of the international and domestic rule of law is legal accountability – the calling to account of individuals and states for policies and activities that grossly violate established norms of international law. To ignore such conduct is to invite its repetition and sustain a culture of impunity. In part because of the failure to prosecute the Turkish officials responsible for the genocide against the Armenians in the early twentieth century, Hitler was emboldened to pursue his crimes against the Jews, communists, Roma, gays and others, in the belief that such crimes would not be punished. This principle applies with particular force with respect to fostering accountability for crimes of sexual and gender violence.

10. Sexual violence against women is epidemic. The frequency and brutality of sexual violence against women intensifies in times of war. These proceedings demonstrate that the institutionalisation of sexual slavery of girls and women was an integral part of the Japanese military aggression. Significant progress has been made recently toward prosecuting crimes of sexual violence and recognising their multifarious roles in military strategies. The International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) provide two examples. This Peoples' Tribunal is another step towards ending impunity and reversing the blatant disregard of the bodily integrity, inherent dignity, and, indeed, the very humanity of women.

11. Throughout the testimony, it was clear that the pain of women who were the victims of sexual violence was exacerbated by the denial of recognition and healing that justice can bring and by the community or familial rejection they were forced to endure purely as a result of the sexual nature of the crimes committed against them. The survivors were forced to suffer physically and mentally in shame and silence as a consequence of sexist attitudes treating them as responsible for the very atrocities they suffered. The findings of the Tribunal are intended to contribute to the proper attribution of responsibility for the crimes, placing it upon the perpetrators and not the victims of the crimes of sexual violence, and, thereby, to assist in changing worldwide patterns of sexual stereotyping which continue to subjugate women in contemporary society.

12. Part I of this Judgement consists of this Introduction and Background, Part II contains the Factual Findings, Part III, the Applicable Law, Part IV, the law of Individual Criminal Responsibility, and Part V provides the Legal Findings and Verdict. Part VI considers State Responsibility, Part VII covers Reparations, and Part VIII contains the Conclusions. Appendices provide the Common Indictment, Charter, and Application for Restitution and Reparations.

B. ORGANISATION OF THE TRIBUNAL

13. This Peoples' Tribunal was brought into existence by an International Organising Committee (IOC) chaired by representatives from Japan, the Philippines, and South Korea, each of whom has been deeply involved since 1991 in assisting the survivors to give voice to their experiences and to enable these voices to be heard. The goal, as expressed by the organisers at the opening ceremony in Tokyo, is to achieve "not vengeance but justice, . . . not only for the survivors but also for those who have perished and for the generations to come."

14. The indictments and presentations before this Tribunal were prepared by interdisciplinary teams led by legal prosecutors from East Timor, Indonesia, Japan, Malaysia, the Netherlands, North and South Korea (jointly), the People's Republic of China, the Philippines, and Taiwan, all of whom laboured separately and jointly for over two years to bring this Tribunal to fruition. The Country Prosecutors were joined by two co-Chief Prosecutors who have made significant contributions to international accountability for gender violence, and all participants affirmed the commitment of the international community to these proceedings. Each prosecution team submitted a Country Indictment. In addition, each joined, together with the co-Chief Prosecutors, in a composite Common Indictment and an Application for Restitution and Reparations, which instruments are the subjects of the proceedings before this Tribunal.

C. THE CHARTER

15. The IOC and the Prosecutors drafted the Charter of the Tokyo Tribunal 2000 (Charter), which was approved by the Judges. Article 2 of the Charter gives the Tribunal jurisdiction over crimes against humanity, including but not limited to sexual slavery, rape and other forms of sexual violence, enslavement, torture, deportation, persecution, murder, and extermination. In Article 14, the Charter declares that the Tribunal has an obligation to state clearly, based on the evidence presented, whether each accused is guilty, not guilty, or whether there is insufficient evidence upon which to make such a determination. The latter provision was adopted taking account of the Japanese

destruction and concealment of documents pertaining to the crimes charged as well as the continuing investigation of responsibility of which this Tribunal is but one step.

16. Through the Common Indictment, the Prosecutors call upon this Tribunal to determine the criminal responsibility of various high ranking officials of the Japanese government and military, including Emperor HIROHITO, for sexual slavery and rape as crimes against humanity. None of the accused has previously faced charges arising from the existence of the system of sexual slavery during the Asia-Pacific Wars of the 1930s and 1940s or from the rapes at Mapanique. As previously stated, this Tribunal was established to adjudicate gender related crimes that the IMTFE, the original Tokyo Tribunal, failed to redress.

17. The Charter also grants the Tribunal jurisdiction over breaches of state responsibility flowing from the commission of international wrongs attributable to the state of Japan. In this way, the Tribunal is uniquely situated to consider both individual criminal responsibility and state responsibility. Article 4 of the Charter recognises that international wrongs committed by Japan arise both from the original crimes against humanity and from its subsequent failures to repair them as required by international law. The international wrongs include discrimination, concealment or failure to find and disclose the truth concerning international crimes, failure to prosecute and provide reparations, failure to take measures to protect the integrity, well being, and dignity of the human person, and failure to take the necessary measures to prevent recurrence.

18. Article 14 of the Charter authorises the Tribunal to make recommendations regarding the responsibility of persons and states to afford redress through such means as offering an official apology, restitution, compensation, and rehabilitation, to those whose rights have been violated.

D. THE COMMON INDICTMENT AND THE APPLICATION REGARDING STATE RESPONSIBILITY

19. The Prosecutors filed eight Country Indictments and one Common Indictment. The Judges note that the Country Indictments list names of some accused who are not included in the Common Indictment.[2] Because the Common Indictment reflects a consolidation of the positions of the Country Prosecutor teams for the purposes of these abbreviated proceedings, this Tribunal will determine the criminal responsibility only of the accused who are listed in the Common Indictment.

20. In the Common Indictment, the Prosecutors have charged the following accused with the crimes against humanity of rape and sexual slavery pursuant to Article 2 of the Charter of the Tribunal: Emperor HIROHITO, ANDO Rikichi, HATA Shunroku, ITAGAKI

[2] By agreement of the prosecutors to focus the attention of this proceeding on the common defendants, the charges contained in country indictments against the following additional high-ranking defendants will not be considered in this Judgement: Tani, Hisao (China), Nakajima, Kesago (China), Prince Asakanomiya Yasuhiko (China), Okamura, Yasuji (Korea)(China), Harada, Kumakichi (Indonesia), Dohihara, Kenji (Indonesia), Takahashi, Ibo (Indonesia), Okouchi, Denshichi (Indonesia), Ushijima, Mitsuru (Japan), Hongo, Yoshio (Japan), Cho, Isamu (Japan), Kondo, Nobutake (Japan), Kato, Kyo hei (Japan), Morioka, Jiro (Japan), Arita, Hachiro (Japan), Minami, Jiro (Korea), Matsuyama, Yuzo (Korea) Homma, Masaharu (the Philippines), Kuroda, Shigenori (the Philippines), Hasegawa, Kiyoshi (Taiwan)(Malaysia).

Seishiro, KOBAYASHI Seizo, MATSUI Iwane, TERAUCHI Hisaichi, TOJO Hideki, and UMEZU Yoshijiro.[3]

21. In Counts 1 and 2 of the Common Indictment, the Prosecutors charge the accused with criminal responsibility for crimes against humanity based on the system of sexual slavery, known as the "comfort women" system, instituted and sustained by the Japanese military. The Prosecutors allege that under the system of sexual slavery, high-ranking Japanese officials accused caused thousands of women and girls to be enslaved and subjected to pervasive mental and physical violence, including rape and other forms of sexual torture, mistreatment, and death.[4]

22. In Count 3 of the Common Indictment, the Prosecutors also charge Emperor HIROHITO and YAMASHITA Tomoyuki with rape as a crime against humanity for the mass rapes inflicted upon the female population of Mapanique in the Philippines on November 23-24, 1944. This rape is included as an example of the many incidents of the Japanese military's mass rape of women of local populations which were not tried before the IMTFE; it is also before this Tribunal because survivors of Mapanique, inspired by the courage of "comfort women" survivors, spoke out and joined the quest for justice and healing.

23. The Prosecutors request that the accused be found guilty under Article 3 of the Charter, which identifies two standards of responsibility. The first, Article 3(1), provides for individual responsibility where the accused planned, ordered, instigated, committed, or otherwise aided or abetted the rapes and sexual slavery. In addition, Article 3(2) provides that the accused may be found responsible for certain crimes committed by their subordinates that they as high-level commanders and superiors failed to prevent, halt, or punish. The Prosecutors allege that the evidence shows that each accused:

> planned, participated in and/or condoned or omitted to act in regard to the illegal system of military sexual slavery perpetuated through the comfort stations from 1937 through 1945. In addition, each defendant is also responsible for the rapes perpetrated against the comfort women in perpetuation of the system of comfort stations.[5]

24. In addition to the Common Indictment, the Prosecutors have submitted an Application for Restitution and Reparations pursuant to Article 4 of the Charter of this Tribunal. In the Application, the Prosecutors assert that the state of Japan incurs responsibility for the alleged crimes and they seek reparations from the state for the harm inflicted on women as a result of these criminal acts, and for the continuing harm inflicted because of the failure of Japan to fulfil its duty to prosecute perpetrators, provide reparations, and take other measures to remedy the original wrongs.[6]

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3 The names of both accused and witnesses are spelled and arranged according to the native practice of their particular nationality, so inconsistency in usage in this Judgement is due to attempts to refer to a person in the way in which they would normally be referred to depending on their nationality. This Judgement omits, however, the accents used in original language because of the tendency of such accents to corrupt in the English text, particularly when transmitted electronically.

4 Common Indictment, para. 40.

5 Common Indictment, para. 48.

6 Charter of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, Article 4 (b) (ii) and (iii).

E. STANDARD OF PROOF

25. The Charter of this Tribunal is silent regarding the standard of proof to be applied in assessing responsibility under the Common Indictment. Accordingly, the Judges are tasked with determining the appropriate standard of proof based on international legal norms and precedents applicable to the crimes committed in 1937-1945. Our analysis stems from a commitment to the principle that individuals have a right to be presumed innocent until proven guilty. From this right flows the universal rule that the guilt of the accused must be proved. We note that under international law, the standard of proof is not specified in international legal instruments, with the exception of Article 66(3) of the Rome Statute of the International Criminal Court (ICC Statute), which provides: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt." While the post-war Tribunals did not often articulate the standard applied, we note that the Nuremberg Tribunal did so on occasion. For example, it found the defendant Schacht not guilty as charged because the evidence provided by the prosecution was not sufficient to establish his guilt "beyond a reasonable doubt."[7]

26. The Human Rights Committee has subsequently affirmed, in General Comment 13, that,

> by reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.[8]

Accordingly, this Tribunal adopts the position that, to find an accused guilty, it is necessary for the Prosecutors to prove "beyond reasonable doubt" that the accused committed the necessary *actus reus* and possessed the requisite *mens rea* of the crimes alleged.

27. Article 14(2) of this Tribunal's Charter provides that the Judges may decide that an accused is guilty, not guilty, or that there is "insufficient evidence available to the prosecutors" upon which to make such a finding. This latter option would be an unusual procedure for formal legal systems that espouse the presumption of innocence. Most formal legal systems provide only two choices: guilt or innocence. But here, the Judges recognise the wisdom of the authority granted to us by the Charter's third alternative. This is appropriate because this is a Peoples' Tribunal with the purpose of discovering the truth and pronouncing upon the responsibility of those who are accused. As discussed in Part VI, the capacity of this Tribunal to discover the truth is limited by the massive destruction of documents carried out by the Japanese military in conjunction with its surrender and by the continued concealment of pertinent information by the state of Japan and the World War II Allied states. A purpose of this Judgement is to alert states, including Japan and the Allied states, to the violations and to the responsibility to provide reparations and, as part of that, to reveal the truth. The Judgement is thus a piece of the historical record that will always be incomplete and is still being withheld. And finally, as this Tribunal has no capacity to punish or compel, we find it appropriate to consider the third option – a pronouncement of insufficient evidence in lieu of a finding of not

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7 IMT Judgement, p. 137.

8 Human Rights Committee, General Comment 13, para. 7.

guilty. We note that on two occasions the IMTFE also declined to make a finding of guilt or innocence as to particular counts of the Indictment.[9]

28. Notwithstanding that the record available is partial due to the deliberate destruction or nondisclosure of documents by the state of Japan and other governments, the Judges consider that the fundamental presumption of innocence must be adhered to in this proceeding. Accordingly, we can find an accused guilty only if guilt is proved beyond a reasonable doubt. At the same time, the Charter enables us to balance the rights of the victims against the rights of the accused and thus, we may deem it inappropriate to declare an accused "not guilty" when evidence strongly suggests, but does not conclusively prove, culpable conduct.

F. THE ACCUSED

29. The accused in this case held some of the highest level positions in the Japanese government and military during the war. The information below is simply a summary of the highest levels of authority that the accused held during 1937-1945, the time period covered by the Common Indictment.

30. HIROHITO Emperor Showa was the Head of State of Japan and Supreme Commander of the Armed Forces. His political powers were independent of and superior to the legislative, judicial, and administrative powers of the Japanese government. The Prime Minister, Ministry of War, Home Ministry, and other cabinet members were bound by the Meiji Constitution to advise HIROHITO about domestic and international political relations and military operations of Japan and the Governors-General of Taiwan and Korea reported directly to him.

31. ANDO Rikichi was the Commander of the 21st Army from November 1938 to February 1940 and Commander of the South China Area Army from February to October 1940. He also served as Commander of the Taiwan Army from November 1941 until February 1945. From December 1944 until the end of the war, ANDO was the Governor General of Taiwan.

32. HATA Shunroku acted as the Commander of the Taiwan Army from August 1936 until August 1937 and as Commander of the Central China Expeditionary Army in 1938. After serving as the Minister of War from August 1939 to July 1940, HATA was appointed, in March 1941, to the position of the Commander of the China Expeditionary Army until November 1944.

33. ITAGAKI Seishiro served as the War Minister between June 1938 and August 1939. He was thus directly responsible to the Emperor. ITAGAKI was appointed as the Chief of Staff of the China Expeditionary Force from August 1939 until July 1941. He also acted as Commander of the Korea Army from July 1941 until April 1945 when he began serving as the Commander of the 7th Area Army stationed in Southeast Asia.

34. KOBAYASHI Seizo was Governor-General of Taiwan from 1936 until 1940. In this capacity and when he acted as cabinet minister from December 1944 until March 1995, KOBAYASHI reported to the Emperor.

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[9] The IMTFE Judgement made "no finding" as to Count 55 for Dohihara Kenji (at Verdict, p. 49,779) and ITAGAKI Seishiro (at Verdict, p. 49,800).

35. MATSUI Iwane held the position of Commander of Shanghai Expeditionary Army and Central China Area Army for seven months during 1937 and 1938.

36. TERAUCHI Hisaichi was the Commander of the North China Area Army from August 1937 until December 1938 and, from November 1941 until the end of the war, he was Commander of the Southern Expeditionary Army in Philippines, Indonesia, Malaysia, Timor, and Burma. He was also Minister of War from March 1936 until February 1937 when he was appointed the Inspector-General of Military Education.

37. TOJO Hideki was Chief of Staff of the Kwantung (Guangdong) Army in 1937; in May of the following year, he became the Vice-Minister of War. From October 1941 to July 1944 he held the positions of Prime Minister and War Minister, and during this period he held the position of Home Minister for some time. As Prime Minister, TOJO was in a position and had a duty to review and report to the Emperor the actions of all governmental ministries involved in the war effort. From February until July 1944, TOJO also served as Chief of General Staff of the Army.

38. UMEZU Yoshijiro was the Vice Minister of War from March 1936 until May 1938 when he became the Commander of the 1st Army in May 1938. After serving as Commander of the Kwantung (Guangdong) Army from September 1939 until July 1944, UMEZU was appointed Chief of General Staff of the Army in July 1944.

39. YAMASHITA Tomoyuki served as Commander General of the 14th Area Army from September 1944 to September 1945. In this capacity, he directed and was responsible for Japanese troops operating in the Philippines, including the area of Mapanique.

G. NOTICE TO JAPAN AND PROCESS FOR CONSIDERATION OF DEFENCES

40. The Registry of this Tribunal served the Prime Minister of Japan with notice of these proceedings, including an invitation to participate in the proceedings, on November 9, 2000 and November 28, 2000. The Judges regret the lack of response by the Japanese government to this invitation. Although this Tribunal is not an official court of law, the Judges bear in mind the approach of the International Court of Justice in circumstances where both parties do not take part in proceedings before it. Article 53 of the Statute of the International Court of Justice provides: "Whenever one of the parties does not appear before the Court, or fails to defend his case, the other party may call upon the Court to decide in favour of its claim."[10]

41. In fulfilling its mandate to discover the truth, this Tribunal declines to enter a summary or default judgement on behalf of the complainants and will instead endeavour to consider all defences the accused might conceivably raise on their own behalf had they agreed to participate.

42. Accordingly, in the interests of justice and fairness, the Tribunal will consider the anticipated arguments of the individual accused and of the Japanese government. To this end, we requested that the anticipated arguments of Japan be compiled by an attorney assisting us as *amicus curiae* (or "friend of the court") and we are very grateful for the *amicus curiae* brief submitted by Imamura Tsuguo in response to this request.[11] We will

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10 Statute for the International Court of Justice, 3 Bevans 1153, 26 June 1945, Article 53. See also Articles 36 and 37.

11 Exhibit 1, *Amicus* Brief, Imamura Tsuguo. We appreciate also the additional *Amicus Curiae* Brief submitted by Suzuki Isomi, Exhibit 226.

also consider arguments advanced by the Japanese government in cases pending before its courts,[12] and the responses of the Japanese government to the reports of UN Special Rapporteurs who have investigated and condemned the "comfort women" system.[13]

H. THE PROCEEDINGS

43. The Tribunal sat in Tokyo from December 8 until December 10, 2000 and took testimony of survivors, experts, and perpetrators. On December 12, 2000 the Tribunal orally issued its Preliminary Findings. Sixty-four survivors were present at the proceedings of the Tribunal, seeking justice not only for themselves but also for an indeterminable number of girls and women who did not survive or who continue to live in silence. Some of the survivor-witnesses testified in person and, because of the limited time allotted to the prosecution teams, still more gave testimony through videotape and affidavit, some of whom also appeared in the proceedings. All presenting live testimony were sworn in by the Registrar and made an oath to testify truthfully and those present whose testimony was presented by video also affirmed the truth of their statements. During the course of the trial, the Tribunal heard testimony of the most horrific and inhumane treatment, surpassing imagination, giving rise to the question of how human beings can act so inhumanly, and underscoring the violence to which gender, racial/ethnic discrimination and war can lead.

44. In addition to the testimonies of the victim-survivors, the Tribunal heard and received in written form the testimonies of historians, of legal experts and psychologists, and of two former Japanese soldiers who testified about their participation in rape crimes and in the "comfort women" system. The Tribunal received documentary evidence from memoirs of officials involved in the war and from the limited official documentation available to the public. The Tribunal considered a small number of documents which, having survived the Japanese military's pre-surrender destruction of documents, had been discovered by researchers or voluntarily released by the government of Japan or other states.

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12 See, e.g., The Case of Hainan Island "comfort women" seeking written apology, etc., the 24th Civil Department of Tokyo District Court, Docket No. (wa) 14808 of Heisei 13 nen (2001); The Case of Taiwanese "comfort women" claiming compensation and written apology, Panel of Judges, the 26th Civil Department of Tokyo District Court, Docket No. (wa) 15638 of Heisei 11 nen (1999); The Case of victims of sexual violence in Shan-xi Province, China, claiming compensation, etc., The 44th Civil Department of District Court, Docket No. (wa) 24987 of Heisei 10 nen (1998); The Case of Chinese "comfort women" claiming compensation, etc. (2nd group), The 10th Civil Department of Tokyo District Court, Docket No. (wa) 3316 of Heisei 8 nen (1996); The "koso" appeal Case of Chinese "comfort women" claiming compensation, etc. (1st group), The 5th Civil Department of Tokyo High Court, Docket No. (ne) 3775 of Heisei 13 nen (2001) (original claim dismissed at the 23rd Civil Department of Tokyo District Court on 30 May 2001); The "koso" appeal case of Korean victims of the Asia-Pacific War claiming reparations, The 16th Civil Department of Tokyo High Court, Docket No. (ne) 2631 of Heisei 13 nen (2001) (including Kim Hak-sun and seven other women) (original claim dismissed by Tokyo District Court on 26 March 2001); The Case of Pusan "comfort women" and Women's Labour Corps members claiming official apology, etc. (claim dismissed on 29 March 2001 by Hiroshima High Court (reversing the decision of Shimonoseki Branch, Yamaguchi Dist. Court of 27 April 1998)); The Case of Dutch POWs and civilian detainees claiming compensation (koso-appeal dismissed by Tokyo High Court on 11 Oct. 2001); the "jokoku" Appeal Cases of Philippino "comfort women" claiming compensation, the 1st Petty Bench of the Supreme Court, Docket Nos. (o)949, 950 of Heisei 13 nen (2001) – (ju) 930,931 of Heisei 13 nen (2001) (koso-appeal dismissed by Tokyo High Court on 6 Dec. 2000); The "jokoku" Appeal Case of SONG Shin-do claiming apology, etc., the 2nd Petty Bench of the Supreme Court, Docket Nos (o)315 of Heisei 13 nen (2001) – (ju) 302 of Heisei 13 nen (2001) (Korean resident in Japan) (koso-appeal dismissed by Tokyo High Court on 30 Nov. 2000).

13 See, e.g., Report of the Special Rapporteur on Violence against Women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission Resolution 1997/44, UN Doc E/CN.4/1998/54, 26 January 1998; Final Report of the Special Rapporteur on Systematic rape, sexual slavery and slavery-like practices, Ms. Gay J. McDougall, to the UN Economic and Social Council, E/CN.4/Sub.2/1998/13, 22 June 1998 (hereinafter, McDougall Final Report).

45. The Tribunal appreciates the courage and dignity of the survivors who offered their eloquent testimony as well as the impressive efforts of the Prosecutor teams who provided the evidence in a comprehensive, effective, and professional manner. The Tribunal also appreciates the former soldiers' willingness to testify as well as their candour in recounting their own criminal activity and that of their fellow soldiers, officers, and subordinates. Appreciation is also due to the legal experts and to the historian experts, who have uncovered and analysed with extreme care the surviving documents, and to the psychological experts who have devoted their attention to healing and to revealing here the traumas of rape, sexual slavery, and other forms of sexual violence.[14] Appreciation is also due to those who provided support to the survivor-witnesses in the preparation and presentation of their painful testimonies, and to the translators who worked tirelessly for many months to enable these proceedings to be understood by all.

46. The evidence before this Tribunal is but a small portion of the documentary, scholarly, and historical evidence available that illuminates the violations of and damage to the former "comfort women." Because this is a Peoples' Tribunal, we may on occasion refer to other material to more fully contribute to the historical record engendered by these proceedings, but information outside the official record will be relied upon only insofar as it confirms existing evidence and will not be taken into account in relation to assessing the guilt of the accused.

I. THE POTENTIAL ARGUMENTS OF THE ACCUSED AND THE JAPANESE GOVERNMENT

1. Arguments Concerning Criminal Responsibility Under the Common Indictment

47. Before considering the facts and making our findings, the Tribunal summarises the anticipated arguments of the state of Japan with respect to the criminal responsibility of the accused under the Common Indictment. The arguments not disposed of here will be considered in greater depth in the appropriate sections of this Judgement.

(a) Lack of Jurisdiction

48. The Tribunal notes that its jurisdiction is not recognised by the state of Japan. Japan maintains that jurisdiction to adjudicate is ancillary to the sovereignty of a state and belongs only to states and/or international organisations recognised by states as authoritative adjudicators. On this basis, it might claim that this Women's Tribunal has no international legal standing and thereby lacks the power to prosecute individuals. The lack of jurisdiction claim is also made regarding the Application for Restitution and Reparations.

(b) Denial of Due Process

49. All criminal defendants have the right to a fair trial.[15] This includes the right to defend oneself in person or through counsel,[16] to be presumed innocent,[17] and to call and examine

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14 This Judgement will footnote the documents relied on as well as the testimony or submission of experts. We have quoted extensively from the testimony of survivors but we do not include transcript cites thereto.

15 Article 10 of the Universal Declaration of Human Rights (UDHR).

16 Article 11(1) of the UDHR; Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR).

17 Article 14(3)(d) of the ICCPR.

witnesses.[18] An *amicus* argues that prosecuting posthumously defendants who cannot be present at trial and cannot present their defence violates due process rights. In support, the *amicus* points to the Criminal Procedure Law of Japan that prohibits the continuation of a trial once a defendant is deceased.[19]

(c) Non-Applicability of the Laws of War to the Annexed Territories

50. The Japanese government has argued in other fora that the sexual slavery of the "comfort women" does not give rise to legal responsibility because the victims were not nationals of a belligerent state. It asserts that the laws of war only apply to conduct committed by the Japanese military against nationals of a belligerent state and do not apply to Japanese persons or persons of colonised countries, like Korea and Taiwan.[20] The Tribunal need not address this argument applicable only to the Japanese, Korean, and Chinese "comfort women" as the Indictment does not charge violations of the laws or customs of war but only crimes against humanity. Crimes against humanity can be committed against any civilian population, including nationals of the perpetrator state.

(d) Violation of the Non-Retroactivity Principle — Nullum Crimen Sine Lege

51. The Tribunal notes that the accused may not be tried for acts that were not crimes at the time that the acts were committed. This principle expressed in Latin as *nullum crimen sine lege*, also known as the principle of legality, is a fundamental principle of criminal law that prevents retroactive application of the law.[21] The principle protects against punishing a person who has not had notice that his or her actions are illegal at the time the acts are committed. In this case, the Common Indictment charges the accused with rape and sexual slavery as crimes against humanity. The accused could conceivably assert that these proceedings violate the principle of legality because crimes against humanity were newly recognised and defined by the Nuremberg and IMTFE Tribunal's Charter, and thus their actions did not constitute crimes at the time of their commission.

52. With regard to the sexual violence charged as crimes against humanity, the Japanese government has also argued in other contexts that rape during armed conflict was not prohibited by the Regulations annexed to the Hague Convention No. IV of 1907, or by applicable international customary norms in force at the time the acts were committed. Japan has also argued that the 1929 Geneva Convention is not applicable because Japan was not a signatory and that Convention was not evidence of custom. Additionally, with regard to the charge of sexual slavery, Japan might maintain that the crime of sexual slavery or enslavement does not accurately describe the "comfort station" system and, in any event, that the prohibition against slavery was not established as a customary norm under applicable international law at the time of the crimes alleged in the Common Indictment. It might further assert that when Japan ratified the 1921 Convention on Suppression of the Traffic in Women and Children, it exercised its prerogative to declare that Korea and Taiwan were not within the scope of the Convention.

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18 Article 14(3)(e) of the ICCPR.

19 Exhibit 1, Amicus Brief, Imamura Tsuguo, p.2, Item #4.

20 Japan submitted a paper as an official U.N. document titled "Japan's policy on the issues of violence against women and 'comfort women'" (E/CN.4/1996/137) on 27 March 1996. The document contested the Report written by Special Rapporteur Radhika Coomaraswamy; Views of the Government of Japan on the Addendum 1 to the report of the Special Rapporteur on Violence against Women, E/CN.4/1996/53/Ass.1 (hereinafter "Views of Japan").

21 Article 15 of the ICCPR; Andrew Ashworth, Principles of Criminal Law (1991) pp. 59-60.

(e) Violation of Double Jeopardy

53. No one can be tried or punished more than once for the same crime or for a crime based on the same underlying conduct.[22] Many of the accused might contend that because they have already been tried for crimes based on their activities during World War II, the Tribunal lacks legal authority to try them again for crimes committed during the war. As previously noted, the sexual violence crimes charged here were not prosecuted before the IMTFE or its related military tribunals.

(f) Lack of Criminal Responsibility of Commanders or Other Superiors

54. An *amicus curiae* asserts that criminal liability requires that the accused have the mental intent to commit rape and sexual slavery and that they had the ability to prevent the crimes. The *amicus* argues that the accused in this case were not aware of the extent to which the women were forced to provide sexual services or that the women were maintained under conditions amounting to slavery. Alternatively, it contends that even if the accused had the requisite knowledge, they had no real power to prevent or stop the situation.[23]

(g) Non-Coerciveness of the "Comfort System"

55. Some members of the Japanese government have contended that the "comfort women" were not forcibly recruited and held as sex slaves under conditions of enslavement, but were instead voluntary prostitutes who were paid for their services and were free to return home when their contracts expired.[24]

(h) Immunity of Emperor HIROHITO

56. An *amicus* argues that the Emperor of Japan enjoys absolute immunity under international law and the Constitution in force during the war. Further, it asserts that the negative consequences to Japanese society resulting from trying and holding Emperor HIROHITO accountable for crimes committed during the Asia-Pacific Wars makes it imprudent for the Tribunal to prosecute him, because the Emperor is the "symbol of the State and the unity of the people."[25] It is also claimed that he had no real power, as he was merely a figurehead and, therefore, cannot be held responsible.

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22 Article 14(7) of the ICCPR. This principle does not include situations such as "hung juries" in which jurors are unable to reach agreement as to the guilt or innocence of an accused, in which case the accused is sometimes, but not always, retried before a differently constituted jury.

23 Exhibit 1, Amicus Brief, Imamura Tsaguo, p. 3.

24 Exhibit 1, Amicus Brief, Imamura Tsaguo, p. 2, Item #4.

25 Exhibit 1, Amicus Brief, Imamura Tsaguo, p. 3; Exhibit 219, Chronological list of remarks; Yoshimi Yoshiaki, Comfort Women: Sexual Slavery in the Japanese Military During World War II (1995) (Yoshimi, Comfort Women.)

2. Arguments Concerning State Responsibility: The Application for Restitution and Reparations

57. Beginning in 1992, the government of Japan and various officials therein began to recognise, in general terms, the coercive nature of the "comfort system" and admitted that the government was involved in establishing the system.[26] Despite these admissions, the Japanese government has put forward various arguments in other fora regarding its lack of responsibility to compensate victims for the Japanese military sexual slavery during the war. Some of these arguments are the same as those listed above relating to the authority of the Tribunal to try the accused for these crimes. Other arguments specifically relate to state responsibility. Among the arguments not already outlined above, and which will be considered *infra*, are the following:

(a) Statute of Limitations

58. The state of Japan might assert that any civil or criminal cases concerning the activities of the Japanese military during the Second World War are now time-barred and that it is too late to bring a claim for either individual or state responsibility.

(b) No Individual Standing to Claim Reparations

59. Japan has asserted in other contexts that individual "comfort women" have no right to reparations since individuals have no standing under international law to bring claims against the state. It further contends that while Article 3 of the Hague Convention No. IV of 1907, which was ratified by Japan, obligates state contracting parties to pay indemnity for violations, it does not provide individuals with a right of action.

(c) Individual Claims Settled by the Peace Treaties

60. Japan has also asserted that whatever individual claims the survivors may have had for compensation or other reparations, they were fully satisfied and extinguished by peace treaties and international agreements reached between Japan and the Allies as well as other Asian states following the end of the Second World War. The position of the Japanese government is further that it has diligently fulfilled all its obligations under the treaties.[27]

61. Additionally, while denying any legal obligation to provide reparations, the government of Japan may assert that it has fulfilled its "moral" obligation through its facilitation of and contributions to the Asian Women's Fund, established in 1995.

62. The arguments not disposed of above will be considered in the pertinent sections of the Judgement on the Common Indictment and the Application for Restitution and Reparations.

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26 See Exhibit 219, Chronological list of remarks.

27 See Exhibit 218-a, p. 2, Postwar responsibilities by Etsuro, Totsuka.

J. THE LEGAL AND MORAL BASIS OF THE WOMEN'S INTERNATIONAL WAR CRIMES TRIBUNAL

1. The History of Peoples' Tribunals

63. The Women's International War Crimes Tribunal is not the first Peoples' Tribunal – it is built upon prior examples, such as the Vietnam War Crimes Tribunals instituted by Lord Bertrand Russell in the late 1960s.[28] The Russell Tribunal passed a just condemnation upon the horrific practices that occurred within Vietnam perpetrated by the governments and militaries of the United States of America, South Korea, New Zealand and Australia during the Vietnam War. The leading motivation behind the creation of the Russell Tribunal was dissatisfaction with the inadequacies of legal processes within the sovereign states to deal with the atrocities of war occurring within Vietnam. The Tribunal's establishment also was influenced by the European intellectual leadership of Lord Bertrand Russell and Jean-Paul Sartre, who were similarly dissatisfied with international responses, including the response of the United Nations, to the atrocities.[29]

64. Another example of a Peoples' Tribunal is the permanent Peoples' Tribunal established in Italy in the 1970s by "private citizens of high moral authority" from a number of countries.[30] This Tribunal has a continual existence over a number of years and has examined a series of alleged violations of international law to which there have been inadequate official response, including the Soviet military intervention in Afghanistan, that of Indonesia in East Timor, and the Turkish genocide of the Armenians. Reports are published based on the findings of the Tribunal and the application of international law to those findings. The reports provide a valuable alternative source of evidence and jurisprudence around contested applications of international law.[31]

65. Peoples' Tribunals are premised on the understanding that "law is an instrument of civil society"[32] that does not belong exclusively to governments whether acting alone or in conjunction with the states. Accordingly, where states fail to exercise their obligations to ensure justice, civil society[33] can and should step in. As seen in the examples of the earlier Tribunals, civil society is not constrained by state boundaries but inspired by common shared values that extend across borders. The Tribunal recalls the words of

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28 Against the Crime of Silence: Proceedings of the International War Crimes Tribunal (John Duffet ed., 1970). The tribunal met in three sessions in 1966-1967 to consider the United States responsibility for war crimes in Vietnam. An important predecessor to this Tribunal was the International Tribunal on Crimes Against Women, held in Brussels, Belgium from March 4-8, 1976. See The Proceedings of the International Tribunal on Crimes Against Women (Diana E.H. Russell and Nicole Van de Ven eds., 1976.)

29 The words of Jean-Paul Sartre in his inaugural statement to the Russell Tribunal in 1967 bear this out: "That the United Nations, considering all the consequences of what had just been achieved, would, by a vote of the General Assembly, have consolidated it into a permanent tribunal, empowered to investigate and to judge all accusations of war crimes, even if the accused should be one of the countries that had been responsible for the sentencing."

30 Richard Falk, The Rights of People (in Particular Indigenous Peoples), in The Rights of Peoples (James Crawford ed., 1988), p. 28.

31 Started in June 1979, the Permanent Peoples' Tribunal is by statute an organ of the Lelio Basso International Foundation; it is historically connected to the Russell Tribunals I and II (opinion tribunals), differing, however, in that its main research is in the field of the "law for the rights of peoples". The norms of this law are not established by states but by the requirements and exigencies of peoples, and the law according to which the Peoples' Tribunal judge derives from facts and the examination of reality, so as to pass "sentences" which strike, in a legal form, those responsible for the violation of such rights. The Permanent Peoples' Tribunal is permanent and is characterised by the ideological pluralism of the members of the jury selected on the basis of their moral, academic, and literary qualities.

32 Falk, The Rights of People, p. 29.

33 For what constitutes civil society, see Mutunga, Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997 (1999), Chapter 2.

Shridath Ramphal and Ingvar Carlsson, co-chairs of the Commission on Global Governance:

> [N]ation-states find themselves less able to deal with the array of issues – some old, some new – that face them. States and their people, wishing to control their destinies, find they can only do so only by working together with others. They must secure their future through the commitment to common responsibility and shared effort; [what] is also new is the role of people and the shift of focus from states to people. An aspect of this change is the growth of international civil society. These changes call for reforms in the modes of international co-operation – the institutions and processes of global governance. The international system that the UN Charter put in place needs to be reviewed. The flaws and inadequacies of existing institutions have to be overcome. There is [a] need to . . . enabl[e] citizens to exert their democratic influence on global processes.[34]

66. To ignore violative conduct is to invite its repetition and sustain a culture of impunity. Such culture exposes the system to corruption and destruction by its own agency. That a Peoples' Tribunal's power is limited to exercising moral authority is due to the continued grip of the state on the formal institutions of international law. These institutions are beginning to grant non-state actors a limited right of standing, for example through the admission of *amicus curiae* briefs. The Statute of the International Criminal Court also recognises the right of victims to participate in the proceedings.[35] Formal international legal opportunities are, nonetheless, limited and it is through Peoples' Tribunals that the voices of international civil society can be most strongly heard.

67. Legal responses to atrocities have given rise to innovative international and national proceedings over the past decade, particularly through international criminal tribunals and truth and reconciliation commissions. Peoples' Tribunals take their place among these responsive processes. While a Peoples' Tribunal cannot sentence or order reparations, it can make recommendations backed by the weight of its legal findings and its moral force.[36]

68. A Peoples' Tribunal can step in to fill lacunae in international law and to forge new ground in the development of international law by creating a "law of peoples" arising from principles of humanity and justice. John Rawls has contrasted traditional international law with the "law of peoples":

> I note the distinction between the law of peoples and the law of nations, or international law. The latter is an existing, or positive, legal order, however incomplete it may be in some ways, lacking, for example, an effective scheme of sanctions such as normally characterises domestic law.

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34 Foreword, Report on Global Governance (1995).

35 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, Article 68(3) (hereinafter ICC Statute).

36 It remains the task of global civil society to ensure that the Judgement of the Tokyo Tribunal 2000 is disseminated and implemented. Civil society in the country of origin and in the countries of the World War II Allies and victims have a particular obligation to ensure that pressure is exerted upon the Japanese government to provide reparations. For example there is no reason why Japanese civil society, through mass action and civil disobedience and other forms of advocacy and activism, cannot pressure the Japanese to admit the truth and to provide remedies for the "comfort women." Ultimately, the implementation of the judgements of Peoples' Tribunals rests on civil society and not on national or international institutions.

> The law of peoples, by contrast, is a family of political concepts with principles of right, justice, and the common good, that specify the content of a liberal conception of justice worked up to extend to and to apply international law.[37]

69. While recognising our authority as a Peoples' Tribunal to fashion the "law of peoples," we nonetheless consider our jurisdiction confined by the law of states as of the time of the violations charged herein and as it has evolved with respect to state responsibility. We do so in order to assure that the state of Japan cannot evade the force of our Judgement on ground of *nullum crimen sine lege* or on the non-applicability to it of the legal principles expressed here.

70. Fresh approaches to international law can go a long way to giving international law increased legitimacy, especially in areas where state sovereignty operates to obstruct the just condemnation of unjust practices. The sovereignty of the people of the world, the voice of global civil society, is the source of the supreme law because states are not the authors of their own power and law. The essence of the concept of sovereignty is that sovereignty comes from the people, not the state, nor an elite class of privileged social groups.[38] The state must serve the interests of the people. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, for example, in their clauses on political participation, assume that sovereignty belongs to the people.[39] Common Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[40] on the right of all peoples to self-determination, is also based on this concept. Future initiatives will continue the struggle to create and manifest legal structures and institutional mechanisms which respond to civil society. The word "mock trial" inaccurately describes the work of the Peoples' Tribunal, as it is not a fake trial, but essentially a real trial without legal force.

71. This Peoples' Tribunal represents a belief that states cannot, through their political agreements and settlements, ignore or forgive crimes against humanity committed against individuals. Three characteristics in particular distinguish this Tribunal from its predecessors. First, these proceedings were held in Japan, the country which has perpetrated the wrongs charged in the Indictments and the Application for Restitution and Reparations. Second, it is a Women's Tribunal, a Tribunal specifically established by an international committee of women's groups to redress crimes of sexual violence against women. Third, the Tribunal was established by grassroots organisers from within the victimised countries rather than by distinguished persons from outside. It focuses upon crimes of sexual violence and slavery routinely discounted in peace settlements and effectively erased from or ignored in the official records.

72. The reliance in the earlier Peoples' Tribunals upon well-known persons from "cultural, legal and religious life"[41] did not, however, ensure the inclusion of women's voices

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37 J. Rawls, The Law of Peoples, in On Human Rights, The Oxford Amnesty Lectures (Stephen Shute and Susan Hurley eds., 1994), pp. 50-51.

38 Liberal and neo-liberal jurists can be the basis of this jurisprudential position. The discussion of Locke (social contract) and Rousseau (general will) is a starting point. Rawls is yet another source. See Rawls, The Law of Peoples; Dias Jurisprudence (4th ed. 1976) Butterworths, London, pp. 95-96, 98. In the area of case law, see e.g. Uganda v. Commissioner of Prison, Ex Parte Matovu [1966] E.A. 514; State v. Dosso [1958] S.C. Pak. 533.

39 UDHR, Article 21; ICCPR, Article 25.

40 ICCPR, Article 1, and ICESCR, Article 1.

41 Richard Falk, The Rights of People, p. 28.

(despite the presence of Simone de Beauvoir as a Judge in the Russell Tribunal).[42] In the 1990s, the social movements for the empowerment of women and for the greater promotion and protection of human rights have drawn together and have, through a range of initiatives, prompted some changes within national and international structures.[43] Such initiatives include public hearings on discrimination, crimes of oppression, and violence against women, including in armed conflict. For example, the Vienna World Conference on Human Rights and the Beijing Fourth World Conference on Women sought to raise awareness of the extent and severity of gender-based violence and other forms of direct and indirect discrimination against women. The Tribunal also notes the proliferation of public hearings around the world addressed to violence against women and other previously ignored violations.[44] In some cases, the public hearing has taken the form of a community demand, such as the historic march of Rwandan women calling for justice for women before the International Criminal Tribunal for Rwanda (ICTR)[45] in the *Akayesu* case.[46] This Tribunal goes further in combining consciousness-raising with a formal process allocating responsibility for the commission of such offences. It illustrates the value in certain contexts of devising strategies that combine traditional women's organising methodologies – networking, consciousness raising, and alliance building – with procedural initiatives that have established legitimacy among states and within civil society.

73. Taking the above into consideration, we are persuaded by the argument of the Prosecutors that sovereignty ultimately resides in the people of each state and territory and therefore the region. The People as holders of this sovereignty have the right to require states to adhere, at the least, to their international obligations, particularly those that relate to the protection of the individual and concern breaches of international humanitarian law, international human rights law, and customary norms of international law. The Judges therefore find that this Tribunal has been given jurisdiction over the proceedings by the People of the region.

74. The Judges also wish to emphasise from the outset that it has already concluded in its Summary of Findings that the Emperor HIROHITO incurs criminal liability for his acts or omissions in relation to the "comfort system" as does the state of Japan for failing in its responsibilities to remedy this horrendous wrong. Further, we set forth in this Judgement the extensive factual findings and legal analyses underpinning those determinations as well as legal findings as to criminal responsibility of the other accused. The Tribunal also issues its factual and legal findings concerning criminal responsibility for the rapes at

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42 See Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: A Feminist Analysis (2000), pp. 90-93.

43 Christine Chinkin, Human Rights and the Politics of Representation: Is there a Role for International Law, in The Role of Law in International Politics (Michael Byers ed. 2000), p. 131.

44 For example, see Crimes Against Women: The Proceedings of the International Tribunal (Diana Russell ed. 1976, rep. 1984); Report on the Public Hearing on Crimes against Women in Recent Wars and Conflicts and the Events Around the International Criminal Court in Tokyo from 8-12 December 2000, coordinated by the Women's Caucus for Gender Justice; Charlotte Bunch and Naimh Reilly, Demanding Accountability, The Global Campaign and Vienna Tribunal for Women's Human Rights (Center for Women's Global Leadership, 1994); World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 of 12 July 1993; Fourth World Conference on Women, Beijing Declaration and Platform for Action, UN Doc A/CONF.177/20 of 17 October 1995.

45 International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc S/INF/50 annex (1994) [ICTR Statute or Rwanda Statute].

46 Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, 2 Sept. 1998, T. Ch. I (*Akayesu* Trial Chamber Judgement).

Mapanique. We note with extreme dismay, however, that notwithstanding the condemnation of the "comfort system" by several United Nations Rapporteurs and the acceptance of their reports by the political bodies of the United Nations, numerous cases brought by survivors of the "comfort system" against the state of Japan have been dismissed, often summarily, in formal legal proceedings brought in Japan, the US, and elsewhere. It is our hope that the determinations of this Tribunal will not provide the former "comfort women" with the only form of redress they ever receive, particularly in light of their advancing years; but rather that the force of the Judgement of this Peoples' Tribunal will finally persuade the state of Japan, the Allies, and the international community at large to fulfil their respective responsibilities to ensure the long and painfully overdue legal recognition of wrongdoing and provision of full remedies to the survivors and to those who claim on behalf of women who did not survive the atrocities.

2. The Multilateral Nature of International Human Rights Law: Obligations Owed Erga Omnes

75. The Tribunal considers that certain breaches of international law are of concern not only to the victim state but also to the broader international community. We take into account the views of the International Court of Justice (ICJ) in the *Barcelona Traction* case. The ICJ drew an essential distinction between "obligations of a state towards the international community as a whole, and those rising vis-à-vis another State in the field of diplomatic protection." The Court noted: "By their very nature the former are the concern of all States….[A]ll States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[47] Even if the creation of such obligations is an essentially bilateral matter, the violation of those obligations is not. All states (and peoples) have an interest in the enforcement of obligations *erga omnes*.

76. Commentators suggest that public international law demands the enforcement of state obligations *erga omnes* in the same way that a municipal community demands regulation through a core structure of public or criminal law in addition to private contracts operating between individual members of the community.[48] Thus, in this example, individuals may be regarded as free to control and dispose of their own interests in the system, but have no right to control or dispose of the community interest. In the international context, it is permissible for a victim state to waive a right to reparation for its injury, but not to release the actor from the obligation to obey the law as to individuals. In essence, a victim state may excuse, but not exculpate. Accordingly, other states may respond to internationally wrongful acts under international law that give rise to obligations *erga omnes*, for example crimes against humanity, as well as address the continuing failure to accept responsibility for the commission of such crimes.

77. This reasoning flows from the establishment of the Nuremburg Tribunal and the IMTFE. The Allies asserted jurisdiction on behalf of all the victim states and individuals affected by crimes committed during the Second World War in Europe and in the Asia-Pacific region. This Tribunal's findings regarding the application of the Peace Treaties signed by Japan after the Asia-Pacific Wars are centrally related to the precedent established in these earlier fora and shall be discussed later in the Judgement.

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47 Barcelona Traction, 1970 ICJ Rep at 32.

48 See e.g. Vaughan Lowe, Precluding Wrongfulness or Responsibility: A Plea for Excuses, European Journal International Law (1999), pp. 405-411.

78. The concept of obligations *erga omnes* has widened to encompass not only the notion of accountability of states to other states, but also accountability of all international actors to individuals, international civil society, and states alike. This, in fact, is reflected in the United Nations Charter, which refers to "We the Peoples." In this communitarian view of international law, "[m]embership of [the international] community and subjection to at least, its basic norms cannot be understood as an optional matter hinging on anterior expressions of state volition."[49]

79. The Draft Articles on State Responsibility 2000 provisionally adopted by the International Law Commission's Drafting Committee reflect a similar approach and explicitly state:

> The obligations of the responsible State … may be owed to another State, to several States, or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation.[50]

80. In addition to holding states accountable, all states clearly have an interest in ensuring that international crimes, particularly those as egregious as crimes against humanity, are redressed. Certain international crimes, including slavery, are considered so heinous and so threatening to international peace and security that the crimes – and their individual perpetrators – are subject to universal jurisdiction. This means that any state may prosecute alleged individual violators, regardless of where the crime was committed or against whom it was committed.[51] Individual or superior criminal responsibility are separate from state responsibility, and universal jurisdiction over certain international crimes – including war crimes and crimes against humanity – is applicable to individuals. Many of the post World War II war crimes trials held in Europe were explicitly based on universal jurisdiction.[52]

K. THE TOKYO TRIBUNAL AS A CONTINUATION OF THE IMTFE

81. In adjudging the Common Indictment, this Tribunal sits as if it were a reopening or continuation of the IMTFE and the subsidiary trials held in the Asia-Pacific. This is justified because those tribunals did not charge or adjudicate the responsibility of the accused herein for war crimes or crimes against humanity with regard to the "comfort system" or the mass rapes committed in Mapanique. As to those accused who were tried by the post-war Tribunals, this Tribunal will treat these proceedings as an extension of their trial.

82. Accordingly, we shall heed the Charter of the IMTFE insofar as it is relevant to the current proceedings and we note its jurisdictional authority as follows:

> Article 5. Jurisdiction Over Persons and Offenses: The Tribunal shall have the power to try and punish Far Eastern war criminals who as

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49 John Tasioulas, In defence of relative normativity: communitarian values and the Nicaragua case, 16 Oxford Journal of Legal Studies (1995), p. 85.

50 Draft Articles on State Responsibility 2000, UN Doc. A/CN.4/L.600, 11 August 2000 (hereinafter Draft Articles 2000) Article 34(1).

51 Slavery Convention, signed in Geneva 25 September 1926, 46 Stat. 2183, 60 L.N.T.S. 253, Article 5.

52 See discussion in Law Reports of Trials of War Criminals, Vol XV, pp. 23-48.

> individuals or as members of organisations are charged with offenses, which include Crimes Against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.
>
> Crimes Against Peace…;
>
> Conventional War Crimes: Namely, violations of the law or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory;
>
> Crimes Against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.
>
> Article 6. Responsibility of Accused: Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[53]

83. As an extension or continuation of the IMTFE proceedings, it is appropriate to consider the evidence before, and findings of, the IMTFE where applicable. The record and Judgement of the IMTFE contain findings of fact regarding matters relating to certain issues raised in the present case. We note, for example, that the IMTFE found that "torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese army and navy."[54] On the basis of the evidence before it, the IMTFE found that the "atrocities committed in all theatres of war [were] on a scale so vast, yet following so common a pattern in all theatres, that only one conclusion is possible – the atrocities were either secretly ordered or willfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces."[55] This Judgement will incorporate and draw upon these findings.

L. THE INAPPLICABILITY OF AMNESTY

84. This Tribunal finds that there are no amnesties that apply to the adjudication of the Common Indictment before this Tribunal. First, as a Peoples' Tribunal, our Court is not bound by the agreements of states, certainly not by agreements resulting in impunity for international crimes. Furthermore, on signing the Treaty of Peace in San Francisco on 8

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53 IMTFE Charter, Article 5 (emphasis added).

54 IMTFE Judgement (Roling), p. 385.

55 IMTFE Judgement (Roling), p. 385.

September 1951,[56] the state of Japan "accepted the judgements of the International Military Tribunal for the Far East and of other allied war crimes courts both within and outside of Japan."[57] On this basis, Japan consented to both the jurisdiction and Judgement of the IMTFE. Due to the fact that our jurisdiction to consider the Common Indictment before us is likewise based on international law existing at the time the crimes were committed and involves charges that should have been prosecuted in 1946, we consider that there is no amnesty which limits our jurisdiction from considering these issues as a matter of international law.

56 San Francisco Treaty of Peace, 136 UNTS 45, p. 47.

57 San Francisco Treaty of Peace, Article 11.

PART II – FACTUAL FINDINGS

A. DESCRIPTION OF THE EVIDENCE RECEIVED

85. With respect to the question of the criminal responsibility of the individual accused, the nine Prosecutor teams and the two co-Chief Prosecutors presented an impressive amount of evidence regarding the history of the Japanese aggression in the Asia-Pacific region, the painstaking development of the military sexual slavery system, and the horrific experiences of the girls and women enslaved in the system. Thirty-five survivors, who were present and sworn, testified at the proceedings directly or through video interviews about how they were repeatedly raped and otherwise abused by Japanese soldiers or officers. Other unsworn testimonies were received through video and affidavit.

86. The Judges emphasise that, in conformity with formal judicial proceedings, our findings are based solely on the evidence before us and on general factual information that is so commonly accepted that we can take "judicial notice" of it. We note that there is a plethora of other evidence or documentary sources that were not proffered at trial and thus are not part of the official record. Hence, we decline to take these other sources into account in making our deliberations as to guilt. Our findings on the rape and enslavement of women during the war in the Asia-Pacific are based, therefore, predominantly on the testimony of victim-survivor witnesses themselves, many of whom testified in person before this Tribunal. While indicative of the crimes generally, this testimony represents merely a fraction of horrors suffered by the totality of women and girls affected. Likewise, the testimony we heard from two former perpetrator-soldiers represents but a miniscule portion of the vast number of Japanese military personnel who engaged in rape and participated in maintaining the system of military sexual slavery. And, finally, as discussed, *infra*, the documents we examined are only the fraction of documents which survived the massive destruction and concealment carried out by Japanese officials.

B. THE TESTIMONY OF THE SURVIVORS

87. Virtually all of the victim-witnesses who testified before this Tribunal testified publicly, using their own name and declining protective measures such as image or voice distortion devices. Only one survivor – Ms. X – testified under a pseudonym. This fact alone demonstrates the extraordinary courage and strength of the victim-witnesses, as even in domestic settings, victims of sex crimes seldom testify publicly in open court about the crimes committed against them.

88. The Judges find each of the witnesses who testified in person or in video at the proceedings to be credible and we accept their testimony as reliable and trustworthy. It was evident during their testimony that the survivors remain deeply scarred by their experiences and we consider that their obvious suffering is further evidence of the truthfulness and veracity of their stories. While the Judges have observed minor discrepancies in the oral and documentary evidence on occasion, we note that such discrepancies are normal and must be considered in light of the circumstances, particularly the over five decades since the crimes occurred; the youthfulness of many witnesses when the crimes were committed against them; the repeated and traumatising nature of the crimes; and the fact that the women were typically kept in conditions that prevented them from knowing such details as exact dates and precise locations. Inconsistencies in some details in no way indicate that the witness was not subjected to rape or sexual slavery.

89. We agree with the ICTY Trial Chamber Judgement in the *Kunarac* case, which dealt with the sexual slavery of young girls, that the level of detail which such witnesses could be expected to recall may be different from that expected of witnesses who were older at the time the crimes were committed against them. The most important criteria are whether the witnesses have recounted the essence of the events in acceptable detail and whether the Judges find their testimony credible.[58] Finally, we note that the women's testimony was presented in order to document and prove the existence of the system of sexual slavery; it was not relied upon by the Prosecutors to identify particular accused or their involvement in the crimes charged. The prosecution presented expert testimony and documentary evidence to establish their case against the accused. Moreover, the Prosecutors did not allege that any accused were the physical perpetrators of any crimes alleged in the Common Indictment. Therefore, once a finding is made that rape and sexual slavery were committed systematically and on a large scale, any discrepancies in minor details of the particular incidents of rape and sexual slavery would not affect the findings as to criminal responsibility of the accused. Hence, the minor discrepancies are ultimately irrelevant to the final determinations of this case.

C. DOCUMENTARY EVIDENCE REGARDING THE ROLE OF JAPAN OR THE ACCUSED IN ESTABLISHING AND MAINTAINING THE "COMFORT SYSTEM"

90. The Prosecutors also presented evidence in documentary form from the archives of Japan and some of the Allied countries and from memoirs of former officers and others involved regarding the history of the system of the Japanese military sexual slavery. While the documents are valuable as evidence of official responsibility for the "comfort system" and impelled the state of Japan to acknowledge, at least generally, its participation and the coercive nature of the "comfort women" system, the Japanese documents available to us are but remnants of the full record in respect to state responsibility. As discussed in the Judgement on State Responsibility, upon orders from the highest authorities, the Japanese military and government engaged in the deliberate destruction of documents relating to the war. It appears that, if not destroyed, the remaining documents were classified and few have been declassified either by the government of Japan or the Allied governments. Considering the perceived importance of the "comfort system" to Japan's war of aggression, the pervasiveness of the "comfort stations," and the sheer magnitude of the system, the destroyed, concealed, or withheld documents must contain information regarding the "comfort women" system and the responsibility of the accused therein. Nonetheless, despite the partial record and the role of the government of Japan in destroying evidence, we limit our holdings to the evidence before the Tribunal.

91. A significant amount of documentary evidence was entered into the trial record. Due, however, to space considerations and an effort to avoid repetitive or duplicative evidence, only a few of the documents that are of special significance are summarised below.

1. The Recruitment Memo and Taiwan Army Telegram No. 602

92. Two internal documents produced during the war by the Japanese government and military provide substantial evidence of the pervasive responsibility for "comfort station" policy-making and operation at all levels of the government hierarchy. The first is a memorandum entitled "Matters Concerning the Recruitment of Women" ("Recruitment

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58 Prosecutor v. Kunarac, Judgement, IT-96-23 and IT-96-23/1, 22 February 2001, paras. 564-565 *(Kunarac* Trial Chamber Judgement*)*.

Memo") sent on March 4, 1938 by an Adjutant General in the Japanese War Ministry to the Chiefs of Staff of the North China Area Army and the Central China Expeditionary Forces.[59] This incriminating document provides insight into the military's efforts to disguise the coercive nature of the "comfort system", the complicity of local authorities, and the military's supervision of and involvement with private actors in the recruitment process. The Recruitment Memo is reproduced in full below:

> Notice from the Adjutant to the Chiefs of Staff of the North China Area Army and Central China Expeditionary Force.
>
> In recruiting women domestically to work in the military comfort stations to be set up in the areas affected by the China Incident, it is feared that some people have claimed to be acting with the military's consent and have damaged the honour of the army, inviting the misunderstanding of the general public. We are also afraid that, through the mediation of the reporters following the military and people visiting soldiers, people are recruiting women unsupervised and causing social problems. There have also been instances where a lack of proper consideration resulted in the selection of inappropriate people to round up women, people who kidnap women and are arrested by the police. There are many things that require careful attention. In the future, armies in the field will control the recruiting of women and will use scrupulous care in selecting people to carry out this task. This task will be performed in close cooperation with the military police or local police force of the area. You are hereby notified of the order [of the Minister of War] to carry out this task with the utmost regard for preserving the honour of the army and for avoiding social problems.

93. This memo appears, at first, to suggest that the Ministry of War was concerned with ending kidnapping as a means of "procuring" women for the "comfort stations." However, the document does not instruct the chiefs of staff of the North Chinese Area Army and the Central China Expeditionary Force, as the noted recipients of the document, either to ensure that the women consent to their "recruitment" into the "comfort station" system, or to avoid the "recruitment of minors." Instead, the document urges them to "carry out this task with the utmost regard for preserving the honour of the army and for avoiding social problems." The chiefs of staff and the Central China Expeditionary Force were thus notified by this memorandum that the "recruitment" methods included the kidnapping of women. They were warned by the memo that they must be careful not to generate social problems as a result of their recruitment practices, and told that the military police and local police should be involved in the recruitment. The recipients of the document were, therefore, not only on notice that force and coercion were used to "recruit" the women; but they were also ordered to perform their functions within the "comfort system" more discreetly, with the cooperation of military or local police.

94. The Judges consider this Recruitment Memo as evidence of the responsibility of the Japanese military in the coercive or deceptive recruitment of girls for the "comfort system."[60] The Judges find that, in light of the totality of the evidence adduced at trial, the

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59 Registry No. 222-C.

60 This Recruitment Memo was uncovered by Professor Yoshimi, who testified in written form regarding its significance. The Recruitment Memo revealed for the first time the direct involvement of the Japanese government in the creation and operation of the "comfort station" system, and is widely believed to have motivated the Japanese government to publicly

principal concern of the War Ministry was protecting the image of the army and avoiding complaints and rebellion; it was not ensuring respect for and the consent of the "procured" women.

95. The Recruitment Memo provides compelling evidence that the Ministry of War was aware of the coercive methods used to force women into the system. The lack of specific and clear instructions by the Ministry of War to ensure that the women were agreeing to provide sexual services demonstrates a deliberate and palpable disregard for their well-being. Rather, the order to work closely with military and local police, expressed in the Recruitment Memo and in other documents, demonstrates that the War Ministry knowingly authorised the forcible or coercive recruitment of women for the "comfort stations."

96. In addition to the Recruitment Memo, which provides evidence generally of the involvement of the Japanese government and military in the coercive operation of the "comfort stations," other documents in evidence directly substantiate the involvement of several of the accused in the sexual slavery system. One important document is a confidential telegram from the Commander of the Taiwan Army, ANDO Rikichi, to the War Minister, TOJO Hideki, titled "Tai-den No. 602" or "Taiwan Army Telegram No. 602," dated 12 March 1942. The notations on the document indicate that it was received by the Ministry of Army No. 2259 on 17 March 1942. The telegram states:

> In regard to the Secret Telegram of Army No. 63, we've been asked by the Southern Army General Command to dispatch as soon as possible 50 native comfort women to 'Borneo'. On the basis of Secret Telegram of Army No. 623, we request travel permits for the 3 operators named below [names deleted by Japanese authorities], who have been investigated and selected by the military police.[61]

97. This telegram substantiates the claim that ANDO and TOJO were directly involved in the operation of the "comfort women" system and knew that military police were involved in the selection of station proprietors. It is extraordinary that the Minister of War would be involved in such a seemingly insignificant detail as authorising travel permits for three "comfort station" operators and this confidential telegram is indicative of the high priority the military placed upon securing "comfort women" for the soldiers and the secrecy surrounding the system.

98. The Ministry of War responded to the above telegram on March 16, 1942[62] with "Riku-a-mitsu No. 188" or the "Secret Telegram of the Army 188." This response was authored by the Adjutant General of the War Ministry and sent to the chief of staff of the Taiwan Army.[63] It states that "the authorization requested in Tai-den No. 602, dated 12th of

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acknowledge this involvement. As explained in Professor Yoshimi written testimony, this document reveals that the Ministry of War was concerned about the reputation of the Japanese army among the population and that it ordered each expeditionary force to supervise the rounding up of women and to choose the recruiters more carefully. That task was to be carried out in close cooperation with the military or local police. Professor Yoshimi also explained that the phrase "You are hereby notified of the order [of the Minister of War] to…" used within the recruitment memo is very important because it signifies that the document was issued with the authorisation of the War Minister, Sugiyama Hajime, and that the Ministry of War was involved in the development of "comfort station" policies.

61 Registry Nos. 4 and 158.

62 Although the date of the telegram is one day prior to the date the first telegram is marked "received", the Tribunal is not in a position to determine the cause of the discrepancy.

63 Registry No. 5.

March, is hereby granted by order of superior authority." Clearly, procedures involved with the "comfort women" system were a matter to be handled by high level officials. The correspondence between and participation of the Minister of War and Commander of the Taiwan Army establishes that the top government and military officials were involved in "comfort station" policy-making, and that the accused ANDO and TOJO were part of the chain of command which determined and implemented such policies.[64]

2. Allied Reports

99. Two reports by the Allied powers concerning interviews with women from a "comfort station" in Burma corroborate that the Japanese Imperial Army was involved both directly and indirectly in establishing and operating the sexual slavery system and provide support for the contention that Allies had evidence of the coercive nature of the "comfort system."

100. The two Allied reports are based upon information obtained from interrogations held in Burma of "20 Korean Comfort Girls" who had been maintained in "comfort stations." Also interviewed were two Japanese civilians, a couple identified as the "proprietors" of the women. The reports indicate that the "girls" and the two Japanese civilians were "captured" by Allied forces and confined by U.S. troops to a stockade. The interrogations took place between August 20 and September 10, 1944 by the U.S. Office of War Information Psychological Warfare Team attached to the US Army Forces in the India-Burma Theatre. The interrogation responses were compiled and subsequently published in the "U.S. Office of War Interrogation Report No. 49" ("OWI Report").[65] Originally classified "Secret" by the United States, the OWI Report also refers to "other reports

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64 A series of documents dealing with the procurement policies of the Taiwan Colonization Company to provide women for the "comfort stations" and the involvement of the Company in building "comfort stations" reveal the Taiwan Government-General's close oversight of the "comfort stations" in Taiwan. The first is a document entitled "On the Naval Comfort Station in Hainan Island" dated April 4, 1939 and authored by the President of the Taiwan Colonization Company, Kato Kyohei, with two other persons. This document reports that Kihara Enji, the Research Section Manager of the Government-General of Taiwan, asked Takayama Sanpei, the director of the Taiwan Colonization Company, to dispatch 90 women to Hainan Island – 10 *Geigi*, 50 *Shogi*, and 30 *Geigi* and *Shogi*. *Geigi* indicates a geisha who also serves as a prostitute. *Shogi* means a licensed prostitute. According to the expert witness Professor Hayashi Hirofumi, the Taiwan Colonization Company thought it inappropriate to do the job itself and so ordered it done by its subsidiary Fukadai Company.

Another document titled "Proper Supply of Materials to Hainan Island" was authored by the President of the Taiwan Colonization Company on April 21, 1939. In this document, the President reported to Morioka Jiro, Director-General of the Government-General of Taiwan, that "specially required personnel" for the "comfort station" were on board the ship "Kinreimaru" which left Jilong Port on April 18, 1939. The document lists three managers of the comfort station and 13 women between the ages of 17 and 41 identified as potential *geigi* (a geisha who also serves as a prostitute), and *shakufu* (a waitress who also is a prostitute). The document was published in *Operations Review*, 1938, Vol.2, Research Section, No. 43. The expert witness Professor Hayashi testified that these women were most likely Japanese women living in Taiwan.

In conjunction with this project, a "List of Persons Associated with Taiwan Colonization Company Who Went over to Hainan Island (as of June 19, excluding those who returned to Taiwan), Cooperation in Military Activities in Central and South China after the China Incident" dated June 19, 1939 was produced by an unknown author. It lists the persons who left for Hainan Island on April 1, April 18, and May 24. The list includes labourers, "specially required personnel" (and indicates persons involved in the "comfort station" including "comfort women"), and construction workers and the carpenters for the "comfort station." Moreover, the address on the list of four Japanese *Geishi* and four Japanese *Shakufu* is the same as that of Okuda Jinzaburo, manager of the "comfort station." The document corroborates the work of the Corporation in establishing "comfort stations."

The final document in this series relating to the Taiwan Colonization Company is entitled "Outline of the Construction Work in Hainan Island." This document was written by "Sakai" of the Taiwan Colonization Company and dated July 26, 1939. The document states that the "construction business in Hainan Island is what a joint three-ministry meeting requested . . . through the Government-General of Taiwan." These documents demonstrate that the three-Ministry meeting engaged the Taiwan Colonization Company to 'recruit' women and construct stations through the Government-General, which oversaw the company's work.

65 Exhibit 11, U.S. Office of War Information, Psychological Warfare Team, Attached to the US Army Forces India-Burma Theatre, October 1, 1944, Japanese Prisoner of War Interrogation Report No. 49 (OWI Report).

which show that 'comfort girls' . . . [were] . . . found wherever it was necessary for the Japanese Army to fight." The second report, also a US military document, is also based on interviews with the twenty comfort women and two proprietors, and is titled the "SEATIC Psychological Warfare Interrogation Bulletin No.2" ("SEATIC Bulletin").[66] Although the interviewees are the same, it is not known whether the reports are based on the same set of or separate interviews.

101. The OWI Report and the SEATIC Bulletin provide valuable information about the conditions within the "comfort stations" and details about recruitment practices. While the two reports differ in several respects, it is clear, from a comparative reading of the reports, that they are based upon interrogations of the same individuals during the same time period. The Judges read the documents together in order to compare and contrast the information contained therein.

102. Both documents state that the women were employed by contract and according to contract terms at the same time as they make clear that these contracts were not voluntary. The OWI Report indicates that Japanese agents recruited women by deception. The women interrogated for the OWI Report stated that they were told by recruiters that they would provide "comfort" services, such as visiting the wounded, rolling bandages, and "generally making the soldiers happy." The OWI Report states that most of the women targeted for recruitment were uneducated. In addition, the report makes clear that far from tending to recuperating soldiers in a safe and comforting environment, the women were forced into sexual servitude and held during their period of "service" in close proximity to battlefields. The Allied bombing forced them to seek shelter in foxholes and some of the bombs hit the "comfort stations" wounding or killing many of the women inside. The OWI Report also mentions that the women were ordered to follow retreating soldiers and were ultimately abandoned by them.

103. The OWI Report states that the women and girls signed contracts to abide by Japanese army regulations and work for the "house master" for six months to a year. The term period of the contract depended upon the amount of money received by the family. This is corroborated by the SEATIC Bulletin's description of the women's terms of "contract" and the means by which they were acquired. The SEATIC Bulletin states that the "proprietor" of each "comfort station" purchased the women from their families for 300-1000 Yen each, "according to [their] personality, looks, and age," and as a result she became "his sole property." The OWI Report states that the women were "enticed" to "enlist for comfort service" upon which they were "rewarded with an advance of a few hundred yen."

104. The OWI Report describes a "comfort" facility in Burma as "near-luxury . . . in comparison to other places," especially when considering the availability of food, toiletries, and money to buy things and to shop in town.[67] It also states that women could refuse customers and that they were paid well. However, 50-60% of their gross pay (1500 Yen per month) went to the house master who also made "conditions very difficult for the girls by charging them high prices for food and other articles." The SEATIC Bulletin states that the women's maximum gross takings were 1500 Yen per month, and

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66 Exhibit 59, Southeast Asia Translation and Interrogation Center (SEATIC), Psychological Warfare, Interrogation Bulletin No. 2, January 2, 1945 (SEATIC Bulletin), in conjunction with Research Report, Amenities in the Armed Forces, No. 120, 15 Nov. 1945, Allied Translator and Interpretor Section, Supreme Commander for the Armed Forces.

67 The OWI Report states that in Burma the women were usually "quartered" in a large two-story building, typically a school, and that they tended to have separate rooms where "each girl lived, slept, and transacted business."

the minimum was 300 Yen, "or by rule of the house the [woman] had to pay the brothel owner a minimum of 150 Yen per month." It also states that owners charged women exorbitant prices for both necessities and luxuries. These factors combined indicate that the situation was slave-like despite the existence of some provision for payment. If the girls and women were purchased or otherwise did not freely consent to work as "comfort women," at the outset or at any point thereafter, their situation was slavery notwithstanding efforts to disguise that reality.

105. The OWI Report states that, in late l943, the Japanese army issued orders that certain girls who had paid their debts could go home. The Judges' note, however, that the latter order occurred more than one year after the women's arrival in Burma in August l942 and there is no indication that any of the women actually left. The SEATIC Bulletin also states that the contract conditions for the women included a provision indicating they would be provided with free return passage home when their debt was repaid with interest. The SEATIC Bulletin confirms that despite this contract provision, no woman left Burma as a result of such release.[68] However, the SEATIC Bulletin reports that in June 1943 the women who were free from debt were to be assisted by the Japanese army to return home less than a year after their arrival in Burma. The SEATIC Bulletin notes that only one woman qualified for such assistance and that in any event she was purportedly "easily persuaded to remain" in Burma. As earlier indicated, the Judges will carefully scrutinise claims of voluntary participation in the "comfort station" system because overwhelming evidence suggests that slave-like conditions and involuntary recruitment constituted fundamental characteristics of the system as a whole. In this case the source of the information regarding the woman who remained in Burma was the "proprietor" who had "bought" her, a singularly unreliable source on the issue of voluntariness. Based upon such meager information, it is highly questionable that the woman who "was easily persuaded to remain" in fact continued to work within the "comfort station" system of her own free will, whether she was coerced to remain by the proprietors or they took advantage of the wartime conditions that precluded her from leaving.

106. As mentioned, the OWI Report states that the Japanese army established detailed regulations that imposed inhumane conditions upon the "comfort" women and girls. The regulations, provided the time schedule, according to military rank, for sexual services to be provided by the "comfort women." The women interrogated for the OWI Report stated that they were required to be available to Japanese military personnel from 10 am to 12 midnight. The regulations also permitted officers to stay overnight. A second schedule regulated access for the different army units to avoid problems of "congestion" although officers were allowed access to the women seven nights a week. The Japanese army assigned military police to "keep order" but the "congestion" was often too great and caused "ill-feeling" among the soldiers. The OWI Report states that the "girls" held in Burma had the prerogative to refuse a "customer," particularly "if the person were too drunk." The Japanese army supplied condoms to the facilities and to the soldiers directly. Finally, it states that army doctors checked the women for diseases weekly, and both women and soldiers were secluded if diseased, noting that "a soldier did not lose pay during the period he was confined."

107. The Judges find that the description of the realities of "comfort" station conditions contained in the OWI Report, despite references to "near-luxury" facilities in some locations, confirms the testimony of the survivor-witnesses before this Tribunal. Most

68 The SEATIC Bulletin implies that women were prevented from leaving due to war conditions.

witnesses testified both to the deceptive recruitment practices of the Japanese military and private actors acting on behalf of and with the knowledge of the Japanese military, and to the detailed regulation of military access to the women for the purpose of forced or coerced sexual intercourse or other forms of sexual violence.

108. The foregoing documents represent only a portion of the documentary evidence entered into the trial record concerning the responsibility of high-level Japanese officials in establishing and maintaining the sexual slavery system.

D. DECLARATIONS AND ADMISSIONS OF THE STATE OF JAPAN

109. Until 1992, the Japanese government denied any involvement of the military or state in the coercion of women and girls into and in the "comfort system". When the victim-survivors began to speak out and independent researchers discovered incriminating documents, which put Japan under domestic or international pressure, various officials made important albeit partial admissions of state responsibility.

110. On 13 January 1992, two days after Professor Yoshimi disclosed the discovery of six incriminating documents, Chief Cabinet Secretary Kato Koichi issued a public statement that "the Japanese military's involvement [in the 'comfort system'] is underniable."[69]

111. On 4 August 1993, the government of Japan released a report of the findings of government investigation and document survey entitled "On the Issue of Wartime "Comfort Women".[70] Issued by the Cabinet Councillors' Office on External Affairs, this report contains euphemistic but significant admissions. The study lists the findings as follows:

> The comfort stations were established in response to the request of the military authorities at the time…
>
> Comfort stations [were established because of] 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 area occupied by the then Japanese military [and] the need to prevent loss of troop strength by venereal and other diseases, and the need to prevent espionage….

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69 Exhibit 219. See also Asahi Shimbun, 14 January 1992. In the same statement, Secretary Kato also apologized for the suffering of "comfort women"; the matter of the apology is dealt with *infra*. On 11 January 1992, the Asahi Shimbun, a leading Japanese daily newspaper reported Professor Yoshimi's discovery of these documents. Professor Yoshimi's book does not specify what these six documents are, but George Hicks identifies five of them as follows: a notice from the War Ministry dated 4 March 1938 to the North China Expeditionary Force recommending to exercise great care in selecting recruitment agents; a circular from North China Headquarters to units under its command dated 27 June 1938 cautioning against illegal acts including rape and calling for sexual comfort; a 2nd Army with a table covering 854 comfort women under Army control and 150 under private management; and a general circular, dated 18 June 1942, to overseas agents regulating the supervision of comfort stations. George Hicks, The Comfort Women, 1994, pp. 164-165.

70 Exhibit 231, Cabinet Councillors' Office on External Affairs, "On the Issue of Wartime "Comfort Women", 4 August 1993. The subsequent statements of the Japanese government on the "comfort system" have been largely reiterations of the August 1993 statement, which have not added any new information or official documents to shed light on the nature of government involvement. The most up-to-date statement of the Ministry of Foreign Affairs of Japan as of August 2001, for instance, repeats verbatim the August 1993 statement. See, e.g., "Recent Policy of the Government of Japan on the Issue Known As "Wartime Comfort Women", August 2001 http://www.mofa.go.jp/policy/women/fund/policy0108.html (last visited 14 Sept. 2001).

> A comfort station was established in Shanghai…in 1932 [and] it is assumed that comfort stations were in existence since around that time to the end of the World War II….The countries or areas where it has been possible to confirm…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…it is impossible to determine the total number of comfort women, as no document has been found….However, in view of the fact…that comfort stations were operated in extensive areas for long periods, it is apparent that there existed a great number of comfort women…
>
> Many comfort stations were run by private operators, although in some areas there were cases in which the Japanese military directly operated comfort stations. Even in those cases…the Japanese military was involved directly or indirectly in the establishment and management of the comfort stations by such means as granting permissions to open the facilities, equipping the facilities, and 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….
>
> In the war areas, these women were forced to move with the military under constant military control and they were deprived of their freedom and had to endure misery…
>
> 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 recruitment…
>
> The Japanese military approved requests for [transporting] comfort women…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.[71]

112. In an official statement accompanying this report, Chief Cabinet Secretary Kono Yohei stated:

> 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

[71] Exhibit 231, pp. 3-8.

> personnel directly took part in the recruitments. They lived in misery at comfort stations under a coercive atmosphere.
>
> 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.[72]

113. By contrast to the evidence in this case, the report and declarations of Japanese officials minimise the heinous crimes committed. They nonetheless weigh heavily in our consideration of the responsibility of the military for and the nature of the "comfort system" as, a crime against humanity involving rape and sexual slavery.

114. While we welcome these initial steps toward acknowledging overall responsibility for the suffering inflicted through its military sexual slavery system and treat them as admissions for the purposes of this proceeding, the evidence presented before us illustrates that these admissions are both partial and overly general, as discussed *infra* in Part VI on State Responsibility.

E. THE HISTORY OF THE JAPANESE MILITARY AGGRESSION IN THE ASIA-PACIFIC REGION

115. As the Judgement of the IMTFE reveals, the Japanese government and military sought to dominate the entire Asia-Pacific region beginning at the end of the nineteenth century and continuing through the first half of the twentieth century, by waging aggressive war against targeted territories. The IMTFE found that Japan's plan was to "secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein or bordering thereon."[73] In doing so, the Japanese military commanders and government officials perpetrated, facilitated, and permitted some of the most horrible and inhumane atrocities against the civilians (and prisoners of war) in the conquered and occupied Asia-Pacific territories. This section consists of a brief chronological review of the advance of the Japanese army and its treatment of the civilian population in order to provide the framework for the establishment of the so-called "comfort stations" in the next section. The vast majority of the evidence concerning crimes common to the Japanese aggression in all countries and in specific countries comes from the Judgement of the IMTFE and is summarised below.

1. Crimes Common to the Japanese Aggression Throughout the Asia-Pacific

116. According to the IMTFE, the Japanese aggression was marked by similar patterns throughout the Asia-Pacific in addition to the crimes involved in the military sexual slavery system. Mass rape, accompanied by sadistic brutality, occurred in such places as Manila, China, the Philippines, Indonesia, and Hong Kong.[74] The women who were raped included civilian women of the Philippines and Indonesia, as well as some women who were the mothers, wives, and other female relatives of the Indonesian oil fields' personnel. Nurses in Hong Kong were also raped en masse by the Japanese soldiers who captured military hospitals.[75] The rapes in Manila were engendered "when it became

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72 *Ibid.*

73 IMTFE Judgement, p. 49762.

74 IMTFE Judgement (Roling), p. 397-400.

75 IMTFE Judgement (Roling), pp. 397-399.

apparent that Manila would be liberated."[76] The rapes in China, especially in Nanking, gained international notoriety, as discussed hereinafter.

117. Other forms of torture, such as the water treatment method (wherein water is pumped into the victim until he or she is rendered unconscious, then pressure is applied to the abdomen, often by jumping on the victim's stomach, in order to force the water out), and the burning of sensitive body parts, including sexual organs, occurred in such places as the Philippines, Malaysia, Indonesia, and East Timor.[77] Forcing persons to kneel on sharp instruments without movement for hours was particularly prevalent in the Philippines and Malaysia.[78] The knee spread method, which causes the separation of knee joints and intense pain, was common in the Philippines, Indonesia, and East Timor.[79] Applying electrical shocks to parts of the body, including sexual organs, was a common form of torture throughout the Philippines, Malaysia, and Indonesia.[80] Another tortuous method which consisted of suspension by the wrists, arms, legs and neck, and at times in such a manner "as to strangle the victim or pull joints from their sockets" occurred with regularity in the Philippines, Indonesia, and East Timor.[81] Other tortuous acts, such as bayoneting infants in the arms of their mothers, slicing open the breasts and wombs of women, and severing male genitalia, were prevalent in the Philippines.[82]

118. Another major type of atrocity, the death marches, occurred in the Philippines, Malaysia, and Indonesia.[83] Civilian internees (included with the captured American prisoners) in the Philippines were forced to march in extreme heat for several days with little food or water. Those who attempted to seek water, or who fell by the wayside, were shot or bayoneted. The IMTFE found that TOJO visited the Philippines in February 1942 in his capacity as War Minister and saw the dead bodies littering the sides of the roads, and asked General Homma about it.[84] In Malaysia, the Japanese soldiers also forced civilian internees in the prisoner of war camps to go on death marches. One of the most flagrant examples of their atrocities was during the construction of the Burma-Siam Railway, when, on the advice of TOJO, the Japanese army used the prisoners of war and civilian internees for the construction of the railroad. Soldiers forced them to march over 200 miles of the most inhospitable and rugged terrain under inhumane conditions, including receiving little food or water, no shelter, and being constantly driven and beaten by the soldiers. Those who tried to escape were killed.

119. The IMTFE also found that "[m]assacres of prisoners or war, civilian internees, sick and wounded, patients and medical staffs of hospitals and civilian populations were common throughout the Pacific War," including shortly after capture.[85] Mass executions occurred in Indonesia, and in one instance there, against oil field personnel in apparent retaliation for the destruction of oil fields in Java.[86] There were also several instances of wholesale

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76 IMTFE Judgement (Roling), p. 398.
77 IMTFE Judgement (Roling), p. 407.
78 IMTFE Judgement (Roling), p. 407.
79 IMTFE Judgement (Roling), p. 407.
80 IMTFE Judgement (Roling), p. 407.
81 IMTFE Judgement (Roling), p. 407.
82 IMTFE Judgement (Roling), pp. 399, 409.
83 IMTFE Judgement (Roling), p. 401-404.
84 IMTFE Judgement (Roling), p. 401.
85 IMTFE Judgement (Roling), p. 396.
86 IMTFE Judgement (Roling), p. 397.

massacres of the indigenous Indonesian civilians. Many civilians were forcefully conscripted as labourers for the Japanese war effort and then killed.[87] Mass slaughter also took place in Malaysia, China, French Indo-China, East Timor, the Philippines, and Hong Kong.[88] In some instances, the civilians were massacred by the Japanese because they were suspected of giving aid to prisoners, or in anticipation of Japanese withdrawal and subsequent liberation of the civilian populations in China, Indonesia, East Timor, and the Philippines.[89] Particularly in the Philippines, the Japanese troops carried out wholesale massacres against Filipino civilians,[90] under orders issued by the Manila Navy Defence Force, stating: "[w]hen killing the Filipinos, assemble them together in one place as far as possible thereby saving ammunition and labour." [91] Other orders regarding the annihilation of civilians, issued by the Kiirun Fortified Area Headquarters, commanded: "Whether they are destroyed individually or in groups, or however it is done, with mass bombing, poisonous smoke, poisons, drowning, decapitation, or what, dispose of them as the situation dictates. In any case, it is the aim not to allow the escape of a single one, to annihilate them all, and not to leave any traces."[92] In Hong Kong, the Japanese troops "entered the Military Hospital at St. Stephens College and bayoneted the sick and wounded in their beds,…and murdered the nurses who were on duty there."[93] These are only examples of a pattern of murder and mistreatment that commonly occurred against the civilians of territories under Japanese control.

120. A chronological summary of the Japanese aggression in the Asia-Pacific follows.

2. Taiwan

121. Japan took possession of Taiwan in 1895 when it was ceded to Japan as a result of the Shimonoseki treaty, as part of China's compensation package following China's defeat in the 1894 Sino-Japanese War. As the first colony of imperial Japan, Taiwan and its citizens were controlled by Japan. Taiwan remained colonised during the war in the Asia-Pacific until Japan's surrender in 1945.

122. Japan administered Taiwan through the office of Governors-General who were in charge of all the political and policy matters, military operations, and other Japanese interests in Taiwan. According to expert testimony, these Governors-General reported directly to Emperor HIROHITO until the end of the Asia-Pacific war,[94] and worked in close relationship with the Japanese Army in Taiwan as well as in other occupied territories.[95] From 1936 to 1940 KOBAYASHI was Governor-General of Taiwan, followed by ANDO as the last Governor-General four years later, who served from December 1944 to April 1945.[96] ANDO also served as Commander in Chief of the Japanese Army stationed in Taiwan from November 1941 to February 1945, after having served as Commander of the

87 IMTFE Judgement (Roling), pp. 396-398.

88 IMTFE Judgement (Roling), pp. 397-399.

89 IMTFE Judgement (Roling), p. 398.

90 IMTFE Judgement (Roling), pp. 397-400.

91 IMTFE Judgement (Roling), p. 400.

92 IMTFE Judgement (Roling), pp. 400-401.

93 IMTFE Judgement (Roling), p. 399.

94 Exhibit 40-a, Slide, entitled "The De Facto System of the Japanese Empire Until August 1945," presented as part of Expert Witness, Dr. Hayashi, Hirofumi's testimony, December 8, 2000.

95 Yoshimi, Comfort Women, p. 57.

96 List of Defendants and Titles, submitted by Professor Hayashi, March 12, 2001.

South China Area Army from February 1940, and as Commander of the 21st Army from November 1938.[97]

3. Korea

123. As a result of the Russo-Japanese war of 1904 to 1905, Japan annexed Korea unofficially in 1905, and officially in 1910 via the Korean-Japanese Annexation treaty.[98] Japan ruled Korea until 1945 through a succession of Governors-General. From August 1936 to May 1942 Minami, Jiro served as Governor-General of Korea,[99] followed by Koiso, Kuniaki, who served from May 1942 until July 1944,[100] and then succeeded by ANDO who served until December 1944.[101] According to expert testimony, these Governors-General also reported directly to Emperor HIROHITO.[102] The Japanese government also enforced its rule of Korea through the Japanese troops stationed there, where Koiso first served as the Commander of the Japanese Army in Korea from December 1935 to July 1938.[103] General ITAGAKI was the Commander in Chief of the Japanese army in Korea from July 1941 to April 1945.[104]

124. The evidence shows that the Japanese presence in Korea was one of long and brutal economic and social exploitation of the Korean land and society. The Japanese exported set quotas of food to Japan from Korea every year even though the Korean harvests were not bountiful. Thus by 1933, Korean citizens suffered severe deprivation in their diet.[105] The quotas of food shipped from Korea to Japan increased.[106] When Korean groups resisted Japanese troops, the Japanese reaction was "to arrest and execute innocent civilians and burn their homes."[107] Korean youths were conscripted as labourers and forced to work in mines, factories, and military construction sites overseas, while others were drafted into the Japanese army.[108]

4. China

125. Following its annexation of Korea, the Japanese government and military prepared to extend its domination throughout the Asia-Pacific region. To this end, the Japanese army and government commenced the conquest of China via Manchuria.[109] General Honjo commanded Japan's Kwantung Army, which was already positioned in Manchuria under the provisions of the Portsmouth Treaty.[110] During this period, ITAGAKI was a Colonel on the Staff of the Kwantung Army. He later became Vice Chief of Staff of the same

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97 Exhibit 224, "Chart of High Ranking Positions in the Japanese Government and Military, 1935-1945."

98 Exhibit 19, submitted by the Korean Prosecution, December 8, 2000 (Han Woo-Keum, The History of Korea), pp. 428-465; IMTFE Judgement, p. 48465.

99 List of Defendants and Titles, submitted by Professor Hayashi.

100 IMTFE Judgement, p. 49812; Exhibit 224.

101 Exhibit 224.

102 Exhibit 40-a.

103 Exhibit 224.

104 IMTFE Judgement, p. 49798.

105 Exhibit 19, p. 480.

106 Exhibit 19, p. 95.

107 Exhibit 19, p. 484.

108 Exhibit 19, pp. 496-498.

109 IMTFE Judgement, pp. 48460-48469.

110 IMTFE Judgement, p. 48460.

army in 1934,[111] and from 1936 to 1937 was its Chief of Staff.[112] In 1941, ITAGAKI functioned as the personal emissary of General Honjo to Tokyo to gain support for the plan to invade and colonise Manchuria.[113] The Kwantung Army began its offensive against parts of the Manchuria province, which eventually fell to the Japanese troops, commanded by General Honjo, in December 1931. Manchuria was then declared an "independent" state on February 18, 1932.[114]

126. Meanwhile, Japanese troops were sent to Shanghai on January 24, 1932. Troops remained in the Shanghai vicinity and occupied the Shanghai-Woosung Railway Station. From there, the Japanese army commenced the battle for Shanghai.[115] The advancing Japanese soldiers, under the command of MATSUI, inflicted terrible atrocities upon the Chinese inhabitants in Shanghai and other parts of north-east central China. The Shanghai battle lasted intermittently for the next five years and resulted in serious crimes, including murder and rape, being inflicted on the inhabitants of the area. On November 12, 1937 all of Shanghai finally capitulated to the Central China Expeditionary Force commanded by MATSUI,[116] who had taken control of this force three months earlier in August 1937.[117] The Japanese army continued to rape, murder, and plunder as it advanced to Nanking. For example, the army occupied the town of Soochow in late November 1937 and murdered many of the citizens whom had not fled before the arrival of the Japanese troops.[118]

127. On December 12, 1937, MATSUI's forces entered Nanking (then China's capital) and, as found by the IMTFE, there followed "a long succession of [the] most horrible atrocities committed by the Japanese Army upon helpless citizens."[119] These crimes were so notorious they became known internationally as the "Rape of Nanking." Because the large-scale rape of Chinese women in both the Shanghai and Nanking assaults had a significant effect on the decision to expand the "comfort women" system, these crimes will be addressed in greater depth *infra*.

128. After the Nanking invasion, General HATA replaced MATSUI for a brief period as Commander of the China Expeditionary Army in March 1938. Under HATA's command and supervision, the Japanese troops continued their campaign of rape, murder, and pillage as they conquered major sections of southern China. According to findings of the IMTFE, "in 1938 and again from 1941 to 1944 when HATA was in command of expeditionary forces in China troops under his command committed atrocities on a large scale and over a long period of time."[120] Specifically, the soldiers under HATA's command "freely indulged in murder, rape, incendiarism and many other atrocities" throughout the districts of Hainan Island, Canton, Hankou, Changsha, Kweilin and Liuchow.[121] The IMTFE further found that "HATA's original task was to conquer the

111 IMTFE Judgement, p. 49796.
112 IMTFE Judgement Appendix E, p. 123.
113 IMTFE Judgement, p. 48528.
114 IMTFE Judgement, pp. 48526-48529.
115 IMTFE Judgement, pp. 49089-49090.
116 IMTFE Judgement, p. 49613.
117 List of Defendants and Titles.
118 IMTFE Judgement, (Roling), p. 392.
119 IMTFE Judgement, p. 49815.
120 IMTFE Judgement, p. 49754.
121 IMTFE Judgement, pp. 49613-49617.

triangular area between the cities of Shanghai, Nanking, and Hanghow." Having successfully secured this triangular area, HATA's troops, numbering 300,000 to 400,000, proceeded to move "deep into the interior of China" and captured a number of cities.[122]

129. While HATA waged his campaigns from June 3, 1938 to August 1939, ITAGAKI was appointed as Minister of War. A notable intensification of the war manifested by extensive attacks on China followed his appointment.[123] The IMTFE found that "Japan had hoped the Hsuchow Battle would be decisive by engaging and defeating the main forces of the Chinese Army. As the Chinese Government did not yield, even after the capture of Hsuchow, the Japanese Supreme Command proceeded with the plan to drive on to Hankou to deliver yet another blow to the Chinese in the hope of reaching an end of the Chinese war." ITAGAKI, realizing that the war threatened to become a protracted one, sought to bolster the determination of the Japanese people" and told a news agency "that the Army must be prepared to continue hostilities perhaps for the next ten years."[124] From September l939 to July 1941, ITAGAKI served as the Chief of Staff of the China Expeditionary Forces.[125] HATA served as War Minister, from August 1939 to July 1940, and was succeeded by TOJO serving from July 1940 to December 1941. HATA later returned from July 1940 to November 1944 to serve as Commander of the China Expeditionary Army.[126]

130. The subjugation of China by Japan entrenched Japan's aggressive policies and domination that resulted in unimaginable suffering during the first half of the twentieth century in every Japanese-occupied Asian territory, stretching from China to the most southerly Pacific islands. The IMTFE found that the Japanese military repeatedly perpetrated atrocities, such as rape, torture, death marches, and massacres, against the civilians of the occupied territories.

5. The Philippines

131. The Philippines was made part of the commonwealth of the United States in November 1935 in exchange for the recognition and acceptance by the United States of Japan's pre-eminent interest in the Japanese Co-Prosperity sphere which included China, French Indo-China, the Dutch East Indies, Malaysia, Thailand, and the Philippines.[127] In early December 1941, Japan declared war on the United States by bombing its naval base in Pearl Harbor, Hawaii, and other US military bases in the Pacific, including Davao City in the southern Philippines.[128] Following the attack, Japanese forces landed in the northern Philippines on December 10, 1941, declared Manila an open city on December 26, and formally established its military regime in that territory in early January 1942.

132. At the time of the Japanese occupation of the Philippines, General TERAUCHI, was Commander in Chief of the Southern Area Armies, which included the 14th Area Army used to invade the Philippines where he was stationed subsequent to the establishment of the military regime.[129] The 14th Area Army was under the direct command of Generals

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122 IMTFE Judgement, pp. 49259-49260. The cities include Hsuchow, Kaifeng, Matang, Kiukiang, Singyang, and Hankou.

123 IMTFE Judgement, pp. 49261-49263.

124 IMTFE Judgement, p. 49262.

125 IMTFE Judgement (Roling), p. 449; Exhibit 224.

126 IMTFE Judgement (Roling), p. 391; and Appendix E, p. 121.

127 IMTFE Judgement, pp. 49411-49412.

128 IMTFE Judgement, pp. 49569-49573.

129 Exhibit 224.

Homma, Masaharu between 1941 to August 1942, Kuroda, Shigenori from 1943 to 1944, and YAMASHITA beginning September 1944, under whose command the rape of women at Mapanique was carried out as part of a "subjugation" operation, discussed hereinafter.

6. Malaysia

133. The Japanese forces invaded Malaya on December 8, 1941, about an hour before they began their attack on Pearl Harbor and air-raided Singapore just hours later. While Singapore was being invaded, the 25th Army was under Lieutenant-General YAMASHITA, which was a unit of the Southern Army commanded by TERAUCHI, landed in the north of the Malay Peninsula.[130] By February 15, 1942 the Japanese military captured the whole of the Malay Peninsula and Singapore. YAMASHITA set up a military government organization there. During this time, from April 1945 to August 1945, ITAGAKI served as Commander of the 7th Area Army with headquarters in Singapore, with subordinate sub-divisions defending other parts of Malaya and Indonesia.[131]

134. Soon after the occupation of Singapore, YAMASHITA ordered the garrison commanders to "bring about the total suppression of the Overseas Chinese Anti-Japanese elements in the whole of the island" in three days, beginning on February 21, 1942.[132] Chinese inhabitants were specifically targeted for massacres because they had assisted the Allied Forces against the advancing Japanese troops. The massacres were arbitrarily carried out by means of a program called the Concentration for Inspection and Identification, under which the decision to kill was left to the discretion of the squad leaders.[133] Soldiers took many of the victims in military trucks to rural areas and shot or drove them en masse into the forests to be executed by machine gun.[134] This experience shows the lengths to which the Japanese went in perpetrating crimes against civilians in the occupied territories and the targeting of particular groups. This is consistent with the behaviour of Japanese troops in other occupied countries.

7. Indonesia

135. Indonesia, formerly known as the Dutch East Indies, was a colony of the Netherlands throughout the Asia-Pacific War. The IMTFE found that the Japanese had long planned the invasion of Indonesia in order to "secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans and of all islands therein."[135] Indonesia appeared to be a country of unlimited supplies of raw material, most importantly oil, necessary to aid the war effort.[136] To this end, in March 1942, the Japanese military invaded the island of Java in the Indonesian Archipelago (having apparently landed on Indonesian soil via Borneo),[137] overthrowing Dutch sovereignty, and subjugating the Allied armies there.[138] The invasion and occupation of Indonesia was

130 Exhibit 144, submitted by the Malaysian Prosecution, December 10, 2000.

131 IMTFE Judgement (Roling), p. 449.

132 Exhibit 144, p. 35.

133 Exhibit 144, p. 35; IMTFE Judgement (Roling), p. 397.

134 Exhibit 144, p. 36.

135 IMTFE Judgement (Roling), p. 378.

136 IMTFE Judgement (Roling), pp. 396-397.

137 IMTFE Judgement (Roling), p. 396.

138 Live Testimony, by Jan Ruff-O'Herne, witness for the Dutch Prosecution, December 10, 2000.

accompanied by atrocities common to the Japanese aggression, including sexual violence. For example, the IMTFE found that, apparently in retaliation to the demolition of the oil fields at Tjepu, Java, the men were massacred and the women "were raped several times in the presence of the commanding officer."[139]

136. As aforementioned, General TERAUCHI was Commander in Chief of the Southern Area Army from November 1941 until the end of the war. Thus, besides being the Supreme Commander of the Japanese divisions occupying the Philippines and Malaysia, he served in the same capacity over the forces occupying Indonesia. General Dohihara, Kenji functioned as Commander of the 7th Army from April 1944 to April 1945, a command that included Java, Sumatra, and other Indonesia territories, as well as Malaysia.[140] From April l945 to the end of the war, General ITAGAKI followed as the Commander of the 7th Army divisions still directly operating in areas mentioned above.[141] Other commanders included Harada, Kumakichi, Commander of the 16th Army stationed in Indonesia, from November 1942 to April 1945, Vice Admiral Takhashi, Ibo, Commander in Chief of the Southwest Area Fleet, from April 1942 to September 1942, and Vice Admiral Okouchi, Denshichi, Commander of the Southwest Area Fleet, from November 1944 to August 1945.

8. The Dutch Territories

137. The IMTFE also found that the Japanese army specifically targeted Dutch civilians for abuse. In March 1942, the Japanese massacred some 80 to 100 Dutch civilians by driving them into the sea while shooting at them and chopping off their limbs.[142] Soon after the Java invasion, the Japanese military separated the Dutch expatriate population into groups of men, and women and children, interned each group in different Japanese concentration camps and committed atrocities against them in these camps.[143] One survivor witness before this Tribunal, Jan Ruff-O'Herne described the horrible conditions suffered by the women and children including lack of proper shelter, sanitary facilities, and food. She recalled how rats chewed at the feet of the children. She also testified that the internees were beaten and tortured by being forced to stand in the sun for many hours for imaginary breaches of Japanese Military discipline, such as taking scraps of food from the rubbish heaps, which was regarded as hoarding 'contraband.'

9. East Timor

138. The territory of East Timor had been a colony of Portugal since 1515 and remained so throughout the Asia-Pacific War until 1975. On February 20, 1942, the Japanese troops landed in East Timor and advanced from its capital Dili to other regions in the south.[144]

139. From 1941 until the end of the war, General TERAUCHI was Commander in Chief of the Southern Area Armies. Under his command the subdivision of the Southern Area Armies, the 38th Army Division invaded East Timor. The 48th Army Division replaced them in September 1942.

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139 IMTFE Judgement (Roling), p. 397.

140 IMTFE Judgement (Roling), p. 444.

141 IMTFE Judgement, p. 49798.

142 IMTFE Judgement (Roling), p. 39.

143 Live Testimony, Jan Ruff-O'Herne.

144 East Timorese Prosecution, East Timorese Indictment, p. 3, para 1.

140. Atrocities were inflicted on the civilian population during the Japanese occupation of East Timor. Soldiers massacred many inhabitants, sometimes entire families.[145] One of the witnesses before this Tribunal, Esmeralda Boe, testified that Japanese soldiers forced civilians to labour for the Japanese to supply food and build housing for their troops. Other forced labour included planting in the fields all day, and logging timber. As elsewhere, torture, including sexual torture, was inflicted upon the civilians.

10. Conclusion

141. The Judges adopt the pertinent findings of the IMTFE Judgement and consider that the evidence adequately proves that the Japanese government and military, in their goal to dominate the Asia-Pacific region, consistently engaged in various forms of atrocities in each of the territories they occupied. The troops generally demonstrated a complete lack of respect for the safety, dignity, and rights of the inhabitants of both annexed and occupied territories. The abuse of civilians and civilian internees was extensive and pervasive throughout the region, most commonly taking the form of murder, torture, rape, forced labour, and confinement under inhumane conditions. And, as concluded below, rape and sexual slavery as part of the "comfort system."

F. DEVELOPMENT AND OPERATION OF THE "COMFORT WOMEN" SYSTEM

1. The Origins of the Sexual Slavery System: The Rape of Nanking and Related Atrocities

(a) The First "Comfort" Stations

142. According to the expert testimony of Professor Yoshimi Yoshiaki and the recorded recollections of Yasuji Okamura, the Vice Chief of Staff of the Shanghai Expeditionary Army, the Japanese army set up its first known so-called "comfort station" in China in 1932, consonant with that army's movement into China through Manchuria.[146] In March of 1932, Yasuji Okamura, through his Senior Staff Officer Okabe Naosaburo, ordered the establishment of "comfort" facilities in Shanghai. In his memoirs, Yasuji Okamura recalled that he ordered this because rape crimes had been committed by the Japanese troops in Shanghai. Reports of rape prompted him to ask the Governor of the Nagasaki Prefecture to supply a "military comfort women corps," so as to prevent the occurrence of rape.[147] Yasuji Okamura wrote:

> To my shame, I am a founder of the comfort women system. In 1932 when the China Incident occurred, a few rapes were reported. Then I as Vice-Chief of the Staff of the Shanghai Expeditionary Army followed the practice of the Navy and requested of Governor of Nagasaki Prefecture to send a group of comfort women. I was pleased that no rapes were committed afterward.[148]

143. Staff Officer Okabe, writing in his diary, also thought that setting up these facilities would help to alleviate, if not eliminate, occurrences of rape, since "as long as conditions

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145 IMTFE Judgement (Roling), pp. 397-398.

146 Yoshimi, Comfort Women, p. 45; Korean Exhibit, KR4, Inaba, Masao ed., Materials on General Okamura, Yasuji, Vol 1: Recollections on the Battlefields (1970), p. 302.

147 Yoshimi, Comfort Women, p. 45; Korean Exhibit, KR4.

148 Korean Exhibit, KR4.

[were] peaceful and the army [was] not engaged in fighting, these incidents [were] difficult to prevent." He believed that the army could provide facilities and "options for resolving the troops' sexual problems." He stated that "soldiers have been prowling around everywhere looking for women" and he "often heard obscene stories" about their behaviour. Okabe had Lieutenant Colonel Nagami Toshinori implement those "options," namely the setting up of "comfort stations."[149]

144. As stated by Okamura, the model for this "comfort station" was based on other facilities already set up by the Japanese navy.[150] These naval facilities occurred as a result of the Japanese Foreign Ministry's crackdown on licensed brothels, which were viewed as a source of sexually transmitted diseases (STDs).[151] The main objective of the new facilities was to satisfy the sailors' sexual demands while minimising their exposure to STDs. To this end, the navy reserved and regulated seven "restaurants," which employed serving women (102 of whom were Japanese, while 29 were Korean) for the exclusive use of navy personnel. The regulations included medical examinations of the "serving women" twice a week by doctors in the presence of Japanese navy personnel, police officers, or Foreign Ministry officials.[152] Thus, both the military and government were overseeing these "comfort" facilities, by the end of 1932, and the emphasis had expanded from protecting the military from sexually transmitted diseases to diverting the perpetration of rape upon women in the community by the troops.

145. The evidence shows that the following year, in March 1933, the "first confirmed military comfort station," named the "Disease Prevention and Hygiene Facility," was set up in northeastern China, in the town of Pinquan, for the 14th Mixed Brigade.[153] Thirty-five Korean and three Japanese women were in this station wherein they were required to "serve" as "comfort women" and were subjected to regular medical examinations by an army doctor.[154] The Japanese army forbade its military personnel from visiting the licensed brothels in town because they claimed that the prostitutes were all infected with some form of STD. The army actively encouraged the personnel to use the sexual slavery facilities instead.[155]

146. Due, however, to the soldiers' persistence in visiting the local brothels, and the discovery that some of the newly inducted "Korean comfort women" had already been infected with STDs, the army headquarters issued instructions entitled "Guidelines for Conducting Medical Examinations of Prostituted and Serving Women." These guidelines stipulated that in addition to those women in the comfort facilities, all the prostitutes in the vicinity had to undergo medical examinations several times a week.[156] The army constantly admonished its soldiers to check the prostitutes' health certificates, to use condoms

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149 Yoshimi, Comfort Women, p. 45, quoting an entry from the Diary of Okabe, Naosaburo, Senior Staff Officer in the Shanghai Expeditionary Force (entry reproduced in Yoshimi's book).

150 Korean Exhibit, KR4.

151 Yoshimi, Comfort Women, p. 44.

152 Yoshimi, Comfort Women, pp. 43-44.

153 Yoshimi, Comfort Women, p. 47.

154 Yoshimi, Comfort Women, p. 47, referring to a document in his Fn 12, which was a report from the middle of March 1933 issued by the 14th Mixed Brigade Headquarters, p. 11 (Japanese National Archives).

155 Yoshimi, Comfort Women, p. 47, referring to a document in his Fn 13, which was a report from the end of March 1933 issued by the 14th Mixed Brigade Headquarters, pp. 9-10 (Japanese National Archives).

156 Yoshimi, Comfort Women, p. 47, referring to a document in his Fn 14, which was a report from the beginning of May 1933 issued by the 14th Mixed Brigade Headquarters, p. 9 (Japanese National Archives).

together with disinfecting lubricants, and to wash off their genitals with disinfectant after each visit to the prostitutes or the "comfort" facilities.[157]

147. At the same time, the evidence shows that the Kwantung Army located in Manchuria, where General HATA was a divisional commander in 1933,[158] was also managing at least one "comfort" facility in 1933.[159]

(b) The Rape of Nanking

148. The military sexual slavery system became institutionalised in connection with the events leading up to and occurring after the invasion of Nanking, which resulted in a conquest so brutal it became known as the "Rape of Nanking." In July 1937, Japan embarked on an open and full-scale war against China, causing the dispatch to China of hundreds of thousands of Japanese troops under the command of General MATSUI. As General MATSUI's troops approached Nanking, they committed murder, torture, rape, and other atrocities on an extraordinary scale.[160]

149. In a cruel paradox, the Rape of Nanking was a significant motivation for the institutionalisation of sexual slavery facilities. These facilities, which were purportedly intended to prevent unrestrained rape of women in the community, substituted a system of highly regulated facilities where a soldier could safely, conveniently, and relatively cheaply satisfy unrestrainedly his sexual urges.

150. The IMTFE heard extensive evidence on the Japanese army's attack on and conquest of Nanking. It found that Japanese troops in Nanking committed "[w]holesale massacres, individual murders, rape, looting and arson….[In] this period of six or seven weeks thousands of women were raped, upwards of 100,000 people were killed and untold property was stolen and burned."[161] It further found that sexual violence was rampant:

> Death was a frequent penalty for the slightest resistance on the part of a victim or members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city, and many cases of abnormal and sadistic behaviour in connection with these rapes occurred. Many women were killed right after the act and their bodies mutilated. Approximately 20,000 cases of rape occurred within the city during the first month of the occupation.[162]

151. The testimony of Yang Mingzhen before this Tribunal epitomizes the atrocities committed by the Japanese troops. Yang Mingzhen was only six years old in December 1937 when the Japanese officially conquered Nanking. She testified that shortly after the occupation, two Japanese soldiers went to her home where she lived with her parents. She testified:

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157 Yoshimi, Comfort Women, p. 47.

158 IMTFE Judgement, Appendix E, p. 121.

159 Exhibit 17 (Korean Exhibit KG2) Document authored by the 14th Mixed Brigade, entitled "Ten Day Report on Sanitation Affairs for April 11-20, 1933," (Japanese National Archives).

160 IMTFE Judgement (Roling), p. 391.

161 IMTFE Judgement (Roling), pp. 453-454.

162 IMTFE Judgement (Roling), p. 389.

> [The soldiers] kicked my father….My mother was abused. I was still very small but they undressed my trousers. I was just scared and my father who tried to save me was hit very badly by the soldiers and they cut him….[on] his neck three times….They abused my mother and me….I still remember that they treated me very badly. I resisted and they cut me in my face. I still have that scar….It's on my eye on my forehead.

152. Yang Mingzhen testified that she suffered great psychological and physical trauma as a result of these attacks on her and her family. Yang Mingzhen also witnessed the rape, sexual mutilation, and eventual death of a teenage girl, as well as the rape and murder of a twelve-year-old girl by Japanese soldiers.[163]

153. The invasion of Nanking and its attendant carnage produced tremendous outrage in the international community. The evidence shows that although many newspaper correspondents, who were largely responsible for informing the world about the atrocities committed in Nanking, had departed Nanking for Shanghai soon after the invasion, the remaining foreigners continued to carefully document "the hourly outrages" that occurred there.[164] The IMTFE noted that members of the Diplomatic Corps and Press together with the Japanese Embassy in Nanking "sent out reports detailing the atrocities committed in and around Nanking" to their respective governments as well as to the Japanese government. The Japanese Embassy officials sent reports to the Japanese Minister at Large to China.[165] The representative of the German government informed his superiors about the "atrocities and criminal act[s] not of an individual but of an entire Army, namely, the Japanese," and he later characterised the army as "bestial machinery."[166] During the invasion, the diplomatic corps and foreign civilians in the Nanking Safety Zone not only reported on the extent of the atrocities but also protested strenuously against the commission of these crimes by the Japanese troops. The Secretary of the International Committee for the Safety Zone "filed two protests a day for the first six weeks," and foreign governments also complained about the crimes.[167] According to IMTFE, even public opinion in Japan was unfavourable towards the behaviour of the Japanese troops in Nanking.[168]

154. The Japanese government's reaction to the reports received about the atrocities occurring in Nanking was varied. The IMTFE found that some of the officials on the lower rungs of the Japanese government, particularly the embassy officials in Nanking, were interested in making amends and doing something about the behaviour of the Japanese troops. They stated that the "[a]rmy was determined to make it bad for Nanking, but, that the Embassy officials were going to try to moderate the action."[169] Consequently, the Japanese embassy officials sent out reports about the atrocities to their government and encouraged foreign missionaries to generate publicity in Japan about the brutalities, "so that the Japanese Government would be forced by public opinion to curb the Army."[170]

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163 Chinese Indictment, p. 6.

164 Exhibit 209, submitted by the Japanese Prosecution, December 8, 2000.

165 IMTFE Judgement (Roling), pp. 390-391.

166 IMTFE Judgement (Roling), p. 389.

167 IMTFE Judgement (Roling), p. 390.

168 IMTFE Judgement (Roling), p. 391.

169 IMTFE Judgement (Roling), p. 390.

170 IMTFE Judgement (Roling), p. 390.

155. Other Japanese government officials, however, were not as concerned as the embassy officials to make amends. Instead, they were anxious to assess 'damage control' regarding the reputation of the Japanese army. The IMTFE confirmed that higher ranking members of the Japanese government received reports from their embassy officials in Nanking and from members of the diplomatic corps and press regarding the criminal behaviour of the Japanese troops in Nanking. Japanese government members who received reports of the Nanking atrocities included the Foreign Minister, Hirota Koki, who in turn forwarded these reports to the War Ministry where UMEZU was the Vice Minister of War. The IMTFE went on to find that these reports were discussed at Liaison Conferences, which were normally attended by the Prime Minister, War and Navy Ministers, Foreign Minister Hirota, Finance Minister Kaya, and the Chiefs of the Army and Navy General Staffs. News reports of the atrocities were widespread. Minami, who was serving as Governor-General of Korea at the time, admits that he read of these reports in the Press. Following these unfavourable reports and the pressure of public opinion aroused in nations all over the world, the Japanese government recalled MATSUI and approximately 80 of his officers but took no action to punish any of them. MATSUI, after his return to Japan on 5 March 1938, was appointed a Cabinet Councillor and on 29 April 1940 was decorated by the Japanese government for his "'meritorious services'" in the China War.[171]

156. The Judges consider that the Japanese government's attitude to the Rape of Nanking was one of callous disregard. That the government would use the outrage over the mass rapes as an excuse to set up "comfort stations" is an added injustice to both the victims of the Nanking atrocities and to the "comfort women."

2. Institutionalisation of the Sexual Slavery System

(a) Sexual Enslavement in China and of Chinese Girls and Women

157. The Japanese government and military established and expanded "comfort stations" into a vast institution for a variety of reasons. According to the evidence before this Tribunal, "comfort stations" were set up firstly to prevent the Japanese troops from contracting sexually transmitted diseases,[172] and secondly to counteract anti-Japanese sentiment produced by the multiple, mass, and indiscriminate rapes perpetrated by Japanese soldiers against civilian women as the armies advanced and asserted control over the territories.[173] The evidence demonstrated another reason was to offer "comfort" to the soldiers by providing an avenue to release for their pent-up emotions, tensions, and frustrations resulting from the bleak, harsh, and arbitrary discipline and conditions they had to endure.[174] Another reason emerging from the evidence was to protect against and prevent the likelihood of spying and dissemination of army secrets that might occur if the soldiers visited local brothels. The Japanese army believed that "building its own comfort stations

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171 IMTFE Judgement (Roling), p. 391.

172 Yoshimi, Comfort Women, p. 69, referring to the 1939 report of Matsumura Takeshi, Chief of the Medical Branch of the 21st Army (Article 2).

173 Yoshimi, Comfort Women, pp. 45 & 66, referring to the recollections of Okamura Yasuji (discussed above). For example, a document issued in June 1938, entitled "Notification of Warnings concerning the Conduct of Military Personnel toward Local Residents" states that "the trigger causing such potent anti-Japanese sentiment [in the North China Area] is the widespread diffusion of news about rapes." See Registry No. 222-d and 223.

174 Yoshimi, Comfort Women, pp. 72-74, referring to a document entitled "The Communist Party's Truth about the Ideological Campaign to Undermine our Troops and the Means to Stop it," (April 5, 1939, Japanese National Archives), and other documents in Japanese (with no English translations).

and conducting regular supervision and surveillance of them was the best policy" to contain army secrets.[175]

158. According to the expert testimony of Professor Yoshimi, referring to an excerpt from the diary of Iinuma Mamoru, the Central China Area Army ordered the Shanghai Expeditionary Army to establish "comfort stations" in the vicinity of Nanking. Their purpose, according to Professor Yoshimi, was to redirect the sexual demands of the numerous troops from committing widespread rapes against the general female population and stifle the growing outrage of the international and local communities as a result of the rapes.[176] Iinuma Mamoru personally undertook the execution of those orders, and implemented plans for establishing such stations on December 19, 1937, just six days after the conquest of Nanking.[177] At this time, Prince Assaka Nomimia, a cousin to Emperor HIROHITO, commanded the Shanghai Expeditionary Force, and thus was Iinuma Mamoru's immediate superior.[178]

159. At the same time that "comfort" facilities were being erected in Shanghai, the Japanese military set up facilities in other parts of China as well. On December 18, 1937, after the fighting around the cities of Zhenjiang and Yangzhou had ended, the 3rd Division Medical Corps hastily established a military "comfort station" and procured women for it.[179] The purpose for establishing such facilities had expanded to include the providing of comfort, relaxation, and avenues for releasing sexual tensions to the thousands of Japanese soldiers deployed to fight for and further Japan's imperial ambitions.

160. As the Japanese army moved across China in 1938, it set up "comfort stations" in rapid succession. By the end of January 1938, two facilities were established in Changchow, with one managed by a unit directly under the control of the Shanghai Expeditionary Force. The Shanghai Expeditionary Force also installed another station in Yangjiazhai.[180]

161. Military "comfort stations" were established simultaneously in northern China in the first half of 1938. According to the expert witness Professor Yoshimi, in 1938, Okabe,[181] now Chief of Staff of the North China Area Army commanded by General TERAUCHI, recorded in his "Written Notification of Warnings on the Treatment of the Local Population by Military Units and Personnel" that he ordered each unit under his command to set up "comfort stations." Okabe felt that these stations were necessary in order to "stamp out the outbreaks" of rape which were directly triggering widespread rage and anti-Japanese reactions among the Chinese. His comments are noteworthy:

> According to various reports, the trigger causing such potent anti-Japanese sentiment is the widespread diffusion of news about rapes committed by Japanese military personnel in various areas….Naturally, such self-defense organizations…which have fiercely resisted the raping and pillaging of

175 Yoshimi, Comfort Women, p. 74, referring to an Army Report of the General Staff of the 25th Army stationed in Singapore (1942).

176 Yoshimi, Comfort Women, pp. 49-50; live Testimony of Yoshimi, Yoshiaki, Expert Witness for Chief Prosecutor Sellers, December 9, 2000; Exhibit 222-A, Slide entitled "Excerpts from the Diary of Iinuma Mamoru, Chief of the Staff of the Shanghai Expeditionary Force," submitted December 9, 2000.

177 Yoshimi, Comfort Women, p. 50.

178 Live Testimony of Yoshimi.

179 Yoshimi, Comfort Women, p. 51.

180 Yoshimi, Comfort Women, pp. 51-53. Shanghai is located far south of Korea, and a little south of Nanking.

181 Exhibit 225, Yoshimi's written opinion entitled "The Chain of Command in the Japanese Military and Japanese Government" puts the date as June 1938.

> soldiers since time immemorial, were inflamed, but now it is the norm for the entire local population of each area to be so enraged, particularly by rapes, as to seek revenge even unto death….Accordingly, not only are rapes illegal acts in each of these areas, but they also undermine public order and obstruct the combat activities of the military as a whole. We ought to call them acts of high treason, that threaten the nation….We must stamp out the outbreaks of these acts. Any commanders who disregard these orders can only be called disloyal subjects….Along with strict controls on soldier's individual behavior of the aforementioned type, the provision of facilities for sexual comfort as quickly as possible is of great importance, [as it will] eliminate cases in which people violate the prohibition [on rape] for lack of facilities.[182]

162. By November 1938, the Japanese 21st Army, commanded by General ANDO, had moved into southern China. According to the "Wartime Report (Relating to Line of Communications)," by April of the following year, the army supervised approximately 1,000 "comfort women" in areas where the military police squads were stationed.[183] According to the evidence, about 850 of these women were regulated by the military, and the remaining 150 were there under the auspices of the individual units commanded by the 21st Army, having been summoned from the homeland of each unit.[184]

163. The 21st Army had sent out a request to the Home Ministry and the Governor General of Taiwan, in a document entitled "Inquiry on Women Travelling to China," to recruit women for the "comfort stations."[185] As a consequence, by April 1939, the 21st Army established "comfort" facilities in Guangdong, where the approximately one thousand women procured were held. Many of the stations in the Guangdong area utilised Korean "comfort women," with Taiwanese and Chinese women constituting most of the remainder.[186] Korean women complained to the soldiers that they were tricked into becoming "comfort women" through answering an advertisement requiring the services of practical nurses.[187]

164. In 1940, the Chief of the Medical Section of the 21st Army reported to a meeting of the Ministry of War Medical Bureau that to combat the spread of venereal diseases, the army was "importing one comfort woman for every 100 soldiers."[188] The 21st Army established sexual slavery facilities in the municipalities of Guangzhou, Henan, Foshan, Hainan Island, Sanshui, Jiujiang, Zengcheng, and Shilong, to which these women were sent.[189] Eventually the number of "comfort women" under the control of the 21st Army rose to 1,600.[190]

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182 Yoshimi, Comfort Women, pp. 54-55, referring to Chief of Staff Okabe's publication entitled 'Written Notification of Warnings on the Treatment of the Local Population by Military Units and Personnel'; Exhibit 225, Yoshimi's written opinion entitled "The Chain of Command in the Japanese Military and Japanese Government."

183 Yoshimi, Comfort Women, p. 56; Korean Exhibit, KB3.

184 Yoshimi, Comfort Women, p. 56; Korean Exhibit, KB3. According to the Korean exhibit, these military police squads consisted of nationals from the occupied territories such as China.

185 Exhibit 16 (Korean Exhibit KB2).

186 Korean Exhibit, KB4.

187 Korean Exhibit, KB4.

188 Yoshimi, Comfort Women, p. 56, referring to a report made in a meeting with the Ministry of War Medical Bureau.

189 Yoshimi, Comfort Women, p. 56; Exhibit 225.

190 Yoshimi, Comfort Women, p. 56.

165. Simultaneously, in October 1938 the Headquarters of the Central China Expeditionary Army, commanded by General HATA, being deeply concerned about "the prevention of a recurrence of the Nanking Massacre and Rape,"[191] gave orders through the 11th Army staff officer Muranaka to establish "comfort stations" in Hankou.[192] Regarding the "comfort women" and their dealers in Shanghai and Nanking as military suppliers, the army transported the women immediately to the Hankou Depot Headquarters,[193] where they "lent two private houses for each comfort station in Jiqingli, Hankou."[194] These facilities became operational in November 1938[195] and operated on a ticketing system adopted to organise the soldier's visitations.[196] Thus, as the war intensified, the Japanese military found it imperative to set up additional facilities in order to cater to the sexual demands of its troops.

166. As the Japanese military mobilised an estimated eight hundred thousand troops of the Kwantung Army in 1941 along the northeastern border between the then USSR and China, the Kwantung Army, commanded by General UMEZU, Yoshijiro developed a plan to secure and import an additional twenty thousand Korean "comfort women" in order to service his troops.[197] To effectuate this plan, staff officer Hara, Zenshirou requested the assistance of the Government General of Korea, whose governor at the time was Minami Jiro.[198] According to Murakami, Sadao, a non-commissioned officer assigned to Officer Hara who took charge of "the transmission and communication of orders, distribution, meeting with dealers, and other practical business," some 3,000 Korean women were procured and sent to northeastern China.[199] Other sources put the number of Korean women procured for this purpose as high as 8,000,[200] or 10,000.[201] The evidence suggests that the original plan was to "recruit" Japanese "comfort women," but not enough of them were secured, so Korean women were acquired to make up the difference.[202]

167. During the war in the Asia-Pacific, the Japanese military continued to establish facilities designed to provide sexual services to its troops. As excruciatingly evident in the testimony below, these facilities were not brothels staffed with voluntary workers and that merely allowed Japanese soldiers a place to go so that they could obtain sexual release conveniently and safely. They were places – hotels, homes, tents, caves, and factories – of unspeakable horror, facilities where women were enslaved against their will and repeatedly raped and otherwise brutalised for months or years on end, exclusively for the benefit, and purportedly to satisfy the sexual demands, of members of the Japanese military.

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191 Korean Exhibit, KR6, p. 39, affidavit document entitled "Hankou 'Comfort Stations'", originally authored by Kenichi Nagasawa, an army doctor belonging to the 11th Army Depot Headquarters in Hankou.

192 Korean Exhibit, KR6, pp. 42-49.

193 Korean Exhibit KR6, p. 50.

194 Korean Exhibit, KR6, p. 53.

195 Korean Exhibit, KR6.

196 Korean Exhibit, KR7, pp. 212-213 (December 10, 1938), affidavit document entitled "Outline of the Situation of the 2nd Army," authored by the Headquarters of the 2nd Army which was incorporated into the 11th Army in December 1938.

197 Yoshimi, Comfort Women, p. 57.

198 Yoshimi, Comfort Women, p. 57; Exhibit 225 (Yoshimi's Written Expert Opinion).

199 Korean Exhibit, KG3, referring to a Letter from Murakami to Senda, Kako.

200 Exhibit 225, Written Opinion of Expert Witness Yoshimi, referring to the books written by Shimada Toshihiko, The Kwangtung Army; and Senda Kako, Military Comfort Women.

201 Yoshimi, Comfort Women, p. 57.

202 Korean Exhibit, KG3, referring to a Letter from Murakami to Senda, Kako.

168. Wan Aihua, one of the Chinese victim-survivors to give evidence before this Tribunal, testified that the Japanese army captured her in 1943 when she was 14 years old. Wan Aihua stated:

> I was taken into a hole. There was a room inside the hole, but I was taken into the back of the hole and I was raped there. It was a cave, sort of, then I was undressed suddenly, all my garments was taken off and they threatened me…they would kill me if I say anything, if I utter any words. So I was scared; I couldn't say anything….Five soldiers came in at the same time and they raped me…it was like gang rape….I was detained there for a while and every day I was raped….I felt I had no other choice but to obey them. Of course, I resisted but I had no other choice….I was tied to a tree and raped everyday. Everyday, Japanese soldiers came in and I was raped.

169. According to Wan Aihua's testimony, she eventually escaped but was soon recaptured by the Japanese, who subsequently detained her for another 20 days in the same cave of her previous detention where she was tied to a tree and raped everyday. She escaped again and the Japanese soldiers captured her again, meting out more of the same inhumane treatment she experienced after her first recapture. She testified:

> I was hit and they brutalised me….They tied my hands to the tree so I was sort of hanged from the tree…. So my hands were sort of pulled and I was hit upon all my body and after they raped me they put me into the river, into the water….It was winter time, perhaps in January. It was chilling cold, even the river got frozen….and I was sort of naked in the chilling cold.

170. These 'punishments' went on for several weeks. Each time they put Wan Aihua back into the cave, the soldiers raped her repeatedly. Eventually she lost consciousness and the Japanese soldiers threw her into a nearby river. She testified that an elderly man saved her from drowning.

171. Yuan Zhulin, another Chinese survivor, testified that she was deceived into becoming a "comfort woman" at the age of 18. She testified:

> [A] local woman…praised to me that my baby was a very pretty child and she offered me a very profitable job, that is washing the dishes and clothing….[A]t that time I didn't accept the offer and then the woman told that I would regret it and…that she wouldn't lie to me because she was a Chinese woman….I was very poor and had to support five of my family members and I decided to accept the offer. On that same day, I took a car and I went out….[O]n arrival, it was the base of a Japanese Army and there were Japanese soldiers carrying guns on the sentry position and I was very scared and started to cry and told…the Chinese woman that she told me a lie….I said I didn't want to stay there and I begged her to let me go….[T]he Japanese soldiers and the person managing the comfort station came out and tried to take me inside and I resisted but…they started to abuse me and hit me. It was really terrible.

172. Yuan Zhulin described how she was "sexually abused" continuously for fifteen months. As a "comfort woman," she was given the Japanese name of Masako, which was placed on a plaque outside her room. The Japanese soldiers first had to buy a ticket to gain access to her. There would usually be a long line of Japanese soldiers waiting outside the comfort station. One soldier treated her kindly while the other soldiers abused her. She testified:

> [O]ther Japanese soldiers were all very inhumane and they were very, very atrocious and some of the Japanese soldiers changed condoms four times during sexual intercourse with me and it hurt so much I could not even sit. I could not even lie down to sleep. I could not even sleep freely….[W]hen there was a long queue outside we were given medicine and that medicine was a jelly sort of cream and she [the wife of the proprietor] said, if it hurt you, put some cream on to the condom and it can help you alleviate your pains….There was no way to escape so I just had to continue as a comfort woman.

173. Yuan Zhulin was repeatedly raped and forced also to have sex without the protection of condoms because the Japanese soldiers believed that the women were free of sexually transmitted diseases. During one period of her enslavement, a Japanese officer monopolised all her services and he would inflict additional abuses on her if she did not immediately obey his every command.

174. Yuan Zhulin testified that she felt that escape was extremely difficult. Nonetheless, she finally managed to escape, though she was subsequently recaptured and tortured as punishment and as an example to other women who might be tempted to escape. The "comfort station" management also allowed her to go out of the station once when her daughter died, but she had to return to the station before her daughter's burial. She eventually managed to escape again and this time remained free living together with a kind Japanese soldier until the war ended. She spent a total of fifteen months at the "comfort" facility where she was sexually enslaved without payment.

175. Based on the aforementioned documentation and testimony of both the survivors and the experts, it is clear that from the time of the first incursion into mainland China, the Japanese military developed, with great haste and urgency, an extensive system of military sexual slavery facilities. It was the norm for the highest ranking officers in the Expeditionary Forces, through their immediate staff subordinates, to establish sexual slavery facilities and to request or authorise the procurement of women for these "comfort stations," partially in order to divert their troops' sexual demands to the "comfort women" and avoid rape of Chinese women. Other significant purposes included the control of sexually transmitted diseases. Yet according to the testimony of Professor Yoshimi, the "comfort system" prevented neither the rape of community women nor the spread of sexually transmitted diseases.

176. According to the expert opinion of Dr. Hayashi, Hirofumi the army and navy chiefs and the Governors-General had direct access to the Emperor.[203] When the Sino-Japanese War began in 1937, preceding the invasion of Nanking and the intensification of establishing comfort facilities, the Government-Military Liaison Conference was held to decide state policy. According to Dr. Hayashi, within the Liaison Conference the Imperial

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[203] Exhibit 40-a, slide entitled "The De Facto System of the Japanese Empire until August 1945," accompanying the expert testimony of Dr. Hayashi, Hirofumi, witness for the Chief Prosecutor.

Conference emerged when particularly important matters had to be dealt with. The Emperor, the military, and Cabinet leaders comprised the Imperial Conference which acted as the main decision making body of the state.[204] It is also significant that at least one member of the royal family was involved, through his immediate subordinate, in the setting up of sexual slavery facilities around Nanking.

(b) Sexual Enslavement of Taiwanese Girls and Women

177. As the Japanese military expanded the sexual slavery system and sought to get enough women to satisfy their formula of one "comfort woman" for every one hundred soldiers, it regarded Japan's colony, Taiwan, as a useful source of girls and women.

178. In late 1938, Japanese personnel went to Taiwan to recruit women for the "comfort" facilities in China. According to the expert testimony of Professor Hayashi, the Japanese recruited these women by soliciting the aid of a corporation, the Taiwan Colonial Trade Corporation (TCTC), and the local government including the Governor-General and the police.[205] The TCTC was tasked with building "comfort stations" and other facilities, including roads and wells, in Hainan Island, and with bearing the cost of such construction.[206] Then, in early April 1939, the TCTC received and complied with, via their subsidiary Fukudai Company,[207] a request from the research section manager of the Government-General of Taiwan to send ninety comfort women to Hainan Island.[208] A couple of weeks later, on April 21, 1939, the president of the TCTC confirmed to the Director-General of the Taiwanese Government-General that a ship had recently left for Hainan Island transporting "specially required personnel" including three mangers and thirteen women between the ages of 17 and 41 for the comfort stations.[209] Two months later on June 19, 1939, the TCTC produced a list of persons to send to Hainan Island after April 1, 1939. This list included labourers, construction workers who were to build the comfort stations, and "specially required personnel," which was a reference to "comfort women" and persons involved with running the comfort stations.[210]

179. On July 26, 1939, an officer in the TCTC affirmed that the company's involvement in establishing "comfort stations" on Hainan Island resulted from the request of a joint three-Ministry meeting to the Government-General of Taiwan.[211] Thus high level Japanese officials and private corporations joined forces to actively participate in and maintain the "comfort system" in China and to procure Taiwanese females for the facilities.

180. As noted previously, in 1940, as the need for women to fill the "comfort stations" increased, the 21st Army division commanded by General ANDO requested KOBAYASHI, the Governor General of Taiwan, to procure and supply girls and women

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204 Expert Testimony of Dr. Hayashi, Hirofumi.

205 Expert Testimony of Dr. Hayashi, Hirofumi.

206 Exhibit 134, submitted by the Taiwanese Prosecution, December 9, 2000.

207 Expert Testimony of Dr. Hayashi, Hirofumi.

208 Exhibit 195, entitled "On the Naval Comfort Station in Hainan Island."

209 Exhibit 196, entitled "Proper Supply of Materials to Hainan Island," authored by the TCTC president, April 21, 1939.

210 Exhibit 197, entitled "List of Persons Associated with Taiwan Colonization Company Who Went Over to Hainan Island (as of June 19, excluding those who returned to Taiwan), Cooperation in Military Activities in Central and South China after the China Incident," June 19, 1939 (author unknown).

211 Exhibit 194, entitled "Outline of the Construction Work in Hainan Island," authored by Mr. Sakai, July 26, 1939.

for the 21st Army.[212] This request represented the second known request by the Japanese military to the Government-General of Taiwan to assist in procuring and supplying "comfort women" for the Japanese military.

181. As the testimony of the Taiwanese survivors specifies, the Japanese military supervised and, in some cases was directly involved in, procuring women and girls for the "comfort stations" in China and Taiwan. In Taiwan, the military forcibly used women employed as factory labourers as "comfort women," transported the women to "comfort stations" on warships, and, once the women were in the facilities, they prevented them from escaping and had the army doctors monitor them for STDs. The witnesses before this Tribunal testified that procurement was carried out in a variety of ways, most typically by deception and force. Once acquired, the women were sexually enslaved.

182. When Lin Shen-Chung (Iyang-Apay) was 16, a local policeman informed her mother that she would be taken to do stage performances and work as a seamstress sewing clothes for the Japanese army. With three others acquaintances with whom she worked, she was interned by the Japanese in a nearby house without being allowed to go home, on the pretext that Japanese bosses were afraid of them arriving late to work.[213] Lin Shen-Chung (Iyang-Apay) testified:

> After working nearly three months, one day, the deputy captain, Nalida, Gunsho took me to the entrance of a cave, and told me to wait there. A Japanese soldier turned up and asked me to provide sexual service. I firmly resisted. But the Japanese soldier said "since you came to work here, this is part of your work too." He forced me to subject to his sexual request without payment. Everyday, the six of us would be taken to this cave one by one for this, serving as much as five soldiers each night. After each time, we got to rest for half an hour. The six of us were forced to provide sexual service in turns on a bed ten meters from the entrance of the cave. Those who forced us to have sex with them included Doctor Miyamodo, Captain Ela, and Deputy Captain Nalida….All I can do to such ordeal was to weep everyday.

183. During her ordeal as a "comfort woman," Lin Shen-Chung (Iyang-Apay) got pregnant three times. She was required to report them to the Japanese army doctor, and each time she was given an abortion.[214] She returned to her community only after the Japanese army left.

184. Another witness before this Tribunal, Lu Mang-Mei was recruited into the "comfort system" in 1943 at the age of 17, on the pretext that she was going to work as a nurse.[215] Since she and her adoptive family were poor, she thought it would be a good opportunity to accept the offer, saying "I thought that a nurse [was] a good occupation and a nurse can have good pay . . . [and] the term of contract lasted only for one year."[216] She was taken to Hainan Island in China on a Japanese warship. On Hainan Island, the Japanese told Lu Mang-Mei and her two other similarly recruited friends that they were going to work as

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212 Exhibit 16, submitted by the Korean Prosecution, December 8, 2000.

213 Exhibit 140-b, Affidavit of witness Lin Shen-Chung, paras 2-3, submitted by the Taiwanese Prosecution, December 9, 2000.

214 Exhibit 140-b, paras 4-5.

215 Exhibit 139, Affidavit of witness Lu Mang-Mei, para 2, submitted by the Taiwanese Prosecution, December 9, 2000; Live Testimony of Lu Mang-Mei, witness for the Taiwanese Prosecution, December 9, 2000.

216 Exhibit 139, para 2.

waitresses in restaurants abroad, which also paid well. They decided to take the waitressing jobs and another Japanese warship filled with passengers and goods took them overseas to Hung-Sa, their final destination. Lu Mang-Mei testified:

> Only upon our arrival did we realise it was a comfort women station, rather than a restaurant. This station was managed by Japanese and looked like a Japanese styled dormitory. It was separated by wood boards into different rooms, floored with Tatami. Each girl had one room. This dormitory was situated on the hillside, surrounded with many palm trees. There were salt fields by the sea….There were about thirty-something girls at this station. Thirty of them were Taiwanese and there were some Japanese girls too. The Taiwanese girls had no contact with those Japanese girls. Soldiers were all Japanese. They came by car….The soldiers and military officers had to purchase their tickets from the Manager first and then they looked for the girls. I usually earned several (six or seven) hundred Yen each month. The Manager took a share of sixty percent each time. We have to provide service day and night. Some soldiers stayed overnight with us, in which case we could earn more money. We were not allowed to say no to the soldiers. No service, no money. We could take a walk around the station. They wore condoms. At the first time, I was so scared. I felt cheated to be there and left alone without any relatives or friends. I thought I should not do it and did try to resist….I told the 'customer' not to do it, but he replied "I already bought the ticket." Then I told him that I was supposed to work as a waitress and not 'this'. The 'customer' said "it is said so but it is not true." It was too late for us to realise the truth. All of us cried….I was once pregnant and wanted to go home. Nevertheless, I was still forced to provide service for more than eight months.

185. Lu Mang-Mei was allowed to return home when she became pregnant and had malaria. She stated that she had "obeyed them [the Japanese] in order to live."

186. In 1938, at the age of 17, Teng Kao Pao-Chu was drafted into the sexual slavery system by the local government's district office. She had been working as a singer in a restaurant and was procured as part of the Japanese government's effort to draft "comfort women" from bars and brothels.[217] She received a notice from the district office informing her that she was to be sent to the Guangdong Province in China to work as a "comfort woman."

187. The district office's personnel accompanied her and about twenty other women and girls to the port where they would be taken to China.[218] Teng Kao Pao-Chu and the others were taken first to Guangdong, and then on to Fou-Shan in a military truck, finally arriving in Jing-Shan-Si. There, the Japanese forced the women to provide for a month sexual services to the troops there before shipping the women to Burma via Hong Kong and Singapore. Teng Kao Pao-Chu travelled with the Japanese army as it moved around the countryside and mountainous areas of Burma. The army finally settled in a remote mountain area. Teng Kao Pao-Chu informed this Tribunal:

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217 Exhibit 140, Affidavit of witness Teng Kao Pao Chu, para 1, submitted by the Taiwanese Prosecution, December 9, 2000.

218 Exhibit 140, Affidavit of witness Teng Kao Pao Chu, para 2, submitted by the Taiwanese Prosecution, December 9, 2000.

> The unit's name was called Tatsu Butai. It was the headquarters of an army unit. The service was three yen for army officers and two yens for soldiers. We splitted the money with the person in charge by 4/6. For several times, I entrusted money to Japanese soldiers to be sent to my family, but there were several times that my family did not receive them. In the comfort center, they distributed 6 to 12 condoms each month. If that was not enough, we had to wash them in the stream and recycle them. The army physician inspect[ed] our health once a week. I did not get pregnant, but if someone did become pregnant, she still had to work until six or seven months [of] pregnan[cy]. After she delivered the baby, she must work again. A comfort woman that can sing is treated better because she did not have to stay in the comfort center all day, and sing to the Japanese soldier[s] on a stage. The comfort centers were built by woods, with one bedroom for each of us like a dormitory. There were also comfort centers for Koreans and Cantonese. We work[ed] from nine a.m. to five p.m., with more customers during the weekends. During the day time, most of the customers were soldiers, and at nights, most of them were officers. All soldiers and officers must pay for a token to be served. We were forbade to provide service when we had our menstruation, for fear that our vagina or uterus will be infected. I did not want to provide services when I had my menstruation, but some soldiers would insist upon it. I would reject it with an excuse of stomach ache or for sanitary reasons. I prefer to keep them company by drinking and singing with them, rather than having intercourse. I missed my sister there. When I felt homesick, I would go to the mountain to sing alone. Day after day, and year after year, I was alone abroad and wondered and wondered what had become of my country. My sister and brother-in-law did not know about my life here. I often wept while I sang, like a bird trapped in a cage without freedom. Why did I have to suffer here?

188. Teng Kao Pao-Chu could not escape due to the constant presence of the guards at the "comfort stations." She testified that "there [were] so many Japanese soldiers and they were watching us and there wasn't a situation where we could escape." She returned to Taiwan in 1947.

(c) Sexual Enslavement of Korean Girls and Women

189. As the Japanese army's demand for systematic sexual services increased, Korea was also seen as a prime source for procuring women for the facilities. Tens of thousands of Korean women and girls were forced into the sexual slavery system through such means as deception and force, after which they were subjected to rape and other forms of sexual violence and confined in "comfort" facilities under inhumane conditions. Japanese recruited Korean women disproportionately into the "comfort system."

190. As indicated above, the Kwantung Army under General UMEZU had sent out requests to the Korean Governor General to supply 20,000 Korean women, but they were only able to obtain some 3,000 women. The staff officer Hara oversaw the establishment of "comfort stations" under his command in Hankou and north-eastern China. Besides supplying Korean "comfort women" on request, the Government-General of Korea also

sought to control the flow of civilians and "comfort women" going into Hankou, based on the ratio of comfort facilities to the population there.[219]

191. By 1943, there were at least 11 sexual slavery facilities in Hankou, one of them being Sansei-ro which contained at least 150 Korean girls and women, including the witness, Ha Sang-Suk.[220] As previously noted, there were comfort facilities containing Korean comfort women established in Guangdong, China much earlier. In April 1939, according to the testimony of Oda Kiyoshi, a soldier dealing with heavy artillery, there were many "comfort stations" in the Guangdong area. He stated:

> [I]n one of those comfort stations there were about three old Korean guys, and each one was in charge of about 50 Korean comfort women. So that makes about 100 or 150 comfort women in the whole station….Almost all the girls were Korean Ps [derogatory term for 'prostitutes']. Some comfort stations had Taiwan guiangs [young women] or Kuangtung [Guangdong] Ps. The Korean Ps said they'd seen an ad for practical nurses, and when they applied they were brought to a comfort station instead. They were tricked into it. Most of them were just young girls between the ages of 18 and 24.[221]

192. Also in Guangdong, in one of the "comfort women" facilities overseen by the 21st Army under General ANDO, Korean survivor-witness Kim Bok-Dong was forced into sexual slavery. Approximately one thousand women and girls were recruited for the "comfort stations" in the Guangdong vicinity.[222] The Consulate-General of the Guangdong region was undoubtedly aware that such facilities existed in Guangdong because he authored a document indicating that he knew of at least 86 people related to military "comfort stations" in Guangdong.[223] Attached to the document, issued by the Consulate General, was a chart indicating the total number of existing "comfort stations" in Guangdong, Haikou, and Hong Kong between April 1941 and June 1942.[224]

193. In Huichun, Manchuria, there were approximately 20 to 30 "comfort" houses; the women and girls inhabiting them were predominantly Korean.[225] The recollections of one soldier, circa 1943, in referring to "comfort women" held in houses around Huichun, reports that "[s]ome of their faces looked quite childlike." The soldier recalls that the Korean girls "were told that working to comfort soldiers was a fine thing and that they'd be earning money besides." He remarks that "they were taken far away from their homes….On Sundays, the men were just like animals and the girls didn't get a moment's rest. Before they finished with one guy the next one would be knocking on the door. They weren't even allowed to take a break when they had their periods, but had to keep on

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219 Korean Exhibit, KR16, submitted by the Korean Prosecution, December 8, 2000.

220 Korean Exhibit, KR12.

221 Korean Exhibit, KB4, document entitled "Comfort Women and the Fifteen Years War," authored by Nishino, Rumiko, containing testimony of military personnel showing that in April 1939, there were many comfort stations in the vicinity of Guangdong (Kuangtung), and that a large number of Korean comfort women were serving in them.

222 Korean Exhibit, KB3.

223 Korean Exhibit, KB5, entitled "Documents concerning the Consulate-General of Kuangtung [Guangdong] Concerning the Limitation and Regulation of Japanese Citizens Travelling to China at the Time of the China Incident: Summary of Provisional Measures; Record of Statistics Concerning the Provisional Treatment of Japanese Citizens Traveling to China," authored by the Consulate General of Guangdong (date unknown).

224 Korean Exhibit, KB5.

225 Korean Exhibit, KG5.

working….Some finally killed themselves."[226] Witness Kim Gun-Ja was forced to work in Huichun as a "comfort woman" around the same time.

194. A witness before this Tribunal, Pak Yong-Sim, testified that in 1938, at the age of 17, she was working in a shop selling Western suits when a Japanese police officer in uniform and wearing a long sword spoke to her about a job in a factory. Since she came from a poor family and was earning very little with her current job, she decided to apply for it and the officer took her to Pyongyang, where she was loaded into a vehicle with other women and eventually taken to Nanking.[227] On arrival, the Japanese military forced her to become a "comfort woman." Recalling the experiences she was forced to endure, Pak Yong-Sim told the Tribunal:

> I became a 'comfort woman'. I was in a three-story building in Nanjing that was at the Kinsui-rou 'comfort station'. There I was called by the Japanese name 'Utamaru'. I had to service up to thirty soldiers every day. One day I was really in pain and when I didn't respond to the demands of one officer, that bastard beat me with his fists, kicked me with his boots, took a long knife and held it up against my throat and…cut me. The blood poured out and soaked my whole body, but that bastard officer went [on] to satisfy his lust. Other 'comfort women' who caught diseases and became malnourished were carted out or often dumped into the river to drown. I also saw two Japanese army privates stab a pregnant woman in the belly and kill her. I was there for three years.

195. From China, a Japanese army escort took her to Burma via Shanghai and Singapore. Pak Yong-Sim was interned until the end of the war in two sexual slavery facilities in the Burma-China theatres. As to her experience in a sexual slavery facility, she testified:

> I was there for two years and I was called "Wakaharu" there. The 'comfort station' was deep in the mountains and nobody lived in the area. The name of the 'comfort station' in Japanese was "Itakakuro." During the day I had to service about ten army privates, and at night I had to serve the officers. The privates brought condoms.

196. Pak Yong-Sim testified: "I had to service between thirty and forty army privates so I was always in real pain." Soon thereafter she was transferred to Lameng. She testified how she also had to do other work, besides providing sexual services for "tens of Japanese soldiers" daily, such as supplying food for them even during dangerous Allied bombings. Even while pregnant, she was required to continue providing sexual services. Some months later, Chinese troops found Pak Yong-Sim and took her and three other women as prisoners to their military camp where they interrogated and photographed them.[228] While at the camp Pak Yong-Sim started bleeding and had to have an operation and her baby was born dead. She was never thereafter able to have children. She was released from the prisoner of war camp in 1946 and, travelling by boat and train, finally returned to her

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226 Korean Exhibit, KG4, entitled "Military Comfort Station; We and War 2—Records of Wartime Experiences," authored by Shimamoto, Juzo, a soldier with the 733rd unit, stationed at Huichun for two years beginning in 1943.

227 Exhibit 23, Video Testimony of Korean Witnesses, Korean Exhibit Appendix 6-1, at 9, submitted by the Korean Prosecution, December 8, 2000; Live Testimony of Pak Yong-Sim, witness for the Korean Prosecution, December 8, 2000.

228 Korean Appendix 6-1, p. 10; Korean Exhibit KP, pp. 5-6.

hometown after having been away for nine years, at least seven years of which she served as a "comfort woman."[229]

197. Another witness, Kim Bok-Dong, told how in 1941, at age 15, the village headman forced her family to send her away to work in the Volunteer Corps, ordering her mother to put her seal on some documents.[230] She testified that the Japanese took her to Guangdong to a hospital building in an army truck. They put her to work in a "comfort station," which though ostensibly independent from the army, catered only to Japanese soldiers.[231] Of the thirty women at her sexual slavery facility, only one was not Korean. Kim Bok-Dong described the initial stages of her "comfort station" experience:

> There was a corridor in the middle of the building with rooms running along each side. There were thirty rooms. Each woman was assigned a room. The rooms were separated only by plywood and it was possible to hear someone breathing in the next room. The rooms were very small and contained only a bed thrown down on some wood assembled on the concrete floor. Each room was marked by a number on top and the comfort woman's name beneath….Inside the 'comfort station', it wasn't just names that became Japanese; I had to use the whole Japanese language too.

198. The medical officer who examined Kim Bok-Dong on arrival raped her a few days later. She stated:

> Frightened, I tried to escape out back and hide but he caught me and slapped me sharply across both cheeks. It was hard enough that my whole face went numb. He told me to do as he ordered, and I couldn't but hear him. I guessed that if I tried to resist, I would be the only one to suffer, so I resigned myself to doing as he said. But because it was my first time, it was utterly unbearable. I bled between my legs and it hurt as if I had been ripped open. My vagina swelled, and burned so much I could not urinate. The next day I and two other women talked about killing ourselves.

199. Continuing to describe her experiences at the sexual slavery facility, Kim Bok-Dong stated:

> Fifteen soldiers usually came each day, but on the weekend the number often exceeded fifty. The enlisted soldiers came between noon and 5pm, on Saturdays and from 8am to 5pm, and on Sundays, they had to be gone by 5pm when the military police came to check on the station. Officers arrived after 7pm, many of whom slept there and then left. If my vagina was swollen and it was hard to penetrate, the soldiers put an ointment on the condom and forced themselves in. If I didn't know that my menstruation had started and a soldier saw the blood, he would get angry, and slap my face and hit me.

200. From Guangdong, the Japanese transported Kim Bok-Dong to Hong Kong where she was forced to serve as a "comfort woman" under similar conditions. She testified that after

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229 Exhibit 23, Korean Appendix 6-1, p. 10.

230 Exhibit 22, Appendix 6-1, pp. 2-3, submitted by the Korean Prosecution, December 8, 2000; Korean Exhibit KB1.

231 Exhibit 22, Appendix 6-1, pp. 3-5; Korean Exhibit KB5.

three months, they took her under guard to Singapore to the Japanese army division stationed there, where she and other victims were again forced to provide sexual services to the Japanese military. She remained a "comfort woman" until Japan's defeat in 1945.[232]

201. Before this Tribunal, Kim Gun-Ja explained how in March 1942, at age 15, her "adopted father" sent her off with a Korean man in a uniform, though he was not a soldier. The Korean transported her along with seven other girls, first by freight car then by military truck, to Huichun, Manchuria.[233] Kim Gun-Ja explained that "the man who brought me to the comfort station ran it with his wife." Upon arrival the proprietor put her into a room on the first floor and within a few days he forced her to provide sexual services to Japanese soldiers. The proprietor, his wife, and a male employee would beat the women and monitor them.[234] She recalled her suffering in the "comfort station," stating:

> Soldiers started coming from about two or three days after my arrival. At first I refused, and they gave me a hard hit on my right ear that ruptured my eardrum. They just let it bleed, and I still can't hear very well. The soldiers came from about 2 or 3 pm on Saturdays, and there was an especially large number of them between 9am and 7pm on Sundays. There weren't many who came alone, and they came on a truck or on foot, led by officers. The soldiers passed through the office and waited in lines in front of the rooms. The halls were swarming with more than a hundred of them. I couldn't walk, and I wasn't allowed to rest during menstruation. On weekdays there were only officers who came, slept, and then left. On Saturdays and Sundays officers came only at night. When there were a lot of them, I had to service up to forty at one time, and I couldn't wash at all, causing additional pain. The soldiers brought condoms which tended to break so some men didn't use them. Every Friday night we were examined for sexually transmitted diseases. We all got on a truck and went to the military officer who examined us. We were the only women in the barracks hospital. I contracted syphilis and was given the 606 injection. I also got pregnant, but miscarried. I was called "Kumiko" or just my room number "nine."

202. She testified further that she did not entertain the idea of escaping because of the brutal punishment meted out to escapees who were caught. A year and a half later, Kim Gun-Ja was transferred to Kokashi some sixteen kilometres from Huichun, Manchuria. She was finally released when Korea was liberated in 1944.

203. Witness Ha Sang-Suk was 16 in 1944 when a Korean man took her and an acquaintance away to an inn in Kyongsong province where the couple running the inn gave her the name Kimiko. They sent her and forty other women and girls on a train carrying soldiers to Hankou via Pyongyang, Tenjin, Nanking, and Wuhan. There, they were taken to a house operated by a couple from Pyongyang. Ha Sang-Suk recalled they "were examined by a doctor" and that they were "given medicine and injections to prevent pregnancy." She also recounted how the women and girls "were presented to the military department responsible for "comfort stations," and with the permission slip stating that women had to

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232 Exhibit 22, Korean Appendix 6-1, pp. 6-7.

233 Exhibit 22, Korean Appendix 6-1, p. 1; Korean Exhibit KG1.

234 Exhibit 22, Korean Appendix 6-1, p. 1.

be older than eighteen [when] presented. My age was raised to eighteen."[235] Thus any age minimum was merely a ruse. She continued stating:

> The Japanese doctor told me that I was a virgin all right and somebody who seemed old enough to be my father slept with me. He raped me and he told me that from this night on I will be serving Japanese soldiers. I would have to take dozens of Japanese soldiers every night.

In further describing her experience at the facility, Ha Sang-Suk testified:

> The 'comfort station' had two stories, and was the third house in…[the] village. There were about twenty rooms, all with tatami floors. First, three Japanese soldiers came in, and after that, it was only soldiers. Usually, ten to fifteen soldiers came each day. If the soldiers gave money to me, I gave it to the owners in exchange for condoms and tissue. The amount was about one or two Chinese yuan, and the managers kept record of it in an account book. On Sundays the soldiers waited in lines outside. Each soldier was allotted about one hour. When I refused to allow a soldier to go twice, I was sometimes beaten. Some soldiers showed up drunk and threatened to kill me. I fought with those who refused to wear a condom. If a soldier was dissatisfied with any of the women, he complained directly to the proprietor who then beat and kicked the woman….There was a bathhouse. After servicing a soldier, I went to the bathhouse and washed with medicated water. Every Monday I went to a hospital in Jokgyong village and was checked for sexually transmitted diseases….The owner hated it if anyone had contracted a disease so they [the women] covered cotton wool with dust and swabbed themselves. This way, even if there was an infection, it was possible to pass the examination. Women who contracted syphilis were hospitalised and treated with the 606 injection. They usually recovered within fifteen days.

204. Ha Sang-Suk and the other women could neither leave the brothel nor rest. The proprietors of the "comfort" facility bought them clothes and make-up but gave them no money. She tried to borrow money from the Korean man who brought her to the "comfort station" to get the train fare home but he told her that she would have to work for three years to repay him.[236] One day, Ha Sang-Suk heard that Japan had lost the war, so she left the "comfort" house. Later, she decided not to return to Korea and remained in China where she met and married a Chinese native with three children.

205. Song Shin-Do, another surviving victim of the military sexual slavery system, was approximately 16 years old in l938 when a Korean woman proposed that she go to work assisting those on the battlefield. Living alone and unmarried, she went with the Korean woman to Pyongyang where she saw a lot of other girls in their late teens gathered. From Pyongyang, a Korean man took the still unsuspecting Song Shin-Do to Wuchang and deposited her at a large military building which turned out to be a "comfort station" called World View. Due to serious fighting nearby dead bodies were scattered across the floor and Song Shin-Do and other girls were ordered to clear away the corpses and wash the

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235 Exhibit 22, pp. 7-8.

236 Exhibit 22, Korean Appendix 6-1, p. 8.

blood stains off the walls. Afterwards, they were all examined for sexually transmitted diseases and it was then that Song Shin-Do realised what her work would entail.

206. Kanedo became her professional name, and Song Shin-Do had to provide sexual services to many Japanese soldiers.[237] She described her experience, stating:

> The proprietor of "World View" was a short Korean man….There were a dozen or so 'comfort women' at "World View," and we were all Korean. We were not allowed to speak Korean, and even speaking familiarly among ourselves was prohibited. Of all the women, I had the hardest time at "World View." I was so young I had not even begun to menstruate yet. The first time I was forced to service a soldier, I didn't know what I was supposed to do. I couldn't stop crying, and I ran out. The first man to come in to my room was an officer named Takahashi, and when he saw me run away crying, he didn't do anything and left. That officer reported it, and someone from the office exploded with anger at me. In the 'comfort station' office, I got very frightened. Since I didn't know where I was, I didn't speak the language, I had no money and no idea how to take the train, and the area was surrounded with soldiers, escape was impossible. Even so, when the soldiers came into my room, horrifying and terrifying me, and I cried and tried to run away. The manager slapped my cheek until my nose bled, withheld my food and shut me up in a narrow room. However, complete escape was impossible, and while crying, I became a tool for the sexual appetites of the soldiers….I was forced to service dozens of soldiers every day. Rest was not permitted during menstruation. Especially on Sundays, there were a lot of soldiers, and some of them demanded dominant and barbaric sexual acts….If the comfort women were too exhausted and tried to refuse the soldier's demands, they were threatened with knives, beaten, and subjected to all sorts of violence.

207. Although the soldiers were supposed to use condoms, most of them did not and thus many "comfort women" became pregnant as a result of the repeated rapes. The women who got pregnant were still not allowed to refuse sexual demands. The "comfort" facility expelled Song Shin-Do during her second pregnancy, whereupon she was taken to other sexual slavery facilities. She eventually was forced to provide sexual services to soldiers on the front lines where she was in increasing danger as the as the war intensified. As a "comfort woman" serving on the battlefield, Song Shin-Do witnessed many barbaric acts being committed against Chinese prisoners of war. She and other "comfort women" had to do sentry duty as well. When the war ended in 1945, a Japanese soldier took her to Japan where he abandoned her. Having no means of returning to Korea then, she stayed in Japan and eventually found work in a Korean-Japanese owned restaurant and lived together with the proprietor until he died. Thereafter she remained in Japan.

208. Kim Yong-Suk, another survivor witness, testified that at the age of 12, she was working for a rich family until a Japanese policeman told her that she would make a lot of money if she went away with him. She accepted his proposition, and they travelled together for many days before arriving at a Japanese hospital, which also served as a "comfort station." Kim Yong-Suk recalled that "there were many different rooms which belonged

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[237] Exhibit 22, pp. 10-11; Korean Exhibit KR1.

to the sexual slavery facility, many rooms, side by side and they were [surrounded] by very high walls and barbed wire all over the place and had these guards guarding everywhere." She was held in the last room of the "comfort station" and was given the name Nukada. Shortly after arrival, a Japanese soldier named Nakamura came into the room and said "Let's have some fun." He then stripped her naked and took out his penis. Kim Yong-Suk testified to her first day in the station, saying:

> I was only 12. I didn't know what that meant….I was frightened, but he was literally forcing me on the ground and he cut me open with his sword. Then I was bleeding and then he completely took off his pants and he raped me. He raped me to the point where I was bleeding and I was crying….[T]here was another soldier, Kanemura, he came in and called me names for being a Korean woman….He stripped me naked and he also cut me with his sword and he hurt my breast area. If you see my body, I am full of scars. He hurt me all over my body.

Kim Yong-Suk remained a "comfort woman" until the war ended.

209. Moon Pil-Gi testified before this Tribunal that she was 15 years old in 1942 when taken away by a neighbour while accompanied by the police. They put her on a truck that took her to Manchuria. There, Moon Pil-Gi was placed in a "comfort" facility and forced to provide sexual services to Japanese troops. She described her abuse in the following manner:

> They tried to rape me. They were forcing me. They were treating me as a slave and they kicked me [and] hit me when I was not very good to them. And also they…burned my skin….[T]here was a red, burning, scorching, iron bar, and you know I have a scar, still underneath my arm.

210. "Mostly soldiers" raped Moon Pil-Gi. The military stations "were surrounded by the barbed wires" and under guard, and she feared that she would be killed if she attempted to escape. She was forced to remain a comfort woman until the end of the war.

211. Ahn Bok-Soon, another survivor of the "comfort system," testified before this Tribunal that she remained a "comfort woman" at a station in Singapore until the end of the war. One day, when she discovered that there were no more Japanese soldiers around, she went out onto the street. Ahn Bok-Soon hid in the mountains surviving on vegetation for over a year before managing to make her way back to Korea.

(d) Sexual Enslavement in the Philippines and of Filipina Girls and Women

212. With the institution of its military regime in the Philippines in l942, the Japanese army established sexual slavery facilities there. As with other countries, the Japanese military utilised various methods, particularly force and deception, to conscript Filipina girls and women into the system of sexual slavery.

213. These "comfort" facilities were run by Japanese civilians who had received the necessary permission of the commanding officer.[238] The "comfort station" managers were required

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238 Exhibit 59, submitted by the Filipino Prosecution, December 9, 2000, document entitled "Amenities in the Japanese Armed Forces," a research report published by the Allied Translator and Interpreter Section, Supreme Commander for the Allied Powers, November 15, 1945.

to follow rules and regulations issued by the Japanese military. Some of the regulations required separate "comfort stations" for the air and naval forces, and stipulated which stations were to be placed under the supervision of commanding officers and adjuncts to the air and naval depots. Other general regulations purported to forbid using "comfort women" who were still minors, mandated medical check-ups of the women for venereal diseases once a week, and required the use of condoms at all times. The "comfort women" were not to have sexual intercourse during their menstruation, and were only to live in houses that always had clean bedding available.[239] The detailed regulations governing the first "comfort station" in the Philippines, set up in 1942, also addressed certain conditions of detention in the stations. For example, the regulations allowed the "comfort women" to take walks at a designated time (between the hours of 8am and 10am) and for a specific distance. The "comfort stations" were only available to those "military men and civilian employees of the Army wearing military uniform[s]" who paid in advance.[240] Subsequently, sexual slavery facilities were set up in Cagyan City,[241] Masbate Island in Laguna,[242] Santa Cruz,[243] and Panay.[244] The Tribunal notes that the purported regulations were largely unenforced and that the "comfort women" had little effective power to ensure that soldiers used condoms or that minors were not selected for abuse, and to refuse services during menstruation.

214. Before this Tribunal, Tomasa Dioso Salinog testified that in April 1942, at the age of 13, Japanese soldiers forcibly took her away from her home after beheading her protesting father in front of her. Knowing she was a child, they nonetheless took her to a large house nearby, confined her in a room, and beat and raped her, even though she had not even had her first menstrual period yet. She described her initial ordeal in the following way:

> The soldier placed his hands on my thighs and other parts of my body. Then he grabbed my body. . . and we fell. He fell on top of me. I wanted to get up. I struggled against him, wanting to get up but I could not. I was pinned down. I struggled and he got mad. Then he hit my head with a hard object. . . then they left the room. When they came back they brought some water and washed my body, and then that evening they came back and abused me. They took turns abusing me.

In her affidavit, Tomasa Dioso Salinog averred:

> When I woke up the next morning, the soldiers were no longer in the room. For three days they left me alone but then the Japanese soldiers started raping me again. I fainted so many times that I do not remember how many soldiers raped me. I only remember that two to five soldiers a day came into the room to rape me. Often I was continuously raped from afternoon till late at night. . . . In the big house I was served only two meals. . . . There were even times when I was only served breakfast. I

239 Exhibit 59, pp. 12-13.

240 Exhibit 68, submitted by the Filipino Prosecution, December 9, 2000, a memorandum entitled "Rules and Regulations of Comfort Station Asia Kaikan & First Comfort Station," originated by the Iloilo Branch, Visaya Section, Philippine Military Government, Iloilo Military Police Squad, November 23, 1942.

241 Exhibits 66 & 67, submitted by the Filipino Prosecution, December 9, 2000.

242 Exhibit 68, submitted by the Filipino Prosecution, December 9, 2000.

243 Exhibit 70, submitted by the Filipino Prosecution, December 9, 2000.

244 Exhibit 73-A, submitted by the Filipino Prosecution, December 9, 2000.

> slept during the day-time as I had nothing to do being locked up inside the room. I hated for night to come as I know that soldiers will enter the room to rape me. I wanted to die. The soldiers' body odour was very bad. In particular, those who came back from the mountain smelled extremely bad since they came straight into the room without washing. . . . Some of the soldiers visited and raped [me] repeatedly. Some were waiting on vacant beds for their turn while I was being raped by another. Those soldiers from the mountain patrols had been drinking tuba [a local coconut wine] and were brutal. . . . After about a month, I was allowed to go out of the room and walk around the house but never outside the building. . . . While being held captive in the big house, I had medical check-ups but not for venereal disease. No one used a condom.

215. Tomasa Dioso Salinog remained in that "comfort station" for a year, raped daily by three or four men. She managed to escape when, having had too much to drink, the soldiers forgot to take the key. She found refuge with an old couple, but they were forced to give her up when a Japanese soldier appeared demanding that Tomasa Dioso Salinog be turned over to him. She stayed with this soldier, Okumura, until the end of the war preferring to remain in his lodging and be abused by a few, than to be returned to the big house to be sexually abused by numerous Japanese soldiers. She was raped by Okumura and his friends whenever they came home. When the Americans landed in the Philippines, she was able to leave and make her way home. She never married.

216. In August 1944, at age 15, Maxima Regala de la Cruz, another survivor of the "comfort" system, testified through a video before the Tribunal that a Japanese soldier forcibly seized her and her mother from the streets of their town and took them to a nearby house. There they were locked in a room and separated each night, whereby each of them was repeatedly raped. Maxima Regala de la Cruz described her first rape in the following words:

> [A] Japanese soldier entered my room. He told me to lie down on the bed. I refused and he forced me to lie down. I screamed and struggled until he drew his sabre and pointed it at me. I was so scared that I fell silent. He then pushed me to the bed and raped me. I cried for help and pleaded with the soldier to stop but he did not listen to my pleas. Since that first time I was sexually abused, I became extremely nervous. Every time a Japanese soldier armed with a sabre would enter the room and touch me, I would faint. That is why I cannot recall the exact number of times that I was raped. I knew that I was raped though because I felt aches and pains all over my body especially in my private parts. After that day, my mother and I were kept imprisoned in the house. During the day, while the soldiers raided the villages, my mother was brought to my room where we were locked in. A soldier guarded us and was present even when we had to go to the bathroom. At night, we were placed in separate rooms where the soldiers who came back from their military operations would sexually abuse us.

Both women remained in the "comfort station" for three months. Maxima Regala de la Cruz was given additional clothing since every time she returned to her room her clothes were soaked with blood. Although looking for an escape avenue, there was always a guard watching. One day in October 1944, when the soldiers did not lock their door,

Maxima Regala de la Cruz and her mother escaped and they found help for the mother, who was very weak. They were also assisted in returning to their family home where they were reunited with their family.

(e) Sexual Enslavement in Malaysia and of Malaysian Girls and Women

217. Following the Japanese invasion of Malaysia (Malaya) in 1941, the Japanese occupying administration established and managed "comfort" facilities in the Malay Peninsula and Singapore.[245] The 25th Army, in charge of operations in Malaysia, which was under the command of General YAMASHITA, sent soldiers to Bangkok, Thailand to procure "comfort women," and they returned with three Thai women who were not infected with sexually transmitted diseases. Shortly thereafter, the military began setting up facilities throughout Malaysia, whereupon they placed Malaysian girls and women into those facilities along with the other women.[246]

218. YAMASHITA was the Commander of the 25th Army in Malaya from November 1941 to July 1942. The "comfort stations" in Malaysia, like their counterparts in the Philippines, were heavily regulated by the Japanese military, particularly with regard to the medical treatment deemed necessary to prevent sexually transmitted diseases. The regulations explicitly stipulated that condoms were to be rationed and used in proportion to the number of "comfort women" in each city, and that the "comfort stations" were exclusively for military use.[247] "Comfort" facilities were established in many Malaysian regions including, Kuala Pilah, Port Dickson, Penang,[248] Kuala Lampur, and Semarang.[249]

219. As in other conquered territories, the Japanese military utilised a variety of methods, including deceptive advertising and force, in obtaining women for the stations, and they imposed brutal conditions of detention upon the conscripts.

220. Some of the women forced into sexual slavery in Malaysia had been prostitutes. The plight of former prostitutes recruited into the "comfort system" and turned into sex slaves is illustrated by the following example. According to the recollections of Fusayama Takao, an officer in the Signal Corps of the Imperial Guard Division (later a member of the Japan Academy), in February l942 the Japanese military opened a "comfort station" in Singapore.[250] An ad in a Chinese-language newspaper promised good wages and requested "hostesses, aged 17-28," to apply. At first, they sought out prostitutes, described as those in the "shameful calling."[251] According to Fusayama Takao, the rear staff of the 25th Army Headquarters conducted the recruiting and many women who had

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245 Korean Exhibit KB6, entitled "Japanese Military Comfort Stations on the Malay Peninsula," based on documents discovered by Professor Hayashi, Hirofumi, 1993; Exhibit 151, entitled "The Regulations on the Control of Recreation Facilities and Hotel Business": The 28th Notification of Malayan Military Administration," authored by the Malayan Military Administration, November 11, 1943, submitted by the Malaysian Prosecution, December 10, 2000; Exhibit 152, entitled "The Military Administrative Regulations on the Observance of Recreation Facilities and Hotel Business Rules," authored by the Malayan Military Administration, November 11, 1943, submitted by the Malaysian Prosecution, December 10, 2000.

246 Yoshimi, Comfort Women, p. 123.

247 Exhibit 153, submitted by the Malaysian Prosecution, December 10, 2000.

248 Exhibit 145, submitted by the Malaysian Prosecution, December 10, 2000; Exhibit 150, submitted by the Malaysian Prosecution, December 10, 2000.

249 Exhibit 146-c, submitted by the Malaysian Prosecution, December 10, 2000.

250 Yoshimi, Comfort Women, p. 124, referring to a document authored by Fusayama, Takao, "Nankai no akebono" (Tokyo: Soubunsha, 1983), p. 150.

251 Yoshimi, Comfort Women, p. 124, referring to a document authored by Professor Hayashi, Hirofumi, "Shingapouru [Singapore] no nihongun ianjo," Senso Sekinin Kenkyou 4 (June 1996), p. 34.

been the mistresses of the English soldiers as well as impoverished prostitutes applied. The women agreed to the terms, believing that they would have to service only one soldier per day. But once they found out the number was unlimited, they protested that they were required to serve the many soldiers lined up outside the "comfort station." After the women had been required to serve up to five soldiers, the soldier in charge sought to stop further visitors, but this caused rioting among the soldiers. As a result, he "tied the women's arms and legs to their beds," forcing them to continue.[252]

221. Rosalind Saw testified through videotape that one night in 1943 when she was approximately 24 years old, Japanese soldiers took her away from her home and children. The soldiers put her into a lorry and took her to a "comfort" facility in Penang, Malaysia run by an elderly Japanese woman and containing other women of Chinese and Malaysian descent. She was given the Japanese name of Hanako. Rosalind Saw recounted her ordeals in Penang in the following manner:

> Everybody for one room. . . . We cannot make friends. You didn't run away. Ha! Then the Japanese cut your head off. Not only army soldiers but also some other soldiers. Everybody the same. Morning 20 person[s], afternoon 20, night 20. One day, 60 men. Not all the time could you sleep on the bed, sitting down again. No holiday for us. . . . For three years, many soldiers would not use condoms. At night, all the officers very wicked.…Pulled my hair. . . . After they kick you. They drag you around. . . . [H]e threatened me, to cut my throat. I said "no, please don't cut."

In addition to the continuous rapes, Rosalind Saw had to submit to invasive medical examinations on a weekly basis. As a result of the rapes she became pregnant and after giving birth, since abortion was not allowed there, she remained nearly a month in a hospital. Rosalind Saw returned home to raise her children after the war ended.

222. One witness, Ms. X, testified using a pseudonym. In 1942, two trucks filled with Japanese soldiers stopped at Ms. X's house. Three Japanese soldiers gang raped Ms. X, before they carried her to one of the trucks and forced her inside. The soldiers took her to a bungalow in Kuala Lumpur where they gang raped her every night, sometimes 5 or 6 at a time. She was kept in the bungalow for one month before being moved to a "comfort station." Ms. X recalled the experience:

> At the comfort station, the life I led was inhumane. Everyday, I was raped by 10-20 Japanese soldiers. I suffered often from stomach cramps. . . and bleeding of the vagina. Sometimes due to the pain, I could not co-operate in the sexual acts and was beaten and kicked by the Japanese soldiers. Our every move was monitored and we were not allowed to go out of the house. Nor could we communicate with each other.

223. Once the proprietor allowed her to leave the "comfort station" with an escort to search for her brother among the dead, but she had to return. Ms. X was kept as a "comfort woman" until just before the Japanese surrendered. Although she returned to her village, she had to leave it because the villagers openly despised her and treated her as an outcast for being a "comfort woman." She met her husband, who married her despite knowing that

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252 Yoshimi, Comfort Women, p. 124, referring to Fusayama, Takao,"Nankai no akebono" (Tokyo: Soubunsha, 1983), p. 151.

she was not a virgin, in another town. She never told him why she was not a virgin. Ms. X was unable to bear children so she and her husband adopted two children. Eventually however her husband left her because she hated having sex and refused to make love even to her husband.

224. The Tribunal notes that for women held in private homes or held exclusively for officers or held under circumstances or conditions which were not formally within the "comfort" station system, responsibility for such crimes can be attributed to the Japanese government which created an atmosphere that allowed such rape and enslavement of women to be considered normal and acceptable wartime activities.

(f) Sexual Enslavement in Indonesia and of Indonesian Girls and Women

225. The Japanese army also erected "comfort stations" in Indonesia in the wake of their invasion in 1942. It forcibly or coercibly interned many girls and women of native Indonesian and Dutch descent in the "comfort" facilities for the purpose of using and abusing them sexually.

226. A military doctor, Kinbara, Setsuzo, the chief of the medical bureau of the War Ministry, aided in establishing the "comfort system" in Indonesia by advocating in 1941 that "comfort stations" be set up there. His recommendations were based on observing the sense of virtue the Indonesians had due to their Islamic faith and his desire to cultivate the trust of the Indonesians. He feared that trust would be destroyed if Japanese soldiers raped local women.[253] Dr. Kinbara also recommended that the village headmen assist in building the "comfort stations," in order to cultivate a sense of trust between the Japanese and the locals.[254]

227. To this end, in l942 the Southern Army General Command requested by telegram that 50 native Indonesian comfort women be sent to Borneo.[255] Upon this request, General ANDO, in his capacity as Commander of the Taiwan Army, sent a confidential telegram to the War Minister requesting travel permits for "comfort station" operators and proprietors.[256]

228. According to the Netherlands Forces Intelligence Service's "Report on Enforced Prostitution in Western Borneo, N.E.I., during the Japanese Naval Occupation," during 1943, women in Borneo who had had voluntary relations with Japanese persons were forced by the Tokei Tai, the Special Naval Police, into sexual slavery facilities surrounded by barbed wire as a result of the military ban on such voluntary sexual relations. The Tokei Tai also accused other women working for Japanese firms in Indonesia of maintaining relations with Japanese men.[257] The Report on Enforced Prostitution further stated that the Tokei Tai undressed and forced these women to

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253 Exhibit 166, submitted by the Indonesian Prosecution, December 10, 2000, entry in the Diary of Kinbara, Setsuzo, vol. 1, No 3, (July 10-28, 1941), Chief of Medical Section, Medical Bureau (Lieutenant-Colonel, Medical Officer, and Colonel, Medical Officer from August 1942).

254 Exhibit 166, submitted by the Indonesian Prosecution, December 10, 2000, entry in Diary of Kinbara, Setsuzo, *Ibid*.

255 Exhibit 158, submitted by the Indonesian Prosecution, December 10, 2000, document entitled "Tai-den No. 602 [Taiwan Army Telegram No. 602]: Concerning Passage for Personnel to be Dispatched to the South," March 12, 1942.

256 Exhibit 158, submitted by the Indonesian Prosecution, December 10, 2000. The evidence shows that it was a confidential telegram sent by General ANDO at the request of the Southern Army to the War Ministry.

257 Exhibit 160, submitted by the Indonesian Prosecution, December 10, 2000, document entitled "Report on Enforced Prostitution in Western Borneo, N.E.I., during Japanese Naval Occupation," authored by the Netherlands Forces Intelligence Service, Batavia July 5, 1946.

undergo medical examinations after which those who were found to be virgins were compelled to be "comfort women." Other women were arrested on the streets and deposited into "comfort stations." These sexual slavery facilities were run by the garrison for navy personnel or by civilians.[258]

229. In Balikpapan, Indonesia, Lieutenant Nakasone, Yasuhiro, later to be a Prime Minister of Japan, stated that he went to great lengths to build "comfort" facilities in order to prevent the Japanese soldiers and naval civilian employees from continuing to assault the local women.[259] According to a confidential telegram sent to the chief of staff of the Southwest Area Fleet in Balikpapan during 1942, the Southwest Area Fleet was operating sexual slavery facilities and was involved with the proprietors of the "comfort stations" concerning such things as the placement of facilities, provision of goods, the transportation of the women, and the management of the stations.[260]

230. On the island of Anbon Pulau, some Japanese "comfort women" were sent home and "comfort stations" with local women were closed due to worsening war conditions. An officer of the Naval Special Police Corps recalled that because military personnel continued to rape local women, "comfort stations" were again set up in an effort to control the rapes. The civilian police forcibly rounded up local women of Indonesian and Eurasian descent. And, according to the statement of the civil administrator made to the naval police officer, the civilian police forced them on the ships against the screaming protests of their families. Although the officer described some of the women as former "comfort women," prostitutes, and volunteers, he admitted that "a certain degree of coercion was inevitable."[261] According to an account by Sakabe Yasumasa, the paymaster attached to the 25th Special Naval Base Headquarters, after the Japanese "comfort women" were sent home, the headquarters staff planned to open four new stations with about 100 local women. They selected the most attractive women who were not infected with venereal diseases to work as "comfort women" in these stations. The officer recalled feeling "depressed listening to the voices of the young Indonesian women crying out over and over at the club."[262]

231. According to a report to the Chief of the Second Repatriation Squad in Indonesia, in the southern part of Indonesia, in the Celebes region, twenty-seven "comfort stations" were built containing approximately 281 girls and women who were mainly of Indonesian descent. Of those stations, the Japanese navy commissioned twenty-three sexual slavery facilities containing about 223 girls and women. Though run by civilians, the Navy bore all the expenses of food and clothing for the women. The other three stations were operated directly by the navy under the supervision of the Chief of the State Affairs

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258 Exhibit 160, submitted by the Indonesian Prosecution, December 10, 2000.

259 Exhibit 159, submitted by the Indonesian Prosecution, December 10, 2000, document entitled "Niju-san Sai de Sanzen nin no Soushikikan [23 years old Commander of 3000 men]," authored by Nakasone, Yasuhiro (Lieutenant Junior Grade of Accounting of the Navy, later to become a Lieutenant, and Prime Minister after the war), contained in book entitled "Owarinaki Kaigun [The Endless Navy]," Publication Department, Development Center, Nippon Cultural Broadcasting, Inc., pp. 95, 98.

260 Exhibit 162, submitted by the Indonesian Prosecution, December 10, 2000, document entitled "Heibi-4-Kimitsu No. 137 [Secret Telegram of the 4th Section, Naval Preparation Bureau No. 137]," authored by Rear Admiral Oka, Takazumi (Vice Admiral from November 1942) & Chief Hoshina, Zenshiro (Vice Admiral from November 1943).

261 Yoshimi, Comfort Women, p. 127, fn 99, referring to a document by Nogi, Harumichi, "Kaigun tokubetsu keisatsutai," (Tokyo: Taihei shuppansha, 1975), p. 114.

262 Yoshimi, Comfort Women, p. 128, fn 101, 102, referring to a document edited by Soumei, and entitled "Kaigun keiri gakkou gakusei dai 10 ki bunshou kankou iinkai" (Tokyo: Kaigun keiri gakkou gakusei dai 10 ki bunshou kankou iinkai, 1983), p. 312.

Department who was acting with the permission of the Naval Administration's Director-General.[263]

232. Although many Indonesian women were forced into sexual slavery locally, some were sent to other islands of Indonesia. Some Indonesian women and girls were also sent abroad to Burma and the Philippines.[264]

233. In 1942 when she was about 13 years old, Ms. Mardiyem was forced into being a "comfort woman." Explaining her ordeal to the Tribunal, Ms. Mardiyem testified that she was required to work at least 10 hours a day and sometimes throughout the night:

> If I tried to refuse, well, you know yourself that I would face torture or abuse, so there wasn't anything that I could do. Everything kind of worked by the clock, so from 12 o'clock noon until 5 o'clock I would have to do work. . . . [T]here would be a break, but the entire evening, from 7 o'clock until midnight, again we'd have to work. So you can count yourself how many hours that this would go on. Sometimes from 12 o'clock night until morning, there would be someone who would spend the entire night.

234. At the age of 14, Ms. Mardiyem was pregnant. Five months into her pregnancy, the Japanese pushed on her abdomen until the foetus came out. Ms. Mardiyem did not receive money for her forced sexual services. She was told, however, that if the tickets the Japanese soldiers bought were kept, they could later be exchanged for money when she was no longer a "comfort woman." She proceeded to fill baskets with these tickets but was never able to exchange them for money.[265]

235. Another witness, Ms. Suhanah, reported that in l942, when she was sixteen years old, six Japanese soldiers approached her when she was in her backyard and offered her a job or schooling. She refused their offer, and consequently was pulled by her hair and forced into their jeep, which took her to a "comfort" house two kilometres away. Many other women were already present in the "comfort station." Three days after her abduction, Ms. Suhanah underwent a medical exam and was subsequently raped and whipped by a Japanese soldier for refusing to submit to his sexual advances. She was forced to sexually service several soldiers per day, as well as the examining doctor, and the sexual violence against her was regularly accompanied by additional brutal and degrading treatment. She contracted a venereal disease as a result of the rapes.[266]

(g) Sexual Enslavement in Dutch Territories and of Dutch Girls and Women

236. In 1942, following the Japanese invasion of Indonesia, the Japanese soldiers interned the Indonesian civilians of Dutch descent in separate internment camps for women and children and for men. In 1944, the soldiers registered women between the ages of

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263 Exhibit 165, submitted by the Indonesian Prosecution, December 10, 2000, document entitled "Report on the Repatriation of the Second Repatriation Squad," authored by the Officer for Naval Administration, Head of the Second Repatriation Squad of the Naval Administration of Celebes, June 20, 1946, containing information about the situation of repatriates and general business matter, including an investigation of persons responsible for comfort stations in the whole area of Southern Celebes (Sulawesi).

264 Yoshimi, Comfort Women, pp. 127-128.

265 Indonesian Indictment, paras. 22-24.

266 Indonesian Indictment, para. 19.

seventeen and twenty-eight.[267] Subsequently, Japanese military officials (who were apparently of high rank because they were saluted as they approached) appeared in military vehicles and ordered all the women between the ages of seventeen and eighteen to line up in the compound. The officials selected around a dozen women to accompany them, and these women were forced into sexual slavery to the Japanese military.

237. The witness Jan Ruff-O'Herne was one of the women selected. The officials took these young women to a large Dutch colonial house surrounded by high fences and barbed wire. The women were given their own rooms and informed that they would have to provide sexual service on demand to high-ranking Japanese officers. They protested, cried, and refused. Jan Ruff-O'Herne even mentioned to them that this was against the Geneva Conventions governing war conduct but to no avail. Jan Ruff-O'Herne testified that she was brutally raped on a daily basis by a series of Japanese officers. She was also raped by the examining medical doctor. Rape was often accompanied by threats and savage beatings. Recalling her experience on the first night, Jan Ruff-O'Herne stated:

> We were all virgins. . . . I wanted to be a nun. . . . We were given Japanese names, and these Japanese names, they were all names of flowers. . . . He dragged me up from under the table, and immediately I kicked him and fought him, but he was so strong. He dragged me into the bedroom, and in the bedroom again I started to fight with him. . . . He threw me on the bed and tore off all my clothes. . . . He ran the sword over my body, starting at my neck, right down my body, right up my legs, and just playing with me like a cat would do a mouse. . . until he eventually brutally raped me.

238. Hoping no officer would want her if she was ugly, Jan Ruff-O'Herne shaved her head: "I cut off all my hair. . . real close to my scalp. . . . I thought nobody would want me, but it only had the opposite effect. I became a curiosity object, and everybody wanted to have the girl who cut off her hair."

239. The mothers of the Dutch women taken from the camp complained to authorities and after three months, the soldiers told the "comfort women" to pack their bags and go back to the POW camps, where they were again detained until being liberated in 1945.

(h) Sexual Enslavement in East Timor and of East Timorese Girls and Women

240. Following the invasion of East Timor in 1942, the Japanese military forcibly and deceptively interned women of Timorese and Chinese descent in sexual slavery facilities and homes where they were repeatedly sexually assaulted. According to documentary evidence, the 48th Regiment received permission to establish a "comfort station," whereafter it ordered the nearby village chief to round up women and girls for the station. Many young girls, including mere children, were selected. Those who passed the medical examination were forced into sexual slavery.[268]

241. According to the recollections of First Lieutenant Iwamura, the military asked him to procure women from Indonesia and China for the "comfort stations." After village

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267 Exhibit 155, submitted by the Dutch Prosecution, December 10, 2000.

268 Exhibit 168, submitted by the East Timorese Prosecution, December 10, 2000, affidavit of document entitled "Sousaku daiyonjuuhachi rentai ase to shouen to gouon no kiroku [Record of the Sweat, Powder, Smoke, and Loud Report[s] of the 48th Regiment]," authored by the Association of the 48th Regiment Comrades in Arms, published February, 1982.

massacres, soldiers also took young local girls of the villages to military bases or to the local Japanese headquarters to be raped and otherwise sexually abused. Other girls were sent to various parts of Indonesia and never seen or heard from again.[269]

242. Some "comfort women" came from Kisar Island to staff "comfort" facilities in other parts of East Timor when local women failed to qualify medically.[270] These women had been told that they would be working in an eating place in Abis, in the central highlands of East Timor. Instead, they were used as "comfort women." At the end of the war, they begged the retreating Japanese soldiers to take them to Java, or Japan or anywhere but to their own island, for they were ashamed of their bodies and could not go home.[271] "Comfort" facilities were also set up in Bobonaro,[272] Marobo, Baguia,[273] Dili, Baucau and Lautem. Some of the 70 girls and women (who were around age 20) in the process of being sent to Lautem never made it there due to an air attack.[274]

243. The witness Esmeralda Boe testified before the Tribunal that she was only a child when the Japanese soldiers kidnapped her from a field near her home. She did not know her age at the time of her capture, but recalled that she had not yet begun her menstruation and that her breasts were just beginning to grow. The Japanese soldiers took her to a house where a commander named 'Shimimura' raped and sodomised her. Esmeralda Boe described her first harrowing experience with sexual violence committed by the Japanese military:

> He took off his clothes and took my clothes off. I was so young I had no idea what he was doing. And he pushed me to his bed and then that's when he start[ed] to rape me. . . . [H]e did the sexual intercourse through my vagina and also my anus.

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269 Exhibit 170, submitted by the East Timorese Prosecution, December 10, 2000, affidavit of document entitled "Higashi Timor to sengo hoshou—roufuufu no shougen [East Timor and Postwar Compensation—an Elderly Couple's Testimony]," authored by Tanaka Mariko, published October 1995.

270 Exhibit173, submitted by the East Timorese Prosecution, December 10, 2000, affidavit of document entitled "Chimor, shirarezaru gyakusatsu no shima [Timor, unknown island of massacres]," authored by Tanaka, Atsuo, based on an interview with First Lieutenant Iwamura, Shouhachi officer of the 2nd Taiwan Regiment, published January 15, 1988.

271 Exhibit 172, submitted by the East Timorese Prosecution, December 10, 2000, affidavit of document entitled "Asahi Shimbun, Letter to the Editor," authored by Ageta Akio, published August 7, 1991—document indicates that a comfort station was opened in Abis, in the central highlands of the eastern sector of Portugese Timor.

272 Exhibit 171, submitted by the East Timorese Prosecution, December 10, 2000, affidavit of document entitled "Taiwan hohei daiichi rentaishi, gunki hatameku tokoro [History of the 1st Formosan Infantry Regiment—Where the Flag Fluttered]," authored by Zenkoku Taiwan hohei daiichi rentai rengoukai hen [1st Formosan Infantry Regiment National Federation, eds], published April 1, 1988—document clarifying the name of the unit stationed in the Bobonaro district of the western part of Portuguese Timor where the local residents were forced through the local 'Raja' (king) to labour for the Japanese troops.

273 Exhibit 174, submitted by the East Timorese Prosecution, December 10, 2000, affidavit of document entitled "Kouwa Memo (4)—Higashi Chimoru de no nihongun [Lecture Memo (4)—The Japanese Army in East Timor," authored by Iwamura, Shouhachi, published July 16, 1987; document associated with a speech given by Mr. Iwamura stating that a comfort station was set up in Baguia, Portuguese Timor.

274 Exhibit 176, affidavit of document entitled "Eiko no jucchuutai—Taiwan hohei daini rentai dai juu chuutai [Glorious 10th Company—the 10th Company of the Formosan 2nd Infantry Regiment]," authored by the Association of the 10th Company of Formosan 2nd Infantry Regiment Comrades in Arms, published December 30, 1982—document containing a collection of memories written by former soldiers of the 10th Company of the Formosan 2nd Infantry Regiment, describing the existence of a comfort station in Lautem in the eastern part of East Timor; and Exhibit 177, affidavit of document entitled "Watashira no chiisana senki—Senyuu no hi—Taiwan hohei daini rentai daikyuu chuutai hen [Our Little War Records: Monument of War Comrades]," authored by the Association of the 9th Company of the Formosan 2nd Infantry Regiment Comrades in Arms, published September 15, 1981; document containing a collection of memories written by former soldiers of the 9th Company of the Formosan 2nd Infantry Regiment where one soldier was ordered to transport some 70 comfort women from Surabaya, Java to Lautem, East Timor, but due to an air attack the women did not arrive in East Timor, submitted by the East Timorese Prosecution, December 10, 2000.

Although she was allowed to go home, Japanese soldiers returned to her home every evening to take her to 'Shimimura's' residence to sexually service either 'Shimimura' or two other Japanese commanders. This abuse lasted for three years. Esmeralda Boe stated that her parents despised what was happening to their daughter but that they dared not protest for the Japanese threatened them with death if they did not let her go. During the daytime, she worked very hard in the fields and woods for the Japanese under the threat of a beating or other punishment if she did not do the work well. She testified that the Japanese repeatedly raped her along with the other women from the fields:

> They would send the men back home and the women they would keep in the place. [There] were four houses full of women. Some of the women, they would take to the bushes and they rape in the bushes. Some of them died. They destroyed everything.

244. Another East Timorese survivor, Marta Abu Bere, also testified before this Tribunal that during the day, she was taken to cut wood in the forests in Marobo with several other women and at night she was taken back to "comfort facilities" where she was raped by up to ten men a night. She testified that she and the other women were treated like animals and that their parents were threatened with death if the women did not go to the facilities. In addition to her live testimony, Marta Abu Bere also recounted her ordeal in a statement submitted to the Tribunal:

> During the night the Japanese. . . entered my room. At that time I was so young I didn't know what was happening, my clothes were stripped with force and I was pushed to the bed. I was forced to service 10 men; I was treated like an animal. They told me not to yell, [that] if I yell they would kill me. In the morning I couldn't walk because I was in pain. Since my friend and I were chosen as comfort women, our work was only to service the Japanese army, on the morning and the night. During the day I had to service 4-5 men. When they entered the room they wore civilian clothes and their gun[s] were kept away. I had to service them for 3 months.

Marta Abu Bere was so weak that her parents succeeded in persuading the Japanese Army Commander that their daughter was too weak to continue working in the "comfort station" any longer.

(i) Sexual Slavery of Japanese Girls and Women

245. The Japanese military began recruiting Japanese "comfort women" in early 1938, in the aftermath of the Nanking massacre and mass rape committed by the Japanese soldiers.[275] The recruitment of the women was heavily regulated. Regulations issued by the Home Ministry's Chief of the Police Bureau entitled "Matters Concerning the Handling of Women Sailing to China" stipulated that the women sought to fill the stations were to be "prostitutes, over 21 years, and free from sexually transmitted diseases."[276] The expert witness Professor Yoshimi explained that these regulations were adopted because Japan was a signatory to three treaties forbidding the buying and selling of women and

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275 Yoshimi, Comfort Women, p. 100; Written statement of Expert Witness, Dr. Hayashi, p. 3; Written statement of Expert Witness, Professor Fujime, Yuki, p. 1.

276 Yoshimi, Comfort Women, p. 100, n. 2.

children.[277] It is also very likely that the Japanese did not want to generate condemnation by Japanese society if it forced, coerced, or deceived Japanese citizens who were not prostitutes into sexual slavery. Professor Yoshimi has documented cases of Japanese "comfort women" who were underage and not prostitutes.[278] While the majority of Japanese "comfort women" had previously been prostitutes,[279] the evidence indicates a significant number of other Japanese women and girls were forced into sexual servitude as well.

246. In considering the situation of the Japanese women who had previously been prostitutes and who became part of the "comfort system," the evidence indicates that many of these prostitutes initially volunteered for participating in the "comfort system." Of these, some were free of debt whereas others had their debt purchased by the Japanese army.[280] Professor Yoshimi found some indication that prostitutes may have been promised a patriot's burial in the Yasukuni Shrine for the spirits of the war dead as a reward for providing sexual services to the Japanese soldiers during the war.

247. Some Japanese women were sold by impoverished parents to the Japanese military, or tricked into becoming sex slaves by promises of jobs such as typists or maids.[281] There were also reports that Korean women living in Japan were routinely tricked into becoming "comfort women."[282]

248. Whether or not they had once been prostitutes, were of legal age, or whether they had come voluntarily or as a result of deception, many of the Japanese women procured, as those from all over Asia, were eventually forced into sexual slavery as "comfort women."[283] Japanese "comfort women" were taken to serve in the southwest islands of Japan,[284] particularly in Okinawa,[285] and in Awacha, Miharashitei, Keizuka, Kangetsutei, and Gunjinkaikan.[286] There were Japanese "comfort women" on Hainan Island, as well.[287]

249. While prostitutes, adults, and volunteers were likely the intended targeted group of Japanese conscripts initially, particularly in efforts to curtail condemnation by Japanese society if their own women and girls were forced into sexual slavery, the evidence establishes that Japanese women were forced to become "comfort women" and to serve as sex slaves.

Below, we consider some of the most common characteristics of the "comfort system."

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277 The International Agreement for the Suppression of White Slave Traffic (1904); The International Convention for the Suppression of White Slave Traffic (1910); The International Convention for the Suppression of Traffic in Women and Children (1921).

278 Yoshimi, Comfort Women, pp. 101-103.

279 Yoshimi, Comfort Women, p. 100; Exhibits 187, 188,189, submitted by the Japanese Prosecution, December 8, 2000.

280 Yoshimi, Comfort Women, p. 101.

281 Written statement of Professor Fujime, p. 3.

282 Yoshimi, Comfort Women, pp. 102-103, 110-111.

283 Yoshimi, Comfort Women, p. 103.

284 Exhibit 183, submitted by the Japanese Prosecution, December 8, 2000.

285 Exhibit 184, submitted by the Japanese Prosecution, December 8, 2000; Written Statement of Professor Fujime, p. 1.

286 Exhibit 186, submitted by the Japanese Prosecution, December 8, 2000.

287 Written statement of Expert Witness, Professor Fujime.

G. CHARACTERISTICS OF THE MILITARY SEXUAL SLAVERY SYSTEM

250. Based on the following evidence, the Judges find that the system of Japan's military sexual slavery, commonly referred to as the "comfort women" system, was a standard and integral part of Japan's aggressive war throughout the Asia-Pacific. Policies and procedures for the operation of this system were established at the highest levels of the Japanese government. The Judges also find that girls and women throughout the region were taken either by abduction, conscription, or coercion, or through deceptive means, and forcibly made part of the military sexual slavery system. Once enslaved, the girls and women were subjected to continuous and sometimes gang rape and other forms of sexual violence and torture, as well as inhumane conditions of detention.

251. The women were enslaved and repeatedly raped for varying periods of time, most typically several months to two years, though shorter and longer periods were also common. Most of the young girls or unmarried women lost their virginity when they were first raped. During their time in the facilities, the relentless violence and violations resulted, intentionally or incidentally, in a variety of reproductive harms, such as pregnancy, abortion, miscarriage, sterilization, sexually transmitted diseases, and sexual mutilation. The beatings, stabbings, burnings, and sexual tortures inflicted during the course of the rapes and enslavement caused enormous pain and suffering, as did the humiliating medical checkups forced upon the women. These abusive conditions also caused severe emotional or psychological harm. The appalling conditions of detention often resulted in malnutrition, disease, illness, or death. A large number of women and girls did not survive the conditions or mistreatment or were intentionally killed.

252. While many of the details of women's experiences differed from country to country and from one "comfort station" to another, there are similarities that cut across national boundaries, demonstrating a degree of regularity characteristic of a highly organised system. This section describes some of the general characteristics common to all of the countries affected.

1. Military Control and Regulation of the "Comfort Women" System

253. Pursuant to governmental approval at the highest levels, the Japanese military established sexual slavery facilities for the use of officers and soldiers. Some of these facilities were directly controlled by army or navy units, while others (perhaps the majority) were run by civilians who operated them for personal profit. The civilian managers often functioned as "recruiters" as well. The military was directly involved in the acquisition of "comfort women" by deceptively recruiting, forcibly abducting, arresting, and ordering local officials to cooperate in obtaining girls and women. The military also had the authority to select and control civilian "recruiters."

254. The evidence confirms that military control of "comfort women" was organised at the highest levels. The role of the War Ministry and the military in the "recruitment" process is illustrated by the official directive entitled "Matters Concerning the Recruitment of Women," sent by an Adjutant General in the War Ministry to the Chiefs of Staff of the North China Area Army and the Central China Expeditionary Forces on March 4, l938. The Recruitment Memo shows that civilian recruiters were subject to the authority and control of the military, and that the military itself was authorised to control the "recruitment" of women.

255. A confidential telegram sent on March 12, 1942 by ANDO, Commander of the Taiwan Army, to TOJO, the Minister of War, entitled "Tai-den No. 602" or "Taiwan Army Telegram No. 602," confirms that the War Ministry was involved in the detailed operations of the "comfort women" system and that military police were involved in the selection of "comfort station" proprietors.

256. Centralised army control of the "comfort women" system extended beyond recruitment. The War Report (Concerning the Rear) for April 11-20, l939, authored by the 21st Army Headquarters, then under the command of ANDO, confirms that the military was involved in the regulation of the "comfort women." Because reports such as these were sent to the superior command, the document also implicates the China Expeditionary Army, the War Ministry, and the army section of the Imperial Headquarters.

257. Hosokawa Tadanori noted in his 1944 Diary of the Journey to the Battlefield that a department in the 11th Army Headquarters managed the "comfort stations" and "it was under their authority that agents are allowed to operate." The 11th Army was in an area under HATA's command.

258. The military also provided extensive logistical and material support for the sexual slavery facilities. The official documents and testimony of survivors demonstrate that the military transported women all over the region on navy warships and in army trucks. Thus, the military provided the needed permission to transport civilians abroad, for which they required a statement of the purpose of travel. It dispatched soldiers to the warehouses and holding areas where women were confined prior to transport and soldiers were also assigned to guard and keep order in the "comfort stations." The military also supplied the comfort stations with condoms.

259. From its establishment, the Japanese military issued extensive regulations governing the "comfort system." Among these were the health regulations designed to prevent and identify sexually transmitted diseases (STDs). Professor Yoshimi stated that the Japanese navy issued regulations requiring "comfort women" to be free of sexually transmitted diseases. Pursuant to regulations, doctors carried out initial examinations (often accompanied by rape) and invasive medical examinations of the "comfort women" as often as twice a week, and these examinations were done in an insensitive environment and often violent manner. These STD examinations were conducted for the purpose of preventing sexually transmitted disease among soldiers, and not for the benefit of the women. As evidenced above, the Japanese military continued to issue regulations requiring these STD examinations for the "comfort women" as they set up "comfort stations" across China, and the rest of the Asia-Pacific.

260. The military also issued regulations indicating which "comfort stations" would be used by the various military divisions, and which personnel were to supervise the stations. Other regulations detailed the type of women to be selected for use as "comfort women," the ages of the victims to be targeted, the conditions of the "comfort stations," and the rules to be followed by the "comfort women." Finally, the regulations indicated the proper behaviour expected of the soldiers, and required that "comfort women" should be available to only those military personnel who had paid, and that a general ticketing system be installed to ensure this.

261. The creation of "comfort stations," which were purportedly designed in part to stop the rape of local women, did not accomplish that purpose. Rather, it reflected and reinforced

a military culture in which sexual violence was acceptable and institutionalised sexual slavery in a way that would make it less visible to the outside world. This signalled to the soldiers that rape done secretly or with precautions to avoid disease was tolerated and even encouraged. The official documents reveal that the primary concern of the Japanese military was to adequately "supply" the troops with "comfort women" and to avoid hostile reactions in the communities where the women came from or by the international community. There is no indication at all in the official Japanese documentation of anything done or any orders given to ensure that the women were not taken against their will. Nor is there any indication in either the Japanese documents or the testimonies of the survivors of any process to repatriate the women. Two former soldiers who testified before this Tribunal admitted that they told their subordinates that it was acceptable to rape.

262. The testimony of the survivor-witnesses, discussed below, confirms many things revealed by the documents and memoirs regarding the role of the military. As well, it demonstrates the ways in which even these pernicious regulations were broken.

2. Who Were the "Comfort Women"?

263. The Japanese military preyed on the most vulnerable members of society for its sexual slavery system – those who because of age, poverty, class, family status, education, nationality, or ethnicity were most susceptible to being deceived and otherwise trapped into slavery. The women were drawn primarily from Japan's occupied and annexed territories, mostly from poor and rural communities. In the very beginning, the military recruited some Japanese women and girls, particularly but not exclusively from the ranks of licensed prostitutes. However, as the military expanded the war and the problems of rape of local women grew to notorious proportions, the demand for women to work in the stations far exceeded the availability of Japanese women. Thus, the vast majority of women and girls were trafficked from the occupied and annexed territories, while many were abducted in the process of occupying new territories.

264. Many, if not most, "comfort women" came from poor, rural households where the girls had to go to work at an early age to provide support to their families. Some of the witnesses testified that at the time they were enslaved, although they were still just girls, they had already been working outside the home. Already living a difficult life, they were among the most underprivileged people in their own society.

265. A very large number of the comfort women were, in fact, girls when they were taken away to be forced into sexual slavery. Of the witnesses who testified before this Tribunal, one was taken at 12 years and the vast majority were under the age of 20 when they were enslaved. Since so many of the victims have since died, it is impossible to say with any accuracy their median age when they were enslaved; women who were older when they were enslaved are less likely to have survived to this day. Nevertheless, the evidence is striking: many of the witnesses testified that they themselves were underage and that they saw other underaged girls similarly enslaved. Moreover, other documents, such as school records, confirm that young girls were targeted. The evidence regarding the forced examinations by military doctors shows that the Japanese military was particularly interested in obtaining girls who had not previously engaged in sexual activity. For example, in Borneo, the Special Naval Police forced women to undergo invasive

examinations and selected those who were virgins as "comfort women."[288] In Indonesia, Japanese officials and soldiers required many families to hand over daughters over the age of 15. The age of these and other underage girls would have been obvious to those involved in the system. The evidence shows that no effort was made to limit the age of "comfort women" to females over 21 years old, with the single exception of an official regulation applicable only to Japanese women, requiring that they be "prostitutes, over 21, and free from sexually transmitted diseases."[289]

266. In some instances, women were targeted because of their participation in the resistance movement or because of their relationship to suspected members of the resistance. For example, the Chinese Prosecutors identified Wan Aihua as having been captured and enslaved in China while participating in anti-Japanese activities.

267. In Borneo, women were targeted for enslavement because they had been involved in voluntary sexual relationships with Japanese men even though such relations were prohibited by a military regulation. Other women were forced into slavery based on false accusations or suspicions of having such relationships.

268. Apologists for Japan's military sexual slavery system commonly assert that the "comfort women" were voluntary prostitutes. This Tribunal firmly rejects this claim, although it does not suggest that there were no voluntary prostitutes servicing members of the Japanese military during the war. However, by definition, voluntary prostitutes are not part of the system of military sexual slavery.[290] While the military did recruit some former prostitutes into the "comfort women" system, the evidence shows that once a part of the system, the former prostitutes suffered the same slave-like conditions as the other women. The expert testimony indicates that Japanese licensed prostitutes were not free to refuse to become "comfort women" or, once a part of the system, they were not free to dictate the nature or terms of their service or to leave.

3. Acquisition or Procurement of "Comfort Women"

(a) Methods of Procurement

269. The Judges find that the Japanese military, civilian police, and their civilian agents took "comfort women" into the system by any means available. The methods used cover a broad spectrum ranging from outright force or threats of force, to purchase and deception. Many witnesses testified that they were enslaved by abduction or other types of force, including official conscription, arrest, intimidation by soldiers, violence, and use of traditional leaders to hand over girls and young women. Most of the witnesses from the Philippines, Malaysia, and East Timor, and some from Korea, China, Taiwan and Indonesia, testified that they were enslaved through forcible abduction.

270. For example, Tomasa Dioso Salinog of the Philippines and Ms. X of Malaysia both testified that they were abducted during raids in which their family members were killed. Tomasa Dioso Salinog witnessed her father being beheaded while trying to defend her

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288 See Exhibit 160.

289 Yoshimi, Comfort Women, p. 100, n. 102.

290 We do not question that some form of voluntary or unregulated prostitution existed contemporaneously with the "comfort women" system; indeed it was part of the concern of the Japanese military that prostitutes in the communities presented a danger of infection with sexually transmitted diseases. The concern of this Tribunal is with the women who were subjected to involuntary sexual servitude by the Japanese military.

from being taken. Esmeralda Boe of East Timor testified that four Japanese men and one East Timorese man came and pulled her into their vehicle. Mun Pil Gi of Korea testified that police abducted her from her neighbourhood and carried her away in a truck. Other Korean witnesses also testified that Japanese soldiers or police took them away on trucks. Rosalind Saw of Malaysia and Ms. Suhanah of Indonesia testified to similar experiences. Wan Aihua of China testified that she was captured by Japanese soldiers.

271. In Borneo, the Special Naval Police arrested women and forced them into "comfort stations." Statistics compiled by the Korean Prosecutors show that a number of Korean women and girls were also arrested and forced to become "comfort women."

272. Abduction of girls and women was therefore typical across the region – as confirmed both in the testimony of the survivors and of the expert witnesses. This method was in itself unspeakably traumatic for the girls and women. When being abducted, many women and girls witnessed traumatizing violence such as the rape of their mother or beheading of their father. Some were themselves raped in front of their families. The accompanying violence undoubtedly contributed to their terror and sense of powerlessness over their own fate. In addition to the violence, most of the girls and women experienced the terror and isolation of being estranged from their families and homes and taken to a strange and foreign land, where they often did not speak the language.

273. Another method of securing girls and women for the sexual slavery facilities was official conscription. The evidence confirms that the Japanese military drafted some women in the annexed territories of Korea and Taiwan into sexual slavery as part of the war effort. Witness Teng Kao Pao-Chu from Taiwan testified that the Office of the District sent a draft notice informing her that she was to go to Guangdong Province in China as a "comfort woman." Although she knew that she was to be a "comfort woman" before she left, she had no choice as to whether or not to go. She testified that she was working as a professional entertainer at the time performing Japanese songs and dance in a nightclub. Teng Kao Pao-Chu stated that it was a practice of the Japanese military to forcibly conscript women who worked in bars as well as brothels to be "comfort women." Korean girls and women were also forced to go as part of the military war effort. Witness Kim Bok-Dong of Korea testified that a Japanese man and the local village headman forced her mother to sign papers agreeing that because she had no sons, Kim Bok-Dong could be taken away as a "Teishintai" member to a military uniform factory. In this case, deception was employed as part of the draft to lessen resistance.

274. The evidence also demonstrates that "comfort" girls and women were obtained from civilian internment camps. Witness Jan Ruff-O'Herne testified that soldiers, including one whom she believed was a high-ranking officer, came into the camp where she was held and inspected the girls and young women who were 17-28 years old. They selected several girls and women and forced the girls and women to go with them despite their protests and that of their mothers.

275. Some of the girls and women procured for the "comfort stations" were purchased from their economically destitute parents. A Korean witness testified that she and others "were sold to the Japanese." The SEATIC Bulletin of the Allied Reports states that the Japanese manager of the "comfort station" in Burma, who operated under military authority, purchased the Korean women from their families for 300 to 1000 Yen each, "according to [their] personality, looks, and age," and once bought, they "became his sole property."

276. The OWI Report based on the same interviews with "comfort women" and proprietors states that the term of the "contract" "varied from six months to a year depending on the size of the family debt advanced." Some women and girls were victims of debt bondage: they were taken away in exchange for money that they had to "work" far longer than expected to pay off. The Report indicates that the purported terms of the "contracts" were not respected.

277. The testimony illustrates that the most common method of acquiring women and girls for the "comfort stations" was deception. This was particularly true in Korea, as found by statistics compiled by the Korean Prosecutors. To entice women and girls to "volunteer," recruiters would promise them jobs doing laundry, working in restaurants, factories, hospitals, or other types of similar work. The Japanese military used Japanese and/or local civilians, schools, and job agencies to take advantage of the women's poverty and desire for a better life. The IMTFE Judgement noted that soldiers under HATA's command used false promises of employment in factories to recruit women for forced prostitution, by which we infer they meant the "comfort stations," during the Japanese occupation of Kweilin in China.[291]

278. The OWI Report suggests that initially the nature of the "comfort service" was assumed to be connected with visiting wounded soldiers and generally making the soldiers happy, and that Korean women enlisted on the basis of these false representations.

279. Japanese agents also deceived women by offering them education or training in skilled professions, such as nursing. Others were attracted by the promise of performing in a theatre. For example, one witness testified that a Japanese recruiter "enticed" her to join a children's theatre where she "could make money, eat well and wear nice clothes."

280. Song Shin-Do testified that as a teenage girl she had run away rather than marry. When an older woman solicited her to go and earn money on the battlefield with the promise, "it's not like marriage and you can live alone," she agreed, not realizing the conditions to which she would be subjected.

281. Others were motivated by the need to support their families. Lu Mang-Mei testified that she and two friends agreed to go work as servants in a restaurant in order to improve the quality of life of their families, who were all poor. Witness Yuan Zhulin of China testified that she was deceived by an offer of a job washing dishes and cleaning in a hotel because she was poor and had to support five family members, including her own baby.

282. It is a tragic irony that the enslavement of these women resulted, in many cases, from their proud exercise of independent judgement and agency in seeking to better their own lives and the lives of their families.

283. When soldiers or other government officials participated in the process of deceptively recruiting the women and girls, there was always an element of coercion, and sometimes deception and force were combined. For example, even while being physically restrained, assaulters attempted to lessen resistance by telling the victims they were being taken to work.

284. It is clear that deception soon changed to abduction or enslavement. Sometimes the soldiers or recruiters gathered the girls and women in a central location, confining them

[291] IMTFE Judgement (Roling), p. 393.

and abusing them, sometimes sexually, prior to transport. In other cases, the deception continued until they eventually reached a facility for sexual slavery.

(b) Agents of Procurement

285. Like most crimes of a widespread nature, numerous people from many segments of society were involved in procuring girls and women for sexual slavery. Soldiers, military police, civilian police, and other officials were heavily involved in the forcible abduction or deceptive recruitment. Civilians were used as agents of the Japanese to procure women. Civilians were involved primarily as deceptive recruiters although, as noted above, deception quickly turned into coercion, usually with military or police involvement.

286. In some cases, local officials or traditional leaders in the occupied or annexed territories also participated in the acquisition of the girls and women. A Korean witness testified that in Korea, "the township government official came by and told me that if I followed him I would have lots of beef soup and wear nice clothes and I would live happily," but he subsequently sold her to the Japanese. Kim Bok-Dong of Korea testified that the village headman, accompanied by a Japanese man, ordered her mother to turn her over to them. The Japanese man then took her away and locked her in a warehouse guarded by armed soldiers.

287. The evidence shows that in Indonesia, it was a common practice for village headmen to be involved in recruitment. Japanese officials required village heads to meet a quota, and the headmen, in turn, went to parents to coerce them to surrender their daughters. The Diary of War Ministry Operations states that "it is necessary that village headmen be assigned the task of building comfort stations and strictly administering [them]." Ms. Mardiyem testified that the Japanese mayor of Banjarmasin, Indonesia, named Shogenji, was involved in her recruitment.

288. Based on the above, the Judges find that the Japanese military, together with local and traditional officials and civilian agents, acquired girls and women for the "comfort" system against their will. Whether the girls and women were deceived into becoming "comfort women," bought or exchanged, conscripted, or procured by force, the salient fact is that they did not consent to becoming part of the "comfort" system. The girls and women who thought they were going to work in such jobs as waitresses, launderers, nurses, or maids did not knowingly agree to provide sexual service or to be subjected to rape and sexual slavery. When the will of the victim is subverted, as the testimony and evidence before us establishes, consent does not exist. This principle applies equally to those women who were prostitutes at the time of recruitment and were deceived as to the conditions of the sexual servitude.

(c) Assignment & Transport

289. The evidence shows that while some of the "comfort women" were abducted and forced into slavery in or near their communities, the majority were transported great distances to be close to the Japanese troops. The Japanese military was intimately involved with the transportation of the "comfort" women and girls, both at the outset of and during the enslavement process. Some women and girls were taken to the frontlines where they were not only raped, but also exposed to the dangers inherent in being on or near battlefields.

290. Some witnesses testified that they were enslaved in their own countries, including those from China, Taiwan, Indonesia, the Philippines, Malaysia and East Timor. Others travelled extremely long distances. Lin Shen-Chung (Iyang-Apay) of Taiwan was enslaved on the mountain where her tribe had lived before the Japanese forcibly removed them. Mun Pil-Gi and Kim Gun-Ja were taken from Korea to Manchuria. Ha Sang-Sook, Kim Yong-Suk, and Song Shin-Do were taken from Korea to China. Lu Mang-Mei was taken from Taiwan to Hainan Island, China. Ms. Mardiyem was taken from Yogyakarta to Banjarmasin, both in Indonesia.

291. A few witnesses were enslaved for as long as seven or eight years, and were transported to several different countries during that time. Pak Yong-Sim was taken from Korea to Nanking, China, then to Rashio, Burma and Lameng, China. Kim Bok-Dong was taken from Korea to Guangdong, China, then to Hong Kong, Singapore, Java and Sumatra, and back to Singapore. Teng Kao Pao-Chu was taken from Taiwan to Jing-Shan-Si, China, then to Hong Kong, Singapore, and Burma. Song Shin-Do was transported to many different areas of China during her enslavement.

292. Several women testified in detail to military involvement in their transport, including transport by warships, military trucks, and with military escorts. The transport was often in itself arduous, and particularly terrifying to those who had never previously travelled away from home. Kim Bok-Dong testified that during the long and complicated journey to Guangdong, she rode first in a boat from Pusan to Shimonoseki, then in a cargo ship to Taiwan and stayed there for one month, monitored by someone who said he was with the Japanese police. Before boarding a ship to Guangdong, she had to put on a "National Defense Uniform." Lu Mang-Mei testified that she went to Hainan Island on a warship carrying military personnel, passengers, and goods.

293. Kim Bok-Dong testified that some facilities were mobile, taking the women as a group from country to country. In that case, women were transferred between facilities under the supervision and guard of Japanese soldiers.

294. Transport on military vehicles created grave danger for the girls and women. Many women were killed or injured while being transported on military vehicles. Teng Kao Pao-Chu testified that while travelling between "comfort stations" she lost hearing in her right ear when a submarine shot the ship she was on with a cannon. Ahn Buk-Soon gave testimony regarding one incident in which some women were killed on a military vessel: when the Japanese soldiers abandoned a "comfort station" in Singapore, the women who had given birth to "Japanese" children were sent home by the Japanese on a boat. The boat sank and all those aboard were killed.

(d) Experiences upon Arrival at the "Comfort Stations"

295. On arrival at the "comfort station," many girls and women were confronted for the first time with the terrifying realization that they were to be confined there and repeatedly raped. For those who had been deceived into thinking they were going to good jobs, arrival at the comfort stations was particularly traumatic. This was also the stage at which some of the girls and women were first raped and beaten. Jan Ruff-O'Herne described her experience arriving at a "comfort station" in Indonesia:

> The house was all surrounded by fencing and barbed wire, so we could see straight away that there was no escape possible from the house. . . . Before

> long we were told that we were in this house for the sexual pleasure of the Japanese military. It was as if my whole world collapsed from under my feet when I heard this.

Kim Yong-Suk testified that a "comfort station" in Shenyang, China at an army base, was "surrounded by very high walls and barbed wire, with dogs barking. . .and guards guarding everywhere." She wanted to leave but the policeman who had brought her there left her there.

296. Several witnesses testified that the first thing that happened on their arrival in the station was being forced to undergo a medical examination for sexually transmitted diseases. Song Shin-Do testified that this was when she first realised she was to be required to provide sexual services. She stated,

> It was at this point that I who had left my home and come so far to work and be independent, first received the inexpressible shock of what I was about to do. . . . I refused to get on the board and struggled against the medical officer, but he forcibly stripped off my clothes and examined me.

Both Ha Sang-Sook and Ms. Suhanah testified that the doctors noted their virginity.

297. Kim Bok-Dong testified that the doctor who forcibly examined her was also the first to rape her. She testified that when she tried to run away, he slapped her with such force that her cheeks went numb. The rape itself she described as "utterly unbearable. I bled between my legs and it hurt as if I had been ripped open. My vagina swelled, and burned so much I couldn't urinate."

298. Ms. Suhanah testified that the doctor examining her raped her. Because she cried uncontrollably, one perpetrator slapped, shook, kicked and beat her. She said, "He asked, 'Do you want to live or die.' I wanted to live, I gave up."

299. Many other witnesses told of the rapes they suffered their first day in the "comfort station" or soon after their arrival. Ms. Mardiyem, held in Indonesia, testified that on the first day, "from 12-3 pm, six men raped me. Doctor raped me once, others raped me twice. I was raped 11 times in three hours." She shouted and threw bloody underwear in the manager's face. Song Shin-Do testified that at first, she ran out of the room, not knowing what to do. But the manager beat her, confined her in a narrow room and withheld her food, and finally soldiers raped her while she was crying. Ha Sang-Sook testified that after the doctor examined her, an older man raped her and told her that from that night on, she would have to serve dozens of Japanese soldiers every night.

300. The introduction to life as a "comfort woman" traumatised the girls and women. Kim Bok-Dong testified that the day after her first rape, she and two other women tried to kill themselves. Jan Ruff-O'Herne testified, "In the early hours of the morning, there were seven frightened little girls, all huddled together, all crying over lost virginity."

4. Conditions of the Facilities

(a) Types of Sexual Slavery Facilities

301. The types of facilities used by the Japanese military varied. Many of the sexual slavery facilities were buildings constructed on or near Japanese bases or camps, but others were

nothing but makeshift tents partitioned off into tiny rooms. Some facilities were caves used by soldiers.

302. A large number of the facilities were commandeered private homes, hotels, dormitories, or other such buildings. The typical set-up was a large building partitioned off with plywood boards into small rooms in which the girls and women were isolated. Rosalind Saw described the room of a "comfort station" in Malaysia as having "one bed, one table." In his memoir, a former soldier, Megumi Teruma, describes the "comfort station" on the front lines beyond Kweilin, China: "In a wooden barracks, there were five small rooms about 5 meters square, with dirt areas outside to take off one's shoes."

303. In other cases, many women shared the same room. Ms. Suhanah testified that the Bandung "comfort station" where she was enslaved had "a special room for raping." There were two beds in the room and two women might have to serve soldiers at the same time. Marta Abu Bere testified that in East Timor, many women were raped in the same room, each in one corner.

304. Other witnesses testified that they were confined in rooms and forbidden to speak to the other women there. Song Shin-Do, who was confined in various places in China, and Ms. X and Rosalind Saw, who were confined in Malaysia, all testified to this effect. Tomasa Salinog, who was confined in a "big house" in the Philippines, and Maxima Regala de la Cruz, who was confined in a garrison in the Philippines, testified that they remained locked in the same room to which the soldiers first took them.

305. One witness testified that on the front lines, soldiers set up a tent to serve as a "comfort station." Two other witnesses testified that soldiers enslaved them in caves. In Taiwan, the local policeman first forced Lin Shen-Chung (Iyang-Apay) to work as a seamstress for the Japanese army. After the first day, the soldiers would not let her or the other women leave; after three months of this, a Deputy Captain, officer named Narita, took her to a cave in the mountains that was used to store boxes. There she was forced to have sex with Japanese soldiers. In China, soldiers captured Wan Aihua and forced her into a large cave where they began raping her the first night, thereafter daily.

306. Other "comfort stations" on the front lines were mobile units that "moved with the army," as Teng Kao Pao-Chu and Kim Bok-Dong testified. In general, there was a strong correlation between the presence of the Japanese military and sexual slavery facilities.

(b) General Living Conditions in the Sexual Slavery Facilities

307. Some witnesses testified that they lived in "miserable conditions" with poor food, such as "rice and pickles" daily. Sometimes women were not able to wash because of the large number of soldiers waiting in line. Many women described the life in the "comfort station" as "inhumane." Poor living conditions also made the "comfort women" more susceptible to diseases such as malaria and tuberculosis. Pak Yong-Sim testified that in Nanking, "comfort women" were malnourished and caught diseases. Song Shin-Do testified that the "comfort women" in Wuchang contracted dysentery, malaria and lung-related illnesses, in addition to sexually transmitted diseases. Lu Mang-Mei stated that she was infected with malaria on Hainan Island.

308. The OWI Report states that the twenty "comfort women" interviewed lived "in near luxury in Burma as compared with other places," that "they lived well because their food and material was not heavily rationed and they had plenty of money with which to

purchase desired articles." However, the Report then goes on to state that the women had to pay the proprietor exorbitant prices for food and other items, and that they spent the last part of the war in foxholes during the Allied bombing. The characterisation of the living conditions as being "near luxury," at best, underscores that conditions were much worse in other "comfort stations."

309. The conditions in the sexual slavery facilities based on the front lines were even worse. The women were subjected to a higher degree of violence from soldiers who were angry, scared, and geared for aggression. Being so close to the fighting of the war, they lived in constant fear for their lives. Pak Yong-Sim testified that in 1943 or 1944 the military drove the women from one facility in Rashio to Lameng, where the women were forced to serve the soldiers of the 56th Division as sexual slaves while they were under fire, and that most of these women were killed. The OWI Report also states that many "comfort women" in Myitkyina, Burma were killed by Allied bombing and that the women serviced the soldiers even in foxholes.

310. Song Shin-Do testified that on the front lines in China, there were no medical officers to examine the women for sexually transmitted diseases, while they were continually exposed to the risk of infection. There, they also had to do sentry duty, not knowing when the Chinese would attack. Song Shin-Do testified that once, she was forced to witness a massacre of Chinese prisoners of war and then serve liquor at a party.

311. Song Shin-Do also testified that as the war drew to an end, soldiers became increasingly desperate and wanted her to commit seppuku (ritual suicide) with them. This was terrifying to her because, as she said, "I wanted to live under any circumstances."

5. Physical and Mental Violence

(a) Relentless Rape and Accompanying Violence

312. Witness after witness testified to the horror, pain, fear, violation, and helplessness they experienced when soldiers raped them. In the "comfort stations," women and girls had to endure rape during most of their waking hours, for periods ranging from a few months to many years. Witnesses said that as a result of this, their genitals were swollen and they experienced constant bleeding. Many witnesses told how they could not walk, sit, sleep, or urinate without pain. Marta Abu Bere testified: "First of all, there were ten men who raped me. One got off and the other would replace him. They would do it all over again. We were treated like animals. We could not do anything. If we do something, we would be choked. I could not walk. How could I walk if I was raped by ten men?"

313. Tomasa Dioso Salinog, like many of the witnesses, was still a child when she was raped. She testified that she was chubby and that "the soldier placed his hands on my thighs and other parts of my body." He pushed her to the floor and hit her head with a hard object when she struggled. Other soldiers also raped her.

314. Lu Mang-Mei testified that the first time she was raped, she felt cheated, scared and alone. She tried to resist, but the soldier said, "I already bought the ticket." When she protested that she came to work as a waitress, the soldier said, "It is said so, but it is not true."

315. Wan Aihua testified, "Five soldiers came in at the same time and raped me so it was like a gang rape." Maxima Regala de la Cruz testified, "I bled every time since I did not have my first menstrual period yet. I cried since I always felt pain."

316. Kim Yong-Suk testified about the harrowing experience of sexual torture. A soldier named Nakamura cut her genital area with a sword when she didn't understand what he wanted. Then he raped her. Jan Ruff-O'Herne testified that an officer tortured her by running a sword down her entire body until she was completely immersed in fear. She indicated to him that she was willing to be killed rather than be raped, but he laughed and then tortured and raped her.

317. Pak Yong-Sim testified that once, when she was too tired to respond to a soldier's demand, he cut her neck with a long knife and then raped her while blood was soaking her body.

318. Despite the women's debilitating pain, they were forced to continue serving the long line of soldiers who paid for tickets. Kim Bok-Dong and Yuan Zhulin both testified that ointment or cream was used to enable soldiers to penetrate women who were already suffering extreme pain and swelling of their genitals.

319. Maxima Regala de la Cruz testified to the constant terror she felt with every rape: "Each time they pointed a bayonet at me, I trembled like this. I didn't know what they were doing to me any more." She testified that she fainted many times. Mun Pil-Gi also testified that she fainted the first time a soldier raped her.

320. The testimony shows that some officers kept individual women in their quarters as personal sexual slaves. Two witnesses testified that they were forced to service individual officers for a period of a time. Yuan Zhulin, who was confined in China, testified that for 6 months, an officer named Fujimura "monopolised" her. She said, "He did not respect me because he liked me. He only wanted me as a sexual partner, as a sexual toy for his sexual pleasure." She had to stay with him at night. Tomasa Salinog, who was held in the Philippines, testified that after she escaped from the "comfort station," an officer named Okumura abducted her again and forced her to live with him and required her to perform domestic labour as well as sexual servitude.

321. Officers in general had greater privileges of access to women, including the privilege to stay all night with a woman in the "comfort station," as several witnesses testified. Two witnesses testified that they were taken to the officers' group quarters. Ms. X, who was confined in Malaysia, testified that she was first taken to a bungalow, which she was told was the quarters of "high ranking soldiers," and locked in a room there for one month. She was raped by 5-6 soldiers every day while there, and another one every night. Ms. Suhanah, who was confined in Indonesia, testified that she was brought to the officers' house several times a week.

322. The women and girls were kept in a constant state of terror through frequent beatings, threats, and torture. Witnesses testified over and over again that the soldiers and managers beat and tortured women who resisted rape, who escaped or attempted to escape, who were exhausted or in pain, or with whom the soldiers were dissatisfied for any reason. Mun Pil-Gi testified, "They kicked me, hit me when I was not very good with them." She also testified, "I was burned with an iron bar under my arm." Ha Sang-Sook testified, "If a soldier was dissatisfied with any of the women, he complained directly to the proprietor who then beat and kicked that woman." Kim Bok-Dong testified that a soldier hit her because she was menstruating. Ms. X also testified that she was beaten when she was unable to cooperate in sexual acts because of severe pain. One of the most egregious examples was told by Ms. Mardiyem, who was forced to have an

abortion at age 14 by Chikada, the "comfort station" manager. Because she was already five months pregnant, the "medicine" used for abortion did not work, and so they pressed on her abdomen till the foetus came out. Chikada then raped her.

323. As discussed above, Ms. Suhanah and Song Shin-Do were both beaten for resisting rape at the outset of confinement. Kim Gun-Ja also testified that she was beaten for resisting. She testified that soldiers hit her on her right ear with such force that they ruptured her eardrum, leaving her partially deaf. Ha Sang-Sook testified, "When I refused to allow a soldier to go twice, I was sometimes beaten."

324. Escape was punished with extreme forms of torture. Wan Aihua testified that she escaped twice from the cave where soldiers kept her and several other women as sex slaves, and was tortured in retaliation for these escapes. After the second escape, she was taken out of the cave naked, rendered unconscious, and then hung naked. Afterwards, the soldiers threw her into freezing water. She continues to suffer the physical effects of her injuries. Yuan Zhulin suffers from terrible headaches, insomnia, and sleepwalking as a result of torture inflicted on her as punishment for escaping. Another witness, Chun-Ok-Soon, was tortured with an iron rod on her lips, tongue, and breasts for trying to escape. She could not speak for many years because of the damage.

325. The witnesses testified that they suffered other lasting injuries from beatings and torture, such as broken bones that never healed properly, deafness, scars, headaches, nightmares, and digestive problems.

326. Most women testified that they were relentlessly raped by numerous soldiers, day in and day out, regardless of the circumstances, including during menstruation, pregnancy, illness, or excessive swelling. Kim Bok-Dong testified that in Guangdong fifteen soldiers came daily, but on the weekends the number exceeded fifty. Then officers arrived in the evening, many of whom stayed overnight. Other witnesses testified to numbers anywhere from "2, 3, 4" to 60 men per day. Most witnesses testified that they had to serve more than ten men every day. Many were gang raped or subjected to repeated rape by the same soldier. Ms. Mardiyem testified that in Indonesia, she was raped 20 to 30 times a day, many of whom raped her twice. Yuan Zhulin testified that, in Hubei Province, China, soldiers would change condoms up to four times while having intercourse with her.

327. Most witnesses had to provide sexual services every day, without rest days, and for most of their waking hours. Some also had to sleep with their rapists at night. Ms. Mardiyem testified that she worked 12 noon to 5pm, again from 7pm till midnight, and sometimes from midnight till morning. While some were able to rest during menstruation, others testified that they were forced to provide services even then. Several witnesses testified that pregnant "comfort women" were forced to work up until the sixth, seventh, or eighth month.

328. Witnesses before this Tribunal repeatedly testified that they could not refuse soldiers, that they succumbed to the rapes in order to live and, as discussed above, that they were tortured and beaten as punishment for any kind of resistance. Wan Aihua testified, "I felt I had no choice but to obey them." Lu Mang-Mei testified that she was not allowed to say "No". She said, "I obeyed in order to live." Esmeralda Boe and Marta Abu Bere both testified that they feared their parents would be killed if they refused to go with the soldiers.

329. As discussed above, some women were able to refuse soldiers while menstruating, or when they were given medical permission to "rest" because they were too swollen to be penetrated. Some were also able to insist that soldiers wear condoms. However, others testified that they could not even exercise these small degrees of control over their bodies. Song Shin-Do testified that soldiers sometimes "demanded barbaric and dominant sexual acts." As described more fully below, Yuan Zhulin was not even able to refuse intercourse while mourning the death of her infant daughter.

330. Some women testified that they were forced to continue providing sexual services during most of their pregnancies, and had to return to "work" soon after delivery. Whether a woman had her pregnancy continued or terminated often depended on the religious practices or requirements of the country. Some "comfort stations" expelled pregnant women. Lu Mang-Mei testified that she was allowed to go home on a medical certificate when she was eight months pregnant and infected with malaria. She stated that she thought it was because she was no longer of any use. Song Shin-Do testified that her first pregnancy ended in stillbirth after 7 months during which she was forced to continue servicing the soldiers. During her second pregnancy she was expelled from the "comfort station" and did laundry and cleaning for a navy "comfort station" in the meantime. After giving birth, she was twice forced to leave the babies with strangers and return to work as a "comfort woman." For subsequent pregnancies, she used a folk remedy to abort. She testified, "I still feel sorrow over not being able to give birth or raise my children."

(b) Illnesses and Deteriorating Health

331. As is common in situations of slavery, the health of the girls and women deteriorated greatly in the "comfort stations." Scores of women and girls perished, mostly from murder, disease, malnutrition, exhaustion, brutal treatment, or by committing suicide.

332. Disease was rampant in the sexual slavery facilities, particularly gonorrhoea and syphilis. Most witnesses testified that some condoms were available, but very often there were not enough and they had to be washed and re-used. One witness stated that she fought with men who would not wear a condom, but others testified that soldiers often insisted on having sex without a condom in the apparent belief that the "comfort women" were free of STDs. Because of the failure of many soldiers to use condoms, and the insufficient availability of condoms, there were numerous pregnancies and a high rate of sexually transmitted diseases incurred by the women.

333. Some witnesses testified that they contracted a sexually transmitted disease, including Lin Shen-Chung (Iyang-Apay) who stated that she had to hide this from her community because chastity was so important to them that they would kill a woman who violated this standard. Another witness stated that she did not find out she had syphilis until later, when her son was born with symptoms. The expert testimony indicates that the rate of sexually transmitted diseases among former "comfort women" was extremely high compared to the rest of the Korean population, and even compared to the population of highly sexually active individuals.

334. Other diseases were also rampant, and medical treatment for anything other that STDs appears to have been unavailable. Lu Mang-Mei testified that she contracted malaria while pregnant. She attributes her child's death several weeks after his birth to her malaria. Song Shin-Do testified, "Among the 'comfort women,' many caught tuberculosis, malaria and sexually transmitted diseases. Patients were moved to

separately prepared small rooms. Inside the rooms were also the dead left by the enemy bombings."

335. The high rate of diseases is shown by documents of regular examinations of women from two "comfort stations" in Iloilo, the Philippines, which show the rate of diseases noted among a group of thirty women over a period of six months.[292] The records show a high rate of gonorrhoea. The women were also found to be suffering from vaginal ulcers, vaginal inflammation, vaginal eczema, metritis, appendicitis and bronchitis.

336. Mistreatment of those who succumbed to illness went as far as murder. Pak Yong-Sim testified that in Nanking, "comfort women" who caught diseases eventually died of them, or were thrown into a river, or taken away.

(c) Forced Medical Examinations and Mistreatment

337. Many witnesses testified that they had to endure regular examinations for sexually transmitted diseases. In reports of these examinations, the condition of their genitals was noted. Jan Ruff-O'Herne testified, "the examinations were as bad as the rapes," and that the medical officers left the door of the examining room open so that soldiers could watch.

338. At times, doctors raped the women after they examined them. Jan Ruff-O'Herne testified that she complained about her rapes to the doctor because she thought he would have higher morality, but instead he laughed and raped her himself. As noted previously, some witnesses testified that doctors were the first to rape them upon arrival.

339. Many witnesses testified to debilitating medical treatment that served only to suppress symptoms that would prevent them from continuing to "work." The most notorious treatment was the "No. 606" injection, identified as salvarsan, an arsenic compound.[293] Ha Sang-Sook and Kim Gun-Ja both testified that this treatment was given for syphilis. Their testimony was confirmed by the expert testimony. According to the expert testimony, salvarsan is not a good cure for sexually transmitted diseases, but only a temporary panacea. This meant that the women were constantly exposed to reinfection while their bodies were still coping with a previous infection. Kim Bok-Dong testified that in Guangdong, each woman was given "606" a few times a month regardless of infection, and it caused her to experience a strange smell and to become dizzy.

340. Some girls and women were subjected to forced medical treatment. Yuan Zhulin testified that the proprietors of the sexual slavery facilities in which she was held applied against her will a liquid contraceptive medicine directly to her sex organs which caused haemorrhaging and pain for over a month. She also was also given injections against her will, to which she attributes her subsequent infertility.

341. In addition to the forced examinations and medical treatment described above, some girls and women were subjected to forced abortions. Some witnesses testified to "medicine" being given to induce abortions. Lin Shen-Chung (Iyang-Apay) testified that women were required to tell the doctor if they went a month without menstruation and he would give them medicine to abort.

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292 Registry Exhibits 63A-V, 64.

293 Korean Appendix No. 7.

342. There is additional evidence of cruelty towards pregnant "comfort women." For example, Pak Yong-Sim testified that she had seen Japanese soldiers stab a pregnant woman in the belly. The Prosecutors also presented evidence that Japanese soldiers cut the foetus out of a pregnant woman with a sword.

6. The Facade of Prostitution

343. The "comfort stations" were typically set up to appear and work as brothels, where the soldiers paid to use the women's services. The fee was set by military regulations. However, according to the testimony of witnesses at this Tribunal, most women did not receive any part of this money themselves. Kim Bok-Dong testified, "At the time, I didn't even know I was supposed to receive money." Song Shin-Do testified that she received "next to no payment," and that when she was given nominal wages, it was then taken away as a "National Defense Donation."

344. A small number of "comfort stations" split the money with the "comfort women," with the managers taking fifty or sixty percent. Lu Mang-Mei and Teng Kao Pao-Chu testified that they received a percentage of the money, and Lu Mang-Mei testified that she managed to buy her own passage home for 99 yen when she was finally released on a medical certificate.

345. Teng Kao Pao-Chu stated that when she received money she gave it to soldiers to send home to her family, although the money never reached them. Ha Sang-Sook testified that she received useless military currency. Ms. Mardiyem testified that she collected baskets of tickets and was supposed to be able to redeem them at the end of the war, but they were worthless. Ms. X testified that she received 5000 yen at the end of the war when she was released from the "comfort station." It may be that as a result of the compensation, she was rejected by her village after returning home at the end of the war and had to move elsewhere. Some would have indignantly refused payment even if offered so as not to confused with prostitutes.

346. Most witnesses testified that they were not paid, but instead the proprietors provided them with food, clothing, and makeup. Soldiers sometimes gave the women money or gifts, according to the OWI Allied Report on the Burma "comfort station."

347. When women received money, either from the "comfort station" proprietors or as gifts from soldiers, they were often forced to exchange it for necessities such as food, clothing, and condoms. They had to purchase these items from the "comfort station" proprietors. Ha Sang-Sook testified that she purchased "condoms and tissue" from the proprietor. According to the OWI Report, the proprietors charged women exorbitant prices for their food and clothing. Ha Sang-Sook also testified that when she attempted to borrow money for train fare and clothes, she was told that it would take her three years to pay off her debt, and so she stopped trying to borrow more.

348. Many women were recruited with the deceptive promise of a job and ability to earn decent money. Thus, in addition to their other suffering, the lack of payment meant that their efforts to improve their own and their family's living was not only in vain; it also exacerbated their poverty as the women could not earn other wages while enslaved in the stations. This was illustrated poignantly by the testimony of Yuan Zhulin that her baby daughter died of hunger while she was in the "comfort station."

349. Although many of the facilities for sexual slavery were set up to appear as if they were brothels, not all of them functioned this way. In addition to Wan Aihua, the witnesses from East Timor and the Philippines spoke of being confined and raped without any pretence of prostitution. Where there was not even the pretence of prostitution, the conditions were exceptionally brutal, such as when women were enslaved in caves. Lin Shen Chung (Iyang-Apay) testified that she never received money, but was subjected to strict regulations. One was that she was required to report to a doctor if she had a month without menstruation, and the doctor gave her medicine to cause an abortion.

7. Control over Movement

350. Once procured, the girls and women were deprived of their basic liberty of movement, including the liberty to leave the "comfort station" at will. Many witnesses testified that they were not permitted to leave their room or that they had to remain within the "comfort station." Ms. Suhanah testified, "I wasn't allowed to go out, nor to see people walking outside. I was just like a prisoner or a thief." Some, like Rosalind Saw, were allowed out only for the weekly medical checkup. Ms. X, whose brother had been arrested when she was abducted, was allowed to go and search for him when she found out that the Japanese were killing Chinese youths. She did not find him, but was traumatised to see severed heads of several young Chinese men.

351. The rules forbidding women to leave were enforced by the prison-like setting of the "comfort stations." This included locked doors, soldiers and military police acting as armed guards, the presence of guard dogs, barbed wire surrounding the building, and barred windows. Some of the "comfort stations" were within military bases or garrisons. Another obstacle to the women's freedom of movement was the presence of soldiers in the area surrounding the "comfort station." These soldiers would return any women who managed to escape, as described by Ms. Mardiyem.

352. Escape from the sexual slavery facilities was also prevented by lack of resources, inability to speak the language, lack of familiarity with the foreign country, and the dangers of the war. These things prevented the women and girls from being able to travel home even if they had succeeded in escaping. Song Shin-Do and Mun Pil-Gi described the combination of factors that prevented their escapes. Song Shin-Do stated, "Because I didn't know where I was, I didn't speak the language, I had no money, I had no idea how to take the train, and the area was surrounded by soldiers, escape was impossible." Mun Pil-Gi said, "I couldn't escape, I would need to know all the places; we were surrounded by barbed wire and all military stations, and I was young and scared."

353. As discussed above, women who escaped and were recaptured were subjected to extreme forms of torture. As Kim Gun-Ja testified, public torture of women who tried to escape served to intimidate and deter the others. After the proprietor "beat one woman ferociously," she testified, "I couldn't dream of escaping."

8. Isolation and Separation from Families

354. Women suffered terribly from being separated from their families and loved ones. For example, Yuan Zhulin testified that when her baby was ill and dying of hunger, she was allowed to return home for a visits but that her daughter died before she arrived. She was not permitted to stay long enough to see her daughter buried, and the officer who "monopolised" her services at that time demanded intercourse immediately upon her

return, thus denying her any period to mourn. Most had no news about loved ones and worried constantly about them during the war. Teng Kao Pao-Chu had to leave her adopted daughter and other family members behind and suffered constant homesickness, loneliness, and anxiety because of her imprisonment. All of the women endured isolation and loneliness at being separated, usually without any communication for a period of years, from friends and family. Some testified they were not allowed to talk to the other women in the "comfort stations" or to speak in their native language. Song Shin-Do and Kim Bok-Dong testified that in "comfort stations" filled with Korean women, they were forbidden to speak the Korean language and had to instead speak Japanese.

9. Sexual Slavery Accompanied by Additional Forms of Forced Labour

355. The sexual slavery was occasionally accompanied by additional forms of forced labour. Some Japanese soldiers took women as forced labourers and then also used them as sexual slaves. In Taiwan, the army first compelled women to work as forced labourers and confined them for that purpose. Witness Lin Shen-Chung of Taiwan testified that the Japanese army first forced her and five other women to work as seamstresses, keeping them confined at night and not allowing them to go home. After three months, they began taking the women to a cave at night, one by one, to be raped by soldiers. One soldier told her, "Since you came to do work, this is part of your work, too."

356. In East Timor, forced labour and sexual slavery were typically accomplished by military control of the territory and population, so that the girls and women had no choice but to obey soldiers. Witnesses Esmeralda Boe and Marta Abu Bere of East Timor testified that the Japanese occupying army forced women and men to do physical labour such as farm work and cutting down and hauling timber during the day, and then at night took the women away and raped them. Evidence submitted relating to the District Court case of Filipina former "comfort women" shows that in the Philippines, some "comfort women" also had to do forced domestic labour or dig foxholes.

10. Treatment as Property and Objects

357. The Japanese military treated "comfort women" as property and regarded their worth solely in terms of their use to the military. The evidence shows that the army regarded the women as military supplies and transported them along with weapons and soldiers. The dehumanization and objectification of the women allowed the soldiers to treat women's bodies as commodities to be used, abused, and disposed of at will. For example, Professor Yoshimi records the comments of a Japanese officer whose words demonstrate the callous disregard the soldiers had for the "comfort women," regarding them as no different than human toilets:

> During the battle, which lasted about fifty days, I did not see any women at all. I knew that as a result of (being without access to women), men's mental condition ends up declining, and that's when I realised once again the necessity of special comfort stations. This desire is the same as hunger or the need to urinate, and soldiers merely thought of comfort stations as practically the same as latrines.[294]

358. Many testified that were treated as if they were less than human. Esmeralda Boe and Marta Abu Bere testified that they were "treated like animals," and no one afforded any

[294] Yoshimi, Comfort Women, p. 199.

respect whatsoever for their human dignity. Jan Ruff-O'Herne testified that when she and the other "comfort women" resisted, "we were told they would do with us as they liked." Teng Kao Pao-Chu said that they called them derogatory names.

359. The women were deprived of complete control over their sexuality, as well as such rights as their basic freedom of movement, their existing family relationships, and their ability to give birth and raise their children.

360. Many witnesses confined in various geographical areas testified that they were given Japanese names by which they were known in the "comfort stations" and that soldiers identified them by these names. Some women were identified by a name or by a room number. Kim Bok-Dong testified that soldiers gave many women the same names because the name was popular among the soldiers. Jan Ruff-O'Herne testified that the names the soldiers gave her were all names of flowers. She testified that the managers displayed the women's photographs on a table with the Japanese names underneath, so that the soldiers could choose among them. Such objectification deprived the women of their individual and national identities and labelled them solely as sexual objects, possessed by the Japanese.

361. The renaming was accompanied by racial slurs and domination. Kim Yong-Suk of Korea testified, "I told them my name is __ and they said, 'That's such an ugly name and your new name is Otaka.'" Another soldier also called her dreadful names for being Korean.

11. Abandonment after the War – Attempts to Return Home and Reintegrate into Society

362. Some "comfort women" were summarily killed as the war neared an end, while others were simply ignored and left stranded far from home. Many witnesses testified that the Japanese army abandoned the "comfort stations" when the war was over and left them to fend for themselves and attempt to make their way back home, despite overwhelming obstacles. Witnesses who were confined in Burma, China, Singapore, and Taiwan all testified to having been abandoned. As Song Shin-Do stated, "the army didn't inform the women." Rather, many learned that the war was over from civilians employed in the "comfort station" or from the disappearance of soldiers and guards.

363. In Manchuria, Malaysia, and Indonesia, most survivors were simply released from the "comfort stations" when Japan was defeated. Only one witness, Ms. X, testified that she received money from the "comfort station" manager upon her release and was helped to get on a bus to go home.

364. The survivors faced severe hardship attempting to make their way home over thousands of miles of land and sea with no money and, in some instances, while the war was still raging. Pak Yong-Sim testified that a few "comfort women," who had survived the Allied bombing that had killed the other members of her "comfort station" on the front lines of the Burma-China theatre, sought refuge in an air raid shelter where Chinese soldiers discovered them and kept them in detention, treating them as prisoners of war for a year before releasing them. Song Shin-Do testified that she agreed to leave China and marry a Japanese soldier since, as she stated, "I didn't know how to get to Korea and had no means of supporting myself." The soldier later abandoned her in Japan where she remained. Ahn Buk-Soon testified that she was left all alone after the Japanese had sent other "comfort women," who had given birth to part-Japanese children, back to

Shimonoseki on a military ship. She testified that she went to the mountains of Singapore, where she survived alone for over a year before eventually making her way home. Wan Aihua testified that after they were released from captivity, she remained in China, leading a life of misery.

365. Some women chose not to return to their home countries or towns. Ha Sang-Sook testified that Koreans gathered together after Japan's defeat, but she was unwilling to go back home. She stated that she was "wondering what I could do after going back with this body, I decided not to go." The study done by Young-hee Shim of the Department of Sociology, Hanyang University ("Silence and Social Aftermath of the Korean 'Comfort Women': Focusing on their Life After the Return") reports that some Korean women returned to Korea, but rarely to their hometowns. Young-hee Shim emphasises that because this was a sharp break with the traditional social values of the time the women must have had compelling reasons to avoid returning home.

366. A few survivor witnesses testified that, although they had been able to escape successfully from the "comfort station" during the war, they were not safe. Yuan Zhulin hid on a boat under the protection of a "kind landlord." Maxima Regala de la Cruz testified that she and her mother returned to their home after escaping their rapes, but they continued to live under Japanese control.

367. Some witnesses testified that they had been released from their "comfort stations" before the war ended. For example, Lu Mang-Mei was allowed to leave on a medical discharge, and Jan Ruff-O'Herne and a group of Dutch Indonesian women were returned to a civilian internment camp, where they remained confined until the war ended. In the camp, they were rejected by other internees who referred to them as "whores." The women and girls who were allowed to leave the "comfort stations" were virtually always deemed "useless" because of disease, pregnancy, or illness.

368. Some women were kept as forced labourers even after Japan's defeat. Kim Bok-Dong testified that she was taken along with 300 other women to the 10th Army Hospital, where she was forced to work as a nurse and do cleaning, until a relative came looking for her and brought her home.

369. Many women did not survive their trip home from the "comfort stations." Ahn Buk-Soon testified that, of all the "comfort women" in her station, she was the sole survivor, as the other women were killed when the ship transferring them was bombed and sank.

370. The women who attempted to return home often endured months to years of hardship and continued exile. Teng Kao Pao-Chu returned home to Taiwan from Burma by travelling through Thailand and Vietnam, working in bars and factories along the way. She spent a year in Vietnam before taking the "army's ship home." Tre Gop-Soon walked from Manchuria to Korea, a journey that took four years, during which she witnessed many deaths and suffered continuous adversity. Kim Gun-Ja described her month long journey in which she walked, crossed a river, and rode freight cars to travel from Manchuria to Korea.

371. During the immediate post-war period, most "comfort women" had no support system to which they could turn. In some cases, women's families helped them, cared for them, and gave them some initial assistance to enable them to survive. However, there was no community or national resources to support them or redress their physical wounds,

illnesses, and emotional trauma. Young-hee Shim's study draws attention to the burden of daily life for all Koreans after Japanese colonialism when there was no nation-state to provide these types of resources for people.

372. Witness testimony, together with Young-hee Shim's study, demonstrates that in addition to the context of hardship and trauma prevalent in post-war society, patriarchal notions of "chastity ideology" and an adherence to restricted roles for women in public and private life exacerbated the suffering of the surviving "comfort women" and rendered them invisible and the harm they suffered unnamed and unmentionable.

12. Conclusion

373. The suffering endured by the "comfort women" began with their illicit procurement, often by deception or abduction after seeing their family raped or killed, and continued daily through the time enslaved and repeatedly raped and otherwise tortured, abused, and mistreated over a period of months or years. That women and girls could not exercise control over their own lives was demonstrated by their being denied the ability to make even the most basic decisions about their bodies, their movement, their identities, and their future, with every facet of their life in the "comfort stations" controlled and manipulated by the Japanese or their agents.

374. The next section examines evidence of one of the countless incidences of sexual violence committed outside the context of the "comfort stations." The section following that contains our findings as to the continuing harms suffered by the survivors of both the "comfort stations" and the rapes at Mapanique.

H. THE RAPES AT MAPANIQUE

375. Despite the availability of "comfort stations," the Japanese military commonly committed rape against local women in communities being conquered or occupied, both by design or as a result of ineffective control. Most of these crimes were not prosecuted before the IMTFE. The rape of women at Mapanique in the Philippines, which forms the basis of Count 3 of the Common Indictment, is but one example of rape crimes committed during the war.

376. When Korean and Filipina women started speaking out about sexual slavery in the 1990s, the women of Mapanique decided they too should give voice to their victimisation by the Japanese military, and many survivors consequently joined the organisation for survivors of sexual violence, Malaya Lola (Free Grandmother). Their solidarity with the surviving "comfort women" and their quest for justice together with the importance of shedding historical light and ending impunity for other examples of sexual violence by Japanese military led to the inclusion of Count 3 in the Common Indictment, which we now address.

377. Thirty-one witnesses as to the Mapanique crimes gave video or affidavit testimony to the Tribunal, thus allowing the Judges the opportunity to obtain a detailed picture of the events of those days. Other evidence about the events in Mapanique was also entered into evidence. Official Japanese documents provided insight into the military background and purpose of the attack.

378. On November 23, 1944, beginning around dawn, the Japanese military began shelling in and around Mapanique, in Candaba, Pampanga, the Philippines. This was not the first

Japanese raid in the area; prior raids had resulted in arrests, capture, and execution of some of the barrio's men. Maxima Regala de la Cruz testified that she saw many trucks lined up in the highway with their headlights on before the explosions started.

379. On October 11, 1944, General YAMASHITA, Commander of the 14th Area Army in the Philippines, promulgated the "Guiding Principles for Philippine Operations" in which he warned his troops of the danger of subversive activities against the Japanese. The Principles ordered that armed Filipino bands "be subjugated and pacified. These united activities must be destroyed."[295] On November 22, 1944, the 2nd Tank Divisional Commander, Iwanaka, a subordinate of YAMASHITA, issued an order to purge Mapanique of all "anti-Japanese Communist guerrillas through a punitive or subjugation mission."[296] The next day, 14th Area Army troops attacked Mapanique, committing murder, rape, torture, and pillage throughout the barrio. An estimated 100 women and girls were raped that day, and the evidence indicates that the murder of the men and torturous rape of the women of Mapanique had been planned, as the attack followed a familiar pattern.

380. Most witnesses stated that they heard the explosions initiating the attack. Some witnesses who heard the explosions identified them as bombs, cannon blasts and machine gun fire. Families hid in the fields or underneath their houses. Some remained in their houses. The Japanese soldiers entered people's houses, looted and deliberately destroyed their property.

381. The soldiers then herded men, women, and children to the school grounds. In some cases, the solders dragged women out of their houses to rape them, often killing or torturing men in the process. Leoncia de Guzman Guevarra, Mamerta Tolentino Sagum, and Cecilia Punzalan Sanguyo testified that Japanese soldiers raped them in or near their own houses. Mamerta Tolentino Sapum was raped in front of her baby. Leonora Hernandez Sumawang testified that although only 13, three Japanese soldiers raped her in a neighbour's house. One soldier used the tip of his bayonet to cut off her underwear, wounding her thigh. When the people arrived at the school grounds, the Japanese soldiers separated men from women and tied some of the men together and forced the people to remain under the hot sun without any food or water. They then proceeded to torture and brutalise the men.

382. Some witnesses testified to seeing their family or neighbours tortured or killed. Natalia Manimbo Alonzo saw her father hacked and beaten by a Japanese soldier, incurring wounds from which he later died. Maxima Regala de la Cruz witnessed her father's death from a bomb that exploded near him. Petronila Ocampo de la Cruz saw her brother and father dragged away, their wrists tied behind their backs, being hit repeatedly by the Japanese soldiers, to the point that her father was covered with blood and she assumed he was already dead. Lucila Hernandez Payawal saw her sister and brother wounded by a bomb that exploded in the village chapel. Senaida Punzalan de la Cruz witnessed the torture of her uncles, who were tied together and hanging by their feet, to get them to admit they were guerrillas. They refused and kept asking for water to drink. She testified that, in response, a soldier then squeezed the liquid from carabao dung and forced her uncles to drink it. Fermina Bulaon de la Pena saw her brother Tomas Bulaon led out on the balcony with his hands tied and head bowed. She testified that, "the soldier raised his

295 Exhibit JJ-2.

296 Exhibit KK.

sword and stabbed my brother at the back." Florencia Macapagal de la Pena witnessed her brother being shot. Tarcila Mangulabnan Sampang was forced to witness the sexual torture of her father, who had been singled out because an informer had identified him as a guerrilla. She stated, "My father was separated from the other men in the village. He was the only one. They kept pummelling him and took his clothes off. They cut off his penis. I saw him stand there, bloodied, as they sliced his flesh off right in front of us. They made him eat his flesh. I saw my father being tortured right in front of me while I stood there unable to do anything about it." Several other witnesses also testified about this incident.

383. After the Japanese soldiers had tortured and killed many of the men, they took the bodies, along with the living men, into the schoolhouse and set it on fire. Many women saw their loved ones burned alive, including Petronila Ocampo de la Cruz, whose uncle, Pedro Ocampo, was among them, and Senaida Punzalan de la Cruz, who saw her paternal uncle Abad Punzalan being pushed into the classroom that was torched. One man, Henio Gonzales, was forced to throw his adult son on the fire and consequently had his own life spared. He was the cousin of witness Mamerta Tolentino Sagum.

384. After the initial expression of terror, intimidation, and outright murder during the attack, the Japanese soldiers marched the females of the village, particularly the girls and young women, toward the *Bahay na Pula* or Red House, which they had commandeered as a field depot. En route, they ordered many of the women to carry sacks of loot and go with them, forcing them to walk through the muddy fields. Some of the women were raped along the way. The soldiers prodded the women and girls to go faster with slaps on the buttocks and jabs of rifles and bayonets. Fermina Bulaon de la Pena testified that Japanese soldiers raped her and her companion on the way to the *Bahay na Pula*. The soldiers had forced them to carry a heavy load on a pole and then made it too heavy to move by pulling down on one end of it. When Fermina Bulaon de la Pena dropped the pole, the soldier became angry and both soldiers raped the girls. Rufina Quilantang Catacutan testified that three Japanese soldiers raped her on the way to the *Bahay na Pula*, and then two others raped her once she entered the house. One of them stabbed her with a bayonet when she resisted, and this left her too weak and terrified to resist further.

385. When the women arrived at the *Bahay na Pula*, they found that the soldiers had built tents around the house. Most women were gang raped by two or more soldiers acting together. Typically two or three ganged up on each victim where one would hold her down while another raped her, and then the others would take their turn. Many were raped in the presence of other women who were also being raped, and they heard each other's screams of pain and cries of terror. Some of the women were raped in front of family and friends. Many victims were girls who had not yet begun to menstruate.

386. Natalia Manimbo Alonzo, Esther de la Cruz Balingit, Guillerma Sombillo Balingit, Virginia Manalastas Bangit, Juanita Maniego Briones, Rosaria Culala Buco, Rosalina Buco, Rufina Quilantang Catacutan, Maxima Regala de la Cruz, Victoria Manalili de la Cruz, Petronilla Ocampo de la Cruz, Maria de la Paz Balagtas Culala, Januaria Galang Garcia, Rufina Quaderna Gulapa, Teodora Marin Hernandez, Maria Reyes Pangilinan, Lucila Hernandez Payawal, Fermina Bulaon de la Pena, Florencia Macapagal de la Pena, Teofila Regala Punzalan, Belen Alonso Sagum, Tarcila Mangulabnan Sampang, Corazon Manlili Suba, and Caridad Lansangan Turla all testified that they were forced to go to the Bahay na Pula and that once there, they were subjected to sexual violence by Japanese

soldiers. Senaida Punzalan de la Cruz and Mauricia de la Pena Domingo were also raped that day.

387. Natalia Manimbo Alonzo testified, "I was sexually molested from 12:00 noon until night time. I was in pain, shocked, and totally numbed when it was over." Esther de la Cruz Balingit testified that a soldier pushed her down on the grass and tied her legs. She said, "It was very difficult for me to move and I knew then that something terrible was about to happen to me." After the first soldier raped her, the soldier who had been standing guard raped her. Guillerma Sombillo Balingit testified, "I was so weak after they raped me that I could not stand, I stayed there until morning." Virginia Manalastas Bangit testified that she was with her niece and another girl. Although the soldiers dragged them to different parts of the house, she could hear the others screaming, crying, and getting slapped just as she was. She also testified that some soldiers wore a woven bag over their heads to hide their faces. Juanita Maniego Briones testified, "I could hear my aunt begging the Japanese soldier to spare me from being raped as I was only 12 years old and was not yet a full-blown woman." The plea was to no avail and the soldier continued his assault. She said, "I feared for my life and hoped that this man would stop hurting me. It was so painful I thought I would die."

388. Rosaria Culala Buco testified that three soldiers took turns in raping her. They kicked her when she fought back. She said, "After it was over, I could not sit or stand up. My body was too painful. I had to crawl to get through the door." Rosalina Buco testified that three soldiers paired up with her and two other women in the same room and raped them all. The one who grabbed her squeezed her neck to make her lose consciousness, after she fought back. He kept choking her neck while raping her. Maxima Regala de la Cruz testified that she and her mother were raped in the same room. Victoria Manalili de la Cruz testified, "I felt like there was no way I could survive the physical and mental ordeal I had been subjected to since early that morning."

389. Petronila Ocampo de la Cruz testified, "I fought him and told him I was a married woman and shouldn't be treated this way. I begged for mercy in Gods name. I asked him whether he recognised me as one of the caretakers of the house." When she resisted, one of the soldiers punched her arm, leaving her with a lasting injury. Maria de la Paz Balagtas Culala testified, "I did not want to go with the soldier but I could not resist because of the overwhelming fear. All the time that soldier was raping me, his gun was on the cot." Januaria Galang Garcia testified, "I tried to resist but he was much stronger. He punched me in the stomach a couple of times. Then, he raped me. After some time, he raped me again. Then he left." Rufina Quaderna Gulapa testified that two soldiers took her to a room, undressed her with a bayonet, and raped her. She said that one soldier "forced me to hold his penis. I was horrified. I could not hold it. He then inserted his penis inside my vagina. I felt a burning kind of pain inside me. I screamed. I must have passed out. I do not know how many times I was raped that night." Teodora Marin Hernandez testified, "My kicking and struggling irritated him so he slapped me several times, then he raped me. I was so weak at this point all I could do was cry and I heard the other women in the room also crying."

390. Maria Reyes Pangilinan testified that she had to leave her year-old child with her relative when soldiers forced her at gunpoint to go to the *Bahay na Pula*, where one raped her while the other held her down. She said, "I started praying and hoping that they will not kill me. I wanted to scream but no sound escaped my lungs. When the other soldier succeeded in pushing his penis inside my vagina, I just closed my eyes and struggled with

the pain it caused me." Lucila Hernandez Payawal testified, "All I could feel was fear." Three soldiers raped her in succession. She said, "By this time I was quite hysterical. I was screaming and scratching the soldiers' head and arms." Florencia Macapagal de la Pena testified, "One Japanese soldier held both my hands as they undressed me. I kept fighting. Another came and punched me on the legs. It was Captain Hiwara who raped me. It was midnight when they were finished with me."

391. Teofila Regala Punzalan testified, "Through gestures, he seemed to be asking me to choose between his penis or his rifle with a bayonet. Then he raped me. I was fourteen years old at the time." Belen Alonso Sagum testified that two soldiers kept her with them for what appears to be about twenty-four-hours. Despite her plea that she was only a child, they each raped her three times. She said, "Every time I fought back they would threaten to kill me. I was only fourteen years old. The soldiers were calling me baby the whole time." Tarcila Mangulabnan Sampang testified, "I was crying because I did not know anything about sex at my age. Before I could protest, I was kicked and lost consciousness. When I woke up, I was naked and already raped. I was made to stay in that tent for a night. I was punched in the stomach, made to have sex with them for a long time. There was no part of my body they did not touch." Corazon Manalili Suba testified that she fought back and a Japanese soldier hit her in the stomach. She said, "I fainted. When I regained my consciousness, I felt pain. I had bruises all over my body. Then I saw blood in my private parts. That was how I knew they raped me." Caridad Lansangan Turla was held in a room with three other girls her age. Four Japanese came in and raped them. She testified, "The Japanese forced me on the floor and pinned both my hands. I struggled and shouted for help but he was strong and I was just a child and very weak. He continuously slapped me on the face. Then he raped me. When he finished another Japanese came and raped me. By the second Japanese I could no longer struggle. I felt pain all over my body. I just lay on the floor helpless. After the four Japanese left the room all four of us stayed awake crying all night."

392. The women and girls who were raped were left with terrifying memories and lasting physical scars and emotional pain. They did not have the opportunity to heal in safety, however, because of the wholesale destruction of their community.

393. In conclusion, the evidence shows that the Japanese military committed systematic and organised rapes, targeting young women and girls of the barrio of Mapanique. They rounded up community members in a central place (the schoolyard), separated women and children from the men, and brought the young women and girls to the *Bahay na Pula* to rape them. The rapes were an integral part of the mass attack on the community, which also included looting, arson, massacre of the men, and other forms of torture and abuse.

I. CONTINUING HARM TO SURVIVORS OF RAPE AND SEXUAL SLAVERY

394. The Judges are impressed by the extraordinary strength and courage of all of the survivors of sexual violence in the face of the suffering they have endured. The suffering did not end with the termination of the war or their release from sexual enslavement; they were constantly challenged in the process of rebuilding their cruelly shattered lives. As Tomasa Dioso Salinog stated, "The wounds they did to me are very deep. I thought I couldn't bear it. But I had to bear it in order to survive."

395. Overcoming enormous obstacles, the "comfort women" have given survival new meaning. Many of them raised children, even though the majority were subsequently unable to give

birth themselves. They married widowers and raised stepchildren and some also adopted children. They worked hard to support their families and themselves, often at menial labour and at low paying jobs, despite their emotional pain and physical illnesses and disabilities. They endured hostility, ostracism, and invisibility. They struggled to find contentment in marriage or to reconstruct their lives as single women in patriarchal societies that valued women according to their family role.

396. Eventually, these remarkably strong and courageous women spoke out publicly to bring an end to the long years of silence and shame. They found courage and inspiration in each other and this bravery encouraged others like themselves to come forward, creating networks of mutual support and giving expression to the unspeakable through their testimonies. The surviving former "comfort women" helped to bring about a worldwide movement for the condemnation of sexual violence against women in war.

397. At the same time, in the some fifty-six years since the war ended, the survivors of rape and sexual slavery have endured and struggled with terrifying and recurrent memories and the long-term effects of sexual violence and servitude, in the form of physical injuries that left scars and lasting pain and disability, mental and emotional suffering consistent with expert descriptions of post-traumatic stress, damage to their reproductive capacity, and harm to their social relationships in marriage, work, and community.

1. Enduring Health Damages and Physical Suffering

398. Many witnesses testified that they still experience physical pain and have disabilities and scars as a direct result of beatings and torture and, of course, the sexual violence inflicted against them.

399. Wan Aihua testified that she suffers pain from having been tortured upon being recaptured after escape, including being hung from a tree by her arms. Kim Yong-Suk testified that she has aches in her legs from broken bones where the soldiers kicked her. Yuan Zhulin testified that she still has "terrible headaches" from being beaten on her head. Yang Mingzhen testified that her body is still badly injured as a result of the violent rapes she experienced when she was just a child.

400. Survivors experience disability from broken bones that never healed properly. Wan Aihua testified that the torture damaged and "bent" her bones and shortened her height. Ms. Kim testified that she cannot walk properly. Ms. Mardiyem testified that as a result of being kicked, she had abnormal bone growth and one leg is shorter than the other.

401. Two survivors mentioned digestive problems caused by torture. Kim Yong-Suk suffers from digestive problems as a result of being cut in her stomach area with a sword, and Kim Bok-Dong suffers from having water forced down her throat with a hose.

402. Two witnesses testified that they suffered hearing loss. Teng Kao Pao-Chu lost the hearing in her right ear from a cannon shot that exploded on the ship during her transport as a "comfort woman." Rosalind Saw testified that she believes her deafness is a result of being slapped and having her hair pulled.

403. Chun Ok-Soon lost her ability to speak as a result of tattoos that were imprinted on her tongue; she also lost one eye as a result of violence.

404. Many survivors have scars on their bodies from the physical violence to which they were subjected. Leonora Hernandez Sumawang has a scar on her thigh from a bayonet wound. Yuan Zhulin and Tomasa Dioso Salinog have scars from being beaten. Mun Pil-Gi has scars under her arm from being burned. Kim Yong-Suk has many scars from sword cuts, especially on her breast and stomach area. She testified, "If you see my body, I'm full of scars." Yang Mingzhen has a scar on her forehead from a sword. Jong Ok-Soon has tattoos on her stomach and breast in addition to her tongue.

405. The injuries inflicted on the survivors in their youth have been exacerbated by age. The stress and violence has impacted upon their health in ways that are largely incalculable and intangible.

2. Reproductive Harms

406. Reproductive harm occurred on numerous levels and it often depended upon the country as to whether abortion was induced or the pregnancy was carried to term, whether a woman who became pregnant as a result of rape was killed or released, given a break or forced to continue servicing soldiers. Little is known about the children born as a result of rape but it appears some of the women were able and willing to keep the child whereas others were not. Many lost the ability to bear children as a result of the damage caused to their bodies by the rapes and other violence.

407. The rate of infection with sexually transmitted diseases was high in the "comfort stations." Two Indonesian survivors, Ms. Titih and Ms. Sukarlin, suffered from untreated syphilis until their advanced age. Medical records from a small group study at In-chun Sa-rang Hospital in Korea show five survivors suffering from late latent syphilis.

408. Survivors of sexual slavery suffered damage to their reproductive organs including loss of ability to bear children. Six survivors testified that they were unable to bear children, and three testified that they gave birth to children after their release from sexual slavery. Ms. X and Ms. Suhanah testified that they had had their uterus removed due to infection as a result of sexual violence. Pak Yong-Sim testified that she miscarried after being forced to continue providing sexual services during her pregnancy; Chong Sun Myong and Lee San Gyung lost their reproductive capacity as a result of torture.

409. Yuan Zhulin testified that injections she received as a "comfort woman" caused her to lose her reproductive capacity. Teng Kao Pao-Chu stated that she is unable to have children because of damage to her reproductive organs. Kim Bok-Dong also stated that she is unable to have children.

410. Other witnesses testified that they suffered miscarriages, including Ms. Mardiyem and Jan Ruff-O'Herne. Jan Ruff-O'Herne required a series of operations in order to be able to carry her children to term.

411. Sexually transmitted diseases could affect the women's children as well. One survivor testified that her child suffers with mental illness as a result of the syphilis she unwittingly transmitted to him.

412. Inability to bear children interfered with women's marital and family life. Kim Bok-Dong testified that her husband started to have frequent affairs because she could not have children. This led to their eventual separation. Ms. Suhanah testified, "I couldn't have child nor husband because my uterus [was] taken away." Many survivors married

widowers and raised stepchildren, while others adopted children either with their spouses or to raise alone.

3. Ongoing Psychological Harms

413. Survivors of sexual violence experience severe psychological consequences as a direct result of the trauma and violence, which was exacerbated, particularly for the former "comfort women," by social isolation, societal stigma, economic hardship, marriage difficulties, and the failure of the state of Japan to recognize and repair its wrongs. These factors were also foreseeable consequences of the sexual violence and servitude.

414. Despondency led some survivors to contemplate suicide. Lin Shen-Chung (Iyang-Apay) stated that she considered suicide many times but refrained on account of her five children whom she raised alone. Teng Kao Pao-Chu testified that during an unsettled period of her life, she attempted suicide by taking pills. She stated, "I felt that my life was doomed." Rufina Quilantang Catacutan and Rosalina Buco both testified that they thought of suicide. Thoughts or attempts at suicide were common among the girls and women in the sexual slavery facilities. Some witnesses testified that they or others attempted suicide. Kim Bok-Dong and two other women tried to commit suicide after they endured their first rape.

415. Survivors also experienced nervous breakdowns and addictions due to the trauma they suffered. Pak Yong-Sim testified that she suffered a nervous breakdown. Song Shin-Do and Teng Kao Pao-Chu both testified that they had drinking problems. Teng Kao Pao-Chu stated that she was able to quit drinking only when it was necessary to win the respect of her children. A study at In-chun Sa-rang Hospital showed that a large number of former "comfort women" smoked and had smoking-related illnesses due to the stress. Some became addicted to painkillers.

416. Survivors testified that the past will not let them rest and that they desire peace. Belen Alonso Sagum stated, "I have not found peace and shall not find peace until the Japanese government recognises the wrong it has done and compensates the people whom they have done wrong." Rosario Culala Buco testified, "I still experience depression and anger." Maria de le Paz Balagtas Culala stated, "I want some peace from the past." Ms. Mardiyem stated, "I was forced for three years without any opportunity to rest, ten hours a day, and right now I really want to be able to live my life."

417. Survivors testified that they still experience strong anger towards the perpetrators and the Japanese government. Lin Shen-Chung (Iyang-Apay) testified that a former perpetrator came back and apologised, and also asked if she still hated them. She stated, "Although I told him I did not hate them, I had to suppress all the sufferings in my heart when I spoke." Teodora Marin Hernandez testified that she still feels animosity when she sees Japanese men. Wan Aihua testified, "I am angry that my body was injured so badly." Kim Yong-Suk testified, "He hurt me all over my body and I hate Japanese soldiers. I could never forgive them."

418. Teng Kao Pao-Chu stated that she was angry that the Japanese government took non-Japanese women, and that they have not admitted the truth. She stated, "All my youth has been ruined like this! This is not to be endured."

419. The Survivors continue to deal with terror, pain, and grief caused by the crimes committed against them. Yang Mingzhen testified, "I am still terrified when I remember

all these things." Wan Aihua said that it was hard to put her experiences into words. She stated, "I am just filled with sorrow." Two witnesses testified that they had flashbacks in which they felt they were reliving the painful experiences. One of those witnesses, Guillerma Sombillo Banlingit, testified, "During those times, I just cry and feel helpless."

420. Several witnesses testified that they suffer from nightmares and anxiety. Song Shin-Do testified, "The battleground scenes never left my dreams." Jan Ruff-O'Herne testified that she has had nightmares and sleepless nights ever since her period of sexual slavery. Leonora Sumawang testified, "I still wake up from nightmares of Japanese soldiers." Rufina Quaderna Gulapa stated, "I have nightmares of a Japanese soldier wearing a cap with flaps on the ears, with his trousers down around his ankles, forcing himself inside me."

421. Many witnesses testified that they feel a pervasive sense of shame, even though the events were beyond their control. Rosalina Buco testified, "I could not stand the humiliation and the loss of respect for myself." Tomasa Dioso Salinog testified, "I was so humiliated and I see myself as no more than a pig in a pen." Jan Ruff-O'Herne testified, "We felt dirty. We felt soiled. We had this enormous shame." Because of this shame, she stated, "for us, the war was not over." Maxima Regala de la Cruz testified, "I felt shame because I felt dirty and used." Ms. Suhanah testified that on visiting the site of the former "comfort station," "I always cry and feel ashamed." Teng Kao Pao-Chu stated: "I lost my life. I was regarded as a dirty woman."

422. Maxima Regala de la Cruz stated also that having no recourse against the perpetrators increased their silence and shame. She stated, "It is so shameful that what we did with our history and pain is dig a deep hole and cover it since justice continues to elude us."

423. Shame caused women severe distress and social isolation. One witness, Corazon Manalili Suba, stated that shame caused her to stop attending school. Teng Kao Pao-Chu and Senaida Punzalan de la Cruz testified that feeling ashamed of the experience of sexual violence made them avoid marriage. Rosalina Buco stated, "Had I been the lone rape victim on that dark day, I know that I would have, without a doubt, taken my life out of utter shame."

424. Ms. Mardiyem lost the dream of becoming an actress. Other witnesses testified that they lost their youth. Jan Ruff-O'Herne had wanted to become a nun. Virtually all lost educational opportunities, job opportunities, and promises of normal and family life as a direct result of being repeatedly raped.

4. Impediments to Intimate Relationships and Social/Community Life

425. In the post-war period, marriage and family were the predominant roles to which women could aspire and this familial role defined their lives and future security. In addition, romance, love, and the satisfaction of raising children were important to many women. However, because the ideology of women's chastity was promoted in many countries including in the Asia-Pacific region, survivors of sexual violence often had a difficult time finding marriage partners, and also suffered a high percentage of divorce and abandonment for reasons directly related to the sex crimes they endured. This was especially true for survivors of sexual slavery, for many of whom there were additional sources of marital problems stemming from the view that they were "spoiled," from the

accusation that they had been prostitutes and from their inability to bear children and to enjoy sexual relations.

426. The women who were involved in relationships when they were procured were rarely able to sustain the relationship upon their return. Teng Kao Pao-Chu testified that she had a boyfriend when she was ordered to go abroad as a "comfort woman," and that although he promised to wait for her, he had married by the time she returned. Unable to be with the one she loved, she chose to avoid marriage for many years and later only married for economic security.

427. Some witnesses testified that they shunned relationships for fear that potential marriage partners would reject them. For many, it became reality that partners or potential partners rejected survivors of sexual violence. Rosario Culala Buco testified that suitors rejected her because she had been raped by Japanese soldiers and was not a virgin. Lu Mang-Mei testified that she was unable to marry until the age of 38, when intermediaries helped to arrange a marriage for her with a man who would not suspect her past which she had to hide and lie about. Teng Kao Pao-Chu stated that many former "comfort women" could not find marriage partners.

428. Some witnesses testified that their choice of marriage partners was limited due to their past. Ha Sang-Suk and Teng Kao Pao-Chu married widowers with children.

429. Many witnesses testified that, although they eventually married, their marriages ended in abuse and divorce. Lin Shen-Chung (Iyang-Apay) stated, "Of the history of my four marriages and three divorces, my husband's difficulty to accept my past usually is the main reason for my divorce." Her first husband divorced her when he learned the truth; at the time she was three months pregnant. Her second husband took their three children and left her when he learned of her past. Her fourth husband had known of her past before the marriage, but found fault with her later and tried to extort money from her to obtain a divorce. Only her third husband, who died in 1971, was kind to her.

430. Belen Alonso Sagum testified that she initially had not told her husband of her past; when he found out he began to get drunk and verbally abuse her, saying "Better to have a leftover dog than a leftover person."

431. Lu Mang-Mei testified that her husband started to have affairs when he found out the truth. Ms. X testified that, although her husband accepted the fact that she was not a virgin, she had not told him the reason. She testified that they were happy with their two adopted daughters, and that he had taught her to read, but her inability to enjoy sexual relations eventually led him to find another woman and abandon his family. Kim Bok-Dong's first marriage ended in separation when he had affairs in response to her inability to bear children.

432. Other witnesses rejected marriage themselves after the trauma. Tomasa Dioso Salinog testified that she never wanted to marry, fearing that a husband would abuse her. She stated, "I feel like everything will happen again. If I marry, and my husband will hurt me, what will I do?" Tarcila Mangulabnan Sampang stated, "I never married because I was raped by the Japanese."

433. Song Shin-Do, who had hated marriage and was deceived into becoming a "comfort woman" with the promise that she could make a living while remaining unmarried,

formed a platonic relationship with the man who helped her after the war and lived with him until his death.

434. Many married only reluctantly. Kim Bok-Dong married in response to her mother's wishes. Teng Kao Pao-Chu married for security after living a hard life working in nightclubs for many years. Teng Kao Pao-Chu testified that when she did marry, she was unhappy and led a hard life, raising her husband's nine children, cooking for him and taking care of his business.

435. Witnesses testified repeatedly that they suffered from community defamation and rejection. The combination of chastity ideology, moral condemnation of prostitution, and nationalistic rejection of anyone supposed to have been associated with the Japanese resulted in complete isolation for many of the women in many countries.

436. Japan's repeated insistence that the "comfort women" were voluntary prostitutes instead of victims of military force and coercion exacerbated their suffering, by feeding false impressions of survivors throughout the Asia-Pacific region. That the Japanese assertion was believed also demonstrates the strength of misogyny and the misconceptions and stereotypes surrounding crimes of sexual violence.

437. Jan Ruff-O'Herne testified that in the internment camp after the war, other women called the survivors "Japanese whores" thinking they had gone voluntarily in order to get better food. Lu Mang-Mei stated that people defamed her because she had worked as a "comfort woman" on Hainan Island. Teng Kao Pao-Chu testified that people regarded her as a "dirty woman." She also stated that some but not all people looked down on the former "comfort women," and it was commonly thought that they would not be happy with the life of a housewife.

438. Tomasa Dioso Salinog and Ms. Mardiyem both testified that people referred to them as "leftovers of the Japanese" and treated them as outcasts. Similarly Ms. Emi was called a "bread crumb of Japan" and villagers burned her house down.

439. Ms. X testified that immediately after her return home, she had to move to another place because of the reaction of her village. She stated that villagers despised the "comfort women" because many Malaysians had been killed by the Japanese.

440. Some survivors led an unsettled life. Teng Kao Pao-Chu stated that, after staying with her sister for a few years immediately upon her return, she left her sister "to wander around." She described this as a period of her life during which she worked in nightclubs, and lived in a rented house. She was deprived of having children since she could no longer give birth and was also no longer close to her adopted daughter because of the long separation. It was during this period that she attempted suicide. From her testimony, it appears that the rootless lifestyle and deprivation of close family relationships was the cause of her despondency. Kim Gun-Ja also testified that she wandered for a while, going from city to city as a servant and peddler.

441. Several survivors of sexual slavery testified that they lost the ability to take pleasure in sexual relations. As Jan Ruff-O'Herne stated, "How can you enjoy lovemaking, even by your husband, if you are reminded of all the hundreds of times you were forcibly raped by the Japanese?" She stated that she felt fortunate that her husband is very patient. Ms. Mardiyem and Ms. X testified that they had no pleasure in sexual relations with their husbands. As discussed above, Ms. X's marriage ended because she refused to engage in

sexual relations. Rosalind Saw testified that after her experiences, she was afraid to make love with men because of the pain.

442. As discussed above, many survivors of sexual slavery testified that they were unable to have children. In addition to the physical deprivation of reproductive capacity, some had chosen not to marry or were unable to marry or form sexual relationships with men. Survivors had also been separated from their children whom they had been forced to leave behind. Some of their children died while they were in the "comfort station." Teng Kao Pao-Chu had left behind her adopted daughter and was unable to be close to her when she returned nine years later. Song Shin-Do had been forced to leave her newborn children with strangers when she gave birth during the time she was a "comfort woman." She testified that she continued to suffer guilt over having left her children in China.

5. Silence

443. Most of the Survivors of sexual slavery and mass rape kept silent about their experiences until the 1990s, when they began to break the silence. Even now, however, there are many former "comfort women" who are unable to speak out. For some women, this meant hiding their past. For others, it meant living alone with their pain.

444. Although some witnesses were able to disclose their history of sexual violence to their husbands, other witnesses testified that they never did so. Maxima Regala de la Cruz stated that she did not tell her husband until she decided to speak out publicly in the 1990s. Several of the Mapanique survivors, including Juanita Maniego Briones, Fermina Bulaon de la Pena, Florencia Macapagal de la Pena, Caridad Lansangan Turla, and Belen Alonso Sagum also testified that they did not tell their husbands. Teofila Regala Punzalan testified that she only told her husband after they had six children. Fermina Bulaon de la Pena testified that she was afraid her husband would leave if she told him about the sex crimes committed against her. Ms. X did not tell her husband that she was a survivor of sexual violence, only that she was not a virgin. Lu Mang-Mei and Lin Shen-Chung (Iyang-Apay) also did not reveal their pasts to their husbands. As discussed above, some of these women's husbands abused or abandoned them when they discovered the truth.

445. For most former "comfort women," their family members were unable to cope with the truth. Both the family members and the women themselves suffered from this. Jan Ruff-O'Herne testified that she only spoke with her mother once about what she had suffered as a "comfort woman," and that because her mother could not cope with what she heard, they never spoke about it again. Kim Bok-Dong testified that at first she told her mother only that she had been a nurse, and that her mother had a heart attack when she finally told her mother the truth in response to her mother's urging for her to marry. Florencia Macapagal de la Pena testified that, upon learning that she had been raped, her father became very angry and disappeared because he could not control himself.

446. Some women never told their families. Ms. Mardiyem testified that neither her family nor her husband's family knew, although she had told her husband. Caridad Lansangan Turla testified that she never told her family until she spoke out publicly; at the time, after the rapes and massacres, they were only concerned whether everyone was alive.

6. Poverty and Social/Economic Hardship

447. Many survivors of sexual slavery testified that they lived in poor economic conditions and experienced great hardship in supporting themselves and their families. Most of these survivors were women who chose to remain single after returning home or whose husbands abandoned them. Ms. X testified that after her husband left her and their two daughters, she worked despite her many illnesses, as a launderer, hawker and maid; however, she could not earn enough to support her family and her eldest daughter had to leave primary school after two years. Lin Shen-Chung (Iyang-Apay), who was repeatedly left to raise her children alone, despite making four attempts at marriage, testified that she had a hard life raising crops as a member of her tribe. Tomasa Dioso Salinog, who chose to remain single out of fear that a husband would abuse her, worked as a launderer and seamstress and ran a shop, but never earned more than a very small income.

448. Other witnesses testified that they earned their living performing domestic labour or working in other occupations in which they had a marginal social status. Song Shin-Do testified that she worked for a Korean-Japanese man after she had been left alone in Japan. Kim Gun-Ja testified that she worked as a peddler and servant. Lu Mang-Mei and Teng Kao Pao-Chu both testified that in the later periods of their lives, they worked at domestic labour; Lu Mang-Mei, as a babysitter and laundress, and Teng Kao Pao-Chu, as a cook and laundress. Teng Kao Pao-Chu had worked earlier in bars and as a dancer in nightclubs, and even while she was married she led a hard life working for her husband.

449. Some witnesses testified that defamation by their communities had interfered with their ability to earn their living. Ms. Mardiyem stated that after she spoke out publicly about her experiences, people boycotted the catering business that she managed. Teng Kao Pao-Chu stated that her job opportunities were limited because people considered her a "dirty woman."

450. In sum, for survivors of rape, sexual slavery and other forms of sexual violence, the social and economic consequences of their experiences, as well as the physical and emotional trauma they suffered, combined to make life a daily struggle.

451. The witnesses all made the decision to break the public silence that had surrounded them for over fifty years. Many of them spoke about the power of speaking out, and the strength they drew from hearing other women who had done so and suffer similar atrocities.

452. The section below confirms the testimony of survivors as to the impact of sexual violence on their lives at the time the crime is committed and often for the remainder of their lives. It also underscores further the continuing harms resulting from impunity for the crimes.

J. THE EXPERT TESTIMONY REGARDING THE IMPACT OF SEXUAL SLAVERY

453. The Prosecutors presented the testimony of Lepa Mladjenovic, a psychologist and expert on sexual violence against women in armed conflict, about the harm experienced by survivors of such violence, and what helps them recover. She testified that it is usual for survivors to go through three stages of harm after the violence is over. The first stage is characterised by numbness and shock, where the survivor cannot believe what happened. The second stage involves emotional outbursts, flashbacks, strong feelings of shame, guilt, fear, and low self-esteem. The survivor also has a changed body image and may experience depression, thoughts of suicide, and loss of trust in the outside world. She

may also have difficulty concentrating and problems with recent memory. In addition, she may be isolated from people because she has lost trust in others. She may decide not to marry or develop intimate relationships or she may be rejected by her community. The third stage may last for the remainder of their lives. A woman may consider suicide all the time to defend against the psychological pain. She cannot forget the trauma. She might recover her relationship with her body, or might feel that her body is foreign to her. Symptoms of the other stages may always recur. Women who have given birth to children as a result of the rape suffer particularly extreme emotional conflict.

454. Lepa Mladjenovic testified that trauma due to sexual violence during armed conflict is particularly intensified, for the following reasons. Rape in wartime may take place in public places, army barracks, and in front of the community. It is often committed by men in uniform. Victims are often raped multiple times by one man or several. It is also common that men rape groups of women. Rape using foreign objects,such as knives, sticks, bottles, glass and cigarettes, is also more common in war. It is common that the men inform the women that they are treating the women's bodies as the territory of the enemy nation which they want to defeat. The constant presence of death and suffering adds significantly to the trauma, as many women have witnessed the killing of family members and endured the demolition of their homes, poverty and hunger. Women experience the constant fear of death as well as the fear of being raped.

455. Lepa Mladjenovic stated that social justice is an important part of recovery for survivors of sexual violence in armed conflict, along with the support of family and community, and psychological counselling. She stated that trauma is not the private matter of a woman, but a political issue. When the state takes responsibility for the sexual violence, it can contribute to the survivor's recovery, and conversely, when it refuses to take responsibility for the crimes, it can impede the survivor's recovery.

456. The Korean Prosecutors presented in writing three expert testimonies. The first, by Lee, Sooyun (Ph.D. candidate, Medical Sociology Department of Seoul National University),discusses the immediate and long-lasting physical harm to survivors of sexual slavery, as found by a study of fourteen women. Seven of the fourteen women suffered lasting effects of beatings and other trauma, such as scars, neglected shoulder joint dislocation, amputation, and hearing disturbance. Another study showed that 35.9% of sexual slavery survivors tested positive for syphilis. This is a very high statistic for Korea, where the national average ranges from 0.3% for blood donors, to 9-15% for high-risk sexually active people. Many women became sterile. Lee quotes survivor Hwang Kum-Ju, who says that sterility resulted from repeated scrapings of the womb after women took Shot 606 while pregnant, which caused them to hemorrhage.

457. The fourteen survivors in the study were also tested for post-traumatic stress disorder (PTSD), a psychological response to trauma, with eleven testing positive. Among the findings were: the women were intimidated by the threat of death and experienced helplessness and fear during the period of sexual slavery; they feared and avoided men and stopped anticipating marriage; they mentally blocked much of their past; they spent many sleepless nights and experienced physical anxiety when they saw men or soldiers. These symptoms were repeated continuously for decades and interfered with the women's social and occupational lives. A high proportion of survivors smoked and suffered from many tobacco-related diseases including pulmonary diseases as well as heart attacks. They had started smoking during or after their ordeal.

458. The second expert testimony from Korea is by Lee, Chulwon (Director, Imam Counseling Center), who studied the psychological consequences to fourteen survivors. Lee found several general patterns. Survivors had maintained their daily life with painful effort although they had experienced severe depression, pessimism, instability, and lack of energy. They suffered from many physical symptoms related to their experience of neglect and abuse in sexual slavery. Those symptoms included headache, migraine, back pain, ulcer, hypertension, and rheumatism. Survivors had negative attitudes in interpersonal relationships, which often interfered with their intimate relationships. Survivors of sexual violence also had difficulty testing reality, which usually lead to further difficulty in dealing with daily life. Lee found that these women had greater suffering than other aged people as a result of their trauma. Lee suggests further that survivors be compensated for psychological distress, loss of financial opportunities, psychotherapy, and treatment for physical diseases.

459. The third expert testimony is by Young-Hee Shim, from the Department of Sociology at Hanyang University. Young-Hee Shim studied both the causes and the effects of the women's long silence and social isolation. She identifies living conditions, cultural factors, and language and identity factors as reasons for the women's silence. Young-Hee Shim found that a component of the trauma was coming back to ordinary life after a sort of moratorium, in which familiar social ethics and value judgements were temporarily suspended. When the victim survivors realised they were going back to previous lives and relationships, they probably felt fear and anxiety, since they had to be conscious of the eyes of people around them. Many women could not or did not go back to their hometowns, and thus had no opportunity to tell their stories since they were cut off from previous relationships. Furthermore, the burdens of daily living after the war consumed the women's attention. Korea did not have a sufficient infrastructure after the emancipation from Japanese rule, so financial support or counselling for victims would have been unavailable. The Korean War from 1950-1953 caused additional devastation, deaths, and trauma to those living in the territory.

460. Anti-Japanese sentiment and chastity ideology also contributed to silencing the women. Some faced community or family pressure not to tell their story. They also feared being accused of cooperating with the Japanese.

461. Furthermore, because of obfuscation regarding men's sexual violence towards women, the women might have had difficulty defining to themselves what had happened. They might not have been sure whether it was rape or prostitution or something else, and did not have the words to describe their experiences. Young-Hee Shim notes that survivors of sexual harassment and wife battering also had no way to name their victimization before those words were found.

462. Colonial and gender domination may have contributed to women's confusion. Sometimes they might have thought they were Korean victims of Japanese colonial rule, but other times, due to Japanese indoctrination, they might have thought they were Japanese patriots serving the Japanese Imperial Army. Young-Hee Shim attributes the outpouring of stories to the development of feminist discourse by the Korean Council for Women Drafted into Military Sexual Slavery by Japan and women's studies.

463. Young-Hee Shim, like Lepa Mladjenovic, emphasises the importance of social justice for survivors. However, Young-Hee Shim focuses on the power of truth of the women's

stories to restore collective memory and compel the rewriting of history. She also notes that for many survivors, discussing their stories solved some of the pains of their trauma.

464. The Judges accept the opinions of the experts as persuasive. The testimony regarding the impact of the sexual slavery on the lives of the survivors and regarding the contributing or mitigating factors and continuing harms will also be taken into consideration for the issue of state responsibility and reparations, discussed in later sections.

K. DEMANDS FOR REPARATIONS

465. The Judges consider that it is important to listen to the requests of the survivors themselves. Witnesses made powerful demands for reparations to this Tribunal, including the demand for an apology and compensation by the state of Japan, the demand that the perpetrators be held accountable for the crimes, and that the truth of their experiences be told and incorporated as part of the history to prevent recurrence.

466. Kim Yong-Suk of Korea stated, "I didn't come here for pity, I didn't come here for money. I want you to know that I lost my life, my youth, and unless a Japanese government official comes in front of me and apologises, I will never forgive them." Wan Aihua of China stated, "I came to Japan because I have a lot of things to say to the Japanese Emperor and to the Japanese government because perpetrators are still living. They did terrible things to us. They have to make apology to us and they have to make compensations. My body is injured so badly I am angry about it. I have a very strong anger toward Japan."

467. Yuan Zhu-lin of China testified, "I would like to once again prosecute the Japanese military. They damaged my body and I cannot be productive any more and I would like to have the Japanese government apologise and also pay reparations. I am an old woman and I don't know how long I will live but I will not give up until I win my victory."

468. Tomasa Dioso Salinog of the Philippines stated, "The wounds they did to me is very deep . . . I am asking for justice. I am asking for justice." Maxima Regala de la Cruz of the Philippines stated, "The women in our barrio who were raped by Japanese soldiers have the right to demand for justice and financial compensation."

469. Many of the witnesses expressed interest in receiving apologies from the direct perpetrators. Virginia Manalastas Bangit of the Philippines stated, "We want the Japanese government to acknowledge what it did to us, and to pay for the suffering they forced us to go through. The soldiers who raped me must have been about my age during the war, and they could still be alive today. They should apologise to us and make reparation."

470. In the Philippines, many of the survivors of the "comfort stations" and Mapanique testified that they joined the Malaya Lola group (an organisation of WWII sexual slavery survivors) to demand compensation out of a desire for justice. Rosaria Culala Buco of the Philippines stated,

> I joined [the Malaya Lola group] because of the difficulty I went through. I am now showing my shame to the whole Philippines and to the whole world so that the Japanese government will have the conscience to compensate its victims. They should compensate us for the houses they

> burned, the things they have stolen from us and for taking away the dignity of its rape victims.

471. Fermina Bulaon de la Pena stated, "I joined the Malaya Lolas to seek justice from the government of Japan for the violence they have committed against me. I seek indemnification for damages against my person and property." Florencia Macapagal de la Pena states, "My purpose for joining [Malaya Lola] is to seek justice for what happened to us. I want the Japanese to understand the pain they inflicted on us. Whoever owes must pay." Leonora Hernandez Sumawang, a Mapanique survivor stated that she joined the group "to demand for justice from the government of Japan. No amount of money can compensate for the assault against my dignity as a person, as a woman, so first and foremost I demand that the perpetrators and whoever else is responsible to make an apology. Secondly, I want the world to know about our experience so that the lesson will be learned and that our experience at the hands of those soldiers will never be repeated. Third, I demand for just compensation for the damages suffered by my person and my property. My family and I have lost too much. Our lives were taken away from us in just one day."

472. Another common demand was that the truth be revealed. Lu Mang-Mei of Taiwan stated, "the younger generations in Japan do not know much about our sufferings. People know nothing about the truth, since the data was all burned. What is the use?" Ahn Buk-Soon of Korea stated that "these perpetrators should own up and disclose the truth" and further: "And we have to correct the situation when they say that nothing of the sort happened. It really happened." Teng Kao Pao-Chu of Taiwan stated,

> I am very angry with the Japanese. They said they did it for their country. But for whom did we do it? For the Japanese? They took us by deception, and called us Chinks, which is most painful. Why didn't they recruit their own Japanese women, but recruited us! And the Japanese pretend that they know nothing, and we had to file our own lawsuit by ourselves! All my youth has been ruined like this! This is not to be endured! A lot of people knew that we have been there, nobody wanted us, and everyone all looked down upon us. Because I have sent money back to Taiwan, and my family did not receive them, I want the money back, and ask for an open apology from the Japanese government.

473. Lin Shen-Chung (Iyang-Apay) of Taiwan testified, "The past was very traumatic for my life. . . . When I think of the past, I feel very painful in my heart. Now that I am old and frail, what can I do? Only the Taiwanese government has been helping us. Where is the Japanese government? I ask for an apology and compensation from the Japanese government."

474. Some witnesses mentioned their desire to ensure that these crimes are not repeated in the future, and their identification with other victims of rape and sexual violence in war. Jan Ruff-O'Herne of the Netherlands stated, "It took us fifty years. We couldn't talk about it, and then first the Korean comfort women spoke out and I saw them on television. Also in Bosnia, women were being raped again, and I thought this is something that didn't just happen fifty years ago. It happens again in war." Ms. Mardiyem of Indonesia testified that she wanted the younger generation to understand so that the crimes won't be repeated. Teng Kao Pao-Chu stated: "The next generation of Japanese people must know my suffering – that their parents did such bad things."

475. The survivor-witnesses also expressed a keen need to be heard and to be believed. This is reflected in the eloquent words of as East Timorese witness as to why she travelled to Japan to testify before the Tribunal: "We came all the way from our nation to this place to ask them if they could be responsible for what they did to us, for what they have taken from us. We were treated so bad. So now we are requesting for responsibility, for compensation. We came here for justice. We didn't come here to see Japan. We came here to tell the truth. We are not telling lies here."

PART III – APPLICABLE LAW

A. PRELIMINARY LEGAL ISSUES

476. In the sections below, we first consider the principles of criminal law essential to understanding the nature and fairness of this proceeding, namely non-retroactivity, due process, statute of limitations, double jeopardy, and head of state immunity. We then consider the substantive crimes of rape and sexual slavery as crimes against humanity, and the applicable concepts of criminal responsibility analysing the law as it existed at the time the crimes charged in the Common Indictment were committed.

1. Principles of Criminal Law

(a) The Principle of Legality: Nullum Crimen Sine Lege

477. It is a fundamental principle of criminal law that no one shall be prosecuted for acts that were not recognised as crimes at the time the acts were committed. The underlying concept of *nullum crimen sine lege* – no crime without law – serves as a core principle of legal systems worldwide.

478. As noted previously, this Tribunal sits as if it were an extension or reopening of the proceedings before the IMTFE as a result of the IMTFE's failure to consider the system of sexual slavery established and maintained by the Japanese government and military. In order to avoid violating the principle of *nullum crimen sine lege,* the Judges will adjudicate the criminal responsibility of the accused in accordance with the law as it existed at the time the acts occurred.

479. The Preamble to the Charter of the Tribunal is consistent with this principle in calling upon the Tribunal "to render its judgements respecting responsibility for commission of crimes against women in light of the principles of law, human conscience, humanity and gender justice that were an integral part of international law at the time and that should have been applied by the International Military Tribunal for the Far East."[297] In determining criminal culpability of individual accused, particular weight will be given to the antecedents to and decisions of the post-World War II Tribunals. We will refer to more recent legal developments for the purpose of confirming or explaining earlier interpretations of the law but, in conformity with the principle of legality, we will not apply them to adjudicate the crimes when they represent a more recent or progressive evolution in the law.

480. The Tribunal must examine whether the conduct charged – namely, rape and sexual slavery as crimes against humanity – constituted a crime for which the accused could have been tried in 1946 by the IMTFE and incurred criminal responsibility as an individual or superior for that conduct.

481. It is also necessary to examine state responsibility to determine whether the crimes can be attributable to Japan and, if so, to determine the appropriate remedies. In gauging state responsibility of the government of Japan, it is appropriate to apply evolving legal norms to continuing violations. Hence, where the failure to prosecute wrongdoers and to repair the injuries inflicted causes ongoing and progressive harm to the survivors and their families and to heirs of those who have not survived, the violation is a continuing one and

297 Charter, Preamble, para. 14.

the Tribunal can apply the most recent developments of international law to determine the scope of state responsibility and to ascertain the most appropriate remedy.

(b) Due Process

482. The Tribunal considers the argument that adjudicating the charges against the accused *in absentia* constitutes a violation of their due process rights. The right of accused persons to defend themselves in criminal proceedings is essential and one of the bulwarks of freedom. It flows from the principle that individuals shall not be deprived of life, liberty, or property except through due process of law and in accordance with fair procedures which permit them to defend themselves through all appropriate legal measures.

483. The Judges note that due process constitutes an obligation of the state and of those that wield legal authority; members of civil society have no legal powers and thus no correlative legal duty to provide due process to those they accuse. Nonetheless, given the judicial form of this civil society initiative, the Judges examine to what degree it is desirable and feasible for this Peoples' Tribunal to afford due process measures.

484. The extent of due process rights is contingent on the potential prejudice to the individual whose rights are affected. This is a Peoples' Tribunal that has no power to impose any criminal sanctions or civil penalties on the accused, nor any power to compel testimony or production of evidence. It cannot punish the accused, all of whom are deceased,[298] nor does it have any power to force the accused, their heirs, or the state of Japan to provide reparations to the victims or those entitled to make claims on their behalf. This Tribunal can only make findings of fact and law, issue verdicts in the form of declarations, and make recommendations to encourage or influence the state of Japan to provide appropriate remedies. The Tribunal has no legal or binding power to enforce any determinations rendered in this Judgement.

485. The Tribunal's Judgement does, however, carry significant moral force. It can serve to expose the acts or omissions of the accused to the court of public opinion and thereby, at least, subject the accused to shame.[299] In this way, the Tribunal is similar to the work of scholars and historians, case studies, human rights reports, symposiums, documentary films and other civil society initiatives that publicise historical facts in the absence of any official judicial or legal process. Such indirect prejudice to the reputation of accused as may arise from this civil society initiative does not warrant recognising the same due process rights as should be afforded during an official or even unofficial criminal proceeding affecting solely reputation. Here, those who wish to represent the accused have the right to contest their responsibility before the public, just as the prosecutors, survivors, and experts have the right to assert and attempt to prove their guilt.

486. In sum, the Judges find that no due process rights of the accused have been violated by proceeding in their absence or, since they are deceased, in the absence of their representatives. The time and resources available to this Tribunal placed severe time limitations on the prosecution teams, and the state of Japan was offered a limited but,

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298 The following accused in this Tribunal received death sentences by the IMTFE: ITAGAKI Seichiro, MATSUI Iwane, and TOJO Hideki; HATA Shunroku and UMEZU Yoshijiro were sentenced to imprisonment for life. YAMASHITA was tried in a US Military Court and sentenced to death. Each of these trials and convictions was for crimes separate than for what they are accused of in the Peoples' Tribunal.

299 See, e.g. Takuya Asakura, Nonbinding Tribunal Can Only Sentence the Nation to Shame, Japan Times, December 9, 2000, p. 2.

under the circumstances, reasonable amount of time to register its contest to the proceedings on its own behalf and on behalf of the individuals accused. Regrettably, Japan made no response.

487. Nonetheless, in an effort to consider the potential defence positions of the accused and the state of Japan, the Judges invited *amicus curiae* or "friend of the court" submissions to bring before this Tribunal the anticipated arguments of the defence. The Judges have also identified additional potential arguments from records available to us. We deem it important to consider the arguments of the accused and the state of Japan, not because due process compels it, but because it lends balance to our consideration of the issues and affects the force and accuracy of the Judgement.

488. Japan might further argue as a due process matter that too much time has passed since the occurrence of the crimes charged to make fair proceedings possible. However, this argument is without merit. As with the exposure of criminal conduct many years after the occurrence of the crime, and sometimes even after the alleged perpetrator has died, it is both lawful and constructive to determine responsibility for criminal activity. Indeed, in this process, more due process consideration is afforded to the accused than would likely be present in, for example, a historical text or a news report exposing the crimes and naming the perpetrators.

489. The Judges recognise that in some respects, the IMTFE procedures were inadequate and would not satisfy current international due process standards, although, at the time, the procedures utilised there were far better than the customary practice of summarily executing defeated foes considered responsible for wartime atrocities. While it is appropriate in this proceeding, based as it is on l945 law, to adopt the findings of the IMTFE - and, beyond that, we find them warranted by the evidence there presented - we nonetheless caution against seeing the previous post-war military trials or this Tribunal as a legitimation of proposals to evade due process requirements by utilising military tribunals equipped with power to consider secret evidence, conduct secret proceedings, or lower the beyond reasonable doubt threshold. The progress of the world community in recognising fundamental guarantees of due process as an essential part of the rule of law must not be sacrificed.

490. Finally, the Judges consider that had the Allied powers included charges covering the system of sexual slavery or the rapes at Mapanique in the original indictment before the IMTFE, that Tribunal would have afforded greater due process to the accused than here. Undoubtedly, bringing the appropriate charges for these crimes in 1946 would have made more thorough fact-finding possible, notwithstanding the destruction of documents by Japan. Not only is it likely that the prior Tribunal would have had greater access to information from the Allied prosecution and from survivors or other witnesses than is available to us now some 55-65 years later, but the accused would also have had an opportunity to respond and to present their defences. But as the charges were not formally brought before the IMTFE, the responsibility now falls to this Tribunal to adjudicate them. This it strives to do despite the obstacles that delay imposes upon both the prosecution and the defence.

(c) Statute of Limitations

491. The state of Japan has contended that all judicial initiatives concerning the activities of the Japanese military during World War II are now time-barred by a statute of limitations.

This argument has been put forward by the Japanese government in other contexts to support its position that it has no legal obligation to pay reparations to the victims. It must also be considered whether the charges in the Common Indictment against the accused can be adjudicated or whether it is too late to bring a claim.

492. With regard to criminal culpability of the accused, a statute of limitations is a non-issue considering that this Tribunal functions as if it were sitting in l946. Further, Article 6 of the Charter stipulates: "The crimes within the jurisdiction of the Tribunal shall not be subject to any statute of limitations." This provision is consistent with international law. The egregiousness of such offences, which threaten the peace and security of humankind,[300] led the U.N. General Assembly to adopt in 1968 the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. That Convention declared that there is no requirement that prosecution of crimes against humanity be brought within a specified period of time.[301] The Convention, reflective of established principles of international law, notes in its Preamble that none of the declarations, instruments, or conventions relating to the prosecution and punishment of war crimes and crimes against humanity allow for a limitation period.[302]

493. As discussed herein, in regard to the Application for Restitution and Reparations filed in this case, the principle against limiting the time to seek relief for war crimes and crimes against humanity applies with equal force to the right to reparations as a result of the original criminal conduct.[303] Moreover, the fact that the failure to repair the original violations constitutes a continuing one negates any question of time limits.

494. The Judges find that there is no statute of limitations that bars this Tribunal from considering the allegations contained in the Common Indictment.

(d) Double Jeopardy – Non Bis in Idem

495. The Judges note the argument that those accused who have already been tried for crimes against humanity committed during World War II would be subjected to double jeopardy if they were tried in the Peoples' Tribunal. We find this claim to be without merit. First, we do not consider that a defence of double jeopardy lies because this Tribunal functions as an extension of the prior IMTFE trial and other post war trials and, as to the accused previously tried, as a reopening of their cases. Thus, there is no bar to considering evidence previously deduced as pertinent to these proceedings since the prior proceedings are incorporated herein. Second, the Common Indictment charges rape and sexual slavery as crimes against humanity. While there were allegations of certain instances of

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300 See ICC Statute (preamble and art 5) stating that genocide, war crimes, and crimes against humanity are "the most serious crimes of concern to the international community as a whole." Rape and sexual slavery are among the crimes listed as constituting war crimes and crimes against humanity.

301 Art. I(b) states that no statutory limitation shall apply to crimes against humanity. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, GA Res. 2391 (XXIII), annex, 23 UN GAOR Supp. (No. 18) at 40, UN Doc A/7218, 26 Nov. 1968. Entered into force 11 Nov. 1970.

302 In addition, domestic war crimes legislation has been passed in a number of states, such as the United Kingdom, Canada, Germany, and Australia, with the result that domestic courts have continued to convict Nazi war criminals for international crimes committed more than 50 years ago during World War II. See, e.g., Canada's Crimes against Humanity and War Crimes Act, 2000, c. 24.

303 As expressed by Mr. Louis Joinet, the Special Rapporteur of the Sub-Commission on impunity of perpetrators of violations of civil and political rights, "[p]rescription is without effect in the cases of serious crimes under international law." Further, he added that a statute of limitations "cannot run in respect of any violation while no effective remedy is available." Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (civil and political) by Mr. Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para. 31.

rape and sexual violence charged in the IMTFE Indictment, there are legally significant differences that prevent double jeopardy from arising here. The IMTFE Indictment contained no charges covering either the "comfort system" or the rapes at Mapanique. Further, the fact that some instances of rape or forced prostitution were cited in the IMTFE Judgement would not preclude a subsequent court from trying similar conduct committed against different victims or at different times and places.[304] In other words, the crimes charged in this Common Indictment clearly did not form the underlying basis for the sex crimes covered in the IMTFE Judgement.

496. In sum, the Prosecutors have argued that the charges brought are against those who could have been and should have been indicted by the IMTFE in 1946 for crimes of rape and sexual slavery as crimes against humanity. While some of those accused herein were in fact indicted, tried, and convicted (or acquitted as to some charges) in the IMTFE or in other post-World War II trials, they were not tried for the sexual violence alleged in the Common Indictment, in particular the system of sexual slavery or the rapes at Mapanique.

(e) Head of State/Official Immunity

497. We next turn to the claim that heads of states and other high-ranking officials enjoy absolute immunity from prosecution for crimes committed while acting in an official capacity. Article 5(1) of this Tribunal's Charter, which is consistent with language in other recent international criminal tribunal charters,[305] states:

> The official position of any accused person, whether as the Emperor, the Head of the State or Government, a military commander or a responsible government official shall not relieve such person of criminal responsibility, nor mitigate punishment.

498. The exceptional seriousness of crimes against humanity negates any argument that official status - whether head of state or otherwise - immunises a person from prosecution. Historically, states developed diplomatic immunity in order to facilitate relations between states. In essence, states designed the doctrine to prevent one state from challenging the official actions carried out by another state's leaders, as this was seen as not only an interference with state sovereignty but also an impediment to the efficient and effective functioning of intergovernmental relations.

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304 Because criminal prosecution under international law is a rare occurrence, the concept of double jeopardy in the international crimes context has not been well-developed. We refer therefore to Article 20.1 of the Rome Statute of the International Criminal Court which stipulates that no person shall be "tried before the Court for conduct which formed the basis of crimes for which the person has been convicted by the Court." We understand the term "conduct" in this context to refer to specific forms and incidents of illegal conduct and not any and all illegal conduct that might conceivably have been tried. Thus, for example, if an accused is convicted of crimes against humanity consisting of murder, but not of rape, or if there was no evidence of rape submitted as an underlying basis for a conviction on inhumane treatment, the Judges do not consider that the accused person has been previously tried and convicted for the conduct of rape. Likewise, if an accused has been convicted or acquitted of crimes against humanity consisting of rape in one defined context, for example, the Rape at Nanking, but not for rape against different victims or occurring at a different time or place, the double jeopardy bar would not preclude a subsequent charge of rape. In other words, simply because "crimes against humanity" is charged in one context does not require that a second charge of crimes against humanity be barred by the rule against double jeopardy. Otherwise one charge of crimes against humanity could result in insulating other egregious conduct from prosecution. Thus, as discussed *infra*, the fact that the IMTFE Judgement mentions that women were forced into prostitution under HATA's command – which could be considered to be a reference to the "comfort system" – would not operate to bar subsequent prosecution for his responsibility for such conduct when it does not form the underlying basis for crimes for which he has already been tried.

305 See ICTY Statute, art. 7(2); ICTR Statute, art. 6(2), providing: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

499. The Treaty of Versailles of 28 June 1919 recognised as a general principle of international law that immunities granted to heads of states are limited and not absolute, especially when international crimes are involved. In Article 227 of that Treaty, the Allied and Associated Powers publicly accused William II of Hohenzollern, formerly the German Emperor, of "a supreme offence against international morality and the sanctity of treaties" and recommended the establishment of a special tribunal to try the former head of state.[306] Article 227 was based on the Report presented to the 1919 Preliminary Peace Conference by a commission of 15 leading international law scholars. The Report, noting the grave crimes committed, including murder, rape, and torture, stated:

> [I]n the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognised, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different. . . . If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilised mankind.[307]

500. The Charters of the Nuremberg Tribunal and the IMTFE authorised the Tribunals to prosecute persons acting in an official capacity. Article 6 of the Tokyo Charter and Article 7 of the Nuremberg Charter explicitly denied immunity to state actors, regardless of their position as head of state or otherwise. In specifying that holding an "official position" as a government official or other superior does not free an accused from a crime within the jurisdiction of the Tribunal, the Tokyo and Nuremberg Charters provide:

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superiors shall, of itself, be sufficient to free such accused from responsibility for any crimes with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

501. The Nuremberg Judgement held that the doctrine of sovereign immunity does not apply to responsibility for international crimes:

> It was submitted that . . . where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this contention] must be rejected. . . . The principle of international law,

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306 The Treaty of Versailles, adopted on 28 June 1919, Article 227.

307 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, reprinted in 14 Am. J. Int'l L. (1920) (Supp.), pp. 95, 116.

> which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[308]

502. More specifically, the Nuremberg Tribunal made clear that sovereign immunity of the state did not apply when the state authorised acts, such as crimes against humanity, which were "outside its competence under international law":

> [T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[309]

503. In denying head of state immunity, the Nuremberg Tribunal found that Karl Doenitz, as head of state of Germany from 1 to 9 May 1945, was "active in waging aggressive war," in part based on his order to the Wehrmacht to continue the war in the East. He was convicted of Crimes Against Peace and sentenced to 10 years' imprisonment.[310]

504. The IMTFE did not have occasion to consider this issue as the Emperor of Japan was not charged by the IMTFE Prosecutors. The decision not to prosecute Emperor HIROHITO was not, however, based on the belief that he was immune under international law as a head of state. Rather, it was a political decision made by the Allies and "the good grace of General Douglas MacArthur," who was the Supreme Allied Commander and the architect of the IMTFE Charter.[311]

505. The Tokyo and Nuremberg Charters and the jurisprudence of these Tribunals, which deny head of state immunity, reflect international law as it existed in l946.

506. More recent developments in international law affirm the principle that crimes against humanity are *ultra vires*: they are beyond any conceivable definition of a head of states' or other public officials' legitimate powers. As such, they do not form part of the official functions that the immunity doctrine is designed to protect.[312] Indeed, the *Kunarac* Judgement considers acting in an official capacity to be an aggravating factor, not a mitigating factor or a defence, "because the official illegitimately used and abused a power which was conferred upon him or her for legitimate purposes."[313]

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308 IMTFE Judgement (Roling), pp. 41-42.

309 IMTFE Judgement (Roling), p. 42.

310 IMTFE Judgement (Roling), pp. 110, 131.

311 Bassiouni, Crimes against Humanity, p. 466; see also the view of B.V.A. Röling, one of the judges of the IMTFE, that the decision not to prosecute the Emperor was the result of a political, rather than a legal, decision by the American President, contrary to the wishes of Australia and the Soviet Union. Roling & Cassese, The Tokyo Trial and Beyond (1994) (paperback edition), p. 40.

312 See "Universal Jurisdiction and Absence of Immunity for Crimes Against Humanity", Amnesty International, AI-index: EUR 45/001/1999-01/01/1999, on their website www.aiusa.org. See also dissent by Judge Patricia Wald on the *ultra vires* doctrine in the context of sovereign immunity, in *Princz*, 26 F.3d at 1180.

313 *Kunarac* Trial Chamber Judgement, para. 494. Note that while the IMT and IMTFE Charters did allow the Tribunals to consider acting in an official capacity in mitigation of punishment, the ICTY and ICTR Statutes prevent it from being considered as a mitigating factor. See IMTFE Charter, art. 6; IMT Charter, art. 7; ICTY Statute, art. 7; ICTR Statute, art. 6.

507. Despite this precedent, the *amicus curiae* contends that this Tribunal has no power to try Emperor HIROHITO because Article 3 of the Meiji Constitution, the Japanese Constitution at the time of the Second World War, placed him above the law.[314] However, domestic law cannot create an immunity from responsibility under international law. Indeed, giving validity to such claims would undermine the legitimacy and the effective enforcement of international law.

508. The Judges find that no head of state immunity exists on behalf of Emperor HIROHITO that would relieve him of responsibility incurred for crimes against humanity.

B. THE SUBSTANTIVE CRIMES CHARGED: RAPE AND SEXUAL SLAVERY AS CRIMES AGAINST HUMANITY

1. Introduction

509. Here we consider the legality of the substantive charges in light of the applicable law during the period l937-1945 and whether the acts constituting those crimes have been proven before this Tribunal. Counts 1-2 of the Common Indictment charge Emperor HIROHITO and eight other high-ranking Japanese military and political officials with responsibility for "crimes against humanity" consisting of rape and sexual slavery of the "comfort women." Count 3 charges Emperor HIROHITO and General YAMASHITA Tomoyuki with responsibility for "mass rape" of women at Mapanique (Count 3).[315] These charges are based on Article 2(1) of this Tribunal's Charter which provides:

> The Tribunal shall have jurisdiction over crimes committed against women as war crimes, crimes against humanity and other crimes under international law. These crimes include, but are not limited to the following acts: sexual slavery, rape and other forms of sexual violence, enslavement, torture, deportation, persecution, murder, and extermination.

510. Below, we examine whether prosecution for "crimes against humanity" satisfied the principle of legality under international law at the time the offences occurred and identify the threshold criteria that transformed common crimes or war crimes into crimes against humanity. Next, we consider whether rape and sexual slavery were cognizable crimes under international law at the applicable time, and then examine whether the Prosecutors have proven that the specific acts charged – sexual slavery and rape – constituted crimes against humanity.[316] Then we address whether the accused can be held criminally responsible for such crimes.

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314 The Constitution of the Empire of Japan, Exhibit 199. The Emperor's political powers were independent from and superior to the legislative, judicial and administrative powers of the Japanese government. In addition, he ruled Japan and the Japanese people by divine provenance. Article 3 of the Constitution.

315 See Common Indictment of the Women's International War Crimes Tribunal for the Trial of Japanese Military Sexual Slavery, December 2000.

316 The Prosecutors' Application for Restitution and Reparations also requires this Tribunal to determine the responsibility of the state of Japan for these crimes and for the continuing violations in relation thereto.

2. Crimes Against Humanity: Principle of Legality and Threshold Conditions

(a) Origins of Crimes Against Humanity and Development in International Law Prior to 1937

511. Our initial task is to determine whether crimes against humanity represented a concept that was sufficiently established as a matter of international law from l937-1945 to satisfy the requirements of legality or *nullum crimen sine lege.* As noted previously, if the accused had been willing to present a defence, they might argue that the crime was not established and that, therefore, the Common Indictment should be dismissed so as to avoid holding the defendants responsible for acts which were not criminal at the time they were committed.

512. The Tribunal notes that the state of Japan "accept[ed] the judgements of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside of Japan" in the Treaty of Peace with Japan, signed at San Francisco on 8 September 1951 (the "San Francisco Peace Treaty").[317] On this basis, Japan consented to both the jurisdiction of the IMTFE and its Judgement. The crimes of rape and sexual slavery as crimes against humanity were properly within the jurisdiction of the IMTFE. Given that this Tribunal is an extension or reopening of the IMTFE proceedings, Japan's consent in the San Francisco Peace Treaty applies to this Tribunal as well. Still, we consider it our obligation to determine whether charging these crimes is also consistent with the principle of *nullum crimen sine lege.*

513. The term "crimes against humanity" was incorporated in Article 6(c) of the Nuremberg Charter, appended to the Allied London Agreement of August 8, 1945 and later in the IMTFE Charter.[318] We have considered the criticism of prosecuting this crime in the post-war Tribunals.[319] After reviewing the antecedents of this crime in the post-war Tribunal Charters as well as in their Judgements, and having the benefit of the subsequent practice of states as well as opinions of jurists who have largely confirmed the earlier Judgements, the Judges find that prosecution for crimes against humanity did not then and does not here violate the principle of *nullum crimen sine lege.*

(b) Precedents for the Concept of Crimes Against Humanity

514. It is beyond dispute that acts constituting crimes against humanity listed in the Nuremberg and Tokyo Tribunal Charters – murder, extermination, enslavement, deportation, and other inhumane acts – were established crimes during the Asia-Pacific Wars. In terms of the principle of *nullum crimen sine lege*, it is disingenuous to assert that the acts constituting crimes against humanity were already recognised in justice systems worldwide as crimes of the gravest dimension. One of the main reasons that the

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317 Treaty of Peace with Japan, adopted on 8 Sept. 1951, Article 11 ("San Francisco Peace Treaty").

318 Article 6(c) of the Nuremberg Charter defines the acts constituting Crimes against Humanity as:

> [M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Article 5(c) of the IMTFE Charter defines the acts constituting crimes against humanity in largely identical terms. The differences are not relevant here.

319 M. Cherif Bassiouni, Crimes against Humanity, in International Criminal Law (M. Cherif Bassiouni ed., vol. I, 2nd ed. 1999), pp. 563-588; *Tadic* Appeals Chamber Judgement, paras. 649-659.

category of crimes against humanity was included along with war crimes in the post-war Tribunal Charters was to capture the outrage at the enormity of the atrocities in terms of their systematic nature and the magnitude of suffering inflicted.[320] The concept of crimes against humanity did not create crimes, but rather applied to conduct, which was already unquestionably criminal, a term which underscored its egregiousness.

515. This Tribunal recognises further that the concept that crimes that are particularly abhorrent constitute "crimes against humanity" has its origins in a number of pre-existing international legal sources. Among the oldest sources are the prohibitions against piracy and slave trading.[321] Historically, piracy and slave trading were committed on the high seas and across territorial borders, respectively. Due to the transnational nature of these crimes and their gravity, their perpetrators were referred to as *hostis humani generis*—the "enemies of all mankind"—and were "susceptible to prosecution by any nation capturing them."[322] For example, the 1815 Declaration Relative to the Universal Abolition of the Slave Trade proclaimed that the slave trade was "repugnant to the principles of humanity and universal morality and created a duty to prohibit and punish it."[323]

516. The precise term "crimes against humanity" was used in the early twentieth century by the Russian Foreign Minister to refer to the atrocities committed against the Armenians by Turkey.[324] Upon his suggestion, reference to "crimes against humanity and civilization" was used in a 1915 Declaration by the governments of France, Great Britain, and Russia regarding the Armenian genocide.[325]

517. A few years later, statements made by the 1919 War Crimes Commission of World War I also referred to the need to punish "the greatest outrages against … the laws of humanity."[326] In addition, the peace treaty concluding the Italo-Ethiopian War of 1935-36

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320 For example, the Nuremberg Indictment alleged: "[The Nazis] conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others."

321 Roger S. Clark, "Crimes Against Humanity and the Rome Stature of the International Criminal Court," presented at a conference on 'The Rome Statute of the International Criminal Court: A Challenge to Impunity', University of Trento, Italy, May 13-15, 1999; Jordan Paust, "Threats to Accountability after Nurnberg: Crimes Against Humanity, Leader Responsibility and National Fora", 12 New York Law School Journal of Human Rights, (1996), pp. 545, 549.

322 *Tel-Oren et al. v. Libyan Arab Republic, et al*., 233 U.S. App. D.C. 384, 726 F. 2d 774, argued 1982, (1984), p. 781.

323 2 Martens Nouveau Recueil 432, *reprinted in* 63 Parry's T.S. 473 (1969). Congress of Vienna, Act XV.

324 Gary Jonathan Bass, Stay the Hand of Vengeance (2000), pp. 115-116.

325 A detailed account is told by Gary Jonathan Bass. In *Stay the Hand of Vengeance* Bass describes the negotiations which resulted in the use of this term as follows: The Russian Foreign Minister sent a draft text of the Declaration to Britain and France which provided: "In face of these fresh crimes committed by Turkey against Christianity and civilization, Allied Governments announce publicly . . . that they will hold all the members of the Ottoman Government, as well as such of their agents as are implicated, personally responsible for Armenian massacres." Britain was uncomfortable framing the issue as "against Christianity", and therefore, the Russian Foreign Minister proposed replacing "Christianity" with "humanity." Special military courts were set up by Turkey, upon the insistence of Britain, to conduct trials for the massacres, deportations and other atrocities against the Armenians. However, only a couple of these trials were held. PP. 116, 124-130. See also Olivia Swaak-Goldman, "Crimes Against Humanity," in Kirk McDonald and Swaak-Goldman eds., Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts. 2000, at 146, footnote 4, referring to the Declaration of the Governments of France, Great Britain and Russia, 28 May 1915, cited in the United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War, pp. 32-38, 189 (London 1948); see also, Egon Schwelb, "Crimes against Humanity", 23 British Year Book of Intl Law (1946), pp. 178, 181.

326 The Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established at the Peace Conference in Paris on 25 January 1919, which concluded that violations of "the elementary laws of humanity" had occurred. U.S. members of the Commission dissented on this point. Carnegie Endowment for International Peace, Pamphlet No. 32, Violation of the laws or customs of war: Reports of the majority and dissenting

exhorted Italy to take all necessary steps to apprehend and surrender those accused of having "committed, ordered or abetted war crimes and crimes against peace or humanity", during the war.[327] Thus, even at the time of the offences charged, the term "crimes against humanity" and similar concepts had gained a currency that reflected the notion that certain crimes are so egregious that they become the concern of all humanity as a whole.[328]

(c) Connection to War Crimes and Other International Crimes

518. Crimes against humanity committed during the war in the Asia-Pacific and during the Second World War were also closely tied to, and an outgrowth of, war crimes.[329] This provides a further basis for adjudicating this crime as consistent with the principle of legality. First, most of the acts designated as crimes against humanity – and specifically those charged here – were either explicitly or implicitly included within the legal parameters of war crimes. The purpose of specifying these acts as "crimes against humanity" was not only, as previously stated, to express outrage at the enormous scope of these crimes, but also, *inter alia*, to recognise criminal responsibility for acts which were comparable to war crimes, but which were committed against a civilian population of the perpetrator state or against stateless persons.

519. Moreover, the major international instruments regulating armed conflict and applicable during l937-1945 demonstrate that states had already accepted the principle that the codification of war crimes was not exhaustive but that other forms of inhumane treatment generally recognised as such or that emerge and shock the public conscience are likewise prohibited. Indeed, the Martens Clause of the 1907 Hague Convention makes this principle explicit:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience.[330]

520. The Martens Clause stands for the proposition that even though formal law fails to prohibit certain inhumane acts, such acts can be legitimately treated as crimes if their character is accepted as criminal in nature but the offending conduct is not necessarily explicitly named. The justification that such protection is inherent in the "laws of humanity" and the "dictates of public conscience" is based on the same general principle as that underlying the codification of "crimes against humanity." The Martens Clause provides a solid foundation for the codification of crimes against humanity in the Nuremberg Charter and later in the Tokyo Charter and for their application by the Tribunals.

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reports of American and Japanese members of the Commission of Responsibilities; Schwelb, Crimes Against Humanity, pp. 178, 180.

327 Swaak-Goldman, referring to Emperor Haile Selassie of Ethiopia's many denouncements of the crimes committed by the Italian forces and authorities during the conflict and after Ethiopia's annexation, against the Ethiopian civilians. The Peace Treaty of February 10, 1947, concluded the Italo-Abyssinian conflict. War Crimes Commission, pp. 189-190.

328 Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals, 2000, fn. 73, p. 349.

329 M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, 1999, p. 42.

330 1907 Hague Convention IV, preamble.

521. The close relationship between crimes against humanity and war during the pertinent period was also explicit in the Nuremberg and IMTFE Charters and applied by the Judges. The Charters required that the enumerated acts listed as crimes against humanity, with the exception of persecution, be committed before or during a war and that all crimes be committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal" (i.e., crimes against peace or war crimes).[331] One expert writes:

> This requirement was necessary in 1945 insofar as "crimes against humanity" did not exist in positive international criminal law even though its origin and sources clearly exist in the international regulation of armed conflicts. Article 6(c) extended the same prohibitions that existed in time of war against civilian populations of another state to the same category of protected persons within the jurisdiction of the state.[332]

522. While subsequent developments cast doubt on and more recently have decisively rejected the need to prove a connection to war or to another crime, it is not necessary to explore this point at length since the connection is unquestionably present in this case.

(d) The World War II Tribunals' Treatment of Crimes Against Humanity

523. According to the Nuremberg Judgement, its Charter was definitive and binding on the Tribunal with respect to the law to be applied by it. Significantly, the IMT found that the Charter was an articulation of then prevailing international law, stating: "The Charter is not an arbitrary exercise of power. . . . [I]t is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."[333] The Nuremberg Judgement recognised that although the term "crimes against humanity" was first officially inscribed in the IMT Charter, an international prosecutorial instrument, the concept was already established in international law.

524. Crimes against humanity was subsequently identified and incorporated as a substantive crime in Article 5(c) of the IMTFE Charter in terms quite similar to that of the Nuremberg Charter.[334] Both Tribunals also recognised crimes against humanity as an independent juridical concept,[335] at the same time as they linked crimes against humanity to war crimes, explicitly and implicitly, when rendering their Judgements.[336] The Nuremberg Tribunal in particular made clear that criminal sanction extended to conduct such as persecution and extermination, acts which had not been explicitly identified as war crimes; it also applied the crime to cover persons who were not in the hands of the enemy state and therefore not necessarily protected under the laws of war.

525. In the IMTFE Indictment, the Prosecutors expressly charged the accused with crimes against humanity, including for acts of sexual violence. In generally alleging crimes committed, the prosecution accused the defendants of responsibility for, *inter alia*, "mass

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331 Article 5 of the IMTFE Charter also required, as a threshold condition for the exercise of the jurisdiction of that Tribunal, that the accused be charged with crimes against peace.

332 M. Cherif Bassiouni, ed., International Criminal Law: Crimes (vol. I, 2d ed. 1999), p. 571 (hereinafter "Bassiouni, Crimes").

333 The Nuremberg Judgement, p. 218.

334 We note that the final amended IMTFE Charter deleted the phrase "against a civilian population," in order to "render punishment possible for the wholesale killing of military personnel in an unlawful war." IMTFE Judgement (Roling), p. 475.

335 IMT Judgement, pp. 84-85. See also IMTFE Judgement, p. 48,439 incorporating the jurisdictional rulings of the IMT.

336 The Nuremberg Tribunal treated its conclusions with respect to crimes against humanity and war crimes jointly. The IMTFE Tribunal also merged the two concepts by treating crimes against humanity as magnified war crimes.

murder, rape, pillage, brigandage, torture, and other barbaric cruelties inflicted upon the helpless civilian population of the overrun countries."[337] Group Three of the Indictment, titled "Conventional War Crimes and Crimes Against Humanity," brought charges against the accused who "together with divers other persons" incurred responsibility for the crimes alleged in Counts 53-55.[338] Although the IMTFE Indictment explicitly charged sexual violence, it did not include either the rape and sexual slavery of the "comfort women" or the rapes at Mapanique within the purview of the charges.

526. In the IMTFE Judgement, the focus was largely on war crimes instead of crimes against humanity, with the language indicating that the judges considered crimes against humanity subsumed within and forming part of the war crimes charges. Although the IMTFE Judgement did not separately address the propriety of exercising jurisdiction over crimes against humanity, it often used language drawn from the concept of crimes against humanity to describe the type and form of crimes committed against the civilian population. For example, under the sub-heading "Conventional War Crimes (Atrocities)," the Judgement emphasised that it received evidence of "torture, murder, rape and other cruelties of the most inhumane and barbarous character." The IMTFE Judgement also transcended the framework of war crimes in that it did not distinguish between violations inflicted upon Japanese, Korean and Chinese persons and those committed against individuals not under the authority of Japan.[339]

527. Crimes against humanity was also defined in the Control Council Law No. 10, promulgated by the Allies to try alleged World War II European war criminals whose crimes had specific locales.[340] The CCL10 definition of crimes against humanity, though largely similar to that contained in the IMT and IMTFE Charters, included some significant differences. For example, CCL10 did not require that the crimes be committed "before or during the war" or in connection with war crimes or crimes against the peace. CCL10 also identified more specific offences, including rape, as one of the acts explicitly constituting crimes against humanity.

528. Based on this review of the origins of the concept of "crimes against humanity" and its treatment in the post-war Tribunals, we find that this concept did exist under international

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337 IMTFE Indictment, p. 31, as reproduced in the IMTFE Docs, Vol 20, Annex A-6.

338 Appendix D attached to the Indictment, titled "Incorporated in Group Three," provided "particulars of breaches" of the laws or customs of war. Appendix D asserted that the accused were responsible for "inhumane treatment," and other "mistreatment" because "prisoners of war and civilian internees were murdered, beaten, tortured and otherwise ill-treated, and female prisoners were raped by members of the Japanese forces." In addition, Appendix D alleged that "female nurses were raped, murdered and ill-treated." Also, "[l]arge numbers of the inhabitants of such territories were murdered, tortired [sic], raped and otherwise il-treated [sic], [and were also] arrested and interned without justification." Appendix D to the Indictment, as reproduced in IMTFE Docs, Vol 20, at pp. 111, 113, 117.

339 IMTFE Docs, Vol 20, Judgment, transcript pp. 49591-49592. See also e,g. Judgment, transcript pp. 49592-49594 (Vol 20). The Tribunal also stated under the heading Responsibility for War Crimes Against Prisoners that "[r]esponsibility for the care of prisoners of war and of civilian internees (all of whom we will refer to as 'prisoners') rests therefore with the Government having them in possession. This duty in not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, *acts of inhumanity* to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners." IMTFE Judgment (Roling), p. 29; see also discussion of the Rape of Nanking, *Ibid*., pp. 389-391.

340 Under Article 2(c) of CCL10, "Crimes against Humanity" is defined as:

> Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.

law by 1937-1945, and thus, that the Indictment herein charging the accused with crimes against humanity does not violate the *nullum crimen sine lege* principle.[341]

(e) Threshold Conditions of Applicability

529. Having determined that the principle of *nullum crimen sine lege* is not a barrier to this Tribunal's jurisdiction to adjudicate the charges of "crimes against humanity," we next examine when the crimes of rape and sexual slavery charged herein also constitute "crimes against humanity."

530. As discussed above, both the IMT and the IMTFE Charters included certain threshold conditions in the definition of crimes against humanity, namely that the acts be committed before or during the war,[342] and in execution of or in connection with either war crimes or crimes against the peace.[343] The linkage to war was not required by the other war crimes trials and such linkage is no longer required as a matter of customary international law today.[344] For the purposes of this Judgement, however, the Judges accept that the

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341 We note that institutions and proceedings subsequent to the World War II Tribunals have increasingly regarded crimes against humanity as a part of customary international law. Immediately succeeding the Nuremberg Tribunal, the United Nations (UN) General Assembly in 1946 affirmed the prohibition of crimes against humanity in a resolution entitled, Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal. U.N.G.A. res. 95 (I) of 11 December 1946. Four years later the UN International Law Commission (ILC), acting on the directive of the General Assembly, followed the principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal in the Draft Code of Crimes. (*Nürnberg Principles,* Ybk I.L.C., 1950, Vols I & II., para. 124.) The ILC noted that the Nuremberg Tribunal "did not…exclude the possibility that crimes against humanity might be committed also before the war" (para. 122), and that the specific enumerated crimes constituted crimes against humanity "even if they are committed by the perpetrator against his own population." (para. 197).

Subsequent treaties on international law confirmed that the substantive crime had also achieved customary status in international law. See the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, of 26 Nov. 1968 at art. I (deciding that no statutory limitation shall apply to crimes against humanity, "even if such acts do not constitute a violation of the domestic law of the country in which they were committed"); the I.L.C.'s Draft Statute for a Permanent International Criminal Court, Report of the I.L.C. on the work of its Forty-sixth Session, U.N. Doc. G.A.O.R. A/49/10 ("I.L.C. Draft Statute") at art. 20 (including crimes against humanity as a crime within the jurisdiction of the court and one which is a crime under general international law). The UN Secretary General in a subsequent report gave further legitimacy to the codified crime by explicitly noting that the Nuremberg Charter, as well as the designation of individual criminal responsibility for crimes against humanity had acquired customary international law status. See *Tadic* Trial Chamber Judgement, para. 622, referring to the Report of the Secretary General, para. 35.

In recent years the Charters of the Ad Hoc International Criminal Tribunals of the former Yugoslavia (ICTY) and Rwanda (ICTR), and the Rome Statute of the International Criminal Court (ICC) have also incorporated the doctrine of crimes against humanity. (See Article 5 of the ICTY Charter, Article 3 of the ICTR Charter, and Article 7 of the Rome Statute of the ICC.) It is important to note that the recent codifications have verified that crimes against humanity is a separate crime, and does not necessarily bear a connection to war or to war crimes, despite there being some overlapping of the two. The ICTY case law has also confirmed the separation of crimes against humanity from the war context, though its statute still fails to reflect this progression in its definition of crimes against humanity. The *Tadic* Trial Chamber Judgment stated that: "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to an armed conflict." Para. 623. Thus, not only has the ICTY reaffirmed the legitimacy of the doctrine of crimes against humanity, it has also confirmed the separate nature of crimes against humanity from war crimes.

342 Only the crime of persecution is not so temporally limited in the Charter.

343 Article 5(c). We have already noted that the condition in chapeau to Article 5 that the accused be charged with crimes against the peace is not an essential part of the definition of crimes against humanity.

344 Both these predicates were dispensed with in the other war crimes trials held in Europe and Asia after the war. For example, the Control Council Law 10, which governed the subsequent Military Tribunals established by the Allies to try alleged war criminals not tried by the IMT, did not have this requirement CCL10, Article 2(1)(c). Subsequently, in l950, the International Law Commission recommended maintaining the link between crimes against humanity and war. Principles of International Law recognised in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (hereinafter 1950 ILC Report) and then its removal in the 1954 Draft Code of Offenses against the Peace and Security of Mankind, U.N. GAOR, 9th Sess., Supp. No. 9, U.N. Doc. A/2691 (1954). Uncertainty about the independence of crimes against humanity from war may have underlay the return of the war link in the Statute of the ICTY. Nonetheless, this Tribunal notes that in drafting its Statute, the UN may have defined its crimes against humanity provisions more narrowly than required by customary international law. *Tadic* Appeals Chamber Decision on Jurisdiction, paras. 78,140-141.

requisite linkage to war or to other crimes within the jurisdiction of the IMTFE was an essential condition for crimes against humanity to be justiciable in the Tokyo Tribunal and, thus, will apply it to this case.

531. The Nuremberg Charter additionally required that crimes against humanity be committed against any civilian population.[345] This requirement was dropped in the IMTFE Charter, presumably because of the potential for charging violations against military personnel as crimes against humanity, as well as war crimes.[346]

532. Beyond the requirements of the Charter, the Nuremberg Tribunal, which explicitly addressed crimes against humanity, indicated an additional threshold condition of applicability flowing from the fact that the concept of crimes against humanity was designed to embody crimes of singularly grave dimension.[347] Thus, the Nuremberg Judgement stressed the fact that the proscribed acts were perpetrated as part of a policy of terror carried out on a vast scale and in an organised or systematic manner. It frequently used the terms "large scale" or "systematic" to refer to the crimes committed by the Nazis. For example, in referring to the persecution and extermination of the Jews, the Tribunal characterised the policy as "a record of consistent and systematic inhumanity."[348] It further found that the Jewish persecutions were "planned and systematic" in character.[349] Other examples can be found in its discussion of the Nazi regime's treatment of the populations of the occupied territories, incarceration of civilians in concentration camps, and use of forced labour.[350] It is evident that the Tribunal attributed great importance to the fact that the prohibited acts under crimes against humanity were committed on a large-scale or systematic basis, and, thus, gave rise to the contemporary requirements that crimes against humanity be "widespread" or "systematic."

533. Although the IMTFE Judgement did not explicitly address crimes against humanity as a separate crime, it utilised similar language stressing the scale and systematicity of the crimes committed by Japan. Accordingly, the contemporary threshold requirements[351] –

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345 IMT Charter, Article 6(c).

346 M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (M. Cherif Bassiouni ed., Vol I., 2d ed., 1999), pp. 563-567.

347 In this regard, we note that during this period, genocide was treated as a crime against humanity and was not yet recognised as a separate crime. See e.g. IMT Indictment, referring to genocide as a crime against humanity. The Genocide Convention was adopted in 1948.

348 IMT Judgement, p. 247.

349 IMT Judgement, p. 250.

350 The Nuremberg Judgement, p. 254. With regard to the treatment meted out to the civilian population of the occupied territories, the Tribunal characterised the Nazi administration as "a systematic rule of violence, brutality, and terror." (p. 232). In terms of the incarceration of citizens of occupied territories in concentration camps, the majority noted that "[w]ith the aid of a secret police force, this practice was widely extended, and in course of time concentration camps became places of organised and systematic murder, where millions of people were destroyed. Those who arrived at the camp were subjected to systematic cruelty." (p. 233). With respect to Nazi occupation of territories of the Soviet Union, that occupation was "characterised by premeditated and systematic looting." The Judgement goes on to say that "[w]hen the Soviet territory was occupied there was large scale confiscation of agricultural supplies, with complete disregard of the needs of the inhabitants of the occupied territory." (p. 241). With regard to the forced labour, the Tribunal highlighted the fact that "the conscription of labour was accomplished in many cases by drastic and violent methods. The 'mistakes and blunders' were on a very great scale." (p. 245).

351 The post-war jurisprudence was incorporated into subsequent international law as the requirement that the crimes be "widespread" or "systematic," with the terminology "large-scale" sometimes substituting for or incorporated in the concept "widespread." Most recently, the Statute of the Rwanda Tribunal and the case law of the Yugoslav Tribunal, along with the ICC Statute, used these threshold requirements, along with the IMT requirement that the crimes be committed "against any civilian population." ICTR Article 3; *Tadic* Trial Chamber Judgement paras. 635 & 649; ICC Statute, Article 7(1). On the other hand, the most recent codifications, with the exception of the ICTY Statute, reject the requirement of connection to

that the crimes be "widespread" or "systematic" – reflect the jurisprudence of the major post-war crimes tribunals. Further, the Judges note that the IMTFE Charter did not require that the attack be committed against any civilian population, as was required by the IMT Charter. However, because there is some dispute as to whether this was a formal requirement in 1945, we will impose this requirement for the case in hand, even though it is not strictly necessary.

534. In conclusion, the Judges find that the following threshold conditions are applicable to determining whether particular acts constituted "crimes against humanity" during 1937-1945: the prohibited acts must be committed (1) before or during war, (2) as part of a large-scale or systematic attack committed against a civilian population, and (3) in connection with war crimes or crimes against the peace.

(f) Application of the Threshold Conditions of Crimes Against Humanity to the Facts

535. The evidence presented at trial overwhelmingly establishes that the acts of rape and sexual slavery committed as part of the "comfort system" and the rapes at Mapanique were all committed before and during the war in China and the expanded war in the Asia-Pacific region. Thus, the first prerequisite condition that the crimes must be committed before or during a war has been satisfied.

536. The evidence also establishes that the crimes qualify as being committed against the civilian population on a large-scale and systematic basis, although either alternative would be sufficient to establish liability. The sexual slavery was the result of an organised plan and formal policy implemented by the Japanese military and government at the highest levels. Indeed, having disease-free women and young girls readily accessible for sexual usage by the Japanese soldiers was considered an essential component of the war machinery. The "comfort women" system was systematic in much the same way as the brutal system of forced labour established by the Axis powers in Europe and Asia as well as part of a broader policy and practice, found by the IMTFE, of systematic and inhumane brutality toward civilians and prisoners alike.

537. The "comfort system" was ostensibly designed to prevent the soldiers from raping civilian women in the armies' path or under their occupation, but not to prevent rape. The system consciously and deliberately systematised rape and sexual slavery of women and girls forced into the system, all of whom were civilians and most of whom came from poor families or cultures unable to wage an effective protest, as well as those most susceptible to false promises and offers of money. It was not accidental that civilian women from marginalised societies (poor, non-white, indigenous, uneducated, or considered lower class) were the ones consistently targeted for attack.[352]

538. The evidence establishes that the "comfort system" was methodically planned, highly regulated, and invariably sustained by the Japanese military and civilian authorities wherever the Japanese troops were stationed. Recruitment, conscription or capture, military transport, confinement, supply, continuous rape and sexual or other violence,

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war or to war crimes or crimes against the peace leading to the clarification of crimes against humanity as a clearly independent juridical norm applicable to non-war as well as war situations.

352 The evidence indicates that some women and girls from Dutch Indonesia were taken from a prisoner of war camp and forced into sexual servitude, some of whom were wealthy and privileged, but this was very rare. After the families of those taken complained to Dutch authorities, the girls were eventually returned to the camp. Almost always, such women were taken for use by officers, not ordinary soldiers.

invasive and unethical medical "treatments," and efforts to conceal the real nature of the system all formed part of the plan to force women and girls into sexual slavery to the Japanese military.

539. Further, there is no doubt that the "comfort system" operated on a large-scale and widespread basis. Stations were prevalent wherever Japanese soldiers were present throughout the Asia-Pacific region. The sheer number of victims – considered to be approximately 200,000 – would also demonstrate that the crimes were committed on a vast scale.

540. The evidence also indicates that the rapes committed against civilian women and girls in Mapanique were also systematic. The conduct of the soldiers at Mapanique followed a consistent pattern of rape and mistreatment. This is a sufficient basis to enable us to conclude that the mass rape of women by Japanese soldiers during the course of the attack on Mapanique was systematic. In addition, the fact that virtually all the younger women were raped would also indicate that the sexual violence was widespread. It also bears noting that the pattern of sexual attacks committed in Mapanique was strikingly similar to other mass rapes in the Philippines for which the accused YAMASHITA was held responsible in the post-war proceedings[353] as well as to other instances of mass rape committed by Japanese soldiers during the course of the war. The Judges stress, nevertheless, that whether planned or spontaneous, targeted or indiscriminate, massive or isolated, all sides to a conflict historically commit rape crimes, and committing such crimes in retaliation, revenge, anger, or simply opportunistically does not excuse the crimes or mitigate criminal responsibility.

541. The Tribunal finds that the rape and sexual slavery of the former "comfort women" and girls and the mass rape of women during the attack on Mapanique were both large-scale and systematic, thus satisfying the second threshold condition.[354]

542. The final threshold criteria, that the crimes be committed in connection with war crimes or crimes against the peace, is also satisfied. The evidence convincingly demonstrates that the system of "comfort stations" was established in part to reduce the incidence of rape of local women, so as not to arouse the antagonism of the population in occupied territories and make their submission more difficult. It was also to avoid international outrage over the crimes and increased opposition to Japan's aggression. Other objectives of the system were to redirect the sexual aggression or urges of Japanese soldiers so that they would not contract venereal diseases from or disclose military secrets to "voluntary prostitutes" working in the area. In general, it was anticipated that having women and girls held for sexual access by the Japanese soldiers would increase their battlefield performance. These objectives were integrally related to Japan's war effort. As noted previously, the sexual enslavement of the "comfort women" was seen by the Japanese government and military as crucial to Japan's success in waging aggressive war. The "comfort women" and girls were treated as essential supplies, as the "booty" of war and were considered a necessary cog in the wheel of the Japanese war machine. Many of the crimes were committed in connection with Japan's unlawful war of aggression. The third prerequisite,

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353 See Trial of General Tomoyuki Yamashita, US Military Commission, Manila, 8 October-7 December 1945; *In re Yamashita*, 327 U.S. 1 (1946).

354 The Judges note, however, that while in this case the evidence fully established that the particular crimes of rape and sexual slavery were in and of themselves committed on a large-scale and systematic basis, the threshold requirement is only that the attack itself be large-scale or systematic, and that the prohibited act(s) form part of the broader attack against any civilian population. This has been most recently codified in the Rome Statute, Article 7(2)(1).

that the acts be committed in connection with a war crime or crime against peace, has also been satisfied.

543. The Judges find that crimes against humanity as formulated by the Charter was committed by the Japanese military during the Second World War.

3. Rape as a Crime Against Humanity

(a) Introduction

544. Having established that crimes against humanity existed under international law at the relevant time charged in the Common Indictment and that the crimes charged satisfy the then prevailing threshold conditions, the next issue to address is whether rape was properly prosecutable as a crime against humanity at the time that the acts charged in the Common Indictment were committed.

545. Crimes of sexual and gender violence have historically been trivialised and mischaracterised under international humanitarian law. Rape has long been considered an inevitable part of war, and women regarded as the legitimate spoils of war, along with livestock and other chattel. Although wartime rape began to be forbidden in the 14th century and rape has subsequently been explicitly or implicitly recognised as a serious crime in war for several centuries, its commission was often ignored or tolerated by military commanders and the military justice system. Rape and other forms of sexual violence were regarded as acts which heightened soldiers' aggression before battle and rewarded them for their bravery thereafter. The women victimised were thus conveniently sacrificed on the basis of their gender and, usually, other factors such as nationality, ethnicity, race, or poverty also played a role in their being targeted for abuse. Rape and other forms of sexual violence have also been used as strategic weapons of war, acts committed in order to terrorise and punish the population, force victims to flee their homes, humiliate the men, and stigmatise the victims as outcasts, thereby acquiring the territory fled while simultaneously disrupting and in some cases destroying the civil society of the opposing group. Prosecution of rape in military justice systems has been erratic, as have other violations of the laws and customs of war. That a pattern of tolerance set long ago has been continually repeated does not undermine the long-standing legal condemnation of rape and sexual violence in war or preclude its prosecution.[355]

(b) Origins of Rape as a War Crime

546. Notwithstanding the military use of rape and sexual violence as a weapon of war, rape has been prohibited by the customs of war for centuries.[356] As noted above, even before international humanitarian law began being codified in the latter part of the 19th century, the customary laws of war, as reflected in the writings of international publicists of the

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355 See e.g., Susan Brownmiller, Against Our Will: Men, Women and Rape (1975); Rhonda Copelon, Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law, 5 Hastings Women's Law Journal (1994), p. 243; Kelly Dawn Askin, War Crimes Against Women, Prosecution in International War Crimes Tribunals (1997).

356 See, e.g., discussion in Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 Am. Journal Int'l Law (1993), p. 424; M. Cherif Bassiouni and Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia (1996), p. 578; M. Cherif Bassiouni and Marcia McCormick, Sexual Violence, An Invisible Weapon of War in the Former Yugoslavia (Occasional Paper No. 1, International Human Rights Law Institute, 1996).

Middle Ages and a fifteenth century international military trial,[357] prohibited rape and other forms of sexual violence. It is beyond dispute that by 1937, rape was considered a war crime under the laws and customs of war.

547. In 1863, the United States issued a military code to govern the conduct of the Union troops during its Civil War. Known as the "Lieber Code," it reflected then current international customary laws of land warfare.[358] The Lieber Code listed rape as a war crime. Significantly, rape was considered so serious that it carried the harshest possible penalty: death.[359]

548. The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and its annexed Regulations did not include explicit reference to rape crimes. However, it addresses rape and other forms of sexual violence in both general and more specific ways.

549. Article 1 of the annexed Hague Regulations states that belligerents must "conduct their operations in accordance with the laws and customs of war." This has been interpreted to include a prohibition on rape and other forms of sexual violence.[360] In addition Chapter III of the Regulations apply to military authority exerted over the territory of the hostile state. Article 46 states: "Family honour and rights, the lives of persons and private property as well as religious convictions and practice must be respected."[361] At the time, and still today, a violation of family "honour" was understood to include sexual violence and abuse.[362] The Tribunal considers that this interdiction should be considered as emphasizing the duty to provide supplementary protection against sexual violence. These re-enforcing proscriptions of rape reiterated that enemy inhabitants were to be spared sexual violence throughout the war, from open combat to military occupation.

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357 Wartime rape has been prohibited for centuries. In the 1300s, Italian lawyer Lucas de Penna urged that wartime rape be punished just as severely as rape committed in peacetime. In the 1474 trial of Sir Peter Hagenbach, an international military court sentenced Hagenbach to death for crimes, including rape, committed by his troops. William Parks, Command Responsibility for War Crimes, 61 Military Law Review (1973), p.4; M. Cherif Bassiouni, International Criminal Law, A Draft International Criminal Code (1980), p.8. Alberico Gentili (1552-1608) contended that it was unlawful to rape women in wartime, even if the women were combatants. Alberico Gentili, De Iure Belli Libri Tres (trans. John C. Rolfe, Vol. II, 1995)(1612), pp. 258-259. Hugo Grotius (1583-1645) concluded that sexual violence committed in wartime could be punished with the same rigor as sexual assault committed outside the context of war. Hugo Grotius, De Jure Belli Ac Pacis Libri Tres (trans. Francis W. Kelsey, Vol. II, 1995) (1646), 656-657. The historical treatment of women in the context of war and the evolution of proscriptions of wartime rape is examined in Kelly Dawn Askin, War Crimes Against Women (1997); Susan Brownmiller, Against Our Will: Men, Women, and Rape (1975); Rhonda Copelon, Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law, 5 Hastings Women's L.J. (1994), p. 243; Christine Chinkin, Rape and Sexual Abuse of Women in International Law, 5 European Journal of Int'l Law (1994), p. 326; Patricia Viseur Sellers, The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law, in Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts: Commentary (Gabrielle Kirk McDonald and Olivia Swaak-Goldman eds., vol. I, 2000); Dorean Koenig and Kelly Askin, Women and International Criminal Law, in Women and International Human Rights Law (Kelly Askin & Dorean Koenig eds., vol. II, 2000).

358 Instructions for the Government of the United States in the Field by Order of the Secretary of War, Washington, D.C., 24 April 1863; Rules of Land Warfare, War Dept. Doc. No. 467, Office of the Chief of Staff, approved 25 April 1914 (G.P.O. 1917) [hereinafter, Lieber Code]. For a discussion of war crimes trials prosecuting rape under provisions of this Code, see e.g., Susan Brownmiller, Against Our Will, Men, Women, and Rape (1975).

359 Article 44 of the Lieber Code stipulated that "all rape . . . [is] prohibited under the penalty of death," and Article 47 dictated that "[c]rimes punishable by all penal codes, such as . . . rape, . . . are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred."

360 Patricia Viseur Sellers, Emerging Jurisprudence on Crimes of Sexual Violence, 13 (6) Am. Univ. Int'l Law Review (1998), p. 1523; Kelly Dawn Askin, War Crimes Against Women (1997).

361 Convention Respecting the Laws and Customs of War on Land, with annexed *Regulations*, Oct. 18, 1907, 36 Stat. 227, 1 Bevans 631, art. 46 [Hague Convention IV].

362 For instance, when Professor J.H. Morgan reported the rape of Belgium women during the First World War, the terminology he used for rape crimes was that the "[o]utrages upon the honour of women by German soldiers have been frequent." *As quoted in* Susan Brownmiller, Against Our Will: Men, Women and Rape (1975), p . 42.

550. Further, Article 4 of Chapter II of the Hague Regulations relating to the treatment of prisoners of war provides that "[p]risoners of war must be humanely treated." While Article 4 refers explicitly to the particular position of prisoners of war who were designated as combatants rendered *hors de combat*, the Judges consider that the provisions prescribing humane treatment are based upon minimum and elementary standards of humanity, as articulated in the Martens Clause, and that being afforded humane treatment includes the right to be free from rape and other forms of sexual violence.[363] Accordingly, women in detention were entitled to at least the same minimum standards of protection as provided to prisoners of war under international law. These standards of treatment were therefore applicable in the present context.

551. Under the Hague Convention, battlefield commanders, whether responsible for armies, militias or volunteers, as well as occupying authorities were required to teach and enforce the proscription of rape at all times in all contexts of war. The requirements of Articles 1, 4 and 46 apply directly to the treatment of "comfort women" in Mainland China, the Dutch East Indies (current day Indonesia), East Timor, the Philippines and Malaysia. Although these provisions do not regulate the treatment of a state's own inhabitants (i.e., Japanese "comfort women") or inhabitants of its former colonies (Korea and Taiwan), they nonetheless establish standards of minimum decency. That humanitarian law imposed these minimum standards of treatment was relied upon in the codification of crimes against humanity in the post-war Charters, which included "other inhumane acts" as a residual clause. The IMTFE Indictment cited the Hague provisions as evidence of the proscription of rape crimes.[364]

552. The Judges note and agree that the categorisation of rape as a crime of "honour" has been more recently criticised as minimising the violent nature of this crime, ignoring the egregious harm to the bodily integrity of the women, and reflecting as well as perpetuating the stigmatisation of raped women.[365] Nonetheless, the codification of crimes against family honour and rights in the early 20th century was clearly intended to incorporate and condemn rape as a war crime, despite the fact that it was not vigorously or consistently prosecuted.[366]

553. Accordingly, this Tribunal finds that the "comfort women", as well as the women raped at Mapanique were entitled to protection against rape and sexual violence in the terms laid down by the 1907 Hague Convention IV and its Regulations.

554. The 1919 War Crimes Commission, which investigated and made recommendations regarding methods of punishing suspected Axis war criminals of the First World War, listed thirty-two non-exhaustive punishable violations of the laws and customs of war

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363 IMTFE Judgment (Roling), pp. 416-417.

364 Appendix D to the Indictment, IMTFE Docs, Vol. 20, pp. 105-117.

365 Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission resolution 1997/44, Comm. H.R., 54th Sess., E/CN.4/1998/54, 26 Jan. 1998; Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Report of the mission to Rwanda on the issues of violence against women in situations of armed conflict, E/CN.4/1998/54/Add.1, 4 Feb. 1998; Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict, Final report submitted by Ms. Gay McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13, 22 June 1998; Rhonda Copelon; Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law, 5 Hastings Women's L. J. (1994), p.243.

366 See Susan Brownmiller, Against Our Will (1975); Patricia Viseur Sellers and Kaoru Okuizumi, International Prosecution of Sexual Assaults, 7 Transnational Law & Contemp. Problems (1997), p. 45; Kelly D. Askin, Women and International Humanitarian Law, in Women and International Human Rights Law (Kelly Askin & Dorean Koenig eds., Vol. I, 1999), p. 41.

committed by the Axis powers. "Rape" and "abduction of girls and women for the purpose of forced prostitution" were listed as items five and six, respectively, and thus were situated high on the list and alongside other crimes of physical violence, such as murder and torture, as opposed to crimes ranked lower on the list, such as destruction of property. Not only did the inclusion of sexual violence crimes on the list of prosecutable war crimes further reinforce the status of sexual violence as war crimes in the early 1900s, their high rank on the list also underscored their gravity.[367] The Judges note that the state of Japan participated in the 1919 Commission, and thus the government was surely aware that crimes of rape and enforced prostitution were regarded as amongst the most serious crimes of war that deserved prosecution and punishment.

555. Between the two world wars, the 1929 Geneva Convention further codified protections for prisoners of war and provided explicitly for the protection of female prisoners of war. The protections envisaged - most designed to prevent sexual violence - were delineated by the International Committee of the Red Cross. Although, like Article 4 of the Hague Regulations, this Convention was not directly applicable to civilian internees such as the "comfort women," the inclusion of these protections evinces the international recognition that sexual violence was considered a major wartime concern.[368]

556. The Tribunal finds that sexual violence was prohibited by both the laws and the customs of war by the time of the Second World War, and violations were considered prosecutable war crimes.

(c) Rape and Other Forms of Sexual Violence in the Post-War Trials

557. The post-war Tribunals did treat rape and other forms of sexual violence as war crimes and crimes against humanity, even though these crimes were inadequately addressed in the proceedings. The Charters of the IMTFE and IMT[369] did not explicitly list rape and other crimes of sexual violence as crimes within its jurisdiction to prosecute, although CCL10 did expressly list rape as a crime against humanity.[370] Where not specifically

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367 UN War Crimes Commission, XIII Law Reports of Trials of War Criminals 122, 124 (1949); History of the UN War Crimes Commission 34 (1948); "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," Report Presented to the Preliminary Peace Conference, March 29, 1919, 14 Am. Journal Int'l Law (1920), pp. 95, 114.

368 [Third Geneva] Convention Relating to the Treatment of Prisoners of War, 27 July 1929:

> Art. 2. Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.
>
> They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.
>
> Measures of reprisal against them are forbidden.
>
> Art. 3. Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex.
>
> Prisoners retain their full civil capacity.
>
> Art. 4. The detaining Power is required to provide for the maintenance of prisoners of war in its charge.
>
> Differences of treatment between prisoners are permissible only if such differences are based on the military rank, the state of physical or mental health, the professional abilities, or the sex of those who benefit from them.

369 Charter for the International Military Tribunal for the Far East, and Charter of the International Military Tribunal, Annexed to the London Agreement, 8 Aug. 1945, 8 UNTS 279; 59 Stat. 1544, 8 AS No. 472.

370 Under Article II(c) Crimes against Humanity is defined as:

> Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, pp. 50-55.

listed in Charters or Statutes, however, rape crimes formed part of the broad category of "other inhumane acts" and were thus implicitly encompassed as crimes against humanity.[371] As the proceedings and jurisprudence further demonstrate with respect to war crimes, rape and other forms of sexual violence were implicitly recognised as "ill-treatment" and "inhumane acts" in the Nuremberg Charter and CCL10 and as "conventional war crimes" or violations of "the laws and customs of war" in the IMTFE Charter.[372] Evidence was received of various forms of sexual violence in proceedings before the IMT, IMTFE and CCL10 trials.[373] In some cases, particularly in the IMTFE, the Judgements based convictions explicitly on rape crimes; in other cases, rape and other forms of sexual violence were implicitly encompassed by general language in the residual clauses and the discussion of the types of atrocities committed.

(i) The IMTFE Proceedings

558. In the IMTFE Indictment against 28 defendants, rape was expressly named as a crime for which the accused incurred criminal responsibility. As noted previously, the Indictment and its Appendix D, which provided more specificity as to the allegations, both cited rape crimes. The Indictment accused the defendants of responsibility for inflicting, *inter alia*, "mass murder, *rape*, pillage, brigandage, torture, and other barbaric cruelties upon the helpless civilian population of the overrun countries."[374] Appendix D, attached to the Indictment, asserted that the accused were responsible for "inhumane treatment," and other "mistreatment" because "prisoners of war and civilian internees were murdered, beaten, tortured and otherwise ill-treated, and female prisoners were raped by members of the Japanese forces."[375] In addition, it asserted that "female nurses were raped, murdered and ill-treated,"[376] and "[l]arge numbers of the inhabitants of such territories were murdered, tortired [sic], raped and otherwise il-treated [sic]."[377]

559. The prosecution introduced volumes of evidence indicating the routine and callous nature of sexual violence committed by Japanese troops either alone or in conjunction with other crimes.[378] For example, the IMTFE received and summarised evidence that the returning Japanese soldiers described as some of the sexual atrocities they had committed. The Judgement cites "some of the stories commonly heard" as follows:

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371 The Report of the Commission I of the International Assembly which made recommendations to the drafters of the Nuremberg Charter, indicated that the scope of the crimes against humanity article should encompass:

(1) Crimes committed without order or authority: Serious crimes against persons, punishable by ordinary criminal law…(including, e.g.: murder, manslaughter, infliction of grievous bodily harm, torture, false imprisonment, rape, etc.)

(2) Crimes ordered by or committed under order of or with the approval of authorities:

…

(h) Abduction of women with the object of prostitution….

372 IMT Charter, art. 6(b); CCL10, art. II(1)(b) and IMTFE Charter, art. 5(b).

373 See, e.g., in IMTFE trials, Vol. 2, transcript pp. 2568-2573, 3904-3944; in IMT trials, Vol. VI, transcript pp. 211-214, 404-407; in CCL10 trials, see *Medical Case, Pohl Case,* and *RuSHA Case*.

374 IMTFE Indictment, p. 31, as reproduced in the IMTFE Docs, Vol 20, Annex A-6 [emphasis added].

375 Appendix D to the Indictment, as reproduced in the IMTFE Docs, Vol. 20, p. 111.

376 Appendix D to the Indictment, as reproduced in the IMTFE Docs, Vol. 20, p. 113.

377 Appendix D to the Indictment, as reproduced in the IMTFE Docs, Vol. 20, p. 117.

378 For examples of documentation of sexual violence by the IMTFE, see e.g., Vol. 2, transcript pp. 2568-2573, 2584, 2593-2595, 3904-3944, 4463-4479, 4496-4498, 4501-36, 4544, 4559, 4572-73, 4594, 4602, 4615, 4638, 4642, 4647, 4660; Vol. 6, transcript pp. 12521-12548, 19995, 13117, 13189, 13641-13642, 13652. See discussion of these crimes in Askin, War Crimes Against Women, pp. 164-203.

> One company commander unofficially gave instructions for raping as follows: 'In order that we will not have problems, either pay them money or kill them in some obscure place after you have finished.'
>
> 'If the army men who participated in the war were investigated individually, they would probably all be guilty of murder, robbery or rape.'
>
> '[W]e captured a family of four. We played with the daughter as we would with a harlot. But as the parents insisted that the daughter be returned to them we killed them. We played with the daughter as before until the unit's departure and then killed her.'
>
> 'In the half year of battle, about the only things I learned are rape and burglary.'[379]

560. As part of its case, the IMTFE prosecution team submitted extensive evidence of rape and other forms of sexual violence committed by subordinates under the command of General MATSUI and his staff officer Muto in the attack on Nanking, and by troops in Changsha and Kweilin under the command of General HATA. Examining the evidence, the Tokyo Judgement characterised the crimes of rape and other forms of sexual violence as "barbarous"[380] and "atrocities."[381]

561. The Judges of the IMTFE expressed particular revulsion at the vast scale of rape and other sex crimes committed during and following the conquest of Nanking. The Judgement reports that "individual [Japanese] soldiers and small groups of two or three roamed over the city murdering, raping, looting, and burning."[382] The Judgement notes that after Nanking, Japanese troops under the command of General HATA moved on to Changsha where they again "freely indulged in murder, rape, incendiarism, and many other atrocities throughout the district."[383] Soon afterwards, they moved on to Kweilin, where "they committed all kinds of atrocities such as rape and plunder."[384] In what appears to be a reference to "comfort women," the Tokyo Judges found that under HATA, the Japanese forces "recruited women labour on the pretext of establishing factories. They forced the women thus recruited into prostitution with the Japanese troops."[385]

562. The IMTFE Judgement identified numerous other instances of rape and sexual violence perpetrated by Japanese troops against civilian women and men in the occupied territories. For the majority of women and girls, rape was simply a prelude to their subsequent murder. In some cases where the women were not slaughtered, they were subjected to

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379 IMTFE Judgement (Roling), p. 393.

380 The Judges characterised the rape and other crimes at Nanking by saying that:

> [t]he barbarous behavior of the Japanese Army cannot be excused as the acts of a soldier which had temporarily gotten out of hand when at last a stubbornly defended position had capitulated -rape, arson and murder continued to be committed on a large scale for at least six weeks after the city had been taken and for at least four weeks after MATSUI and MUTO had entered the city.

IMTFE Judgement (Roling), p. 391.

381 The Tribunal President was particularly vocal, stating "that rape and murder of women and such things like that could never be just reprisals" in response to that line of questioning of a witness to the Nanking atrocities by the defence. IMTFE Docs, p. 2595.

382 IMTFE Judgement (Roling), p. 389.

383 IMTFE Judgement (Roling), p. 392.

384 IMTFE Judgement (Roling), p. 393.

385 IMTFE Judgement (Roling), p. 393.

multiple rapes and mutilation of their sexual or reproductive organs. For instance, the Judgement states that in 1940, while all the male personnel at the Blora oil field were massacred, the "[w]omen in this place were not killed, but were all raped several times in the presence of the commanding officer."[386] As another example, in 1945, "[w]hen it became apparent that Manila would be liberated, massacres…were committed all over the city as well as rape and arson."[387] The Tribunal found that individual murders were regularly committed by the Japanese troops and that "[m]any of them were committed … in connection with other crimes such as rape."[388]

563. The Judgement describes the gratuitous cruelty the Japanese troops inflicted toward fugitives hiding out at the German Club in Manila:

> [Japanese soldiers] surrounded the Club by a barricade of inflammable material and poured gasoline over this barricade and ignited it. Thus the fugitives were forced to attempt to escape through the flaming barricade. Most of them were bayoneted and shot by the waiting Japanese soldiers. Some of the women were raped and their infants bayoneted in their arms. After raping the women the Japanese poured gasoline on their hair and ignited it. The breasts of some of the women were cut off by Japanese soldiers.[389]

564. The Judgement documents further brutality by officers:

> A young woman about 24 years old, was caught hiding in the grass. The officer in charge of the entire patrol tore off her clothes, while two soldiers held her. He then had her taken to a small nipa hut, without walls and there the officer in charge of the patrol used his saber to cut her breasts and womb. Soldiers held her while the officer did this. At first the girl was screaming. She finally lay still and silent. The Japanese then set fire to the nipa hut.[390]

565. Nurses were likewise not spared from sexual violence. The IMTFE reported that during massacres in Hong Kong in 1941, "the Japanese troops entered the Military Hospital at St. Stephen's College and bayoneted the sick and wounded in their beds, and raped and murdered nurses who were on duty there."[391]

566. The Judgement also noted that Japanese forces inflicted sexual torture upon both men and women:

> Torture by burning was practised extensively. This torture was generally inflicted by burning the body of the victim with lighted cigarettes, but in some instances burning candles, hot irons, burning oil and scalding water were used. In many of these cases the heat was applied to sensitive parts

386 IMTFE Judgement (Roling), p. 397.
387 IMTFE Judgement (Roling), p. 398.
388 IMTFE Judgement (Roling), pp. 398-399.
389 IMTFE Judgement (Roling), p. 399; IMTFE Docs, transcript p. 49640.
390 IMTFE Judgement (Roling), p. 409.
391 IMTFE Judgement (Roling), p. 399; IMTFE Docs, transcript p. 49638.

> of the body, such as the nostrils, ears, abdomen, sexual organs, and in the case of women, to the breasts.[392]

567. The Tribunal also found that electrical shock to sexual organs was also a common method of torture:

> Electric current was applied to a part of the victim's body so as to produce a shock. The point of application was generally a sensitive part of the body such as the nose, ears, sexual organs or breasts.[393]

568. The most common form of male sexual violence considered by the IMTFE appears to have been sexual mutilation. For example, the Judgement recounts that "[a]t Manila an eyewitness described how his house boy was tied to a pillar. The Japanese then cut off his genitals and thrust his severed penis into his mouth."[394]

569. The amount of evidence of sexual violence included in the IMTFE Judgement confirms that it was regarded as a serious crime within the jurisdiction of the Tribunal. Based upon evidence of sex crimes committed by troops under their command, the defendants HATA[395] and MATSUI,[396] along with Minister Hirota,[397] were found guilty by the IMTFE of failing to prevent atrocities, including rape and other forms of sexual violence, committed by their subordinates. The jurisprudence of the IMTFE thus verifies that rape and other forms of sexual violence constituted crimes within the jurisdiction of the Tribunal.

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392 IMTFE Judgement (Roling), p. 407.

393 IMTFE Judgement (Roling), p. 407; IMTFE Docs, transcript p. 49666.

394 IMTFE Judgement (Roling), p. 409.

395 The majority stated that HATA was "in command of expeditionary forces in China [and] atrocities were committed on a large scale by the troops under his command and were spread over a long period of time. Either HATA knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provisions for learning whether [his] orders for the humane treatment of prisoners and civilians were being obeyed." He was regarded as "in breach of his duty as charged under Count 55." IMTFE Judgement (Roling), p. 446.

396 The verdict stated that MATSUI was:

> Commander-in-Chief of the Central China Area Army, which included the Shanghai Expeditionary Force and the Tenth Army. With these troops he captured the city of Nanking…. Then followed a long succession of most horrible atrocities committed by the Japanese Army upon the helpless citizens. Wholesale massacres, individual murders, rape, looting and arson were committed by the Japanese soldiers. …In this period of six or seven weeks thousands of women were raped, upwards of 100,000 people were killed and untold property was stolen and burned. At the height of these dreadful happenings,…**Matsui** made a triumphal entry into the City and remained there from five to seven days. From his own observations and from the reports of his staff he must have been aware of what was happening. He admits he was told of some degree of misbehavior of his Army by the Kempeitai, and by Consular Officials. Daily reports of these atrocities were made to Japanese diplomatic representatives in Nanking, who in turn reported them to Tokyo. The Tribunal is satisfied that **Matsui** knew what was happening. He did nothing, or nothing effective, to abate these horrors. He did issue orders before the capture of the City enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as is now known, and as he must have known…. His illness was not sufficient to prevent his conducting the military operations of his command nor to prevent his visiting the City for days while these atrocities were occurring. He was in command of the Army responsible for these happenings. He knew of them. He had the power, as he had the duty to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge his duty.

IMTFE Judgement, at 453-454.

397 The Tribunal established that in his capacity as "Foreign Minister he received reports of…[Japanese soldier's] atrocities immediately after the entry of the Japanese forces into Nanking….He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily." IMTFE Judgement (Roling), pp. 447-448.

570. Further, in the proceedings of the U.S. Military Tribunal at Manila against YAMASHITA, the Judgement recounts evidence of mass and indiscriminate murder, rape, and pillage in Manila, a campaign that had many parallels to crimes committed during the Rape of Nanking. Although the widespread rapes became an infamous example of unrestrained and unrestricted wartime sexual aggression, the defence attempted to depict them as isolated crimes committed out of fear and uncontrollable frustration: "We see only wild, unaccountable looting, murder and rape. If there be an explanation of the Manila story, we believe it lies in this: Trapped in the doomed city, knowing that they had only a few days at best to live, the Japanese went berserk, unloosed their pent-up fears and passions in one last orgy of abandon."[398] In delivering its Judgement against YAMASHITA, the President of the Commission specified that the crimes YAMASHITA "permitted", and which were "in violation of the laws of war", could be grouped into three categories, with one of these categories consisting of "Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children."[399]

571. Despite considerable evidence of rape crimes admitted into evidence during the IMTFE and other post-war trials held in the Asia-Pacific, neither the mass rapes at Mapanique nor the institutionalisation of rape and sexual slavery through the "comfort women" system was prosecuted in these proceedings.

(ii) The Nuremberg Proceedings

572. Although the Nuremberg Tribunal afforded comparatively little attention to rape and other forms of sexual violence, the fact that evidence of these crimes was admitted at trial reinforces the finding that sexual violence was recognised as within the jurisdiction of the Tribunal.[400] For example, one witness testified to the sexual violence and humiliation inflicted upon women in the concentration camps, where prisoners were selected for use in "brothels" and as domestic servants:

> At Auschwitz there was a brothel for the SS and also one for the male internees of the staff who were called '"Kapa"'. Moreover, when the SS needed servants, they came accompanied by the Oberaufseherin, that is, the woman commandant of the camp, to make a choice during the process of disinfection. They would point to a young girl, whom the Oberaufseherin would take out of the ranks. They would look her over and make jokes about her physique; and if she was pretty and they liked her, they would hire her as a maid with the consent of the Oberaufseherin, who would tell her that she was to obey them absolutely no matter what they asked of her.[401]

573. The Russian Prosecutor introduced evidence of rape and other forms of sexual violence, such as mutilation of the breasts of women:

> In the village of Semenovskoe,…the Germans bound with twine the arms of Olga Tikhonova, the 25-year-old wife of a Red Army man and mother of three children, who was in the last stage of pregnancy, and raped her.

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398 Yamashita, Law Reports of Trials of War Criminals, Vol IV, p. 24.

399 Yamashita, Law Reports of Trials of War Criminals, Vol IV, p. 4.

400 For examples of evidence admitted at trial that concerned gender-based crimes, see e.g., IMT Docs, Vol II, transcript p. 139; Vol VI, transcript pp. 211-214; 404-407; Vol VII, transcript pp. 449-457; Vol XX, transcript p. 381.

401 IMT Docs, Vol 6, pp. 213-214.

> After violating her, the Germans cut her throat, stabbed her through both breasts, and sadistically bored them out.[402]

574. In some instances every woman in the village was raped. Many were forced into sexual slavery in brothels. Often the victims were murdered afterwards:

> Women and young girls were vilely outraged in all the occupied areas. In the Ukrainian village of Borodayevka,…the fascists violated every one of the women and girls. . . . In the village of Berezovka,…drunken German soldiers assaulted and carried off all the women and girls between the ages of 16 and 30. . . .In the city of Smolensk the German Command opened a brothel for officers in one of the hotels into which hundreds of women and girls were driven; they were mercilessly dragged down the street by their arms and hair. . . . Everywhere the lust-maddened German gangsters break into houses, they rape the women and girls under the very eyes of their kinfolk and children, jeer at the women they have violated, and then brutally murder their victims. . . . In the city of Lvov, 32 women working in a garment factory were first violated and then murdered by German storm troopers. Drunken German soldiers dragged the girls and young women of Lvov into Kesciuszko Park, where they savagely raped them. . . . Near the town of Borissov…75 women and girls attempting to flee at the approach of the German troops, fell into their hands. The Germans first raped and then savagely murdered 36 of their number. By order of a German officer named Hummer, the soldiers marched L. I. Melchukova, a 16-year-old girl, into the forest, where they raped her. A little later some other women who had also been dragged into the forest saw some boards near the trees and the dying Melchukova nailed to the boards. The Germans had cut off her breasts in the presence of these women.[403]

575. Recognising the enormity of the horrors documented at trial, the Nuremberg Judgement does not contain extensive detail of atrocities as a general matter and does not explicitly state that any of the 22 defendants was convicted on the basis of evidence of rape or other crimes of sexual violence. Nonetheless, it is logical to conclude, in light of the law in force at the time and the evidence documented at trial, that various forms of sexual violence were integrated into the broad language of 'ill-treatment', 'mistreatment', 'atrocities' and 'brutalities' contained in the Judgement. Surely, the evidence demonstrates convincingly that sexual violence was extremely prevalent. It has been suggested that among the reasons for leaving sexual violence implicit instead of explicit was the fact that Allied soldiers had also commonly committed rape against enemy women.[404]

576. Gender related violence was a peripheral subject in several war crimes trials held under CCL10. In particular, the trials regarded such crimes as forced sterilization, forced

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402 IMT Docs, Vol 7, p. 455.

403 IMT Docs, Vol 7, pp. 456-457.

404 For example, one of the most systematic, enormous, and tolerated examples of mass rape was that committed by the Russian armies against Eastern European and German women at the close of the Second World War. See, e.g., Geoffrey Robertson, Crimes Against Humanity: The Struggle For Global Justice (1999), p. 306; Attina Grossman, A Question of Silence: The Rape of German Women by Soviet Occupation Soldiers, in Nicole Dombrowski (ed) Women And War In The Twentieth Century (Garland, l999).

abortion, and sexual mutilation as forming part of the war crimes and crimes against humanity committed by the Nazi regime.[405]

577. There is no question that rape and other forms of sexual violence were afforded inadequate treatment in the post-war proceedings, and the failure to prosecute the sexual slavery of some 200,000 "comfort women" is the most outrageous case in point. Nonetheless, both the codified and customary laws of war developed prior to 1937, as well as the jurisprudence of the Tribunals, leave no doubt that rape and other forms of sexual violence were recognised as international crimes prior to 1945.

(d) Post-War Developments

578. The Judges note that although rape and other forms of sexual violence have increasingly been prohibited since the Middle Ages, the failure to name them explicitly as prosecutable crimes has contributed to their invisibility and undoubtedly encouraged their perpetration. The inclusion of extensive evidence of rape and other forms of sexual violence in the IMTFE proceedings began the process of making the implicit explicit. The post-war 1949 Geneva Convention IV articulated the obligation to especially protect civilian women from "rape, enforced prostitution, or any form of indecent assault."[406] The 1977 Additional Protocols each contain a prohibition on sexual violence, although regrettably still classified not as violence but as "outrages against personal dignity."[407] The Protocols also protect honour and consider freedom from adverse distinction based on sex as an overarching fundamental guarantee.[408]

579. Explicit recognition of the severity of rape and other forms of sexual violence has increased in the last decade, largely as a result of efforts to redress sexual violence inflicted as an official or unofficial strategy of war and instrument of terror. Sex crimes are directed disproportionately or exclusively against women,[409] who tend to be the mainstay of civil society in times of war. Such violence works insidiously on family and community relations, still shaped by deeply entrenched patriarchal assumptions of female chastity and male possession of women. As in the wars in the former Yugoslavia and genocide in Rwanda to name but a few recent and horrific examples, sexual violence has been used as a weapon to destroy women and the "enemy" group with which they are associated, by causing physical, mental, sexual, and reproductive harm to the women; by causing them and their families to flee their homes and lose their livelihoods and

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405 See especially US v. Karl Brandt, et al., 1-2 Trials of War Criminals Before the Nurenberg Military Tribunal Under Control Council Law No. 10 (*Medical Case*) – includes forced sterilisation and castration; US v. Oswald Pohl, et al., 5 Trials of War Criminals (*Pohl Case*) – mentions brothels in concentration camps, evidence of forced abortion; US v. Ulrich Greifelt, et al., 4-5 Trials of War Criminals (*RuSHA Case*) – refers to forced abortions, efforts to interfere with reproduction.

406 For the protective provision, see Article 27, Convention Relative to the Protection of Civilian Persons in Time of War, (1949) 75 U.N.T.S. 135. In that Convention, rape and sexual assault were generally understood as subsumed with common Article 3's prohibition on "outrages against personal dignity, in particular humiliating and degrading treatment" rather than the prohibition on crimes of violence in internal conflict; in international armed conflict, the Convention's prohibition on inhuman treatment was likewise available.

407 Article 75(2)(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts *(*Additional Protocol I) prohibited "enforced prostitution and any other indecent assault" as part of "outrages upon personal dignity." Article 4(2)(e) of Protocol II had a similar provision which included rape. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) 1125 U.N.T.S. 609 (Additional Protocol II). Additional Protocol I also contained strengthened protective provisions requiring the separation of female from male prisoners and female supervision of women inmates (Article 75(5)) as well as protection from rape, forced prostitution and any other form of indecent assault (Article 76).

408 Additional Protocol I, Article 76(1); Additional Protocol II, Article 4(1).

409 Forced pregnancy or forced abortion would be examples of sexual violence committed exclusively against females.

community ties; by stigmatizing the women as contaminated and casting men as powerless defenders; and by subjecting children to indelible horrors and enduring insecurity.[410]

580. Currently, largely as a result of the mobilisation and work of the international and grass roots non-governmental women's human rights movement,[411] the contributions of feminists and jurists who are committed to examining gender issues,[412] and the commitment of gender-inclusive prosecutors and judges,[413] rape and other forms of sexual violence are becoming explicitly criminalised and increasingly prosecuted. Following its inclusion in CCL10, the Statutes of the Rwanda and Yugoslav Tribunals list the crime of rape as a crime against humanity.[414] Only the ICTR formally lists rape in its enunciation of war crimes, although it remains linked with "outrages upon personal dignity."[415] Most significantly, the Judgements of the Tribunals have emphasised the crime of rape as among the gravest forms of violence. Not only have the ICTY and ICTR convicted several defendants of rape as a crime against humanity, they have also affirmed the seriousness of sexual violence by recognising it as a form of torture, enslavement, persecution, and inhumane acts and as an act of genocide when the requisite elements of the crimes have been proved.[416]

581. Building upon these developments, the Rome Statute of the ICC explicitly codifies and allows prosecution of rape, sexual slavery, forced pregnancy, enforced prostitution, enforced sterilisation and other forms of sexual violence as war crimes and crimes against

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410 See especially the *Akayesu* case in the Rwanda Tribunal and the *Kunarac* case in the Yugoslav Tribunal.

411 See e.g. Charlotte Bunch and Naimh Reilly, Demanding Accountability, The Global Campaign and Vienna Tribunal for Women's Human Rights (1994).

412 As but a small sample, see e.g., Rhonda Copelon, Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War, in Mass Rape, The War against Women in Bosnia-Herzegovina (Alexandra Stiglmayer ed., 1994), p. 197; Christine Chinkin, Rape and Sexual Abuse of Women in International Law, 5 European J. Intl L. (1994), p. 326; Patricia Viseur Sellers, The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law, in Substantive and Procedural Aspects of International Criminal Law (Gabrielle Kirk McDonald and Olivia Swaak-Goldman eds., vol. I, 2000), p. 263; Indai Sajor, Common Grounds, Violence Against Women in War and Armed Conflict Situations (1998); Kelly Dawn Askin, War Crimes Against Women (1997); Theodor Meron, Rape as a Crime Under International Humanitarian Law, 87 Am. Journal Int'l Law (1993), p.424; Ustinia Dolgopol, Rape as a War Crime – Mythology and History, in Common Grounds (Indai Sajor ed., 1998), p. 122-147.

413 The inclusion of females as judges, prosecutors, and investigators in the ICTY/R have made an enormous contribution to developing the gender related jurisprudence in the Tribunals. On the significance of having women in high level positions in the Tribunals and the appointment of Patricia Viseur Sellers as the gender issues legal advisor in the Prosecutor's Office, see discussion in Kelly Askin, Women's Issues in International Criminal Law, in International Crimes, Peace, and Human Rights (Dinah Shelton ed., 2001)(contributions of women to the Tribunals generally); Kelly Dawn Askin, The ICTY: An Introduction to its Origins, Rules and Jurisprudence, in Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald (May, Tolbert et al. eds, 2001)(contributions of President Gabrielle Kirk McDonald to the Tribunals); Askin, Women and International Humanitarian Law, *Ibid.* (contributions of Patricia Sellers as gender issues legal advisor).

414 Rape is included in Article 5 of the ICTY and Article 3 of the ICTR on crimes against humanity, but is not explicitly included within the ICTY's Article 2 on grave breaches of the Geneva Conventions or Article 3 on war crimes. In the ICTR Statute, rape and "enforced prostitution" are listed under Article 4, covering violations of Common Article 3 and Additional Protocol II. The ICC Statute recognises rape and other forms of sexual violence as, *inter alia,* grave breaches of the Geneva Conventions, violations of Common Article 3, and crimes against humanity.
See the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. Doc. S/25704, (1993), Article 5(g) [ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955 (1994), Article 3(g) [ICTR Statute].

415 ICTR Statute, Article 4(e).

416 *Akayesu* Trial Chamber Judgement; *Celebici* Trial Chamber Judgement; *Furundzija* Trial Chamber Judgement; *Kunarac* Trial Chamber Judgement; *Krstic* Trial Chamber Judgement; *Kvocka* Trial Chamber Judgement. As recognised by the Judgements of the ICTR and ICTY, rape and sexual violence crimes can be prosecuted under each article of the Tribunals' Statutes, including as war crimes, crimes against humanity, and genocide, even when the crime is not explicitly enumerated.

humanity.[417] At the same time, the ICC Statute prohibits gender discrimination in the interpretation and application of the Statute.[418] It also affirms the principle of gender integration – that is, of treating gender violence as constituting other crimes where it satisfies the elements thereof – as developed in the jurisprudence of the *ad hoc* Tribunals.[419] This dual treatment will hopefully redress the historical tendency to ignore or minimise the prosecution of these crimes notwithstanding the fact that they have been repeatedly condemned and criminalised for well over a century. The Judges note that the *Kvocka* Judgement additionally recognises molestation, sexual mutilation, forced marriage, and forced abortion as other prosecutable gender related crimes committed during periods of armed conflict.[420]

582. The Judges agree with the approach taken by contemporary sources in emphasising the non-consensual nature of rape and the necessity to take account of coercive circumstances, including particularly the abuse of official authority and the presence of armed agents in the vicinity. We consider that once a girl or woman was brought against her will to a "comfort station," or confined there after arrival based on false representations, she was denied the opportunity to exercise her will to refuse sex with Japanese soldiers and officers. The witnesses before this Tribunal testified in detail about the rapes they endured. For many of them, rape was especially traumatic because they had had no prior sexual experience and were very young.

583. The Tribunal recognises essentially two contexts in which the rapes charged in the Common Indictment occurred: the institutionalised rape as part of the sexual slavery system (Counts 1-2) and the mass rape of local women as part of a military campaign at Mapanique (Count 3). Like the IMTFE, we deem it unnecessary to detail elements of rape since it is clear that the sexual penetration and other forms of sexual violence was committed against the will of the women. The testimony demonstrates that in both contexts rape, gang rape, and continuous rape was committed by force, threat of force, or coercion of the most extreme dimension. In relation to the "comfort system," the testimony also indicates that rape was accomplished as a function of the coercive environment of the system of military sexual slavery. Therefore, in the sections below, we examine the law relevant to institutionalised rape, and hence sexual slavery, committed as part of the "comfort system."

4. International Law Regarding Slavery and Sexual Slavery

(a) Introduction

584. The situations of slavery discussed in the IMT and IMTFE cases demonstrate some common or recurring characteristics which inform our understanding of the essence of the crime of slavery.

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417 Rome Statute, Articles 7(g); 8(2)(b)(xxii) and 8(2)(e)(vi). The various provisions recognize rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or other forms of sexual violence.

418 ICC Statute, Article 21(3).

419 See e.g., Rhonda Copelon, Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law, 46 McGill L J. (2000), p. 217; Kelly Dawn Askin, Crimes Within the Jurisdiction of the International Criminal Court, 10 Criminal Law Forum (1999), p. 33.

420 *Kvocka* Trial Chamber Judgement, para. 180 and fn 343.

585. Freedom is the "birthright of every human being"[421] and a basic human right. It is both central to and interdependent with other human rights. Many other rights derive from this one, including the right to protect, control, and determine the disposition of one's body and self in relation, for example, to work, sexuality, and reproduction; to practice one's religion or spirituality; to express one's opinions, to form intimate relationships of one's choice and to decide whether and when to have children; to vote, to join trade unions, and participate in the political, economic, social and cultural life of one's community; and to have social security and the economic, social and cultural support necessary to human dignity and the full and free development of one's potential. Slavery is the antithesis of freedom. It is a basic tenet of the rule of law that freedom cannot be relinquished. That is why no one can consent to enslavement. To say that no one can consent to enslavement is not an exercise of paternalism. It is fundamental to the nature of freedom itself.

586. Freedom and equality under international law are based on the concept of the human person as free and able to fulfil her or his capabilities. Freedom requires protection of individual autonomy, respect for every person's potential and development and the presence of enabling economic, social and cultural conditions. Consent, to be valid, must be based on knowledge, and sustained by reason, and the ability to make and carry out free and informed choices. Consent is not valid when it is not knowing and free; when there is distorted or deceptive information, or no information at all; when there is violence, coercion, or the threat thereof; when the victim is subject to inhumane and debilitating conditions; when she is kept isolated from social support, denied the means of survival or without access to means of communication, assistance, or redress; or when there is exploitation of the victim's vulnerability. Consent is not free when the victim's every little act that reflects or may spark rebellion threatens grave danger to her physical or mental integrity.

(b) The Historical Development of International Law Prohibiting Slavery

587. Slavery, as one of the most profound violations of a human being's inherent freedom and dignity, was one of the first crimes to be proscribed under international law. The international norm against slavery, which encompasses sexual slavery, developed in at least five parallel contexts well before the institutionalisation of the "comfort system" by the government of Japan.

(i) Slavery as an International Crime

588. The 1926 Slavery Convention was the culmination of a century-long development of the norms against slavery, the slave trade, and forced labour.[422] A series of multilateral declarations and treaties prohibited slavery and the slave trade and increasingly strengthened the penal nature and the universal obligation to prosecute slavery.[423]

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421 1926 Slavery Convention, Preamble, para 1.

422 Slavery Convention, 1926, LNTS 253, entered into force 9 March 1927.

423 For example, the 1815 Declaration Relative to the Universal Abolition of the Slave Trade [Congress of Vienna, Act XV] proclaimed that the slave trade was "repugnant to the principles of humanity and universal morality and created a duty to prohibit and punish it." 2 Martens Nouveau Recueil 432, *reprinted in* 63 Parry's T.S. 473 (1969). States also undertook to prevent and repress the slave trade and to punish those engaging in slavery and the slave trade in the 1822 Declaration Respecting the Abolition of the Slave Trade (Congress of Verona), 6 Martens Nouveau Recueil 139, *reprinted in* 73 Parry's T.S. 32. The 1841 Treaty for the Suppression of the African Slave Trade (Treaty of London), 2 Martens Nouveau Recueil 392, *reprinted in* 92 Parry's 437 and the 1885 General Act of the Conference Respecting the Congo (General Act of Berlin). 10 Martens Nouveau Recueil (ser. 2) 414, *reprinted in* 3 American Journal of Int'l Law (1909). See e.g. Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict

589. A 1944 survey of a representative group of states demonstrated that virtually all had prohibited slavery as a matter of national law. Whereas Japan's criminal code did not specifically address slavery before 1944, in a 1972 case in which Peruvian slave-traders were convicted, Japan appears to have declared that it had always prohibited the slave trade. By 1937, the Slavery Convention was understood as declaratory of customary international law[424] and, therefore, binding upon Japan, regardless of whether it had ratified the 1926 Convention.

590. Article 1 of the 1926 Slavery Convention, applicable under all conditions and to state officials and individuals alike, defined slavery 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 recognised a broad range of acts as constituting the "slave trade":

> The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him [or her] to slavery; all acts involved in the acquisition of a slave to selling or exchanging him [or her]; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

591. In addition, Article 5 of the Convention prohibited "compulsory or forced labour," and recognised the likelihood that such labour involves "conditions analogous to slavery." Thus to avoid such conditions, Article 5 restricts the use of forced labour to that which is authorised by competent public authorities for public purposes or, if for private purposes, permits such labour only when it is performed on an exceptional basis, is adequately remunerated, and does not require the person to be removed from their home. Article 6 called for imposing severe penalties for any infractions of laws or regulations. Interpretations of these provisions are discussed *infra.*

(ii) Forced Labour as a War Crime

592. A second source which allows us to recognise the crime of sexual slavery during the Second World War is the 1907 Hague Convention IV and annexed Regulations, which codified the customary law prohibition on making slaves of prisoners of war or occupied civilian populations. Japan ratified the 1907 Hague Convention on December 13, 1911.

593. Article 5 of the Convention prohibits using prisoners of war for forced labour that is "excessive" or "connected with the operations of the war."[425] With regard to civilian populations, Article 52 of the Hague Regulations is stricter in stipulating protections to be afforded to the civilian population and preventing an invading army from using the conquered people to support the war:

> Neither requisitions in kind nor services can be demanded from communities or inhabitants except for the necessities of the army of

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(E/CN.4/Sub.2/1998/13), Report to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities by Gay McDougall, Special Rapporteur, 22 June 1998. Appendix: An Analysis of the Legal Liability of the Government of Japan for "Comfort Women Stations" established during the Second World War. This study notes the existence of 20 international agreements by 1932 prohibiting slavery.

424 See e.g. Bassiouni, Enslavement, in International Criminal Law (M. Cherif Bassiouni, 2nd ed., vol. I, 1999), pp. 663, 663-704.

425 Convention (IV) Respecting the Laws and Customs of War on Land with Annex of Regulations (18 October 1907), 3 Martens Noveau Recueil (ser. 3) 461, entered into force 26 January 1910, Article 5 ("1907 Hague Convention IV").

> occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.[426]

594. This exception can never be interpreted to include sexual servitude. Slavery, and hence sexual slavery, cannot legally constitute military necessity. Further, the 1907 Hague Convention prohibits rape and emphasises the prohibition in Article 46, which requires respect for "family honour." When read together, these provisions of the 1907 Hague Convention prohibited, amongst other things, what is now understood as the crime of sexual slavery.

595. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, signed by Japan, reinforced and broadened this protection of prisoners of war. Article 29 provides: "No prisoner of war may be employed at labours for which he is physically unfit;" and Article 32 stipulates: "It is forbidden to use prisoners of war at unhealthful or dangerous work."[427] Sexual slavery is obviously dangerous and unhealthy and falls within the purview of protections.

(iii) ILO Convention Concerning Forced Labour

596. The 1930 Convention Concerning Forced Labour (ILO No. 29),[428] which Japan signed in l932, provides a third source of the prohibition on sexual slavery. The 1930 Convention defined "forced or compulsory labor" as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[429]

597. This Convention elaborated on the Slavery Convention's exception of forced labour for authorised public purposes.[430] It also prohibited all forced labour for the benefit of private individuals (art. 4) and required, for example, that the public purpose be "of important direct interest for the community called upon to do the work or render the service," as a matter of "imminent necessity" (art. 9). Further, it called for strict protection of the workers' health (art. 17(1)), prohibited more than sixty (60) days of such work in a year (art. 12(1)), and required working conditions and overtime pay comparable to voluntary workers (arts. 13-15).

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426 1907 Hague Convention IV, Article 52.

427 Geneva Convention (III) Relative to the Treatment of Prisoners of War, signed 27 July 1929, 118 L.N.T.S. 343, entered into force 19 June 1931. Japan was a signatory, although not a State Party.

428 Forced Labour Convention, 1930 (No. 29), UNTS 55, entered into force 1 May 1932.

429 ILO No. 29, Article 2(1).

430 Article 2 permits forced labour as follows:

> (a) compulsory military service [limited to] work of a purely military character; normal civic obligations of the citizens of a fully self-governing country;
> (b) Any work or service exacted from any person as a consequence of a conviction in a court of law, [when done under supervision of a public authority and not hired out to private businesses or individuals];
> (c) Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
> (d) Minor communal services in the direct interest of the said community [which are] normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

598. Significantly, in l997, the ILO Committee of Experts ruled that Japan's system of military sexual slavery violated the Forced Labour Convention.[431] It rejected Japan's contentions that irrespective of whether or not it had violated the Convention, it had fulfilled its obligations regarding issues of reparations and settlement of claims relating to the war, including those of the former "comfort women," in accordance with the relevant international agreements. The Committee of Experts stated that Article 2(a), which permits compulsory military service, does not apply to the "comfort women" system because exception applies only to "work of a purely military character." Further, it found no warrant in invoking Article 2(c), which permits compulsory labour in the event of war or other calamities which threaten the safety or well-being of the population. The Committee found that this exception is strictly limited to genuine public emergencies requiring immediate action and that the scope and purpose of the involuntary labour must be restricted to those meeting the exigencies of the situation. Women's sexual integrity and sexual autonomy may never be sacrificed in the name of public "emergency."

599. In respect of the "comfort women" system, the Judges note that other fundamentals of permissible forced labour under the ILO Convention were also violated even though their observance in this case would not have rendered the "comfort system" legal. For example, medical attention was not designed to protect the health of the women and women were subjected to dangerous "treatments" which in many cases resulted in severe and long-lasting health damage (art. 17(1)). Nor did regulations even purport to limit their horrific servitude to 60 days in a year (art. 12(1)). Instead, most women did continuous service limited only by their own incapacity to continue or the end of the war.

600. The Tribunal endorses the ILO Committee's 1997 holding, and emphasises that sexual servitude can never be a permissible form of compulsory labour. There is no "necessity" argument that can justify subjecting a person – female or male – to sexual violence. Nor can rape, sexual bondage, or other forms of sexual violence ever be rendered acceptable by payment, by providing amenities, health care or rewards, or by limiting the days of service. In this sense, forced sexual labour is different from other forms of forced labour, which may be permissible under narrowly defined circumstances, because forced sex *ipso facto* constitutes an exercise of ownership over a person.

(iv) The Suppression of Trafficking

601. The international prohibition on trafficking in persons, in particular for sexual purposes, is the fourth source of the international prohibition of sexual slavery extant prior to l937. The Trafficking Conventions of 1904,[432] 1910,[433] 1921[434] and 1933[435] provide further evidence that sexual slavery was considered an international criminal offence before and during the Second World War. The 1910 Convention provides, in Article II, that parties must punish those who use fraud, violence, threats, abuse of authority, or any other means of constraint to "procure, entice or lead away" a girl or woman for "immoral purposes,"

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431 CEACR: Individual Observation concerning Convention No. 29, Forced Labour, 1930 Japan (ratification: 1932), published: 1999.

432 International Agreement for the Suppression of White Slave Traffic, 1904, 1 L.N.T.S 83, reprinted in 195 Parry's T.S 326, entered into force 18 July 1905.

433 International Convention for the Suppression of White Slave Traffic, 1910, 7 Martens Nouveau Recueil (ser.3) 242, reprinted in 211 Parry's T.S 45, entered into force 15 September 1911 (hereinafter "the 1910 Convention").

434 International Convention for the Suppression of the Traffic in Women and Children 1921, 9 L.N.T.S 45, reprinted in 18 Am. Journal Int'l Law (Supp. 1924), p. 130, entered into force 22 June 1922.

435 International Convention for the Suppression of the Traffic in Women of Full Age, 1933, 150 L.N.T.S 431, entered into force 24 August 1934.

which was a reference to prostitution. To traffic a woman or girl against her will or by deception was an aggravating circumstance requiring greater punishment than trafficking with her consent.[436]

602. The 1921 International Convention for the Suppression of the Traffic in Women and Children is particularly relevant as Japan ratified it in l925 and all the conventions are cumulative in the sense that the later conventions reaffirmed the earlier ones. We note that Japan was a party to the 1921 Convention. When Japan ratified the 1921 Convention, it did not include Chosen, Taiwan, the leased territory of Kwantang, the Japanese portion of the Saghalien Islands and Japan's mandated territory in the South Seas.

603. Under Articles 2 and 3, states parties were required to take all steps necessary to discover and prosecute persons engaged in the traffic of women and children. We do not consider that Article 14, permitting states to make exceptions to this Convention for certain territories, undermines the Convention's importance as a source of prohibiting the sexual slavery institutionalised by the Japanese military. We find the expert opinion of Professor Kalshoven convincing that the provision was inserted due to concern about practices which had continued as local customs, e.g., payment of dowry and "bride price", in many territories controlled by the then colonial powers.[437] We reject any contention that Article 14 could justify reservations for conduct that constitutes the crime of sexual enslavement under international law.

604. In addition, the General Assembly of the League of Nations considered the prohibition on trafficking in women and girls to have become part of customary international law by the time of the Second World War.[438] Thus both conventional and customary law provide forceful evidence that sexual slavery was a crime well before Japan instituted the system of military sexual slavery.

(v) [En]forced Prostitution as a War Crime

605. The fifth source of the prohibition on sexual slavery at the time of the wars in the Asia-Pacific was the customary humanitarian law prohibition on forced prostitution. The 1919 War Commission Report of World War I listed "abduction of girls and women for the purpose of enforced prostitution" as a serious war crime. With the exception of the post-war Allied military proceedings, the prosecution of war crimes was treated largely as a domestic matter. After World War II, the Dutch Military Tribunal at Batavia (now Jakarta) prosecuted and convicted Japanese defendants on charges of "enforced prostitution" as a violation of the Dutch war crimes statutes, for crimes related to Japan's system of military sexual slavery committed against some of the Dutch women living in Dutch Indonesia during the war. [439]

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436 Convention for the Suppression of the Traffic in Persons for the Prostitution of Others, 1949, approved by General Assembly Resolution 317 (IV) of 2 December 1949, entered into force on 25 July 1951, Final Protocol. Japan ratified the Convention, without reservation, on 1 May 1958.

437 The International Commission of Jurists has also taken the position that Japan may be held responsible for having violated its obligations under the Convention vis-à-vis women taken from the Korean peninsula as a matter of construction of Article 14.

438 Report of the 6th Committee to the Assembly of the League of Nations 1926, League of Nations Official Journal, Sixth Supplement No. 44, p. 416.

439 Temporary Court-Martial in Batavia in the case of the Judge-Advocate ratione officii versus 12 unnamed defendants, No. 72/1947 (hereinafter *Batavia* case).

606. At the same time as this Tribunal views the prohibitions on trafficking and forced prostitution as sources of the international crime of sexual slavery, we note the vehement objection of many "comfort station" survivors to classifying the crimes committed against them as forced prostitution.

607. In sum, based on these five overlapping sources of law, the Judges find that in 1946 there was an ample basis under international law to prosecute Japanese officials for the crime of sexual slavery, even though the terminology is of more recent vintage.

(c) Post-War Jurisprudence

608. The Charters and jurisprudence of the post-war Tribunals confirm the status of enslavement and forced labour as international crimes and outline conditions in the context of non-sexual forced labour that were also prevalent in the context of the military "comfort women" system.

609. The Charters of both major post war Tribunals conferred jurisdiction over "enslavement" as a crime against humanity.[440] With respect to war crimes, the IMTFE Charter does not enumerate prohibited acts, but the IMTFE Indictment charges forced labour and enslavement.[441] The IMT Charter included as a war crime "deportation to slave labour or for any other purpose of civilians in or of occupied territory"[442] and the Indictment of the IMT charged both "enslavement" and "deportation to slave labour."[443] The CCL10 also included enslavement and deportation to slave labour as crimes against humanity, and deportation to slave labour as a war crime.[444] The Tribunals did not endeavour to distinguish these offences in their Judgements.

610. The IMTFE found that Japan had operated a brutal slave labour system, using prisoners of war and civilian internees and members of the occupied populations who were conscripted "by false promises and by force" for various war-related purposes. Labourers were "transported to and confined in camps" and "used to the limit of their endurance." They were deprived of the basic human needs for food, clothing, shelter, and medical supplies, and made to work under dehumanizing conditions and in dangerous places, including on military installations and in war zones.[445]

611. Similarly, the Nuremberg Tribunal and the CCL10 proceedings found that Nazi Germany operated a slave labour system in which forced labourers were taken by deception or force, deported to the aggressor country, deprived of all right to control the conditions of their labour, forced to work under dangerous conditions, and deprived of the rights associated with ordinary community living, such as the right to choose one's residence, live with one's family, and participate in public life. As with Japan's system, labourers who were sick, injured, or otherwise unproductive were starved to death or killed outright because they had outlived their usefulness.[446] On these findings, using the same criteria,

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440 Article 5(c) IMTFE Charter; Article 6(c) IMT Charter.

441 Count 53, Sections Two and Twelve, Appendix D.

442 Article 6(b) IMT Charter.

443 Counts One, Three, and Four of the Nuremberg Indictment. IMT Docs, Vol. I.

444 CCL10, Article II(c) and II(b).

445 IMTFE Judgement (Roling), pp. 413-417. It is notable that the IMTFE, finding that the conscripted labour was subject to the same conditions as the civilian internees, treated the former as part of the civilian internees.

446 IMTFE Judgement (Roling), p. 415.

the Nuremberg Tribunal convicted defendants of forced labour as a war crime and enslavement as a crime against humanity.[447]

612. The post-war Tribunals further found that both the German and Japanese slave labour systems were governmentally organised. The IMTFE convicted TOJO for his participation in the slave labour policies, noting his instructions that prisoners who did not work should not be allowed to eat. The Tribunal held that application of this policy "account[ed], at least in part, for the constant driving [of sick, wounded and malnourished prisoners] to labour upon military works until they died of hunger, disease or exhaustion."[448] Similarly, Germany's slave labour program was found to have exploited people "to the highest extent, and at the lowest expenditure." Indeed, defendant Himmler had expressed regret that the Nazis had allowed hundreds of thousands of Russians to starve to death before using them first as "raw material" for labour power.

613. With limited exception, the post-war proceedings did not define slavery or enslavement; nor did they attempt to define or draw clear distinctions between slavery, forced labour, and the slave trade. The *Pohl* case defines slavery as "involuntary servitude" and describes its essence as "compulsory uncompensated labour." The decision makes clear that it is not necessary to prove ill-treatment: "Slaves may be well fed, well clothed and comfortably housed, but they are still slaves if, without lawful process, they are deprived of their freedom by forceful restraint Involuntary servitude, even if tempered by humane treatment, is still slavery."[449]

614. The detailed treatment and prosecution of both the Japanese and German slave labour systems stands in sharp contrast to the absence of consideration of its gender analogue: the "comfort women system." Nonetheless, the jurisprudence of the post-war Tribunals make clear that the "comfort women" system was in fact a slavery system, as discussed below, and should have been prosecuted as such. Indeed, largely at the insistence of the "comfort women" survivors, the nomenclature "sexual slavery" has been widely recognised today, most significantly in the Statute of the International Criminal Court, which has been signed by more than 120 countries.[450] For the reasons set forth below, the Judges find that this crime was unquestionably encompassed by the accepted understanding of slavery, rape, and forced labour prevailing during the Second World War.

(d) The Crime of Sexual Slavery

615. As neither the IMTFE nor the IMT was presented with charges of sexual slavery, it falls to this Tribunal to adjudicate this crime. In doing so, we review recent developments in international humanitarian law, international criminal law, and international human rights law to the extent that it is useful to our analysis in examining the content and scope of laws in effect from l937-1945.

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447 Thus, the defendant von Schirach was convicted only of crimes against humanity and held responsible for the slave labour program based on the same law and underlying facts discussed in relation to slavery as a war crime.

448 IMTFE Judgement (Roling), pp. 414, 416.

449 US v. Oswald Pohl and Others, Judgement of 3 November 1947, reprinted in Trials of War Criminals Before the Nurernberg Military Tribunals under Control Council Law No. 10, Vol. V, pp. 958, 970. The IMT also convicted Speer in connection with the Nazi slave labour program, notwithstanding that "he insisted that the slave labourers be given adequate food and working conditions so that they could work efficiently." P. 579.

450 Rome Statute, art. 7(1)(g) and arts. 8(2)(b)(xxii) and 8(2)(e)(vi).

(i) Concepts of Chattel Slavery and Forced Labour

616. Considering the various international sources of law in l937-1945, it is clear that enslavement is built upon two interrelated forms of subordination: chattel slavery and forced labour. Likewise, sexual slavery combines, in particularly egregious form, both concepts of slavery.

617. Chattel slavery exists when a person is treated as an object or property subject to use or disposal by another person, whether for economic, recreational, domestic or other purposes. For example, a person is treated as chattel if she is regarded as an item of property or economic value while her humanity is disregarded. When a person's body is placed at the disposal of another to use sexually without their valid or genuine - that is knowing and voluntary - consent, that is a form of chattel slavery. Sexual slavery is particularly heinous because using a person as, or reducing a person to, sexual property violates the physical and mental integrity of the victim on the most profoundly personal plane. The victim is deprived of control over not only her body, but also her sexual activity and autonomy, which denies some of most fundamental components of human dignity. Moreover, because of the sexual nature of this form of enslavement, the victim often suffers either in silence or from socially induced opprobrium and marginalisation.

618. Forced labour exists, with rare exceptions indicated earlier (i.e., legitimate public emergency purposes), when a person is made to perform labour against her will. Forced labour involves fundamental disregard for a person's right to self-determination, physical, mental and spiritual integrity, livelihood and human dignity. Depriving a person of control over sexuality and denying her sexual integrity in order to satisfy the demands of another is a particularly atrocious form of forced labour, using and abusing the victim's body and spirit. As previously stated, the Tribunal considers it axiomatic that rape and other forms of sexual violence or abuse can never be viewed as legitimate forms of labour. Neither remuneration nor the satisfaction of ones survival needs mitigate the conditions involving servitude.

(ii) Essential Elements of Sexual Slavery

619. The 1926 Slavery Convention, which defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised," provides the overarching and enduring element of slavery. This definition incorporates both the chattel and forced labour concepts discussed above and applies with full force to sexual slavery. Based on the l926 Convention, we also recognize that acts involved in the acquisition of persons for the purposes of enslaving them constitute slavery.

620. We find that the *actus reus* of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy.[451] Thus, we consider that control over a person's sexuality or sexual autonomy may in and of itself constitute a power attaching to the right of ownership. The *mens rea* is the intentional exercise of such powers.

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451 We note that this corresponds to the findings of the ICTY Trial Chamber in the *Kunarac* Trial Chamber, Judgement, paras. 539-540. That Judgement concerned a situation of sexual slavery charged both as "rape" and "enslavement" under the ICTY Statute.

621. Accordingly, the Tribunal finds that the crime of "sexual slavery" is a form of enslavement and forced labour and constituted a crime under international law between 1937 and 1945, even though the terminology "sexual slavery" was not then used. Our conclusion is buttressed by the fact that rape and forced prostitution were already articulated as international crimes at that time. Thus, trying the accused for the crime of sexual slavery committed between 1937 to 1945 does not violate the principle of *nullum crimen sine lege.*

(iii) Recent Approaches to Sexual Slavery

622. We note that our approach to the elements of the crime of sexual slavery is also confirmed by more recent jurisprudence and the writings of jurists. It differs, however, from the elements of sexual slavery adopted in the non-binding Elements Annex to the Rome Statute of the International Criminal Court, as discussed below.

623. The groundbreaking *Kunarac* Judgement issued earlier this year by a Trial Chamber of the ICTY reaches a conclusion similar to our own, and it also provided a sound foundation for the subsequent prosecution of the crime of sexual slavery.[452] Because the ICTY Statute does not distinguish sexual slavery as a separate crime, two of the accused in *Kunarac* were instead charged with both "rape" and "enslavement" as crimes against humanity. The indictment charged that these defendants enslaved women and young girls and subjected them to repeated rape and other forms of sexual violence, including forced nudity over a period of weeks or months.[453] In addition to the sexual servitude, many victims were also required to perform domestic labour.

624. The *Kunarac* Judgement adopted the 1926 Slavery Convention's definition of enslavement,[454] and it went on to illustrate what is meant in broad terms by "the powers attaching to the right of ownership:"

> [I]ndications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, not all labour or service by civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The "acquisition" or "disposal" of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however,

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452 Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Judgement, IT-96-23-T & IT-96-23/1T, 22 February 2001 (*Kunarac* Trial Chamber Judgement).

453 The original indictment in the case was the first devoted exclusively to a broad range of crimes confronting women during periods of armed conflict, and the sexual slavery was but one part of the trial held against three of the eight accused who were within the custody of the Tribunal. Guilty verdicts were rendered against two accused for both "rape" and "enslavement" as crimes against humanity.

454 *Kunarac* Trial Chamber Judgement, para. 542.

> is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor [whose] importance will depend on the existence of other indications of enslavement.
>
> [The basic factors include] the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, *control of sexuality* and forced labour.[455]

625. These are all factors "to be taken into account in determining whether enslavement was committed."[456] Significantly, the *Kunarac* Judgement does not rank factors and it treats "control of sexuality" as an exercise of a power of ownership every bit as much as more traditional factors such as control of movement or forced labour.

626. We endorse the *Kunarac* Trial Chamber's holding that control of sexuality is itself an indicator of the general crime of enslavement. We consider that control over sexuality is an indicium of slavery regardless of whether the enslavement encompasses the usage of a person as sexual property or for forced sexual labour. Otherwise, the definition of enslavement would erroneously exclude one of the most common forms of servitude imposed upon women, sexual servitude.

627. The Judges note that, where the exercise of control over sexuality is an essential factor in the enslavement, this can, but need not be, the dominant factor. Such exercise of sexual control will usually entail some other indicators of the status or condition of being enslaved, such as control over movement, coercion, repetition, or duration. Where control of sexuality is a factor in enslavement, the crime of sexual slavery can also be charged separately.[457] In our view, both sexual slavery and enslavement should be charging options because both crimes may be applicable as their elements and the interests they protect are distinct. Sexual slavery recognises the specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves. Moreover, victims of the crime of sexual slavery may need somewhat different forms of protective measures or redress than victims of other forms of slavery.

628. This approach to the essential elements of sexual slavery finds support in the reports of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, by Gay McDougall, a leading expert in international law.[458] In her Final Report to the UN Commission on Human Rights, she defines "sexual slavery" as:

> the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access

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455 *Kunarac* Trial Chamber Judgement, paras. 542 & 543 (emphasis supplied).

456 *Kunarac* Trial Chamber Judgement, para. 543.

457 We note that, in a case involving, for example, forced labour during the day and sexual servitude at night, both enslavement and sexual slavery could be charged because the elements of the two crimes and the interests protected would be different. See e.g., *Celebici* Appeals Chamber Judgement, paras. 400, 412-413; *Kunarac* Trial Chamber Judgement, paras. 556-557.

458 Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13 of 22 June 1998; and the Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/2000/21 of 6 June 2000.

> through rape or other forms of sexual violence. Slavery, when combined with sexual violence, constitutes sexual slavery.[459]

629. The Special Rapporteur's approach is also to recognise that the violation of sexual autonomy through rape or other forms of sexual violence is a power attaching to the right of ownership over a person. Further, the Update to the Final Report explained:

> The Special Rapporteur understands that based on customary law interpretations of the crime of slavery, and thus sexual slavery, there are no requirements of any payment or exchange; of any physical restraint, detention or confinement for any set or particular length of time; nor is there a requirement of legal disenfranchisement. Nonetheless, these and other factors may be taken into account in determining whether a "status or condition" of slavery exists. While the most commonly recognised form of slavery involves the coerced performance of physical labour or service of some kind, again, this is merely a factor to be considered in determining whether a "status or condition" exists which transforms an act, such as rape, into sexual slavery. It is the status or condition of being enslaved which differentiates sexual slavery from other crimes of sexual violence, such as rape.[460]

630. By contrast, we view the approach suggested to the International Criminal Court to be inconsistent with a proper recognition of the breadth of factors that constitute enslavement and the relationship of sexual slavery thereto as a matter of customary international law. The ICC Statute includes the crime of sexual slavery but contains no definition of the crime. The Statute does define "enslavement" as "the exercise of any or all of the powers attaching to the right of ownership over a person," and "significantly provides that enslavement includes the exercise of such power in the course of trafficking in persons, in particular women and children."[461] Subsequent to the adoption of the Statute, however, the Preparatory Commission negotiated an Elements Annex to guide the ICC in interpreting the crimes within its jurisdiction.[462] In our view, the Elements Annex adopts an unreasonably narrow definition of enslavement that it then extends to sexual slavery, and hence the elements adopted do not adequately reflect the crime under international law.[463]

631. The Judges consider that the general enslavement element defined in paragraph 1 is inconsistent with the international concept of slavery articulated in the l926 Slavery Convention. We find no warrant for limiting "any or all of the powers attaching to the right of ownership" to situations involving commercial exchange or "similar deprivation of liberty."[464] We note that the commercial element is contrary to the 1926 Convention

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459 Update to the final report submitted by Ms. Gay J. McDougall, para. 47.

460 Update to the final report submitted by Ms. Gay J. McDougall, para. 50.

461 Rome Statute, Article 7(2)(c).

462 Report of the Preparatory Commission for the International Criminal Court, Addendum Part II: Finalised draft text of the Elements of Crimes, PCNICC/2000/Add.2, 6 July 2000.

463 The Elements Annex defines the *actus reus* of sexual slavery as:

> 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons or by imposing on them a similar deprivation of liberty.
> 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

464 While this aspect of the ICC definition contains potential flexibility (the "such as" language preceding the enumeration of "purchasing, selling, lending or bartering" and the footnote reference broadening the meaning of deprivation of liberty), the

which explicitly applies to "all acts involved in the capture, acquisition or disposal of a person with intent to reduce h[er] to slavery,"[465] and that the ICC Element's footnote linking the phrase "other deprivation of liberty" to "servile status," does not embrace all the possible contexts of enslavement encompassed by the l926 Convention.

632. While the ICC Elements can be applied to embrace the system of sexual slavery in this case, the narrow approach adopted may serve to exclude legitimate cases of enslavement, and particularly sexual slavery, in the future.[466] We note that the ICC Statute itself contains the broader definition drawn from the l926 Convention and that the Elements Annex is not intended to be binding on the future ICC but is specifically for guidance only.[467]

633. In sum, consistent with international law in effect during l937-1945 and with the principle of legality, this Tribunal endorses the jurisprudential approach of the *Kunarac* Judgement and the Special Rapporteur, which recognise that commercial exchange and deprivation of liberty are not mandatory reqirements of enslavement. We find that the control of a person's sexuality itself indicates a power attaching to the right of ownership, which is the defining aspect of the *actus reus* of the crime of sexual slavery. This is so regardless of whether sexual coercion is, as here, the dominant aspect of enslavement, or whether the sexual coercion occurs as incidental to or alongside other conditions that independently constitute enslavement.

(iv) Sexual Slavery v. Forced Prostitution: Correcting the Legal (Mis)Characterisation

634. The identification of sexual slavery as an international crime in our Charter and as a matter of international law today is, in our opinion, a long overdue renaming of the crime of (en)forced prostitution. As such, it responds to a very important concern expressed by the survivors of the "comfort system," which is that the term "forced prostitution" obscures the terrible gravity of the crime, suggests a level of voluntariness, and stigmatises its victims as immoral or "used goods." For the reasons set forth below, the Judges conclude that the crime historically denominated as "(en)forced prostitution" is more appropriately named "sexual slavery." We note initially, however, that the effect to obscure the offence of sexual slavery by calling it prostitution did not end with the end of the war. Japan's sympathizers who deny its responsibility for the systematic atrocities perpetrated against the "comfort women" and girls continue to characterise them as "prostitutes" and "camp followers" to assert both the voluntariness and immorality of the "comfort women," and thus Japan's own innocence.[468]

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clause is unnecessary. Not only is the emphasis on commercial exchange or similar deprivation of liberty antiquated, it is contrary to the lived experience of women and men coerced or deceived into enslavement situations and sexual slavery. We note, for example, the absence of such essential and non-commercial means of enslavement such as "using" another person as one's property.

465 Article 1(2) of the Slavery Convention.

466 The second element in the ICC definition, that "the accused caused such person or persons to engage in one or more acts of a sexual nature," is sufficiently broad to encompass situations of sexual slavery. The flaw here is in the failure to recognize that that exaction of sexual submission or services is itself a power attaching to the right of ownership.

467 ICC Statute, Article 9(1).

468 The Japanese government and military made efforts to create a subterfuge in order to make the "comfort system" appear as it were a form of voluntary prostitution. The very fact they were denominated "comfort women" suggests voluntary engagement in benevolent activity. Terminology such as "comfort stations," "houses of relaxation" and "brothels" to refer to the sexual slavery facilities, and "prostitutes," "camp followers," "hostesses," or "volunteers" to refer to the enslaved women, served to suggest that the "comfort stations" were houses of prostitution tantamount to the system of licensed

635. The problematic character of the term "forced prostitution" is illustrated by the fact that the Trafficking Convention of 1933 uses the term "immoral purposes" to refer to both voluntary and coerced prostitution.[469] The definition of the word "prostitute," historically associated primarily with women, is often referred to in terms such as "base behaviour," "promiscuous lewdness," and "purposeful evil."[470] In many countries, prostitution, the exchange of sex for money or other value, is a crime. Moreover, the epithet "prostitute" refers both to those who sell sex and to women who violate social rules against sex outside of marriage or who otherwise break the rules of proper female sexual conduct.[471] The Judges do not accept the negative connotations associated with the term "prostitute," but recognise that the epithet "prostitute" reflects profoundly discriminatory attitudes toward women.

636. Notwithstanding that forced prostitution involves essentially the same conduct as sexual slavery, it does not communicate the same level of egregiousness. The term "forced prostitution" tends to reflect the male view: that of the organizers, procurers, and those who take advantage of the system by raping the women. The term sexual slavery reflects the victims view: its focus is on the enslavement and the rape, and the term more accurately captures the enormity of subordination and suffering.

637. In defence against the charges of rape and sexual slavery in the "comfort women" system, it has been asserted elsewhere that the women participated voluntarily as prostitutes. We find the persistence of this assertion mind-boggling in light of the enormous amount of testimonial, documentary, and circumstantial evidence to the contrary. The Tribunal categorically and forcefully rejects the proposition that the women subjected to sexual slavery were voluntary prostitutes.

638. The testimony before this Tribunal demonstrates that, even after the ordeal some women survived, their suffering has been cruelly exacerbated as a result of their having been stigmatised as prostitutes. Instead of being welcomed back to their communities as victims of a terrible wrong, many survivors experienced indescribable shame and isolation. Naming the crime as sexual slavery is intended to contribute to lessening the misplaced stigma for these survivors as well as for future victims of such crimes.

639. Accordingly, the Judges find that the situation of the former "comfort women" and girls is more accurately termed "sexual slavery" rather than "forced prostitution."

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prostitution in Japan, and that the women worked there by choice. By thus attempting to sustain the myth that the "comfort women" system was a form of prostitution, the Japanese government and military sought to obscure its exploitative and coercive character as a system of sexual slavery.

469 See e.g. International Convention for the Suppression of the Traffic in Women of Full Age, 53 UNTS 49, 1933, Article 1. See also International Convention for the Suppression of White Slave Traffic, 1910, Articles 1 & 2; Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 96 UNTS 271, GA Res. 317 (IV) of 2 Dec. 1949. For an analysis, see Yayori Matsui, Women in the New Asia (1996), pp. 13-30; Lois Chiang, Trafficking in Women, in Women and International Human Rights Law (Kelly Askin & Dorean Koenig eds., vol I, 1999), pp. 321-364; Ann Lucas, Women and Prostitution, in Women and International Human Rights Law, *Ibid*. pp. 683-726.

470 The word is associated with reference to its common definition across different cultures. Webster's dictionary defines the verb "to prostitute" in wholly negative or derogatory terms: to surrender oneself or one's powers; to expose publicly or shamefully; to offer, as a woman, to a lewd use; to give up to promiscuous lewdness; to devote to based or unworthy purposes; to seduce. As an adjective, prostitute is associated with base purpose or ends, infamous, venal, corrupt, licentious, debased or subjected to evil.

471 See Anne Gallagher, Contemporary Forms of Female Slavery, in Women and International Human Rights Law (Kelly Askin & Dorean Koenig eds., vol. II, 2000), pp. 487-523; Ann Jordan, Commercial Sex Workers in Asia, in Women and International Human Rights Law, *Ibid*., pp. 525-586.

(e) Indicia of Sexual Slavery and Their Application to the "Comfort System"

(i) Introduction

640. The situations of slavery discussed in the IMT and IMTFE cases demonstrate some common or recurring characteristics of slavery. The *Kunarac* Judgement also contains a useful summary of many of the various and variable characteristics or indicia that constitute enslavement and sexual slavery. The indicia are not "elements" that must exist in all cases, but rather are a guide to determining when the status or condition of being enslaved exists. The presence or absence of any one indicium is not dispositive of whether a person has been enslaved. Thus, in discussing the pertinent indicia of sexual slavery here, we also address, where relevant, the significance of either their presence or absence to the determination that the "comfort system" was a system of sexual slavery.

(ii) Involuntary Procurement

641. The acquisition of slaves through a slave trade is a common but not essential indicium of slavery. A review of the case law reveals that a person may be acquired for enslavement in many ways, including abduction, force, coercion, purchase, exchange, deception, or false promises designed to induce a person to submit without resort to force. As discussed above, the IMTFE considered those recruited by either false promises or force to be slave labourers. The IMT also included as slave labourers persons recruited by propaganda and economic coercion, as well as by force and threats of reprisals against family members.

642. Initial consent does not preclude the possibility that consent may be withdrawn at any time. Thus, even if some women initially agreed to provide sexual services, once they were forced to provide the services, enslavement existed and they became part of the "comfort system".

643. The facts before us demonstrate beyond a reasonable doubt that most women were lured into the sexual slavery system through false promises of decent work, good wages and a better life. Some of the women and girls were purchased from families or traded themselves for money for themselves or their families and thereby became the "property" of the proprietor or the military. Others were dragged into the system involuntarily – abducted, conscripted, beaten, or otherwise terrified into submission.

644. With regard to the Japanese women who had worked as licensed prostitutes, the Judges note that some were conscripted, including when the authorities refused to allow them to turn in their licenses and avoid being taken. The facts also support a conclusion that those who initially agreed to provide sexual services to the soldiers became "comfort women" subjected to sexual slavery once they were required to provide services against their will. Because they did not consent to the conditions of enslavement and the utter lack of control over their sexual integrity that the "comfort system" required, their initial consent did not make the ensuing enslavement lawful. To the extent that some may have given knowing consent, their consent was subsequently vitiated by the conditions amounting to enslavement to which they were subjected and to which they objected. Once the women were not free to leave, free to dictate the nature and terms of their services, or free to refuse services, they were enslaved.

(iii) Treatment as Disposable Property

645. Perhaps the most common form of slavery emerging from the jurisprudence is the treatment of people as having value only as objects or things to be used, even to the extent of having their energy, health, or life depleted, for another's purposes or at another person's whim. This usually involves forcing people to work, thereby exploiting them; typically the slave is provided food and medical care only to the extent necessary to maintain their suitability to work. It may also involve working people to death or killing them or allowing them to die as a result of starvation or abuse when they are deemed to have outlived their usefulness. Treating a person as one's own property to use, keep, sell, lend, trade, discard or dispose of at will demonstrates one of the most characteristic forms of exercising powers of ownership.

646. Treating a person as one's sexual property is the epitome of objectification and possession, depriving the sexually enslaved person of even remnants of intimate space and personal integrity. It is a form of objectification disproportionately visited upon women and rooted in the fundamental failure to treat women as full persons. The testimonies and other evidence before us demonstrated that "comfort women" were sexually used to and well beyond the limits of their endurance, provided health care only to the extent it benefitted soldiers and often with lasting harm to the women, and were killed or abandoned when their usefulness had passed.

(iv) Restriction of Fundamental Rights and Basic Liberties

647. Another common feature of slavery is the restriction of fundamental rights and liberties, including freedom of movement and the exercise of free will. Describing the conditions for those enslaved by the Nazi forced labour program, the *Milch* Judgement gave the following list of basic freedoms, the denial of which, taken together or in extreme cases alone, may indicate slavery:

> [T]he deportees were deprived of the right to move freely or to choose their place of residence; to live in a household with their families, to rear and educate their children; to marry; to visit public places of their own choosing; to negotiate, either individually or through representatives of their own choice, the conditions of their own employment; to organize in trade unions; to exercise free speech or other free expression of opinion or to gather in peaceful assembly. They were frequently deprived of the right to worship according to their own conscience.[472]

648. While detention, confinement, or other deprivation of liberty of movement is a common characteristic of enslavement, the inability to leave need not be absolute nor physically enforced. Enslavement does not require armed guards, barbed wire, or physical restraints; rather it involves control – physical, mental, psychological, financial, etc. – exercised over people's lives. For example, in the *Kunarac* case, women and girls were unable to escape the houses in which they were kept as sexual slaves because the territory was surrounded by the opposition. In one instance, the perpetrators gave the women keys to the house in order to keep unauthorised outsiders from entering. In another situation, the door to the apartment where the women were held was left ajar when the men were

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472 Trial of Erhard Milch, United States Military Tribunal, Nuremberg, 20th December -17th April 1947, UNWCC, Vol. VIII, pp. 29-30 (*Milch* case); also excerpts in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law, Vol II, 1947, p. 773.

present. The Chamber in that case addressed the question of whether the possibility of escape negated detention or deprivation of liberty of movement. The Trial Chamber rejected the claim, stating:

> The Trial Chamber is satisfied that the girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were recaptured.[473]

649. Thus an enslaved person can have freedom of movement and yet be unable to exercise it fully because of danger, fear, or circumstances. While in many cases the perpetrator may create the danger through force, threat, coercion, psychological oppression or abuse of authority, in other situations, such as periods of armed conflict, mass violence, or the breakdown of law and order, the perpetrator may simply take advantage of the conditions existing which render a victim unable, either physically or psychologically, to leave or, in the case of sexual slavery, to refuse sex.

650. The facts before this Tribunal demonstrate beyond doubt that in many cases the "comfort women" and girls were physically and unlawfully detained or confined. Barbed wire and armed guards were common throughout the different regions. The survivors' testimony establishes that those who attempted to escape and failed were subjected to exceedingly cruel torture and public humiliation upon recapture designed to punish them and deter others from attempting to escape.

651. The survivors' testimony also indicates that in some cases, other physical, psychological, or logistical barriers operated to restrict movement, even when the women were not physically restrained or obstructed from leaving. Some women remained in their homes but had to leave it at night to provide sexual services to soldiers or officers who threatened them or their families if they refused. In many cases, the "comfort women" and girls were transported far from their homes. Even those "recruited" or abducted locally were typically removed from their communities and everything familiar and did not have the means to return. The "comfort stations" were often in or near war zones; the women, particularly if they were of a different ethnicity or nationality, were easily identifiable, did not speak the local language, or had no resources which would enable them to get to safety. Some were very young. The testimony of Witness Song Shin Do of Korea sums up the most common situation:

> Since I didn't know where I was, I didn't speak the language, I had no money and no idea how to take the train, and the area was surrounded with soldiers, escape was impossible. Even so, when the soldiers came into my room, horrifying and terrifying me, I cried and tried to run away. The manager slapped my cheek until my nose bled, withheld my food and shut me up in a narrow room. However, complete escape was impossible, and while crying, I became a tool for the sexual appetites of the soldiers.

652. The Judges agree with the analysis of the Trial Chamber in the *Kunarac* case that slavery does not depend on the use of physical restraint or the presence of formal signs of the slave status. Nor is it necessary to show that slaves are ill-treated,[474] although gross ill-

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473 *Kunarac* Trial Chamber Judgement, para. 750.

474 *Pohl* case, p. 970 ("involuntary servitude, even if tempered by humane treatment, is still slavery".)

treatment is almost always present. Rather, the key is whether circumstances exist which deprive a person unlawfully of the ability to exercise free will.

(v) Absence of Consent or of Conditions Under Which Consent Is Possible.

653. Consent is not a defence to conditions of enslavement. Apparent acquiescence or the lack of resistance is also irrelevant to a finding of sexual violence, rape or enslavement. The testimony powerfully demonstrates that women were forced to be the objects on which men enacted or extracted their sexual release. While some of the survivor-witnesses before this Tribunal indicated resistance at some point, we unequivocally reject the notion that lack of resistance is a sign of consent. In fact, passive compliance is often the best or only means of both physical and mental survival. In armed conflict situations especially, saying "no" is likely to be a futile gesture that places the victim in greater peril. The evidence before this Tribunal demonstrates that, where women resisted, it aggravated the brutality and their suffering. Thus, the Judges emphasise that passivity in no way precludes a charge of rape or sexual slavery when the elements of the crime are satisfied.

654. Indeed, in some cases, the victim may even initiate the sexual activity out of threat or fear. Although no testimony is before us in the present case to this effect, we have no doubt that this must have occurred on occasion in the "comfort system." We note that our views as to the irrelevance of active participation find support in the *Kunarac* Judgement, which found that a woman who initiated sex with an accused out of fear did not consent to the sex:

> The Trial Chamber is satisfied that is has been proved beyond a reasonable doubt that D.B. subsequently also had sexual intercourse with Dragoljub Kunarac in which she took an active part by taking of[f] the trousers of the accused and kissing him all over the body before having vaginal intercourse with him.
>
> The Trial Chamber accepts the testimony of D.B. who testified that, prior to the intercourse, she had been threatened by "Gaga" that he would kill her if she did not satisfy the desires of his commander, the accused Dragoljub Kunarac. The Trial Chamber accepts D.B.'s evidence that she only initiated sexual intercourse with Kunarac because she was afraid of being killed by "Gaga" if she did not do so.[475]

655. The Judges agree with the wisdom of the Judges in *Kunarac* that active participation does not under these circumstances carry an inference of consent. Accordingly, the Judges emphasise that there is no shame in submission or compliance, as it is rather an entirely reasonable, and often inevitable, response to sexual aggression.

(vi) Forced Labour

656. Forced labour is also a frequent indicum of slavery. Common characteristics include work without pay or other remuneration, the existence of fictitious labour contracts, token compensation, or other attempts to make the system or recruitment appear voluntary or legitimate. The validity of any asserted agreements must be strictly scrutinised in light of the conditions imposed. In the *Milch* case, the Tribunal stated,

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475 *Kunarac* Trial Chamber Judgement, para. 750.

> It was sought to disguise the harsh realities of the German foreign labor policy by the use of specious legal and economic terms, and to make such policy appear as the exercise of conventional labor relations and labor law. The fiction of a "labor contract" was frequently resorted to…which implied that foreign workers were given a free choice to work or not to work for Germany's military industry. This, of course, was purely fictitious, as is shown by the fact that thousands of these "contract workers" jumped from the trains transporting them to Germany and fled into the woods.[476]

657. The presence of payment does not convert forced into voluntary labour. While lack of payment, or lack of adequate payment, is another common indicum of slavery, providing some form of compensation for the labour provided does not of itself negate the existence of slavery. The Nuremberg Tribunal stated that, even though "theoretically the workers were paid, housed and fed…and even permitted to transfer some of their savings back to their native country," the circumstances in which they were held and treated compelled a conclusion that they were enslaved.[477] In particular, in that case, the evidence showed that:

> restrictive regulations took a proportion of their pay; the camps in which they were held were unsanitary; and the food was often less than that necessary to give the workers strength to do their jobs. [In certain cases] the employers were given authority to inflict corporal punishment and were ordered, if possible, to house them in stables, not in their own homes. They were subject to constant supervision by the Gestapo and the SS, and if they attempted to leave their jobs they were sent to correction camps or concentration camps.[478]

658. Thus, inability to refuse work, inappropriate labour conditions, and restrictions on freedom demonstrated slavery, notwithstanding the presence of compensation.

659. The fact that payment does not negate a finding of slavery is underscored in the case of sexual slavery, since rape itself violates the fundamental human right to personal bodily integrity, and rape is the primary way that powers of ownership over a person are exercised in sexual slavery. The existence or non-existence of payment is irrelevant to this determination. Furthermore, as payment is no more than a "specious legal and economic term" used to disguise the reality of slavery, giving victims compensation often causes them additional harm by attempting to obscure the wrong done to them.

660. Thus, that some "comfort women" were given payments by the Japanese military in no way precludes a finding that they were enslaved. In some cases, the payments were a façade since the owners of the houses extorted all or most of it back from the women for so-called expenses. However, even if some women retained a portion of the money, it is the absence of free will to refuse to provide sex that is central to our conclusion that their condition was one of sexual slavery. Payment, even of prevailing wages, does not and cannot negate the crime of rape or slavery.

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476 *Milch* case, p. 38.

477 IMT Judgement, p. 59.

478 IMT Judgement, p. 59.

(vii) Discriminatory Treatment

661. Slavery is typically a product of persecution and discrimination against a targeted group. The experiences of people under the chattel slavery system in the Western Hemisphere are instructive. Under that system, African people were slaves and, thereby, devalued and treated as property, subjected to reproductive and intergenerational bondage, usually denied the right to maintain family and community relationships, denied legal personality, and generally subjected to inhumane treatment and abusive conditions.[479] It was a system that restricted virtually every aspect of liberty. It also involved both forced labour for enslaved women and men, and sexual and reproductive servitude for many of the women. Women were bought and sold through advertising as to their sexual and reproductive characteristics.[480] As a parallel to the "comfort women" system under consideration here, enslaved African women were used as objects of sexual pleasure and release for the "owners" and overseers and were regarded as sexual objects rather than individuals possessing human rights and inherent dignity.

5. Findings as to Rape and Sexual Slavery in the Context of the "Comfort System" (Counts 1-2)

662. The above represent some of the most common, but by no means the only, indicia exhibiting the essential qualities of slavery, namely, the exercise of any or all of the powers of ownership over a person. The horrendous circumstances to which the women were subjected reflected many indicia of slavery. The women were treated as objects and used as property, deprived of their free will and liberty, and forced to provide sexual services to the Japanese military. The survivor-witnesses before this Tribunal testified consistently to being enslaved by force, deception or other involuntary and coercive means, either directly by soldiers or government officials or with their connivance and participation. They all endured a series of rapes over months and years, were not free to leave or refuse to provide the services, and suffered abusive and inhumane conditions of detention.

663. Moreover, kidnapping or "recruiting" and transporting the women and girls, which was condoned, authorised, and often supervised by Japanese military personnel, was in itself a form of slave trade, and in violation of customary international law prohibiting the slave trade and trafficking in women and children. The Judges also note that a large number of the victims of the military sexual slavery system were in fact girls.[481]

664. The evidence establishes conclusively that the Japanese government and military exercised the powers attaching to the right of ownership over the girls and women in the "comfort system." The Japanese military and their civilian agents asserted ownership over the women by procuring them, by confining them, by demanding their obedience and subservience, by subjecting them to repeated rapes and other forms of sexual violence, by otherwise torturing, mutilating and punishing them for disobeying them, by subjecting them to invasive and inhumane medical examinations, by exposing them to sexually transmitted diseases and subjecting them to harmful medical treatments, by subjecting

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479 A. Yasmine Rassam, Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law, 39 Va. Journal of Int'l Law (1999), p. 303.

480 Deborah Gray White, Ar'n't I a Woman? (1985).

481 The 1924 Declaration of the Rights of the Child, adopted unanimously by the League of Nations, recognises that "mankind owes to the child the best it has to give" and in particular the child "must be protected against every form of exploitation." Article 46 of the 1907 Hague Regulations also includes the right not to have children forcibly taken away.

them to unwanted pregnancies, by forcing them to have abortions or give up their children, and by killing them or abandoning them when their services were no longer of use. Each of these acts and all of these acts were violations of international legal standards. The crimes most assuredly amount to rape and sexual slavery.

665. The Japanese military and government officials and their agents committed the crimes of rape and sexual slavery against girls and women as a part of, and in the course of, their aggressive war waged in the Asia-Pacific. These crimes were widespread – occurring on a vast scale and over a huge geographic area – and systematic – being highly organised, heavily regulated, and sharing common characteristics. They were committed against women and girls who were civilians.

666. In sum, the Tribunal finds that the Japanese military and civilian authorities committed rape and sexual slavery as a crime against humanity against tens of thousands of women and girls forced into sexual servitude to the Japanese military as part of the "comfort system" during World War II.

667. Whether the individuals accused incur individual or superior responsibility for these crimes will be addressed *infra*.

6. Findings as to Rape in the Context of Mapanique (Count 3)

668. The evidence establishes that on November 23, 1944 the Japanese army attacked Mapanique and systematically raped an estimated 100 women as part of the wholesale destruction of the barrio, during which the community was shelled, houses were looted and burned, and men were publicly tortured and slaughtered. According to the evidence, the Japanese military planned and conducted a punitive and subjugation raid on Mapanique. During this raid, the soldiers raped all of the young women and teenage girls of the barrio whom they could find. Many older women were raped as well.

669. The rapes to which the witnesses testified followed a consistent pattern which included separating the males from the females, torturing and killing the males, forcing some 100 girls and women to go to the Red House, and then raping them. Many victims were also raped in their homes or enroute to the Red House. Most were gang raped or raped by a series of perpetrators, often in front of others. The pattern reveals that the rapes were committed during the course of the subjugation effort, whether predetermined or emerging in the course of the attack.

670. The rapes were both widespread and systematic, and were committed as part of an attack on civilians during an armed conflict. The acts charged in Count 3 of the Indictment satisfy the legal requirements for the crime against humanity of rape. Thus the Tribunal finds that the rapes at Mapanique constituted crimes against humanity.

671. Finally, in considering the relevant facts and law in this case, the Judges opine that, although it was not charged as such in the Common Indictment, confining women at the *Bahay na pula* for the purpose of repeatedly raping them may in some cases also constitute sexual slavery. The soldiers held women against their will. They raped many women multiple times and the women could not know if or when they would be raped again or free again. The testimony given to this Tribunal on the count of sexual slavery shows that the sexual slavery facilities in the Philippines were most often military garrisons, and the soldiers frequently abducted women and girls for rape during the course of military raids. These facts suggest that rape and sexual slavery outside the

formal establishment of the "comfort system" was a known part of Japanese military operations. Indeed, the formal system of rape and sexual slavery instituted by the Japanese government and military would provide tacit approval of rape and sexual slavery committed outside the formalised system.

672. We now turn to an examination of the law to determine whether the accused incur individual or superior responsibility for the crimes alleged against them in the Common Indictment.

PART IV - INDIVIDUAL CRIMINAL RESPONSIBILITY

A. INTRODUCTION: RELEVANT PROVISIONS

673. Under Article 3 of the Charter, an accused can be found criminally responsible if he or she:

- individually "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" within the jurisdiction of the Tribunal; or

- as a superior or military leader, "knew, or had reason to know, that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent or repress their commission or submit the matter to the competent authorities for investigation and prosecution."

674. Thus, consistent with domestic and international application of the law, an accused can be found criminally liable for a crime, in this case rape and sexual slavery, even if he or she did not physically commit the crime. Indeed, in the present case, none of the accused is alleged to have physically perpetrated the crimes charged in the Common Indictment. Article 3(1) of the Charter establishes individual criminal liability for one's own acts or omissions that contribute to or participant in the criminal conduct, whereas Article 3(2) establishes a superior's criminal liability for failing to prevent or punish crimes committed by subordinates.[482] The principle of superior responsibility enshrined in Article 3(2) is also known in contemporary terms as "command responsibility" or "superior authority." While the doctrine of "superior responsibility" is a more recent articulation designed to cover both civil and military leaders, similar terms were used during the post-World War II Trials, including the IMTFE, as discussed below.

675. In keeping with the duty of this Tribunal to apply the law as it existed at the time the acts were committed, we have had to determine whether the elements of contemporary formulations of criminal responsibility were part of international law during the time the crimes were committed. Below, we examine the development of the law applicable to holding individuals and superiors criminally responsible for international crimes, particularly war crimes and crimes against humanity. We ultimately conclude that the two strands of responsibility identified in Article 3(1) and (2) of the Charter reflect, albeit in somewhat different terminology, the bases of criminal responsibility recognised and applied by the IMTFE, and that these formed part of international law as it existed at the time of the commission of the offences.

676. Just as the IMTFE brought charges only against high level government or military leaders, here too each of the accused is a person holding a high level position. Because all accused held positions of significant authority within the Japanese military or government hierarchy, we have decided to consider superior responsibility under Article 3(2) before considering individual responsibility under Article 3(1).

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[482] These terms are also found in Article 6 of the ICTR Statute, Article 7 of the ICTY Statute, and Article 25 of the ICC Statute. See also Articles 5-6 of the IMTFE Charter, Articles 6-7 of the IMT Charter, and Article II of CCL10.

B. ARTICLE 3(2) – RESPONSIBILITY OF A COMMANDER OR OTHER SUPERIOR

677. Article 3(2) of this Tribunal's Charter recognises that in certain circumstances superiors can be held liable for failing to prevent or punish acts committed by subordinates. Superior responsibility is based on recognising the utility of requiring commanders to enforce the rules of war and the reality that war crimes are often committed by soldiers acting under the authority or with the support or acquiescence, explicit or implicit, of their commanders. Not only would it be unjust in such circumstances for the commander to evade responsibility for actions he or she authorised or permitted, it would also undermine the goal of deterrence to immunise commanders from criminal liability for the acts of persons subject to their authority and control. It further imposes greater incentive on superiors to properly train their troops and to educate them about the laws and customs of war.

678. The historical origins of command or superior responsibility pre-date the Second World War.[483] The Lieber Code, promulgated by the Union government during the United States' Civil War and recognised as a source of humanitarian rules later adopted by international agreement and custom, required commanders to suppress illegal acts committed by their subordinates and to punish the offenders.[484] In the 1907 Hague Convention IV, Article 43 of the Regulations requires the appropriate military authority to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[485] The 1919 post-WWI War Crimes Commission Report further confirmed the principle of command or superior responsibility by recommending the establishment of a tribunal to prosecute alleged Axis war criminals who "ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war."[486]

679. Hence, the laws and customs of war increasingly acknowledged that commanders and other superiors had a duty to exercise adequate control over their subordinates, and recognised that under certain circumstances, the superior should be held criminally responsible for failing to prevent or halt crimes committed by subordinates or failing to punish the perpetrators thereof.

680. Distinct standards of responsibility were applied by and reflected in the jurisprudence of post-World War II Tribunals. Article 5 of the IMTFE Charter empowered the Tribunal to hold responsible "leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy" to commit crimes against humanity or other crimes within the jurisdiction of the Tribunal. Such persons were liable "for all acts performed by any person in execution of such plan." Pursuant to Article 5, the IMTFE considered the responsibility of the accused under various counts of the Indictment, and it found some of the accused guilty of crimes charged under Count 54 of the Indictment for "ordering, authorizing, and permitting the commission of" crimes.

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483 For a detailed discussion of the evolution of this doctrine, see Major W.H. Parks, Command Responsibility for War Crimes, 62 Military Law Review (1973), p. 1-11; Leslie C. Green, Superior Orders and Command Responsibility, 27 Can. Y.B. Int'l L. (1989), p. 167.

484 General Order No. 100 was issued in 1863. It is commonly called the Lieber Code. See Article 71. Article 71 does not explicitly provide for criminal liability for failing to prevent these crimes.

485 Convention Respecting the Laws and Customs of War on Land, The Hague, 18 Oct. 1907 [Hague Convention IV]. See also Article 3 of the Hague Convention IV.

486 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties – Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, reprinted in 14 American Journal Int'l Law (1920), pp. 95, 121.

It also convicted some of the accused under Count 55 of the Indictment for failing "to take adequate steps to secure the observance and prevent breaches of conventions and law of war in respect of prisoners of war and civilian internees." Thus, without expressly articulating the distinctions, Count 54 imports individual responsibility, and Count 55 imports superior responsibility.

681. The IMTFE did not always delineate its reasons for assigning guilt based on one count as opposed to the other, nor did it consistently differentiate between these two distinct theories of responsibility. Nevertheless, the IMTFE Judgement did demonstrate that two standards of responsibility were applied: one for crimes involving individual responsibility (i.e., Count 54 of the IMTFE Indictment), akin to Article 3(1) of this Tribunal's Charter, and the other for crimes involving superior responsibility (i.e. Count 55 of the IMTFE Indictment), akin to Article 3(2) of the present Charter.

682. The theories of criminal responsibility developed by and applied in the post-World War II trials were reinforced through subsequent conventions, protocols, and draft codes which extracted the primary principles from the Tribunals' decisions. More recently, the ICTR and ICTY have analysed and applied them vis-à-vis their own Statutes. The contemporary jurisprudence and formulations will be referred to insofar as it clarifies and is consistent with the law as it existed at the time of the Nuremberg and Tokyo Trials.

1. General Standard

683. Although the concept of superior responsibility existed as far back as 500 B.C., the extent and nature of that responsibility was not clearly delineated.[487] One of the major accomplishments of the Nuremberg and IMTFE trials and related procedures was that they provided more precision concerning the scope of the duty that superiors had over subordinates, and when and to what extent a superior incurred criminal responsibility for crimes committed by persons under their authority or control.[488] The *Yamashita*, *High Command,* and *Hostages* Judgements in particular are considered leading authorities on command responsibility. The Judges note, however, that these Tribunals did not apply the standards with complete consistency.[489]

684. In examining the laws and customs of war prior to World War II, as well as the case law of the Nuremberg and Tokyo Trials, we conclude that the basic elements to be proved before it is possible to find a commander or other superior criminally responsible for crimes committed by a subordinate consist of the following elements:

a. A superior-subordinate relationship existed such that the superior had a duty, whether formal or informal, to exercise authority or control over his or her subordinates;

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487 See especially William Parks, Command Responsibility for War Crimes, 62 Military L. Review (1973), p. 45 (examining the concept of superior and command responsibility from Tzu through the post-World War II trials.) See also Stephen Heder with Brian D. Tittemore, Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge, War Crimes Research Office and Coalition for International Justice, July 2001, at Appendix – Individual Criminal Responsibility, pp. 110-125.

488 See, e.g., William J. Fenrick, Should Crimes Against Humanity Replace War Crimes?, 37 Columbia Journal Transnational Law, 1999, p. 767.

489 While the *High Command* and *Hostage* cases were Control Council Law No. 10 cases held in Nuremberg under Ordinance No. 7 within the American Zone of Occupation, *Yamashita* was a post-WWII trial held by the United States Military Commission in the Asia-Pacific.

b. The superior knew or had reason to know that crimes were being, were about to be, or had been committed by subordinates; and

c. The superior failed to take appropriate measures within his or her power to prevent or suppress the crimes or to punish the offender(s) thereof.

2. Superior-Subordinate Relationship

685. To be held criminally responsible for the acts or omissions of one's subordinates, the commander or other superior[490] must have been in a formal or informal position of authority or control over the offender, had the duty to prevent or halt their commission of crimes or to punish the offenders, and subsequently failed in this duty.

686. The mandate to ensure proper control and treatment in a systematic way applies to all commanders and other superiors. Both civilian and military leaders have the duty to prevent crimes, halt their commission, and punish the perpetrators, so long as they possess sufficient authority or power. Indeed the IMTFE convicted not only military commanders and officers, such as generals and chiefs of staff, for superior or command responsibility, but it also convicted civilian government officials, such as prime ministers and foreign ministers, for failing to take reasonable measures to maintain order and safety, as their superior position of authority required.[491]

687. The duty is contingent on the commander or superior having sufficient power or authority to exercise adequate control over the perpetrators of the crime. Such power can be either informal or formal, *de facto* as well as *de jure*.[492] Because the authority need not be formally prescribed, a commander may be held responsible for crimes committed by troops who are not under his or her immediate command, but who act under his or her authority.[493] In the *Hostages* case, for example, the Court stated that the responsibility of a "commanding general of occupied territory" is co-extensive with his area of command, which prevents him or her from "say[ing] that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility."[494] It explained the scope of the duty of commanders in occupied territory as thus:

> [I]n his capacity as commanding general of occupied territory, [the accused] was charged with the duty and responsibility of maintaining order and safety, the protection of the lives and property of the population, and the punishment of crime. This not only implies a control of the inhabitants

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490 The *Celebici* Appeals Chamber defines a superior as "one who possesses the power or authority in either a *dejure* or *defacto* form to prevent a subordinate's crime and to punish the perpetrators of the crime after the crime is committed." *Celebici* Appeals Chamber Judgement, para. 192.

491 IMTFE Judgement, defendants HATA, p. 446, Kimura, p. 452, Muto, p. 455, Koiso, p. 453, Hirota, pp. 447-48, Shigemitsu, p. 458. A ICTY decision asserts that civilian superiors can be held responsible under the doctrine only to the extent that their degree of authority over their subordinates is akin to that of military commanders. *Celebici* Appeals Chamber Judgement, para. 378.

492 See, e.g., *Celebici* Trial Chamber Judgement, para. 354.

493 See, e.g., *Celebici* Appeals Chamber Judgement, para. 198; *Kordic* Trial Chamber Judgement, para. 406.

494 Trial of Wilhelm List and Others, United States Military Tribunal, Nuremberg, 8th July 1947-19th February 1948, UNWCC, Vol VIII, p. 69 ("*Hostages* case") (p. 1254-1259 in Aristarchus version).

> in the accomplishment of these purposes, but the control and regulation of all other lawless persons or groups.[495]

688. The IMTFE also found that, whether military or civilian, those who have a duty to prevent ill-treatment of those in their custody must establish and secure a "continuous and efficient" system appropriate for such purposes. Such persons become responsible for ill-treatment of prisoners and breach their duty if they fail to establish an appropriate system, or if, having established such a system, they do not ensure it is effectively implemented. Superiors must continue to take steps within their power to prevent crimes.[496] The IMTFE Judgement held that a civilian or military leader has "a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application."[497]

689. The *High Command* case compared the duty of preventing and punishing a crime in an occupied territory to the duty with regard to treatment of prisoners of war, emphasising the positive and preventative nature of this duty. The Judgement stated that "[t]he situation is somewhat analogous to the accepted principle of international law that the army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment."[498]

690. In the *Yamashita* case, the U.S. Military Commission held that as the Japanese commander of the Philippines during the invasion of Manila, YAMASHITA failed in his duty to exercise adequate control over his troops, who had committed widespread rape, murder, and pillage in Manila. He failed in this duty by not halting the crimes. The Court held:

> [A]ssignment to command military troops is accompanied by broad authority and heavy responsibility. . . . It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[499]

691. Where the system of authority is rigidly hierarchical, an accused will not generally be held responsible as a superior if he or she does not have the ability to countermand superiors. At the same time, the superior's title does not necessarily determine responsibility: more indicative is the nature and scope of his or her power. Hence, chiefs of staff on occasion have been found to have sufficient authority to be held liable for the actions of soldiers, while other chiefs of staff have not, depending on their functions or place within the chain of command.[500] For instance, the IMTFE declined to convict defendant Muto of certain charges when he was a staff officer subordinate to General

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495 *Hostages* case, p. 1255.

496 IMTFE Judgement (Roling), p. 30.

497 IMTFE Judgement (Roling), pp. 29-32.

498 See *High Command* case, pp.542-547 (Aristarchus version).

499 *Yamashita* case, p. 486.

500 *Hostages* case, pp. 1974-1978.

MATSUI, on the basis that he did not exercise sufficient authority to have countermanded the General's course of conduct. By contrast, it did convict Muto in his position as chief of staff to General YAMASHITA, after finding that position allowed him the ability to "influence policy."[501] It held that Muto "shared responsibility" for the "campaign of massacre, torture and other atrocities" which occurred during his tenure as chief of staff.[502] In referring to the conviction of Muto, and emphasising that the "influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure", the Rwanda Tribunal noted that the "Tokyo Tribunal reasoned that influential power, which is not power of formal command, was [a] sufficient basis for charging one with superior responsibility."[503]

692. The *High Command* case, on the other hand, rejected the application of command responsibility to chief of staff Foertsch because he lacked "authority in the field", and to chief of staff von Geitner because of his "want of authority…to prevent the execution of unlawful acts."[504] The War Crimes Commission, in its *Law Reports of Trials of War Criminals*, stated that "[a]n examination of the relevant facts…shows that the chiefs of staff who were held guilty took a closer and more willing and active part in the offences charged" than did Foertsch and von Geitner.[505] Thus, the different findings of responsibility as to the chiefs of staff affirm that it is a person's power of control or authority, whether *de jure* or *de facto*, and not the leader's title, that determines responsibility.[506]

693. The scope of a superior's duty depends also on the nature of his responsibilities.[507] For example, in the *Milch* case, the Tribunal found that the Under State Secretary of Reich

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501 IMTFE Judgement (Roling), p. 455.

502 The Tribunal found that as Chief of Staff to YAMASHITA, Muto was in a position to *influence* policy and rejected his defence that he knew nothing of the atrocities, finding such an assertion "wholly incredible." IMTFE Judgement (Roling), p. 455.

503 Prosecutor v. Alfred Musema, Judgement and Sentence, ICTR-96-13-T, 27 January 2000, TCI, paras. 139-140 (*Musema* Trial Chamber Judgement).

504 *High Command* case, (Aristarchus version). Von Geitner was acquitted even though he signed or initialed his commander's orders as an indication of their correctness as to form because this was deemed insufficient to establish criminal liability. Among the reasons command responsibility was not applied to Foertsch was his attempt to "procure rescission of certain unlawful orders and the mitigation of others."

505 Law Reports, Vol. VIII, p. 90.

506 The *High Command* case, p. 82, emphasised, particularly in relation to chiefs-of-staff:

> The rank and care with which staff officers were selected show in itself the wide scope of their responsibilities which could, and in, many instances undoubtedly did, result in the chief of staff assuming many command and executive responsibilities which he exercised in the name of his commander.
>
> One of his main duties was to relieve his commander of certain responsibilities so that such commander could confine himself to those matters considered by him of major importance. It was of course the duty of a chief of staff to keep such commander informed of the activities which took place within the field of his command insofar at least as they were considered of sufficient importance by such commander. Another well accepted function of chiefs of staff and of all staff officers is, within the field of their activities, to prepare orders and directives which they consider necessary and appropriate in that field and which are submitted to their superiors for approval.
>
> As stated heretofore, the responsibility allowed a chief of staff to issue orders and directives in the name of his commander varied widely and his independent powers for exercising initiative therefore also varied widely in practice. The field for personal initiative as to other staff officers also varied widely. That such a field did exist, however, is apparent from the testimony of the various defendants who held staff positions and in their testimony have pointed out various cases in which they modified the specific desires of their superiors in the interests of legality and humanity. If they were able to do this, the same power could be exercised for other ends and purposes and they were not mere transcribers of orders.

507 Invoking this principle as to commanders, the 1977 Additional Protocol I to the 1949 Geneva Conventions finally codified the duty of superiors to take measures in exercising authority over subordinates. Article 87, "Duty of Commanders", stipulates:

Air Ministry, who dealt primarily with aircraft production, could not be expected to concern himself with matters relating to medical experimentation.[508] Yet, in the *Medical* case, Karl Brandt, a leading physician, could be held culpable because "[o]ccupying the position he did and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps."[509]

694. The ICTY *Celebici* case stresses that power, even when not accompanied by a formal position of command, can be a sufficient basis for imposing command responsibility. The Tribunal states that "the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto,* as well as *de jure*, position as a commander."[510] The *Celebici* formulation is to assign superior responsibility when it has been shown that the accused had "effective control" over subordinates.[511] Such control has been defined as "a material ability to prevent or punish criminal conduct, however that control is exercised."[512] We find this consistent with the post-World War Tribunal's approach.

3. The Accused "Knew or Had Reason to Know" that Crimes Were Being Committed

695. After determining that an accused had a duty to control or punish subordinates and possessed power or authority to do so, it must be assessed whether the accused possessed the requisite *mens rea* to be held criminally responsibility for acts committed by subordinates.

696. Consistent with international law, Article 3(2) of the Charter requires that the accused knew or had reason to know of crimes committed by subordinates before criminal liability can attach. In the case before the Tribunal, it would need to be proven that the accused knew or had reason to know that crimes of sexual slavery and rape were being committed and that these crimes formed part of a widespread or systematic attack directed against a civilian population.

> The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
>
> In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations . . .
>
> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach . . . to initiate such steps as are necessary to prevent such violations . . . and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Additional Protocol I, art. 87.

508 *Milch* case, pp. 1781-1785.

509 *Medical* case, Vol. VII, p. 63.

510 *Celebici* Appeals Chamber Judgement, para. 370.

511 See, e.g., *Celebici* Appeals Chamber Judgement, para. 196; *Blaskic* Trial Chamber Judgement, para. 302.

512 *Celebici* Appeals Chamber Judgement, para. 256.

697. The IMTFE convicted superiors for crimes committed by their subordinates if the evidence confirmed that the accused knew or should have known the crimes were being committed or were about to be committed and the superior did not take necessary and reasonable steps to suppress the crimes.[513]

698. We note that different standards as to the *mens rea* are discernible in the case law following World War II. For example, in the *Yamashita* case, a U.S. Military Tribunal found that the commander's failure to prevent or punish the crimes was a violation of the laws or customs of war, despite the fact that the accused was relatively far from the theatre of action and out of direct communication with his troops. Some scholars and jurists have interpreted this as applying strict liability, while others consider that the facts of the case satisfy a "knew or should have known" standard.[514] In contrast, although Admiral Toyoda was charged with violations of the laws or customs of war for tolerating crimes, including rape crimes, committed by his troops, the U.S. Military Commission held that because it was not established conclusively that Toyoda knew the crimes were being committed, he could not be convicted of command responsibility.[515] In the Nuremberg Tribunal, the *High Command* case found criminal responsibility where the commander had knowledge of the offences and acquiesced or "criminally neglected" to interfere with the commission of crimes.

699. In *Krstic*, the ICTY emphasised that "the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he knew or had reason to know of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability."[516]

700. Negligence in failing to acquire information is another way the Tribunals have expressed the "knew or had reason to know" standard. Although the defendant in *Toyoda* was acquitted of superior responsibility charges, the Commission articulated the standard quoted recently by the ICTY in the *Tadic* case:

> In the simplest language it may be said that this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to

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513 IMTFE Judgement (Roling), defendants HATA, p. 446, Hirota, pp. 447-448, Kimura, p. 452, MATSUI, p. 454, transcript p. 49815; Muto, p. 455, transcript p. 49820; and Shigemitsu, p. 458.

514 See, e.g., Major Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 Mil. L. Rev. (2000), pp. 155, 181 (stating that the evidence indicates that Yamashita was not held to a strict liability standard.); Andrew D. Mitchell, Failure to Halt, Prevent, or Punish: The Doctrine of Command Responsibility for War Crimes, 22 Sydney L. Rev. (2000), pp. 381, 390 (stating the standard applied in Yamashita was unclear); William H. Parks, Command Responsibility for War Crimes, 62 Mil. L. Rev. (1973), pp. 1, 37 (stating that strict liability was not imposed); Richard L. Lael, The Yamashita Precedent: War Crimes and Command Responsibility (1982), p. 123 (concluding that Yamashita was held to a strict liability standard.) According to the US Supreme Court: "While this standard does not impose a threshold requirement of knowledge or reasonable anticipation of atrocities prior to the existence of a duty, some limitation on liability is found in the duty 'to take such measures as were within his power and appropriate under the circumstances.'" *In re Yamashita,* 327 U.S. 1, 16 (1946).

515 *Toyoda* case, p. 5006.

516 *Krstic* Trial Chamber Judgement, para. 369.

> continue, he has failed in his performance of his duty as a commander and must be punished.
>
> The Tribunal found that a superior is criminally responsible for breaching the "power of command" if he "fails to take such appropriate measures as are within his power…to prevent acts which are violations to the laws of war".[517]

701. In the *High Command* case, the Court explicitly found that failure to properly exercise "command authority" to prevent atrocities constituted a violation of the commander's duty under the laws of war.[518] Further, in the *Hostages* case, the Court found that "under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law."[519]

702. In the majority of cases, the post World War II tribunals found the accused liable for crimes committed by their subordinates if, based on their position, their power, and the circumstances existing at the time, they knew of or were put on notice about the actual or potential commission of the crimes but they nevertheless failed to take action to determine if crimes were about to be committed or were being committed, and if so, to take measures to halt the crimes.

(a) Actual Knowledge

703. If the Tribunal finds the accused to possess actual knowledge of the crimes, then the *mens rea* requirement is fulfilled. Proof of actual knowledge can be direct or imputed after being inferred from the circumstances.

704. The World War II trials found a superior had actual knowledge of the crimes if he witnessed their commission, received superior orders relating to them, or was present at meetings in which the crimes were discussed.[520] With regard to the latter, the IMTFE found that TOJO Hideki had knowledge of atrocities, in part because he presided at meetings where "protests against the behavior of Japan's troops" and "[s]tatistics relative to the high death rate" were discussed.[521] Koiso, as Prime Minister, was also found by the IMTFE to have actual knowledge, and part of the evidence against him was his presence at meetings in which war crimes were discussed.[522] Likewise, in the *Pohl* case, the Tribunal found a defendant to have knowledge of the commission of crimes based, in part, on his presence at a meeting discussing the logistics of a concentration camp routine.

705. In addition, actual knowledge can be inferred from the circumstances. Factors that can indicate whether the accused had knowledge include, but are not limited to: the notoriety of the crimes; their widespread, massive, systematic, or prolonged occurrence; the

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517 *Toyoda* case, pp. 5005-5006.

518 *High Command* case, p. 1261.

519 *Hostages* case, pp. 507-515 Aristarchus version.

520 The *High Command* case identified superior orders as a source of actual knowledge. pp. 1259-1264, Aristarchus version. The *Toyoda* case identified witnessing the commission and being informed thereof as sources of actual knowledge.

521 IMTFE Judgement (Roling), pp. 457-463. The defendant Sato was also found to have actual knowledge of the atrocities because he was present at meetings of Bureau Chiefs in the War Ministry. But he was not held criminally responsible because he did not have the power to take action to stop the crimes: "he could not initiate preventive action against the chief." P. 457.

522 IMTFE Judgement (Roling), p. 453.

proximity of the accused to the crime scene; the military's hierarchical structure; and the functioning of the military, including its training, methods of communication, reporting, and information gathering methods.

706. Depending on the facts of each case, many of the factors that support an inference of actual knowledge may also support a finding that the accused should have known or had reason to know of the crimes, and vice versa.

707. The notorious, widespread, massive, systematic, and prolonged occurrence of crimes is particularly indicative in inferring the accused's knowledge.[523] For example, in considering the culpability of HATA, the IMTFE found that the fact "[t]hat crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge."[524] Additionally, it convicted defendant Koiso under Count 55 by inferring he had actual knowledge of the crimes:

> When Koiso became Prime Minister in 1944 atrocities and other war crimes being committed by the Japanese troops in every theatre of war had become so notorious that it is improbable that a man in Koiso's position would not have been well informed either by reason of their notoriety or from interdepartmental communications.[525]

708. The U.S. Military Tribunal, in the *Toyoda* case, explicitly included the great number of offences as a factor in inferring knowledge. It defined "constructive knowledge" as consisting of:

> the commission of such a great number of offences within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offences or of the existence of an understood and acknowledged routine for their commission.[526]

709. Thus, the magnitude of the crimes has lead courts to conclude that an accused must have known they were occurring, and, therefore, to infer actual knowledge. Indeed, in *Yamashita*, the Military Commission emphasised that "the crimes were so extensive and wide-spread, both as to time and area, that they must have been wilfully permitted by the Accused, or secretly ordered by the Accused."[527]

710. In the *Hostages* case, the Tribunal noted that a commander's job is to be informed of events occurring under his authority, and stated:

> It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such

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523 We note that the ICTR Trial Chamber in *Akayesu* found that both knowledge and intent could be inferred from the massive and/or systematic nature of the genocide.

524 IMTFE Judgement (Roling), p. 30.

525 IMTFE Judgement (Roling), p. 453.

526 Because it is arguable that the language "must have known" is a stricter standard than "had reason to know," we use this definition as demonstrative of the acceptance of inference of knowledge based on the widespread occurrence factor and not as the actual standard we will apply.

527 The UN War Crimes Commission, Vol IV, pp. 34-35, quoting the Yamashita Commission.

> occurrences result occasionally because of unexpected contingencies, but they are unusual.[528]

711. In the same case, the Tribunal concluded that the defendant Dehner had actual knowledge of the unlawful shootings of hostages and prisoners because his headquarters called attention to the fact that an order authorizing such shootings was still in force.[529]

712. The Tribunals also took into consideration proximity to the crimes or circumstances that logically put an accused on notice of the crimes. For instance, in the *Pohl* case, the Tribunal found an accused to have knowledge of the crimes committed in a labour camp under his jurisdiction because inmate workers, whose poor physical state was obvious, daily passed by the building in which he had his office.[530]

713. The nature of the military hierarchy and the accused's position therein can evince actual knowledge. As noted above, the high ranking positions of the defendant Koiso in the IMTFE and the defendants in the *Hostages* case were significant factors in making an inference of knowledge when the crimes were widespread and notorious.

714. An accused's *de jure* or *de facto* position and his or her corresponding responsibilities can provide the basis for inferring knowledge. The Tribunal in the *High Command* case, after considering the nature of the relationship between a commander and his chief of staff, concluded that orders signed for the commanding officer by a chief of staff "are presumed to express the wishes of the commanding officer."[531] In addition, in the Batavia Judgement, because Defendant III's position put him in charge of all "brothels," it was determined that everything that happened there would have been reported to him.[532]

715. The Tribunals also took into consideration the military's effectiveness, capacity and breadth of communication, and intelligence-gathering in deciding whether to infer actual knowledge. For example, in the *Hostages* case, the Tribunal noted the efficiency of the Nazi army's communications and intelligence-gathering systems in their conclusion that high-ranking officers received information promptly.[533]

716. We also note that the standard applied in the post-war Tribunals has been adopted by the ICTY, which has emphasised that "the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he 'knew or had reason to know' of the offences and failed to act to prevent or punish their occurrence."[534]

(b) "Had Reason to Know"

717. Pursuant to Article 3(2) of this Tribunal's Charter, even if it is not adequately established that the accused actually knew of the rape and the sexual slavery of the "comfort women" or, as to the Emperor HIROHITO and YAMASHITA, of the rapes in Mapanique, we

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528 *Hostages* case p. 1259-1264, Aristarchus version. See also the Tokyo Tribunal's treatment of Muto, IMTFE Judgement (Roling), p. 455.

529 *Hostages* case, pp. 1985-1987.

530 *Pohl* case, p. 2439.

531 *High Command* case.

532 *Batavia* case.

533 *Hostages* case, p. 644.

534 *Kordic* Trial Chamber Judgement, para. 369.

must consider the alternative principle, established under international law, that a superior "had reason to know" of these crimes.

718. Post-war jurisprudence applied the principle that a superior should have known of the crimes if something should have put him on notice to inquire further about possible crimes. In addition, the circumstances themselves may give rise to the duty to know.

719. With respect to the concept of inquiry notice, the information that puts the accused "on notice" need not prove by itself that crimes exist. It is enough that the information indicates the need to inquire further in order to ascertain whether subordinates are or were involved in criminal activity.

720. The IMTFE found Foreign Minister Mamoru Shigemitsu criminally responsible for his failure to prevent crimes or punish the perpetrators because, having received reports of atrocities, "the circumstances, as he knew them, made him suspicious that the treatment of the prisoners was not as it should have been."[535] Although he "bore overhead responsibility for the welfare of the prisoners," he failed to adequately investigate whether crimes were being committed, and indeed they were.[536]

721. In the *Hostages* decision, the Tribunal found the defendant List liable for executions carried out by units under his authority but not tactically subordinate to him because reports of the executions were given to him, and this provided him with sufficient notice of the crimes.[537] Significantly, it held that a commander could not claim ignorance of such reports sent to headquarters: failure to appraise oneself of the substance of reports or to require additional reports if necessary constituted a dereliction of duty.[538] Further, the defendant Rendulic was held criminally responsible for failing to investigate after receiving reports lacking sufficient information about the treatment of hostages. The Tribunal held he should have made inquiries in order to ensure that the "hostage and reprisal practices [were] in conformity with the usages and practices of war."[539] It thus found Rendulic guilty of acquiescing in the crimes because he failed in his duty to investigate as required under international law.[540] Sometimes the duty to investigate regardless of notice overlaps with inquiry notice. It appears in this case that the Tribunal was holding that, because of the situation at hand, the superior had a duty to remain informed of the treatment of hostages, and that this duty was breached further when he still failed to make inquiries after receiving insufficient information as to their treatment.

722. The large-scale or systematic commission of crimes can be considered sufficient "notice" to find that an accused "should have known" or should have taken steps to learn about the crimes. The IMTFE found the defendant HATA guilty of superior responsibility under Count 55 stating:

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535 IMTFE Judgement (Roling), p. 458.

536 IMTFE Judgement (Roling), p. 458.

537 *Hostages* case, pp. 1961-1969. In the same case with regard to the defendant Kuntze, the Tribunal found that documentary evidence showed that he had notice of reports of shootings of Jews and Roma/gypsies by his subordinates. Because there was no evidence that the defendant acted to stop such unlawful practices, the Tribunal found that he had acquiesced in them. *Hostages* case, pp. 1969-1974.

538 *Hostages* case, pp. 1271-1276 (in Judgement against defendant List) [Aristarchus version].

539 *Hostages* case, pp. 1978-1985.

540 *Hostages* case, pp. 1969-1974; defendant Rendulic, *Hostages* case, pp. 1978-1985.

> HATA [was] in command of expeditionary forces in China [and] atrocities were committed on a large scale by the troops under his command and were spread over a long period of time. Either HATA knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provisions for learning whether [his] orders for the humane treatment of prisoners and civilians were being obeyed.[541]

By contrast, the IMTFE did not convict the accused Togo Shigenori under Count 55 because, "[a]t the time of his resignation atrocities committed by the Japanese troops had not become so notorious as to permit knowledge to be imputed to him."[542]

723. In the *Hostages* case, the Court stated that the commanding General of an occupied territory, in order to fulfil his duty of "maintain[ing] peace and order" and "protect[ing] lives and property," may need:

> adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence.[543]

724. In the *Pohl* case, the Tribunal described one defendant's assertions that he lacked knowledge of crimes committed in labour camps under his jurisdiction as "assumed or criminal naivete" because "it was his duty to know."[544] Another defendant was acquitted because the crimes committed by subordinates were not of sufficient magnitude or duration to put him on notice.[545]

725. The post-World War II Tribunals found that a defendant had reason to know of criminal activity committed by subordinates where his command position gave him the duty to know or find out what was happening in his area of command. Thus, asserting lack of knowledge will not have success when the superior has a duty to know and fails in his duty to adequately supervise subordinates.

726. Criminal negligence was also applied by the Tribunals to defendants who failed in their duties to know about crimes committed by subordinates. As stated in the *Roechling* case, a CCL10 trial in the French Zone of Occupation of industrialists who had *de facto* power and influence to prevent the mistreatment of forced labourers by the Gestapo, "[n]o superior may prefer this defence indefinitely; for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence."[546] The criminal negligence standard was also applied in the *High Command* case, in which the Tribunal held that for a superior to be held criminally responsible for acts of subordinates, there must be a "personal dereliction",

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541 IMTFE Judgement (Roling), p. 446 (emphasis added). The IMTFE noted in its separate verdict for defendant Muto, that "widespread" atrocities were committed by the troops under his command "for which MUTO shares responsibility." p. 455.

542 IMTFE Judgement (Roling), p. 461.

543 *Hostages* case, p. 1271.

544 *Pohl* case, p. 64.

545 *Pohl* case, defendant Tschentscher, p. 63.

546 The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v Herman Roechling and Others, XIV Law Reports, Appendix B, p. 1075, para. 1092 (*Roechling* case).

> [t]hat can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.[547]

727. We understand the 'wanton, immoral disregard' language to indicate that guilt can be established where acquiescence results not only from knowing failure but also from a 'willful blindness' on the part of the commander.[548]

4. Failure to Take Necessary and Reasonable Measures

728. In sum, a commander or superior with the requisite power of control over subordinates who knew or had reason to know of the commission of crimes is criminally responsible for crimes under the doctrine of superior responsibility if – in the language of this Tribunal's Charter – he or she then "failed to take the necessary and reasonable measures to prevent or repress their commission or submit the matter to the competent authorities for investigation and prosecution." Thus, to be found culpable, each accused here must have failed to take necessary and reasonable measures available to prevent or repress rape and sexual slavery, or punish perpetrators thereof.

729. While it is not required that the superior be successful in the prevention of crimes or the repression of their commission, the duty is discharged only if he or she has made adequate efforts under the circumstances of each situation. Token, limited, or insincere efforts will generally not suffice. For instance, a commander cannot hide behind assurances that crimes are not being committed or have ceased when other circumstances should have alerted the commander to the fact that those assurances are false or questionable. The IMTFE found Japanese Foreign Minister Hirota guilty of having "disregarded his legal duty to take adequate steps to secure the observance and prevent breaches of the laws of war."[549] After receiving reports of atrocities in Nanking, he contacted the War Ministry, which assured him the atrocities would cease. However, because reports of atrocities continued to come in for at least a month, the Tribunal found that Hirota was "derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end" to the crimes.[550]

730. A commander also fails to fulfil his or her duty to secure performance of the laws of war when punitive or disciplinary measures are not sufficiently severe or effective in relation to the seriousness of the crimes committed. In the *Hostages* case, the Tribunal found that certain measures taken by the defendant Felmy against subordinates who had committed crimes were inadequate. For example, he recommended that the officer in charge of a regiment which had massacred two villages be subjected to "disciplinary action (the

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547 *High Command* case, pp. 73-74. Considering the duties of a commander in overseeing occupied territory, the Tribunal further stated to be held criminally responsible, the "occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal." pp 76-77.

548 Major Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 Military Law Rev. (2000), pp. 155, 182-83.

549 IMTFE Judgement (Roling), p. 448.

550 IMTFE Judgement (Roling), p. 448.

method of trying minor offences)" and never followed up to see what action had been taken.[551]

731. When the potential or actual gravity of the harm is high, the level of effort required to discharge this duty is correspondingly high. In the *Hostages* case, the Court dismissed defendant Lanz's excuses that "as tactical commander he was too busy to give attention to the matter" and convicted him for failing to take any action on the illegal shooting of hostages and reprisals against prisoners.[552] The Judgement noted that "the unlawful killing of innocent people is a matter that demands prompt and efficient handling by the highest officer of any army."[553]

732. Moreover, preventing and punishing crimes under the direct command of others is the duty of the highest level government and military officials. For example, the IMTFE found that Prime Minister TOJO "knowingly and willingly refused to perform his duty to enforce performance of the laws of war" despite his attempted explanation that "a commander in the field is not subject to specific orders from Tokyo." That Tribunal rejected his attempt to disconnect himself from any duty to stop the crimes.[554]

733. The Judges are mindful that international law does not oblige a commander or superior to perform the impossible: he or she may only be held criminally responsible for failing to take such measures as are within his or her power or authority. At the same time, in some circumstances it may be necessary to take certain steps to prevent incurring criminal liability for acts of others, including superiors. For example, the IMTFE concluded that Foreign Minister Shigemitsu should have resigned rather than allow certain crimes to be committed in the territory under his command.[555] Only by resigning could he "quit himself of responsibility which he suspected was not being discharged."[556]

734. The level of effort required to discharge one's duty to prevent, repress, or punish crimes also depends on the nature of a superior's responsibilities. As noted above, if a commander is responsible for the well-being of civilians, for example, in a prison camp, then the duty to prevent crimes against such civilians is heightened.

735. It is clear that commanders and other superiors have a duty to administer a system that prevents and punishes the commission of crimes against civilians, including in detention camps and in occupied or annexed territories that are under their command. There is an indisputable duty on military and civilian leaders to take necessary and reasonable measures to prevent crimes, including slavery and rape, committed by subordinates. This duty is even greater in situations where the leaders have created the situation that poses extraordinary risks upon persons entrusted to their care, such as persons in the "comfort stations." This duty also requires that commanders and other superiors take all necessary measures to prevent the abduction or deceptive recruitment of girls and women into the "comfort stations" and their mistreatment, including rape and sexual slavery, while confined as prisoners therein.

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551 *Hostages* case, pp. 1990-1993.

552 *Hostages* case, defendant Lanz, pp. 1993-1996.

553 *Hostages* case, defendant Lanz, pp. 1993-1996.

554 IMTFE Judgement (Roling), p. 458.

555 IMTFE Judgement (Roling), p. 458.

556 IMTFE Judgement (Roling), p. 458.

736. In concluding this discussion of command and other superior responsibility under Article 3(2) of this Tribunal's Charter, it is important to distinguish superior responsibility for omissions from the criminal responsibility of commanders and superiors as individuals. The ICTY clarifies that the liability of superiors attaches because of omission, not positive acts of the accused. At the same time, it makes clear that positive acts and certain omissions of the accused may also permit a finding of individual criminal culpability under Article 3(1) of the Charter, rather than or in addition to superior responsibility under Article 3(2) of the Charter. [557]

737. The *Kordic* Trial Chamber distinguished the situations in which superiors should be charged with individual instead of superior responsibility, stating:

> The Trial Chamber is of the view that in cases where the evidence presented demonstrates that a superior …[]exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by Article 7(1) [individual responsibility]. Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).[558]

738. Thus, it is only when a superior fails to prevent, suppress, or punish acts committed by subordinates that liability incurs under Article 3(2). For his or her own acts or omissions, the most appropriate charge is for individual responsibility under Article 3(1). The legal standards of individual responsibility will be examined below.

C. ARTICLE 3(1): INDIVIDUAL RESPONSIBILITY FOR PLANNING, INSTIGATING, ORDERING, AIDING OR ABETTING CRIMES

739. The accused in the present case have also been charged with planning, instigating, ordering, or aiding and abetting the rapes and sexual slavery, pursuant to Article 3(1) of the Charter. These are all recognised as forms of "participation" in the crimes. In addition to physical perpetrators, individuals can be held responsible for crimes which they did not commit physically, but to which they contributed directly (such as by ordering) or indirectly (such as by abetting).[559]

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557 See, e.g., *Kordic* Trial Chamber Judgement, para. 369.

558 *Kordic* Trial Chamber Judgement, para. 371.

559 The ICTY in the *Krstic* Trial Chamber Judgement defined various forms of individual criminal responsibility, as covered in Article 7(1) for individual responsibility of its Statute:

- "Planning" means that one or more persons design the commission of a crime at both the preparatory and execution phases;
- "Instigating" means prompting another to commit an offence;
- "Ordering" entails a person in a position of authority using that position to convince another to commit an offence;
- "Committing" covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law;
- "Aiding and abetting" means rendering a substantial contribution to the commission of a crime; and
- "Joint criminal enterprise" liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in [the Statute]. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.

Krstic Trial Chamber Judgement, para. 601 [citations omitted].

740. Article 5(c) of the IMTFE Charter, granting the Tribunal jurisdiction over crimes against humanity, imposed responsibility upon persons in the position of the accused as follows: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." Pursuant to Articles 5(b) and 5(c) of the IMTFE Charter, the Indictment charged many of the accused under Count 54 with "ordering, authorising and permitting" war crimes and crimes against humanity.

741. Article II of CCL10 also contains a provision for assessing individual responsibility, stipulating that a person "is deemed to have committed a crime" if that person "(b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission."

742. The legal authority for and criteria of the various forms of participation required to incur individual responsibility under the terms of the Charter will be discussed below.

1. Ordering, Planning, and Instigating

743. A superior is individually liable for crimes committed pursuant to his or her own orders. This is derived from basic principles of complicity, and makes particular sense in the context of a military hierarchy, which carries out its operations by means of command and discipline. A superior who issues orders that a crime be carried out is utilising the available structure of command to mobilise potentially huge numbers of subordinates, depending on the commander's own position within the hierarchy, to participate in the commission of the crime.

744. Liability for issuing orders to commit crimes against humanity can be found in the Turkish court-martial trials of the Turkish leaders deemed responsible for the Armenian genocide. Established at British insistence, the Turkish Court tried the lieutenant governor and police commander of a district from which Armenians had been deported *en masse*. In finding them guilty, the Court found that the two accused had:

> issued awesome orders to their subalterns at the time of the deportations of the Armenians. Acting under these orders, their underlings…without regard to ill-health, treating men, women and children alike, organised them into deportation caravans.
>
> [I]llegal orders were handed down for the murder of the males…[T]hey were premeditatedly, with intent, murdered, after the men had had their hands tied behind their backs…. The officials then practiced all methods of murder…Nor did they make any attempt to prevent further killings…
>
> All these facts are against humanity and civilization. They are never compatible in any manner to human considerations.[560]

745. Both the Nuremberg and Tokyo Tribunals, as well as the subsequent proceedings against alleged German and Japanese war criminals, held certain defendants criminally liable for having ordered crimes. Most defendants in those cases, as in the present one, were high

[560] Quoted in Bass, Stay the Hand of Vengeance, p. 125.

level civilian and military officials, rather than the soldiers who actually committed the atrocities by their own hands.

746. A superior may also be responsible for orders issued under his authority, including those prepared by a staff officer. The *High Command* case states,

> While the commanding officer may not and frequently does not see these orders, in the normal process of command he is informed of them and they are presumed to represent his will unless repudiated by him.[561]

747. A chief of staff is also liable for orders which he issues under the commander's authority if he drafts the order (directly or through subordinates) or takes personal action to see that it is executed, i.e. if he is "more than a mere transcriber" of the order.

748. Moreover, a commander is also liable for "ordering" a crime if the order is directed to him and he passes it down the chain of command, knowing its criminal nature. Then he or she is considered to have committed a morally culpable act which carries legal sanction. However, if the order is directed to a commander's subordinates, and is merely passed through the commander's headquarters, the commander may not be individually liable for "ordering" the crimes, although he or she may still be liable under a theory of "command responsibility" if he knew or should have known of the crimes and failed to take steps to prevent them.[562]

749. The ICTY Chambers have addressed some of the issues related to proof. The *Blaskic* Trial Chamber found that the existence of an order may be proved through circumstantial evidence; there is no requirement that an order be in writing.[563] The *Kordic* Trial Chamber made clear that, for individual responsibility to attach, no superior-subordinate relationship needs to be established; it is sufficient if the accused possessed the authority to order and gave a criminal order.[564]

750. In the present case, the accused commanders and other superiors can be held individually liable for ordering a crime charged to the extent that they had the authority, *de jure* or *de facto*, to issue an order, that circumstantial evidence proves the existence of an order, or that staff officers subject to their authority issued an order that established or maintained the "comfort system" or otherwise resulted in the rape or sexual enslavement of "comfort women" or, for two of the accused, rapes at Mapanique.

2. Aiding and Abetting

751. The factual findings may also give rise to a conclusion that the accused aided or abetted the rapes and sexual slavery. When examining the case law of the Tribunals after the Second World War, the Judges are somewhat hampered by the imprecise and sometimes inconsistent use of terminology. The phrases "concerned in the killing" and "permitted the commission of Conventional War Crimes"[565] have been used by the Tribunals to indicate aiding and abetting, although on occasion the terms are used to reflect co-perpetration. While the concepts of "aiding and abetting" are often fused, the discussion

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561 *High Command* case, p. 1261.

562 *High Command* case, section: XI: Judgement: Orders, Part 1.

563 *Blaskic* Trial Chamber Judgement, para. 281.

564 *Kordic* Trial Chamber Judgement, para 388.

565 IMTFE Indictment, Count 54.

below distinguishes them for the purpose of more clearly identifying what constitutes a finding of responsibility under these categories. Following the useful discussion of these terms by the ICTR Trial Chamber in the *Akayesu* case, we concur that "aiding" means giving assistance to someone, while "abetting" involves facilitating the commission of an act by being sympathetic thereto.[566]

(a) Aiding: Actus Reus

752. The post World War II Tribunals found criminal responsibility for aiding on the basis of the following actions: participating in the running of a prison camp that constituted a system of ill-treatment of prisoners; procuring Zyklon B gas, constructing gas ovens, arranging for trucks to transport inmates to the gas chambers, and alerting the camp bureaucracy as to the imminent arrival of transports at the Auschwitz concentration camp; standing by, as members of the German guard, while civilians injured and killed American pilots and paraded them through the streets; denouncing French citizens involved in the resistance movement and later arrested and tortured or deported; driving the lorry which carried victims to the woods for execution; digging the grave for the victims; accompanying superior officer to look for suitable sites for shooting; and lighting the oven of a concentration camp crematorium.

753. In each case, the actions of the accused had a material effect on the perpetration of the crime. Thus, in order for a person to be found to aid a crime, some level of assistance is necessary. This principle was confirmed by an ICTY Trial Chamber in the *Tadic* case, which concluded that the post-war Tribunals found criminal responsibility based on these actions because they had a material effect on those of the principals.[567] Significantly, the acts did not have to be a necessary condition of the crime without which the crime would not have occurred. In other words, the act of the aider does not have to be a *conditio sine qua non* of the crime, but it does need to have contributed in some significant way to its commission.

754. In the *Dachau Concentration Camp* case, a U.S. Military Tribunal found that once the existence of a criminal system has been established, a person can be criminally liable for participating in this system.[568] Participation was generally found if the accused held a high level position or if he physically committed crimes, such as beatings, torture, or execution.

755. While aiding crimes, which are not part of a "criminal system," must have a material effect on the commission of the crime, any participation in a criminal enterprise is sufficient for a finding of guilt.[569] This seems to indicate that any participation in a criminal enterprise may, depending on the circumstances, be sufficient to have a material effect on a crime, although more current jurisprudence indicates the participation would need to have a "direct and substantial effect."

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566 *Akayesu* Trial Chamber Judgement, para. 484.

567 The ICTY states that the defendant's actions must "make a significant difference to the commission of the criminal act by the principal." *Tadic* Trial Chamber Judgement, para. 233. See also *Kunarac* Trial Chamber Judgement, para. 391, which required a "substantial effect."

568 *Dachau Concentration Camp* case, pp. 1312-1314. See also *Kvocka* Trial Chamber Judgement, which held that Omarksa prison camp was a joint criminal enterprise, and anyone who knowingly participates in the enterprise is liable if the participation is significant.

569 We note that this conclusion was also reached by the *Furundzija* Trial Chamber Judgement, para. 213.

756. In *Tadic*, the accused, a low level actor who nonetheless wielded power through his bullying and violence, was found guilty of cruel treatment for aiding and abetting a crime when his presence at the scene was deemed to have had a "direct and substantial effect" on the commission of the crime, namely forcing a detainee to bite the testicles of another detainee.[570] Also, in another ICTY case, the *Furundzija* Trial Chamber held that an accused who verbally interrogated a victim while another raped her aided and abetted the rape through his presence, acts, words, and omissions.[571] The Rwanda Tribunal has made similar findings, for instance, by holding the accused Akayesu responsible for rape as a crime against humanity for aiding and abetting the crimes when his presence and words were found to have facilitated the rapes.[572] In each case, the person was convicted of more than mere presence – his acts or omissions were found to have had a substantial effect on the crime's commission.

(b) Abetting: Actus Reus

757. As noted above, the *actus reus* of abetting involves facilitating the commission of a crime being sympathetic thereto. This can take the form of either an act or an omission. If the accused fails to take action to prevent a crime, he or she may be found criminally liable for facilitating that crime. For example, in the *Wagner* case, a conviction was rendered against a defendant found to have failed to grant the "privilege of mercy" to persons unlawfully condemned to death by the Nazi Special Courts despite the fact that he had the power to do so.[573] While some cases rest almost entirely on the failure of the defendant to take action, in other cases, the defendant's lack of action, combined with affirmative acts of assistance, forms the basis for a finding of guilt.[574]

758. Where the post-World War II Tribunal decisions based a finding of guilt solely on failing to act, thus on omissions, the Courts tended to look at whether the accused was in a position to influence the crime or the outcome. The inaction of a person in an influential position may have the effect of facilitating the crime, particularly if he or she has the ability to prevent it. In some cases, the omission may be intended to give "silent approval" to the crime.[575] For example, the IMTFE found Muto guilty under Count 54 for giving silent encouragement when he permitted atrocities to occur when he was in "a position to influence policy" as Yamashita's chief of staff.[576] In addition, that Tribunal found that Tojo Hideki "knew and did not disapprove of the attitude" that soldiers could ignore the rules of warfare and could mistreat prisoners of war.[577]

759. Likewise, in the *Einsatzgruppen* case, the Tribunal found the defendant Fendler guilty based on inaction: although Fendler surmised that the procedure of condemning the Communist party functionaries to death was "too summary," he did nothing about it, even though his objection would have been influential.[578] Being present at a crime scene,

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570 *Tadic* Trial Chamber Judgement, paras. 689, 726.

571 *Furundzija* Trial Chamber Judgement, para. 166.

572 *Akayesu* Trial Chamber Judgement, at paras. 461.

573 Trial of Robert Wagner and Six Others, Law Reports of Trials of War Criminals, Vol. III, p. 25 (*Wagner* case).

574 *Rohde* case, defendant Wochner, p. 54; IMT trial, defendant Frick.

575 *Einsatzgruppen* case, the defendant Fendler, p. 209, defendant Walter Haensch, p.184.

576 IMTFE Judgement (Roling), p. 455. While we have noted above that this verdict reflects an application of superior responsibility, we also understand it as an example of abetting as a matter of individual responsibility.

577 IMTFE Judgement (Roling), p. 463.

578 *Einsatzgruppen* case, the defendant Fendler, p. 209; see also Defendant Walter Haensch, p.184.

though not required for criminal responsibility to attach,[579] can be sufficient to constitute abetting if the accused is in a position of influence and respect. In this situation, the approving spectator gives encouragement and moral support – which constitutes the *actus reus* of the crime – if his or her omissions have a significant effect on the commission of the crime.[580]

760. Whether as an approving spectator or supporter from afar, the accused's position of influence and corresponding power is pertinent to the determination of whether abetting occurred. In contrast to the above examples, certain defendants were acquitted of individual responsibility because they were not in a position to "control, prevent, or modify" criminal activities of which they had knowledge.[581] In the *Einsatzgruppen* case, for example, some of the defendants were acquitted of individual responsibility if his low rank failed "to place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation."[582] As noted previously, the IMTFE acquitted Muto for his failure to stop the atrocities at Nanking because, as staff officer to General MATSUI, he was not in a position of sufficient influence to alter the outcome.

761. It follows then that abetting the commission of a crime does not require tangible or active assistance or facilitation, nor does it require active contribution or participation. Rather, encouragement and moral support alone, whether active or passive, through either action or inaction, can constitute the *actus reus* of abetting where the person occupies a position of trust or influence.

(c) Aiding and Abetting: Mens Rea

762. It is also necessary to ascertain the level of knowledge or intent that is required for a person to be found guilty of aiding and abetting a crime against humanity.

763. The jurisprudence of the post World War II Tribunals demonstrates that, in order to be found guilty of aiding or abetting a crime, it is not necessary to share the intent of the direct perpetrator or principal. The *Furundzija* Trial Chamber considered whether it was necessary for the accomplice to share the *mens rea* of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime was sufficient to constitute *mens rea* for aiding and abetting the crime. After surveying post World War II caselaw, the Chamber concluded:

> [I]t is not necessary for an aider and abettor to meet all the requirements of *mens rea* for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in

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579 See Trial of Karl Adam Golkel and 13 Others, British Military Court Wuppertal, Germany, 15-21 May 1946; *Rohde* case, p. 54.

580 See *Auschwitz Concentration Camp* case, defendant Mulka. The ICTY discussed this in the *Furundzija* Trial Chamber Judgement, para. 215.

581 *Einsatzgruppen* case, defendants Ruehl and Graf, p. 243; see also defendant Foertsch and defendant von Geitner, Trial of Wilhelm List and Others *("Hostages* case*"),* in Substantive and Procedural Aspects of International Criminal Law, Volume II Part 2, Documents and Cases (2000, Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds.) p. 1977; United States v. Kurt Goebell et al. (the *Borkum Island* case).

582 *Einsatzgruppen* case, defendants Ruehl and Graf, p. 243. Note however that the defendants were not acquitted of all crimes alleged against them.

> itself be perfectly lawful; it becomes criminal only when combined with the principal's unlawful conduct.[583]

764. In short, the aider or abettor need not share the *mens rea* of the principal. However, he or she must know that his or her actions or omissions would assist the principal in the commission of the crime. For instance, in the *Einsatzgruppen* case, the accused Klinghoefer was found to have known that his locating, examining, and handing over of the lists of Communist functionaries to his Einsatz unit would assist them in executing those on the list of persons to be exterminated.[584]

765. The post-war jurisprudence supports a finding that, in certain circumstances, knowledge of the intended criminal conduct can be presumed, and thus, it can be inferred. We note that the ICTY interpreted the *Justice* case in this way. The *Tadic* Trial Chamber observed that, in the post-World War II trial, the Court had concluded that either actual or presumed knowledge must be shown:

> [I]f an accused took part with another man with the knowledge that the other man was going to kill, then he was as guilty as the one doing the actual killing. Again, in the Trial of Joseph Altstötter and Others ("Justice case"), the fact that the accused had specific knowledge was treated as essential. The judgement repeatedly confirmed this, stating that the various people charged *knew or had knowledge, or must be assumed to have had knowledge*, of the Nacht und Nebel plan, of Hitler and his associates' use of the German legal system, and of the plans or schemes for racial persecution. In several places, the judgement presumed knowledge on the part of an accused.[585]

766. Thus, in applying the law to the facts of this case, it is necessary to examine whether the accused had direct or inferable knowledge that the "comfort women" were forced, sold, or deceived into slavery, forced to have sex against their free will, and/or that they were held and maintained under conditions constituting enslavement.

767. The Judges will next determine whether there is evidence before this Tribunal to hold the accused criminally responsible as individuals or as superiors for rape and sexual slavery, as charged in the Common Indictment.

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583 *Furundzija* Trial Chamber Judgement, para. 243.

584 *Einsatzgruppen* case, pp. 204-205; also see the *Rohde* case, *Schonfeld* case, and *Zyklon B* case.

585 *Tadic* Trial Chamber Judgement, para. 675 (emphasis added).

PART V – LEGAL FINDINGS AND VERDICTS

A. INTRODUCTION: SUMMARY OF THE CHARGES AND EVIDENCE RECEIVED

768. Counts 1 and 2 of the Common Indictment charge nine accused – Emperor HIROHITO, ANDO Rikichi, HATA Shunroku, ITAGAKI Seishiro, KOBAYASHI Seizo, MATSUI Iwane, TERAUCHI Hisaichi, TOJO Hideki, and UMEZU Yoshijiro – with criminal responsibility under international law for the crimes of sexual slavery and rape as crimes against humanity in accordance with Article 3 of the Charter of this Tribunal.

769. Count 3 charges Emperor HIROHITO and YAMASHITA Tomoyuki with criminal responsibility for the rape of women at Mapanique as a crime against humanity.

770. As to all Counts, the Common Indictment alleges that rape was committed by persons acting pursuant to an order, plan, or policy of the accused, or with their assistance, instigation, encouragement, or acquiescence. To find such participation would establish the accused's individual responsibility under Article 3(1) of this Tribunal's Charter.

771. In addition, under Article 3(2) of the Charter, a military commander or other superior may be held criminally responsible for the crimes of sexual slavery and rape committed by persons over whom they exercised *de jure* or *de facto* control by virtue of their position or authority.

772. The two different bases of individual criminal responsibility enunciated by Articles 3(1) and 3(2) of the Charter each impose different legal requirements, as recognised and applied by the post-war Tribunals and as summarised below.

773. To incur Article 3(1) individual responsibility, the accused must have participated through ordering, planning, committing, instigating, aiding, or abetting crimes. In addition, the Prosecutor must show that the accused had knowledge of the crime. With regard to proving Article 3(1) responsibility for rape and sexual slavery in the "comfort system," the evidence must show that the accused not only knew about the existence of the "comfort stations," but also knew that the "comfort system" involved criminal activity. This standard could be met if, for example, it could be shown that the accused knew that recruitment for the stations was deceptive or coercive or that the women were not providing sexual services willingly.

774. If it is demonstrated that the accused had the requisite *mens rea*, then, for Article 3(1) individual responsibility to attach, the Tribunal must determine whether the accused planned, instigated, ordered, aided, or abetted the "comfort system" by their acts or omissions. These are all commonly recognised as forms of "participation." Thus, the Article 3(1) individual responsibility *actus reus* here would require that the accused participated, through any of the aforementioned acts or omissions, in the "comfort system" or in the rapes at Mapanique.

775. By contrast, to incur Article 3(2) command or superior responsibility, the evidence must show that the accused knew or had reason to know that subordinates may be involved in criminal activity, and the superior failed to take necessary and reasonable measures to prevent or suppress the crimes and punish the perpetrators.

776. For Article 3(2) superior responsibility to attach once the mental element is satisfied, it is left to the Trial Chamber to determine whether the accused was a superior who failed in

his duty to prevent or punish the crimes committed by subordinates. Because there is no evidence which suggests that any meaningful attempts were made by the accused to prevent or punish crimes related to the "comfort system" or the rapes in Mapanique, the sole remaining issue for Article 3(2) liability is to determine whether the accused had a duty to prevent the commission of the crimes by subordinates.

777. We have previously found the powerful and frank testimonies of the survivors of rape and sexual slavery to be credible and accept their testimony concerning the crimes committed both inside and outside of the "comfort system" as trustworthy. The evidence demonstrates the frequent occurrence of rape accompanying the Japanese military aggression, including in Mapanique, as well as the existence of "comfort stations" or facilities for rape and sexual slavery in virtually all regions.

778. In addition to the testimonies of the survivors, the Tribunal heard the testimony of two perpetrators, former Japanese soldiers who confessed to participating in or otherwise encouraging and facilitating the rape of women inside and outside the "comfort station" system. Their testimony confirmed that the military encouraged a culture of sexual violence toward "comfort women" and local women. The perpetrator-witnesses authenticated the accusation that sexual violence inside and outside the "comfort system" was committed on a selective and racist basis, targeted against women whose rape or abduction would not, in the Japanese's view, generate objection, outrage, or revenge. We found this testimony, consisting of admissions of their own criminal conduct, to be credible.

779. The Tribunal also heard and accepted the testimony of a number of experts addressing the question of the roles and responsibility of the Japanese military and civilian officials for the system of military sexual slavery known as "comfort women" and its integral relation to the Japanese military aggression, as well as its sources in the prevailing misogynist and racist imperial culture. The experts assisted us by providing and interpreting a small but significant number of official Japanese documents that they and others had been able to rescue, notwithstanding the massive destruction of documents before surrender and the continued concealment of documents by the Japanese and certain Allied governments. Their testimony and the documents both confirm the testimony of the survivors with respect to the character of the sexual slavery system and shed further light upon the involvement of high-level political and military officials in its design, execution, and maintenance. Experts in international law also provided useful information on appropriate legal standards in effect during the war. The Judges were further assisted in their understanding of the profound and lasting nature of the trauma inflicted upon the "comfort" women by the testimony of psychological experts and sociologists.

780. In this section, we will first summarise the findings relevant to the assessment of criminal responsibility for the system of military sexual slavery charged in Counts 1 and 2 of the Common Indictment. We will then apply the criteria of Article 3(2) and Article 3(1) criminal responsibility to the nine accused herein of those charges. Secondly, we will summarise the evidence and findings relevant to the assessment of the criminal responsibility of the accused Emperor HIROHITO and YAMASHITA with respect to the rape of women at Mapanique charged in Count 3 of the Common Indictment.

B. COUNTS 1 AND 2 OF THE COMMON INDICTMENT

1. Rape and Sexual Slavery in the "Comfort System" as Crimes Against Humanity

(a) Summary of Findings Relevant to the Assessment of Criminal Responsibility of the Accused

781. There is abundant evidence, most notably from victim-survivor testimony, that the Japanese government and military were involved in all aspects of the sexual slavery system. In addition, the evidence provided by experts confirms that Japanese officials at the highest levels participated knowingly in the system of sexual slavery.

782. The Tribunal has considered the findings of the IMTFE and the evidence before this Tribunal regarding the context in which the crimes charged occurred. The totality of the evidence compels a conclusion that there was a consistent pattern of gross abuses committed against civilians by the Japanese military in the territories under Japanese control or attack. The documented atrocities committed by the soldiers provide incontrovertible evidence that the Japanese military cultivated a culture of oppression and violence, including sexual violence, against both women and men. The evidence before us demonstrates that the "comfort system" was a cruel reflection and systematic extension of this culture, visited principally upon women who were treated as inferior and expendable by virtue of their gender, ethnicity, poverty, and subordinated status.

783. The evidence is irrefutable that Japanese military and political leaders were, at the very least, aware of the propensity of soldiers to rape and otherwise sexually assault civilians. This predisposition was inveterate both before and after the establishment of the "comfort system." After the assault on Nanking, consisting of mass murder, rape, and pillage, which became known internationally as the "Rape of Nanking," the rape crimes drew intense international condemnation. These crimes became infamous, cast the Japanese military in disrepute in many parts of the world, and created a major diplomatic issue for the top political and military leadership. In addition, the widespread rape of local Chinese women before, during, and after the conquest of Nanking generated local outrage and resistance which threatened to impede Japan's conquest of China. Accordingly, largely as a result of the mass rapes committed in and around Nanking, in late 1937 Japanese military and civilian authorities approved a massive expansion of the "comfort system," which had begun on a relatively small scale in 1932.

784. Thus, among the urgent goals of the expansion of this system was to reduce the indiscriminate rape of civilian populations and thereby minimize international outrage and local resistance and protect the public image of the Japanese military and state. The evidence demonstrates that the Japanese leaders expanded the "comfort system" for other reasons as well: to prevent the soldiers from being infected with sexually transmitted diseases; to provide a means of "recreation" for soldiers, including to stoke them for battle and relieve their tensions afterward; and to avoid the leakage of strategic information from soldiers visiting brothels outside the control of the Japanese. There is no doubt that the "comfort women" system of sexual servitude was perceived as essential to the success of the Japanese military and its war of aggression.

785. Several key documents reveal the criminal nature of the recruitment process and the sexual servitude imposed upon "comfort women." For example, the Recruitment Memo

of March 1938 reported that recruiters used by the expeditionary forces were rounding up or recruiting women by methods tantamount to abduction, with the effect of creating hostility toward the Japanese military. Consequently, the Recruitment Memo, which was sent by the War Ministry to the North China Area Army and Central China Expeditionary Forces, demands that greater attention be directed toward selecting more discrete recruiters (i.e., recruiters who would not abduct women off the street in broad daylight). A series of Japanese reports and secret telegrams concerning Taiwan demonstrate high-level Ministry and military involvement in minute details involving the trafficking of women and girls and the establishment and maintenance of the sexual slavery system. Even information regarding something as basic as the travel arrangements of individual "comfort women" was reviewed at the highest levels. Two reports by the Allied powers after the defeat of Japan further substantiate the claim that the Japanese Imperial Army was involved both directly and indirectly in illicit procurement and operation of the system of sexual slavery. These reports also verify that the Allies had evidence of the coercive nature of the "comfort system" and, hence, that their failure to charge IMTFE defendants for crimes associated with the "comfort women" system was a conscious one.

786. Incontrovertible evidence verifies that the Japanese government and military used military personnel, local agents (such as police officers), village headmen, and private traffickers in the procurement process. The evidence indicates that they increasingly encountered problems filling their quotas of "comfort women" necessary to satisfy sexual demands of a Japanese military comprised of some two million soldiers. The accepted ratio of "comfort women" to soldiers and the cruel and inhumane conditions alone would have alerted political and military leaders, policy-makers, and those who implemented the scheme that the "comfort system" was coercive and women were subjected to abusive treatment and conditions.

787. It is highly significant that the documents which provide evidence of recruitment and regulations applicable to the "comfort women" do not also contain the necessary protective policies and procedures that would normally characterise a voluntary system. For example, there were no instructions directing the stations to implement measures ensuring that the girls and women were making voluntary decisions to join, were paid prevailing wages, or were able to leave and able to dictate or at least negotiate the terms of services. These omissions are conspicuous. Instead, the regulations were directed toward protecting the health of the Japanese soldiers and the reputation of the military.

788. It is impossible to give credence to the claim that officials believed that the "comfort" girls and women from conquered, colonized, and annexed territories were providing their services willingly to assist the Japanese army, or that the women and girls would have agreed to provide or continue to provide sexual services once the brutal and slave-like conditions in the "comfort stations" became known. The large numbers of women impressed into the sexual slavery system and the fact that the overwhelming majority was young, from poor, rural backgrounds, and from areas exploited and oppressed by Japan renders spurious subsequent claims that the women were not coercively or deceptively recruited.

789. Further, the urgency of the recruitment process and the diverse, dangerous, and extensive number of places to which the "comfort" girls and women were transported also signalled the coercive nature of the system. Experts before this Tribunal estimate that approximately 200,000 girls and women were sexually enslaved, transported, and kept in a variety of facilities, be it formal stations, makeshift shacks, or opportune caves. The

documents, the testimony of survivors, and the admissions by the state of Japan make clear that these stations existed everywhere that Japanese troops were present, including on the frontlines, and that the women had no capacity to refuse services to any demanding them. The logistics alone would have been impossible to implement without approval from the top authorities. Both army and navy support and coordination were required simply for the transportation of the women across countries and through war zones. This extensive system had to be supplied with food and necessities, however minimal; the military also provided to the "comfort stations" condoms, medical personnel, and often dangerous "treatments" for sexually transmitted diseases and pregnancy. Although we do not have amounts, the costs involved in procuring, transporting, and maintaining the system had to have been substantial and required a significant allocation of resources.

790. The ubiquity of the "comfort stations" and the inhumane conditions in which the "comfort women" and girls were detained would have been obvious to soldiers and officers, including the visiting commanders and staff, as would the abuses committed in the stations. It would have had to be apparent that many of the victims were very young, and most were in a perpetual state of exhaustion, pain, malnutrition, and deteriorating health due to the extreme physical, mental, and sexual violence to which they were subjected. In addition to the rapes, tortures, and beatings, they were generally forced to endure horrendous conditions of detention, such as cramped spaces, inadequate food, water, hygiene, and ventilation, selective and invasive medical treatment, repressive, degrading, and exploitative treatment, and reproductive violence, including pregnancy and/or maternity resulting from rapes, forced abortion, forced sterilization, or illness from pregnancy-prevention drugs.

791. The involuntary nature of the "comfort stations" would also have been clear from the fact that they were commonly surrounded by barbed wire and had armed guards and locked doors, indicating that the women were held against their will. The presence of stations was known throughout the military. It was a matter of great importance to the officers that the soldiers be serviced at the same time as the officers enjoyed privileged access.

792. Two former soldiers and perpetrators testified that they knew the women were not participating voluntarily and that use of the "comfort stations," as part of a culture of sexual violence against women, was encouraged by their superiors. Further, their testimony undermines the claim that rape was discouraged even against local women. The mistreatment of women inside and outside the "comfort" stations was so common that the perpetrator-witnesses committed rape or encouraged their own subordinates to rape and then kill local women. One perpetrator-witness recalled how they were taught to kill women of the opposing side because they could reproduce and bear children. The other perpetrator-witness confessed that when he was a superior officer and he told his subordinates they could do whatever they wanted to do to the women of a village, the soldiers went into homes and raped the women. The perpetrator-witness explicitly stated that the Japanese soldiers were allowed to rape local women as long as they were not the type of women who could register complaints or have their complaints seriously considered, and thus generate negative attention for the military. Their testimonies corroborate those of survivors.

793. There is evidence that innocuous terms such as "hostess", "comfort women", "comfort station", and "houses of relaxation" were employed by the Japanese government and military to refer to the victims and the facilities, and there are several indications that these terms were designed to disguise the fact that the system in fact operated as a

criminal enterprise. The destruction of documents regarding the "comfort system" at the close of the war further attests to the high-level awareness of the illegality of the system. Thus, the evidence has had to be examined in light of the systemic nature of the deception and violence involved.

794. In sum, the Judges find that the "comfort system" was designed and maintained to facilitate the rape and sexual slavery of tens of thousands of young girls and women from occupied or conquered territories in the Asia-Pacific region. The scale of the "comfort system" was so enormous, the conditions so inhumane, and the operations so consistent, that no other conclusion can be reached but that the highest level political and military officials must have known of the criminal nature of the system which they set in motion and sustained. Indeed, a system so vast required the planning and knowing participation of a large number of actors at all levels of the hierarchy. Military and government leaders responsible for organising and supervising the movement and activities of troops had to have approved the establishment of "comfort stations" or other facilities for rape and sexual slavery and/or known of the criminal nature of the system. Indeed, from the lowest level soldier visiting the stations, to the top military and government officials who devised and oversaw the regulation of the system, to midlevel actors who procured women and girls for the stations and supplied the necessities, officials at all levels participated in facilitating and maintaining the system of rape and sexual slavery. In light of the fact that there were regulations distinguishing between visits to the "comfort stations" by officers and soldiers, it is the view of the Judges that many superiors also used the "comfort stations," which would also serve to condone and encourage the system.

795. The Judges emphasise that it is axiomatic that when the state or military designs and creates a system with potential for abuse, it has a concomitant duty to implement and monitor protective measures designed to prevent abuses. Hence, where a system was established in which large numbers of women in occupied, annexed, or conquered territories were to provide sexual services to huge numbers of men, particularly in the context of war (where, for example, men were far from families or social life for extensive periods of time, and engaged in dangerous, violent, stressful, and sometimes monotonous situations), there is a very high risk that such a system would inherently facilitate rape, sexual enslavement, and other mistreatment of persons procured to provide the sex. The need, in such a case, for consistent supervision to protect the women and their choices would be critical. Hence, establishing such a system imposes a duty upon its architects and purveyors to monitor the system to ensure that protective measures are enforced, and to punish those who ignore protective measures and commit crimes. The evidence indicates that no meaningful protective measures were ordered or implemented.[586] When people are kept in any form of detention, it is incumbent on the authorities to ensure there are no abuses.

796. By contrast, the Judges find that any protective measures provided by the regulations were limited to preventing conflict among soldiers and officers with regard to their use of the "comfort stations," protecting male soldiers from sexually transmitted diseases, and, at times, restraining soldiers from raping local women because of its negative repercussions for Japan, particularly if committed against women of privilege. Measures regulating women's health were invasive or injurious. For example, medical personnel

586 In this regard, the Tribunal notes with agreement the findings of the *Kvocka* Trial Chamber which concluded that "if a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes." *Kvocka* Trial Chamber Judgement, para. 318.

monitored sexually transmitted disease but not the mutilating impact of constant rape on women's health and medical procedures often inflicted additional harms on women's reproductive health. Regulations barring soldiers from using physical violence or alcohol were sporadically enforced. And none of these purported protections were designed for the benefit of the women. These measures were designed toward protecting the "comfort women" and girls as commodities. They were fed, sustained, and medically examined only to maximize their potential to provide unabated sexual services to the soldiers. The "comfort women" and girls often suffered harm, including pain and permanent reproductive damage, as a result of rape and the sanctioned medical interventions inflicted upon them. These injuries were ignored.

797. The Judges also find that the Japanese military and government established a sophisticated, heavily regulated, and unimaginably cruel system in which women and young girls were held for sexual access by Japanese soldiers. Even if we were to accept the dubious premise that the "comfort stations" were intended to be filled with voluntary sex workers, it is clear that from the onset of its expansion in late 1937 the system rapidly became involuntary. The evidence establishes that only a small minority of the women procured had previously been prostitutes, and that even those who may have initially volunteered were eventually impressed into sexual slavery – required to service many men and enslaved in the facilities without freedom to leave.

798. The "comfort system" was, in essence, state-sanctioned rape and enslavement. The practice of deception, coercion, purchase, and force used to secure women for the "comfort system" was so widespread, the numbers of women acquired so enormous, and the pressure to expand the system so strong that the crimes involved had to have been known to high-level participants of the system as well as to those who oversaw the maintenance of the system and the continued supply of women.

799. In total, the "comfort women" system lasted over 13 years and there were literally thousands of facilities in which women were held for sexual slavery throughout some dozen countries in the Asia-Pacific region. The system depended upon massive transnational trafficking of women and young girls to and between these stations, often by military escorts or on military vehicles or vessels. Nonetheless, the persons in positions of authority or influence did nothing meaningful or effective to prevent or stop the crimes from being committed on a daily and indeed hourly basis.

800. In sum, based on the above findings and on other findings made previously in this Judgement, the Tribunal has already determined that the following has been proved beyond a reasonable doubt:

- that tens of thousands of women and girls were deceived, forced, coerced, conscripted, sold, or otherwise unlawfully procured into the so-called "comfort women" system;

- that the "comfort system" was conceived, established, regulated, maintained, and facilitated by the Japanese government and military, often utilizing, or with the complicity of, local authorities or agents;

- that the "comfort system" was established throughout the Asia-Pacific, including on the frontlines, by the Japanese government and military to provide relatively safe and convenient sexual services to members of the Japanese military;

- that in 1937, after the international and local outrage generated by rape as part of the assault on Nanking ("Rape of Nanking"), the "comfort system" was expanded on an urgent basis to attempt to stop the indiscriminate rape of local women and soon thereafter became firmly entrenched as an intrinsic part of the Japanese military strategy;

- that the "comfort system" was criminal in nature on multiple levels, most particularly as a result of the illicit methods of procurement; the crimes of rape, sexual slavery, and other forms of mental, physical, sexual, and reproductive violence committed against the victims enslaved in the system; and the inhumane conditions of detention;

- that the system was so extensive, the regulation of it so complex, and the crimes committed therein so routine that the criminal nature of the system had to have been known to most members of the Japanese military and to the those holding high-level positions concerned with the war effort. The system was indeed a "system", and all the elements that make it a system demonstrate official involvement of the required levels;

- that the regulations pertaining to "comfort stations" did not ensure that the women's participation was willful or knowing, that women were protected against rape and other forms of violence, and that the women were able to refuse services and to leave the facilities. Instead, the regulations were designed solely to protect Japanese interests; and

- that rape and sexual slavery as crimes against humanity contained in this Tribunal's Charter and prohibited by the laws and customs of war in effect at the time, and charged in Counts 1 and 2 of the Common Indictment, were committed against the former "comfort women."

In the next section, the Judges determine the criminal responsibility of the accused in light of the foregoing findings.

(b) Assessment of Criminal Responsibility of the Accused

(i) Bases for Determining Criminal Responsibility of the Accused

801. Based on the foregoing findings of fact and applicable law, the Tribunal finds that persons holding a high position of authority in the Japanese government or military with connections to the war effort in general or the "comfort system" in particular would have had to have known of the criminal nature of this system unless unexpected contingencies or exceptional circumstances existed that would cast doubt as to whether the particular person knew or had reason to know that crimes were being committed.

802. The Tribunal echoes the words of post World War II *Hostages* case: "It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such occurrences result occasionally because of unexpected contingencies, but they are unusual."[587] The Judges distinguish between "exceptional circumstances" and "unexpected contingencies," the latter of which we consider would

[587] *Hostages* case p. 1259-1264 [Aristarchus version]. See also the Tokyo Tribunal's treatment of Muto. IMTFE Judgement (Roling), p. 455.

cover such things as illness or having lines of communication cut in the midst of battle, and thus encompasses events which would prevent a superior from maintaining constant control over his subordinates.

803. Given the dimension, duration, and perceived significance of the "comfort system" to Japan's war effort, it is impossible to imagine any "unexpected contingencies" that could have prevented an accused from learning that crimes were committed in the "comfort stations." This is particularly true when considering that the "comfort system" existed for the entire eight years covered by the Common Indictment, and that by late 1937 the women and girls procured into the system were held as sex slaves and forced to submit to rape and other forms of sexual and reproductive violence by members of the Japanese military.

804. By "exceptional circumstances" we mean such circumstances as would warrant distinguishing that person as to their knowledge of or participation in the criminal activity. Such circumstances might include whether they held a position at an insignificant time, whether they were incapable of exercising the leadership powers conferred, or whether there was a deliberate and successful effort to prevent them from acquiring knowledge of criminal activity despite their efforts to remain informed.

805. Exceptional circumstances, as used in this case, would distinguish the circumstances of an accused such that it would be reasonable to question his particular or personal knowledge of or participation in the joint criminal endeavour of the "comfort system."

806. Therefore, after reviewing the positions of the accused, we will determine whether exceptional circumstances exist for any of the accused which precludes a finding of guilt on the basis of the more general and circumstantial evidence. If exceptional circumstances as to any accused are found, additional evidence is required before it can be established that the accused had the requisite knowledge or involvement to justify a finding of criminal responsibility under Articles 3(1) and 3(2) of the Charter. If exceptional circumstances are not found, and the accused holds the necessary positions and played the roles which would allow liability to attach, then the evidence is sufficient to establish individual and superior responsibility for the criminal activity committed in relation to the "comfort women" system.

807. In addition, the Tribunal notes that, as to several of the accused, the documentary evidence in particular links the accused directly to the "comfort system" and provides proof of actual knowledge on their part. Nonetheless, unless exceptional circumstances exist, the *mens rea* of the accused has already been established by inferring knowledge based on their position of authority within the Japanese hierarchy and their role in the expansion, institutionalisation, and facilitation of the "comfort system." Thus, it is not necessary, and indeed would be superfluous, to rely on more specific evidence to prove actual knowledge, except where exceptional circumstances indicate the need to consider additional evidence.

(ii) The Positions Held by the Accused

808. The most relevant positions held by the accused during the time period covered in the Common Indictment are summarised below:

- Emperor HIROHITO was the *de jure* Head of State for the duration of the war and, as such, he also held the title of Supreme Commander of the Armed Forces;

- ANDO Rikichi was Commander of the 21st Army (southern China) from November 1938-February 1940, Commander of the South China Area Army from October 1940, and Commander of the Taiwan Army from November 1941-February 1945. He was concurrently the Governor-General of Taiwan from December 1944 until the end of the war;

- HATA Shunroku was Commander of the Taiwan Army from August 1936-August 1937, Commander of the Central China Expeditionary Army from February 1938 - December 1938, the Minister of War from August 1939-July 1940, and Commander of the China Expeditionary Army from March 1941-November 1944;

- ITAGAKI Seishiro was the Minister of War from June 1938-August 1939, Chief of Staff to the China Expeditionary Army from August 1939-July 1941, and Commander of the Korea Army from July 1941-April 1945, when he became Commander of the 7th Area Army in Southeast Asia;

- KOBAYASHI Seizo was the Governor-General of Taiwan from June 1936-November 1940, and a cabinet minister from December 1944-March 1945;

- MATSUI Iwane was Commander of the Shanghai Expeditionary Army from August to December of 1937. In October 1937 he also took the position of Commander of the Central China Area Army, a position he held until February 1938;

- TERAUCHI Hisaichi was Minister of War from March 1936-February 1937, when he became Inspector-General of Military Education until August 1937. He was Commander of the North China Area Army from August 1937-December 1938 and Commander of the Southern Army (covering the Philippines, Indonesia, Malaysia, Timor, and Burma) from 1941-1945;

- TOJO Hideki was appointed Vice Minister of War in May 1938. From 1941-July 1944 he was Prime Minister and Minister of War; he also held the position of Home Minister for some time during this period. He was also Chief of General Staff of the Army from February 1944-July 1944; and

- UMEZU Yoshijiro was Vice Minister of War from March 1936-May 1938, Commander of the 1st Army in May 1938, and Commander of the Kwantung (Guandong) Army from September 1939-July 1944, when he became Chief of General Staff to the Army, a post he held until October 1945.

809. During the Second World War, the Emperor was the highest authority in Japan, a position carrying the ultimate power and influence; a Governor-General was charged with administrative functions and enforcement of laws over their appointed country. Governors-General were the highest authority in the annexed territories of Korea and Taiwan and reported directly to the Emperor; a Commander was the head of the armed forces within his territory, and those holding the highest area positions reported to the Emperor; a Chief of Staff was the most senior administrator to the Commander of a territory who reported to and acted on behalf of the Commander; and the Minister of War was the government cabinet post responsible for all the armed forces.

810. The Judges note that each of the accused held either the highest or one of the highest level positions concerned with the war effort within the Japanese government or military from

at least 1937 to 1945, during which time the "comfort station" system was continually expanded and maintained under the authority and for the use of the Japanese military and this system was considered a critical component to the success of Japan's war effort. With the sole exception of MATSUI, all of the accused held their positions of authority or influence for at least four years, some for considerably longer, and all held their positions during the time that rape and sexual slavery was institutionalized in the "comfort women" system.

811. Barring a consideration that exceptional circumstances exist, the above findings are more than sufficient to establish the guilt of the accused under Articles 3(2) and 3(1) of this Tribunal's Charter for having knowingly participated in the "comfort system" despite being aware that criminal activity was endemic throughout the system and for failing to prevent crimes committed by subordinates.

812. In considering the roles and positions of the accused, the Tribunal finds that exceptional circumstances exist for two of the accused – Emperor HIROHITO and MATSUI – such that additional evidence is required before guilt can be established beyond a reasonable doubt. More precisely, we consider that the brevity and time period of MATSUI's participation in the war effort, lasting some 7 months during the initial stages of the "comfort women" campaign, warrants requiring additional information as to his knowledge of and participation in the "comfort system" as a criminal endeavor. We also consider that the persistent claim that Emperor HIROHITO was merely a ceremonial figurehead who did not have power to effect the war effort and who was shielded from information as to criminal activity warrants additional information establishing that he knew that crimes were afoot in regards to the "comfort system." Although his criminal responsibility has already been found by the Tribunal, as announced in the Summary of Findings of December 9, 2000, the reasoning for rendering such a finding will be examined in more detail below.

813. For the other accused for whom exceptional circumstances do not exist, namely ANDO Rikichi, HATA Shunroku, ITAGAKI Seishiro, KOBAYASHI Seizo, TERAUCHI Hisaichi, TOJO Hideki, and UMEZU Yoshijiro, based on the foregoing evidence which firmly establishes their *mens rea* and *actus reus*, the Tribunal finds them **GUILTY** under Counts 1 and 2 of the Common Indictment as incurring both individual and superior responsibility, pursuant to Articles 3(1) and 3(2) of the Charter, for their knowing participation in a criminal system which cultivated and sustained a system of rape and sexual slavery.

814. Below, we will assess the evidence as to the criminal responsibility of Emperor HIROHITO and General MATSUI.

(c) Consideration of Exceptional Circumstances and Additional Evidence as to Emperor HIROHITO and General MATSUI

815. The Judges now examine with more specificity the evidence relating to Emperor HIROHITO and MATSUI Iwane. We do this because we deem it necessary to address the issues that Emperor HIROHITO was a mere figurehead and that MATSUI held office for such a brief time and at the very outset of the expansion of the "comfort system," and, accordingly, that they each did not have the requisite knowledge of or participation in the crimes committed within the "comfort system" so as to justify a finding of guilt under Article 3(1) or 3(2) of the Charter.

(i) Findings with Regard to Emperor HIROHITO's Superior and Individual Responsibility for Rape and Sexual Slavery Committed as a Consequence of the "Comfort Women System"

816. If the assertion were true that Emperor HIROHITO was not more than a figurehead or puppet and was, therefore, kept ignorant of the military situation and the problems it engendered and had no power to take corrective action even if he knew of the crimes, this would preclude a finding of guilt. Accordingly, we consider this claim to determine whether additional evidence specific to his knowledge and power establishes his individual or superior responsibility for the rape and sexual slavery committed as part of the "comfort system."

817. In our Summary of Findings delivered in Tokyo on December 12, 2000, we found the Emperor HIROHITO guilty on Counts 1 and 2 of the Indictment, concluding that the Emperor exercised both *de jure* and *de facto* power as Head of State and as commander of the armed forces. We explicitly rejected the contention that the Emperor was merely a ceremonial figurehead who did not have the requisite knowledge or exercise sufficient decision-making authority.[588] In this Judgment we elaborate the bases of our earlier findings.

818. As Head of State and Supreme Commander of the army and navy, Emperor HIROHITO held a position of supreme authority over the state and the military. In this position, he had authority over all military personnel and directed through close intermediaries the course of the Area Armies and Expeditionary Forces. He was also the direct superior of the Governors-General of Taiwan and Korea.

819. The evidence demonstrates that HIROHITO had enormous power, going even beyond the powers granted him by the Constitution. The expert witness, Professor Yamada, testified that a formal decree issued in 1882 to the soldiers explicitly declared that ultimate decision-making power resides only in the Emperor. Professor Yamada explained that from the time of its issuance in 1882 until the end of World War II, the decree was the ultimate moral order of the Japanese military and something that all officers were expected to learn by heart. As Professor Yamada further explained, the Constitution of the Empire of Japan issued in 1889 – the Meiji Constitution – clearly states in Article 11 that the Emperor is the Supreme Commander of the army and the navy.[589] In addition, Article 13 of the Constitution provides that the Emperor declares war, makes peace, and concludes treaties.[590]

820. Professor Yamada indicated that, at the time of the promulgation of the Meiji Constitution until the early 20th century, Japanese society understood the Emperor's powers to be set out and limited by the Constitution – what is referred to as the "Emperor-as-organ" theory of government. Indeed, upon examination of the Meiji Constitution, we note that Article 4 provides that the Emperor exercises the rights of sovereignty according to the constitutional provisions.[591] However, in a document issued by the Ministry of Education on May 31, 1937, entitled "The Fundamentals of Our National Polity," the Japanese government explicitly rejected the Emperor-as-organ theory. Instead, it asserted:

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588 Summary of Findings, para. 24.

589 Registry No. 199.

590 Registry No. 199.

591 Registry No. 199.

> The basic principle of government . . . is not rule by mandate, or the English 'monarch who reigns but doesn't rule'; it is not joint government by the monarch and its subjects either, nor is it the separation of the three powers or constitutional government. It is the direct rule of the Emperor instead.[592]

The document emphasises the "divine present Emperor" expressed in Article 3 of the Meiji Constitution, which states: "The Emperor is sacred and inviolable."

821. Moreover, according to Professor Yamada's testimony, the Emperor's power increased in 1936 when he successfully ordered the suppression of an attempted coup. This occurred just a year before the formal rejection of the Emperor-as-organ theory which centralized power in the Emperor. Professor Yamada describes this increasing centralization of power as part of a project to restructure the government for the anticipated war against the United States, the United Kingdom, and Russia.

822. The Tribunal finds that the Emperor had real power and authority over the Japanese government and military. We firmly reject the contention that the Emperor was a mere figurehead.

823. In our Preliminary Findings, we concluded that the Emperor was clearly aware of crimes committed by Japanese soldiers. More specifically, it would have been virtually impossible for him to have been ignorant of the fact that Japanese soldiers committed a range of atrocities, including rape and sexual violence, during events so notorious they were known as the "Rape of Nanking" and the "Rape of Manila." The massacres and rapes were widely reported both in Japan and internationally. The prosecution submitted into evidence international news articles reporting the "Rape of Nanking," as well as a military journal entry in January of 1938 referring to a report written by a group of foreign nationals living in Nanking which described rape and other acts of violence.[593] We accept Professor Yamada's testimony that HIROHITO was very concerned about what the foreign media reported about Japan and, therefore, that the core members of the Foreign Ministry must have given him informal reports. Among those core members was Ishii Itaro, the Chief of the East Asia section of the Ministry of Foreign Affairs, who held the third highest position in the Ministry of Foreign Affairs. In a January 1938 journal entry, Ishii Itaro recorded: "At meetings of the secretariat of the three ministries (Foreign Affairs, Navy and War Ministries), I have frequently given warnings to the Army. Minister of Foreign Affairs Hirota also demanded Minister of War Sugiyama to enforce the military discipline."[594]

824. More recently, further evidence has come to light that Emperor HIROHITO was aware of the cruel treatment by the Japanese military of civilians. Prince Mikasa, HIROHITO's youngest brother, stated that he told his brother about the atrocities committed in China. On June 15, 2000, addressing a party honoring the Japanese artist Hirayama Ikuo's contributions to cultural exchanges between Japan and China, Prince Mikasa said: "I shrank in fear at the sight of the Japanese military's cruel behavior in China during the war and I told Showa Emperor about this."[595]

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592 Registry No. 200.

593 Registry No. 204.

594 Registry No. 204.

595 Registry No. 206.

825. The expert testimony, as well as the documentary evidence assessed with regard to the other accused, all of whom were HIROHITO's subordinates, establishes that it was well known that Japanese troops committed rape with abandon even after the expansion of the "comfort system." There was no prohibition on rape in the Japanese military code, unless it occurred within the context of looting, until l942. On January 8, 1941, the Ministry of War issued a Field Service Code which contained the first of a series of instructions to the soldiers in the field, in an attempt to counter their acts of rape, murder, arson, and looting.[596] Professor Yamada testified that TOJO, Minister of War at the time, discussed the draft of the Field Service Code with HIROHITO, who then granted his permission for its issuance and distribution.

826. The prosecution has also submitted documentary evidence with regard to the amendment to the Army Criminal Code in March of 1942. The amendment defined rape as a crime, abolished the *Shinkokuzai* system, which allowed prosecution of rape only upon complaint, and broadened the sentencing for rape.[597] Professor Yamada testified that the Emperor knew of these changes to the Army Criminal Code.

827. With regard to the communication between HIROHITO and his advisors, the fact that HIROHITO received reports from the Foreign Minister and the Governors-General, that he sanctioned the Field Services Code, and that he knew of the Army Criminal Code amendment show that HIROHITO was not isolated from war events and strategies or from the specific, ongoing problem of rape of local women.

828. In addition, we note that the Ministers of the Japanese government had the constitutional duty, under Article 55, to give advice to the Emperor and to be responsible for it. The expert witnesses also testified that HIROHITO had a close circle of advisers with whom he consulted regularly regarding the war. Consequently, Emperor HIROHITO was kept informed of the military activities, and of crimes such as rape, which generated international outrage when complaints were made. Having been deeply concerned over Japan's international reputation, he surely would have read or been informed of the media reports of rape crimes.

829. The foregoing evidence overwhelmingly supports our findings that Emperor HIROHITO was not a mere figurehead and that he was kept abreast of matters of significance to the success of the war effort and the reputation of the army. That he had knowledge of the rape of Chinese women in the Nanking campaign and of the continuing problem of the rape of local women is indubitable. He had the duty to prevent, monitor, and punish rape crimes committed by his subordinates. Nonetheless, HIROHITO knew that rape was not even an independent crime until mid-way in the war and that it continued to be a serious problem. Instead of instituting and monitoring effective measures against rape, the military and civilian leadership sought to reduce the rape of local populations by channelling it into "comfort stations," not because it cared that women were raped, but because it wanted to protect the reputation of Japan, avoid negative international visibility, and curtail resistance of local populations.

830. With respect to the expansion of the "comfort stations" beginning in l937 as a system of military sexual slavery, it is impossible to believe, given our findings regarding the urgency, extensiveness, logistical complexity and expense, and involvement of the

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596 Registry No. 203.

597 No Registry #. See the photocopy of the slide when Yamada was testifying.

highest level ministry and military officials in various aspects of the process, that HIROHITO was ignorant of the existence of the "comfort system" or was impotent to protest its activities. Indeed, we find that he gave his approval to the system, whether tacitly or explicitly. We note that the original orders to expand the system in China were issued by or on behalf of MATSUI. Given the significance of the problem of rape as a national one, the logistical support needed, and the fact that women were not only being rounded up in China but also "recruited" from Japan and Korea, it is inconceivable that the War Ministry and others were not involved in deciding, approving and facilitating the expansion of the "comfort system." Further, in light of the responsibility to report such matters to the Emperor and the pervasiveness of the problem, we find that Emperor HIROHITO had to have known that the expansion of the comfort system would entail the illicit procurement and trafficking of women for rape and sexual slavery.

831. Accordingly, as supreme head of state and military commander exercising both *de jure* and *de facto* power, we confirm our previous finding as to Emperor HIROHITO's guilt under Article 3(2) for his failure to exercise superior responsibility to prevent these atrocities. Clearly, by virtue of the outcry about rape, he had reason to know of the propensity of his soldiers to commit widespread rape against local women and he had a duty to take necessary and reasonable measures to prevent, halt and punish such violations. He had a duty to institute measures and monitor efforts to prevent the crimes, including in the "comfort stations" set up to provide sexual services to the Japanese military. Emperor HIROHITO failed utterly to fulfill his responsibility. Accordingly, we find Emperor HIROHITO **GUILTY** of criminal negligence under Article 3(2) of the Charter for the crimes of rape and sexual slavery committed as part of the system of military sexual slavery.

832. In addition, the Tribunal finds that Emperor HIROHITO had to have known that the "comfort system" was being rapidly expanded as a purported alternative to the more visible and problematic rape of local women and that rape and sexual slavery were being committed in the "comfort system." Further, we find, based on his position and continuing participation in the war effort and the significance of the "comfort system" to the war effort, that, at the very least, he participated by tacitly or actively approving the existence and expansion of the "comfort system." Accordingly, we reaffirm our previous holding and find Emperor HIROHITO **GUILTY** of rape and sexual slavery as crimes against humanity under individual responsibility pursuant to Article 3(1) of our Charter.

(ii) Findings with Regard to MATSUI's Command and Individual Responsibility for Rape and Sexual Slavery Committed as a Consequence of the "Comfort Women System"

833. MATSUI held a high level position of military authority for seven months during the period of the Common Indictment. Of greater significance is the fact that he held his position only until mid-February 1938, thus arguably prior to the time that the "comfort system" was institutionalized and perhaps when its character as a coercive system was not yet as pervasive. This suggests that, in MATSUI's case, exceptional circumstances could conceivably be present, which precludes an inference of knowledge as to the system's criminal nature based principally on his position in conjunction with the extensiveness and transparency of the criminal nature of the system.

834. What must be considered, then, is whether, at the early point in the expansion and institutionalisation of the "comfort system," there is additional and sufficient evidence

before this Tribunal on which to base a conclusion that MATSUI knew or had reason to know of the criminal nature of the system.

835. As Commander of the Shanghai Expeditionary Force from August to December 1937, MATSUI led the last phase of the assault on Shanghai and, as Commander of the Central China Area Army from October 1937 to at least mid-February 1938, he led the march toward and conquest of Nanking.

836. As Commander, MATSUI was directly responsible for the rampage of rape, murder and looting which began with the conquest and occupation of Shanghai and the crimes reached an abominable level with the Rape of Nanking. The atrocities committed by troops under MATSUI's command generated tremendous international criticism and threatened the reputation of the Japanese military and imperial state. In addition, the mass rape of Chinese women by the troops, even as they were marching toward Nanking, immediately became a critical military problem as it heightened resistance among the local population. Instead of attempting to prevent rape altogether, the decision was taken to attempt to provide an alternative to mass rape of local women through the urgent expansion of the "comfort stations." Based on the evidence before us, MATSUI was significantly involved in that decision.

837. We note that the IMTFE convicted MATSUI of rape charges relating to the conquest of Nanking, finding that he had knowledge of, and criminally failed to take appropriate measures to stop, rape and other atrocities against the civilian population. As an extension of the prior proceedings, this Tribunal accepts and incorporates the evidence before and the determination of the IMTFE with respect to MATSUI. At the same time, consistent with the principle against double jeopardy, we consider the prior determination only in so far as it is relevant to the charges against MATSUI in the Common Indictment. The charges here do not include those tried before the IMTFE; rather, they are strictly limited to the crimes of sexual slavery and rape in relation to the "comfort station" system for which he was neither charged, tried, nor convicted before the IMTFE or elsewhere previously.

838. The problems created for the military and the state by the widespread and uncontrolled rape of local women clearly drew the attention of MATSUI and the highest level military officers. Although MATSUI exercised command for only a relatively brief period of seven months in late l937 to early l938, the evidence demonstrates that this was a critical period in the development of the "comfort stations" as a system of sexual slavery, that this evolution occurred under MATSUI's command, and that MATSUI was knowingly and directly involved.

839. The evidence before this Tribunal demonstrates that in December of 1937, in the midst of the Japanese march toward Nanking, the Central China Area Army, under MATSUI's command, ordered the establishment of "comfort stations." The Diary of Iinuma Mamoru, the Chief of Staff to the Shanghai Expeditionary Army, includes an entry dated December 11, 1937. It records that "On the matter of the establishment of military comfort stations, documents from the [Central China] Area Army arrived, and [I will] oversee the execution" of the orders contained therein. Iinumu Mamoru recorded this entry just before the invasion of Nanking.[598] From this we infer that MATSUI as Commander of

[598] Reg. No. 222. See Yoshimi's written testimony, Reg. No. 225; Yoshimi, Comfort Women, pp. 49-50.

the Central China Area Army had to have given or approved the orders and overseen the establishment of "comfort stations" under his command.

840. The Judges must next determine whether MATSUI's participation in planning, ordering, instigating, facilitating, or otherwise aiding and abetting the expansion of the "comfort stations" under his command was with knowledge of the criminal nature of the system.

841. The evidence makes clear that the establishment of the "comfort stations" was a matter of extreme urgency. The evidence presented by Professor Yoshimi indicates that, during MATSUI's tenure, immediate efforts to establish comfort stations were undertaken by the General Staff of the Shanghai Expeditionary Army and the 10th Army, both under the command of the Central China Army.[599] He writes that "[e]arly in l938, military "comfort stations" were being set up in rapid succession."[600] Some stations were already operating by early January l938.[601]

842. In addition, the evidence shows that it was increasingly difficult to procure women and girls for the "comfort stations", and they were acquired under extremely coercive circumstances, whereupon they were subjected to inhumane and terrifying conditions. For example, even in this early period, the evidence supports the finding that Chinese and Korean women were being rounded up hurriedly by the Japanese military. The diary of Major Yamazaki Masao, a 10th Army staff officer, records:

> Lt. Colonel Terada was sent ahead to take command of the military police and establish entertainment facilities in Huzhou. At first, there were four women, and from now on there will be seven. Because the women are still terrified, it was difficult to gather seven women. I heard that they didn't "perform" their "tasks" very well. If we consistently assure them that their lives will not be in danger, that they will always be paid, and that they will not be treated cruelly, then more women who want to join up will come forward. The military police revealed that they are supposed to round up one hundred women . . . . Soldiers must be warned about their tendency to lapse into abuse.[602]Another report from Sugino Shigueru, a member of the military group in charge of establishing a "comfort station" in Yangzhou, indicates that, during the period of MATSUI's tenure, Sugino and other members of the military group, together with the Chinese local government association established to maintain order, gathered forty-seven (47) Chinese women.[603]

843. There is also evidence that by the beginning of l938, Korean women had begun arriving in considerable numbers to the area under MATSUI's command. For example, Aso Testuo, a military physician with the Shanghai Expeditionary Force noted that the military had set up and directly managed a "comfort station" in Tanjiazhai in Shanghai and that he examined there about 100 women, of which 80 percent were Korean and 20 percent, were Japanese.[604]

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599 Yoshimi, Comfort Women, p. 50.

600 Yoshimi, Comfort Women, p. 51.

601 Yoshimi, Comfort Women, pp. 51-53.

602 Yoshimi, Comfort Women, p. 50.

603 Yoshimi, Comfort Women, p. 51.

604 Yoshimi, Comfort Women, p. 53.

844. With respect to whether MATSUI knew the system was involuntary, we find the direct involvement of the military under his command in obtaining women and setting up the stations to be profoundly incriminating. The Recruitment Memo, dated March 4, 1938, which was sent from the War Ministry to the Chief of Staff of the Central China Area Army removes all reasonable doubt about the coercive nature of the early recruitment process carried out under MATSUI's immediate command.[605] According to this Memo, recruiters used by the expeditionary forces, such as the Shanghai Forces and the Central China Area Army, were openly abducting local Chinese women for the "comfort stations," and this method of securing women was creating hostility toward the Japanese army.

845. MATSUI left his position as Commander of the Central China Area Army in February 1938, shortly before the War Ministry issued the above memorandum. While MATSUI may not have received this memorandum, the timing and content of the Memo make clear that it is responding to the use of coercion and force against Chinese women being procured for the "comfort stations" by military recruiters and their agents operating under MATSUI's command. Accordingly, we find, both because the abductions occurred directly under his command and the high-level concern they generated, that MATSUI was well aware that the system was not voluntary.

846. In addition, we note that many of the records of this period reflect that the coercive and inhumane conditions that we have found to characterize the "comfort system" also existed during the period of MATSUI's tenure and that he would have been aware of them. Major Yamazaki Masao's record of Lt. Colonel Tanaka's report that the women were "still terrified" and didn't "perform their 'tasks' very well" and that the soldiers had to be "warned about their tendency to lapse into abuse" makes clear that these conditions, which presented obstacles to meeting the demand for "comfort women" and satisfying the soldiers, were known to the higher echelons.[606]

847. The urgency and difficulty of recruitment, and the coercion required, also would have indicated to the leadership that the number of "comfort women" necessary to provide sexual services to the soldiers was inadequate to the demand and would remain so unless drastic measures were taken to secure additional women. The "Situation Report" of the military-run station under the Shanghai Expeditionary Force's control in January l938 indicates that the commanding officer had to give the unit permission and that the unit had to be accommodated within one hour.[607] Another report of the opening of a "comfort station" in Shanghai describes the "comfort women" as "besieged."[608]

848. In sum, during MATSUI's tenure as Commander of the Central China Area Army, local Chinese women were forcibly procured by his employees and agents and "comfort stations" were established in rapid succession from Shanghai to Nanking.

849. The evidence supporting our finding that MATSUI knew, beyond a reasonable doubt, of the criminal character of the "comfort stations" being established under his command likewise supports the findings, necessary for determination of command responsibility under Article 3(2) of the Charter, that he "had reason to know" of the criminal character

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605 Reg. No. 222-C. Referred to in Yoshimi's written testimony. Reg. No. 225.

606 Yoshimi, Comfort Women, p. 50.

607 Yoshimi, Comfort Women, p. 51.

608 Yoshimi, Comfort Women, p. 53.

of the procurement and treatment of the "comfort women." His actual knowledge of the troops committing extensive rape crimes and the enormous pressure to rapidly establish more stations is sufficient for concluding that MATSUI had reason to know that there was a danger that the "comfort stations" were or would quickly become facilities for rape and sexual slavery. That danger triggered his duty to take necessary and reasonable measures to prevent these crimes. The evidence aptly proves that he took no meaningful measures to that end.

850. The Tribunal thus finds MATSUI Iwane **GUILTY** under Article 3(2) of the Charter for his failure to prevent, halt, or punish crimes of rape and sexual slavery committed by subordinates in the part of the "comfort system" under his command.

851. In addition to finding that MATSUI knew and had reason to know of the criminal character of the "comfort stations," the Tribunal also finds that he ordered, instigated, facilitated, planned or otherwise aided and abetted the illicit procurement and enslavement of Chinese women and girls to function as sex slaves during his tenure as a military leader.

852. The Tribunal thus finds MATSUI Iwane **GUILTY** under Article 3(1) of the Charter for his knowing participation in the rape and sexual slavery committed as crimes against humanity.

853. The Tribunal next considers the allegations contained in Count 3 of the Common Indictment, charging Emperor HIROHITO and YAMASHITA with rape as a crime against humanity for the mass rape committed in Mapanique.

C. COUNT 3 OF THE COMMON INDICTMENT

1. Rapes in Mapanique

854. In Count 3 of the Common Indictment, the Prosecutors charge Emperor HIROHITO and General YAMASHITA with individual and superior responsibility for rape as a crime against humanity under Articles 3(1) and 3(2) of the Charter for the mass rape of women and girls in Mapanique.

855. With regard to the rape crimes and other forms of sexual violence committed against women and girls in Mapanique beginning on November 23, 1944, the evidence demonstrates the following:

- That the women and girls in Mapanique were subjected to multiple, extreme forms of violence as part of a punitive or "subjugation" attack on the barrio in order to destroy anti-Japanese activity there.

- The attack on the women in Mapanique was widespread. It was visited upon many of the women of Mapanique and included having to witness brutal deaths of loved ones and endure torture and grotesque humiliations.

- That soldiers rounded up the women and girls and caused them to be detained at the *Bahay na Pula* or Red House, where they subjected them to mass rape, gang rape, or other forms of sexual violence.

- That, as found by the IMTFE and confirmed by the testimony in this case, Japanese soldiers routinely engaged in rape accompanied by other sadistic brutality in the Asia-Pacific wars.

- That the rape and other crimes at Mapanique were committed by forces under YAMASHITA's authority and control and as part of a campaign of subjugation or punishment ordered and approved by General YAMASHITA in October 1944 as part of his "Guiding Principles for Philippines Operations," and on November 22, 1944 by his subordinate.

- That rape as a crime against humanity under international law and pursuant to Article 2(1) of this Tribunal's Charter and was committed against women and girls in Mapanique as part of a widespread and systematic attack against the civilian population.

856. These findings as to the rape crimes committed in Mapanique do not reach a conclusion as to whether the accused charged herein incur responsibility for the crimes committed. Therefore, the Tribunal next considers the evidence concerning the accuseds' *mens rea* and *actus reus* to determine whether they are responsible as individuals and/or as superiors for the Mapanique rape crimes.

857. As noted above, Emperor HIROHITO was the Head of State, and held a position of supreme authority over the military. YAMASHITA was Commander of the 14th Area Army from September 1944-September 1945, during which time he was responsible for troops operating in the Philippines, including those attacking Mapanique on November 23, 1944.

(a) Findings with Respect to Emperor HIROHITO's Superior and Individual Responsibility for the Rapes at Mapanique

858. HIROHITO was not the direct superior to YAMASHITA, the commander of the troops who attacked Mapanique, although he was certainly his superior. Rather, YAMASHITA was two steps removed from HIROHITO in the military hierarchy. The expert witness Professor Hayashi testified that the 14th Area Army, which committed the rapes, formed part of the Southern Army, which headed the expansion into Southeast Asia. The Imperial General Headquarters, under the direct authority of HIROHITO, had command of the Southern Army. Nonetheless, given this distance between YAMASHITA and HIROHITO, and with no further evidence available pointing to their communication or any form of encouragement or assistance by the Emperor, we cannot infer that HIROHITO knew of or otherwise participated in the "Rape of Mapanique."

859. We note however that the expansion of the Japanese military into Southeast Asia was of critical importance to the war effort, of which HIROHITO had supreme command. Given HIROHITO's position of command and his communication with the top advisors, including those in the Imperial General Headquarters, it is likely that HIROHITO knew of the Filipino people's resistance to the Japanese military and of the Japanese military's brutal suppression of this resistance. HIROHITO thereby had notice of the possibility that crimes might be committed against civilians. An inquiry into the methods of quelling resistance would have further alerted HIROHITO to the violence, including rape and other sexual violence, being inflicted upon civilian women and girls in the course of punitive missions.

860. Most assuredly, by November 1944, which was seven years into the war in the Asia-Pacific, and three years into the assault on the Philippines, Emperor HIROHITO was well aware that serious crimes had been committed by Japanese troops in all theatres of war, including the Philippines. He was on notice that criminal activity was likely to continue to be committed by Japanese troops and he "had reason to know" that extra measures were needed in order to exercise adequate control over Japanese forces and to remain appraised of their activities.

861. Based on the totality of evidence, it is clear that HIROHITO was on notice that crimes were likely to be committed by Japanese forces under his command and control, and yet he did nothing to prevent the crimes. Accordingly, pursuant to Article 3(2), we find Emperor HIROHITO criminally responsible as a superior for the rape crimes committed against women and girls in Mapanique on November 23, 1944.

862. At the same time, we consider that Emperor HIROHITO cannot be individually liable every time his some two million soldiers committed atrocities. For Article 3(1) individual responsibility to attach, he must have knowledge of the crime and participate in some way – through planning, ordering, instigating, committing, aiding, or abetting – in the crime. While this was readily established in the case of the former "comfort women" with the criminal activity committed throughout the Asia-Pacific over several years, here, where the crimes were committed over a couple of days in a small village in the Philippines, without more evidence to establish the Emperor's knowledge or participation, we find that there is an insufficient basis upon which to conclude beyond a reasonable doubt that HIROHITO had actual knowledge of the rapes or that he participated in any way in the crimes. As such, we decline to find that Emperor HIROHITO incurs individual responsibility under Article 3(1) under Count 3 of the Indictment.

863. In conclusion, pursuant to Article 3(2), the Tribunal finds Emperor HIROHITO **GUILTY** of the crime against humanity of rape under Count 3 of the Common Indictment insofar as it relates to superior responsibility under Article 3(2) of the Charter; it **DISMISSES** as to individual responsibility under Article 3(1) of the Charter after a finding that individual responsibility for the rapes at Mapanique has not been established beyond a reasonable doubt due to insufficient evidence.

(b) Findings with Respect to YAMASHITA's Superior and Individual Responsibility for the Rapes at Mapanique

864. Count 3 of the Common Indictment charges General YAMASHITA with crimes not adjudicated in the previous war crimes trial held against him, namely the mass rape of women and girls at Mapanique in the Philippines. The charge of rape relating to the events in Manila was not and could not be charged here against YAMASHITA because the United States Military Commission already tried and convicted him for that crime.[609] The charges against YAMASHITA here are limited to the rape crimes committed in Mapanique.

865. The evidence demonstrates that YAMASHITA was an experienced commander who held positions of high authority within the Japanese military. From July 1938 to September 1939, YAMASHITA served as Chief of Staff to the North China Area Army. In November 1941, he became Commander of the 25th Army in Malaya, a position he held

609 *Yamashita* case, Decision of the United States Military Commission at Manila, December 7, 1945.

until July 1942, when he became Commander of the 1st Army in North East China. In September 1944, he was appointed to serve as Commander of the 14th Area Army in the Philippines. In such high-ranking military posts, YAMASHITA exercised enormous power over his subordinates.

866. YAMASHITA took control of the 14th Area Army in the Philippines in September 1944. Significantly, on October 11, l944, YAMASHITA promulgated his "Guiding Principles for Philippine Operations" in which he warned his troops of the danger of "schemes" and attacks by Philippine civilians and enemy paratroopers. The Principles ordered that armed Filipino bands "must be subjugated and pacified. These united activities must be destroyed."[610] On November 22, 1944, the 2nd Tank Divisional Commander, Iwanaka, a subordinate of YAMASHITA, issued an order to purge Mapanique of all "anti-Japanese Communist guerillas" through a punitive or subjugation mission.[611] The next day, 14th Area Army troops entered Mapanique and went on a rampage of brutality against Filipino civilians, including the mass rape of some 100 women and girls.

867. Survivors of this mass rape testified before this Tribunal, and their testimony demonstrates that rape occurred according to a pattern.[612] The evidence shows that soldiers attacked the barrio of Mapanique and rounded up the inhabitants, separating the men from the women and children. The soldiers then tortured, mutilated, and killed the men, and forced their families, including some of the survivors who testified before this Tribunal, to watch. Afterwards, the Japanese soldiers led the women and girls of the village to the *Bahay na Pula* (Red House) and repeatedly raped them. An estimated 100 girls and women were raped during this attack, which lasted over a day. The Tribunal has already found that the rapes at Mapanique were not only widespread but also systematic.

868. Because YAMASHITA participated as a high level commanding officer for several years throughout the war, the Judges consider that he was clearly apprised of past criminal activity, including rape crimes, committed by Japanese troops under his command. In addition, we find that YAMASHITA both knew and had reason to know that soldiers under his command might and in fact did commit rapes at Mapanique. As discussed above, the culture of violence created and perpetrated by his troops throughout the Philippines put him on notice that attacks on villages or cities were commonly accompanied by atrocities including rape and other forms of torture.

869. Accordingly, YAMASHITA had a duty to prevent future crimes and to institute measures to prevent, monitor, and punish these crimes and to ensure that his troops respected the laws and customs of war. Although YAMASHITA held a command position over the 14th Area Army soldiers, he failed to prevent the rapes at Mapanique. Despite evidence of a propensity of his soldiers to commit rape and other crimes, YAMASHITA did not fulfill his duty to take reasonable and necessary measures to ensure the safety of the women, men, and children of Mapanique, a region under his command, by instituting measures to prevent such unlawful attacks. In addition, he failed to punish the crimes after they occurred, which also incurs superior responsibility.

870. Based upon his status as commander and the aforesaid findings that he knew or had reason to know that troops under his command were likely to commit violence, including

610 Exhibit JJ-2.

611 Exhibit KK.

612 Registry Nos. 99-128.

rape, and that he did not exercise his power to control his troops, the Tribunal finds YAMASHITA Tomoyuki **GUILTY** of the rapes at Mapanique in accordance with the principles of superior or command responsibility pursuant to Article 3(2) of the Charter.

871. In addition, as Commander of the 14th Area Army at the time of the "punitive missions" in the Philippines, the Tribunal finds that YAMASHITA either ordered, instigated, approved, assisted, and/or encouraged attacks such as the one against Mapanique through publication of the Principles Order. He did this despite knowing that crimes, including rape and sexual violence, were likely to be committed.

872. The evidence shows that, pursuant to this Principles Order, YAMASHITA had established the policy to "eliminate" the anti-Japanese guerillas. In pursuit of this policy, a 14th Area Army a divisional commander subordinate to YAMASHITA ordered the "punitive mission" against Mapanique. It is reasonable to conclude that this plan was approved by YAMASHITA, the Commander.

873. Therefore, the Tribunal finds YAMASHITA Tomoyuki **GUILTY** of individual responsibility pursuant to Article 3(1) of the Charter for the mass rape of women and girls in Mapanique, as charged in Count 3 of the Indictment.

D. VERDICTS

874. In conclusion, as to Counts 1 and 2 of the Common Indictment charging nine accused with rape and sexual slavery as a crime against humanity, the Judges unanimously find Emperor HIROHITO, ANDO Rikichi, HATA Shunroku, ITAGAKI Seishiro, KOBAYASHI Seizo, MATSUI Iwane, TERAUCHI Hisaichi, TOJO Hideki, and UMEZU Yoshijiro, **GUILTY** of superior and individual responsibility for the crimes committed against the former "comfort women," pursuant to Article 3(2) and 3(1) of the Charter.

875. As to Count 3 of the Common Indictment charging Emperor HIROHITO and YAMASHITA Tomoyuki with rape as a crime against humanity, the Judges unanimously find both Emperor HIROHITO and YAMASHITA Tomoyuki **GUILTY** of superior responsibility under Article 3(2) of the Charter for the crimes committed against the women and girls in Mapanique. The Judges unanimously find that there is insufficient evidence that Emperor HIROHITO knew of or participated in the plan to attack Mapanique on November 23, 1944 and therefore **DISMISS** the charge as to his culpability under Article 3(1) of the Charter. Finally, the Judges unanimously find that YAMASHITA Tomoyuki did know about and did participate in the attack on Mapanique, and consequently find him **GUILTY** of individual responsibility pursuant to Article 3(1).

876. The Tribunal will next consider the responsibility of the state of Japan as a result of the findings above and in relation to the Application for Restitution and Reparations submitted to and accepted by the Tribunal.

PART VI – STATE RESPONSIBILITY

INTRODUCTION

877. On behalf of the Peoples of the Asia-Pacific region, and particularly of the women victimised as a result of rape and sexual slavery as crimes against humanity committed by Japanese military and government officials, the Prosecutors have submitted an Application for Restitution and Reparations, asserting that the state of Japan has a duty to both prevent and repair these original crimes. The Application further asserts that Japan has failed to fulfil this duty and that this failure constitutes a continuing breach of its responsibility as a state, which has inflicted additional harm upon the victims, and for which it incurs additional liability.

878. In this Part of the Judgement, the Tribunal considers the responsibility of the state of Japan pursuant to Article 4 of our Charter, which authorises this Application and provides:

> State responsibility arises from the following:
>
> (a) Commission of crimes or acts as referred to in Article 2 by military forces, government officials and those individuals acting in their official capacity.
>
> (b) Acts or omissions by States such as:
>
> (i) concealment, denial or distortion of the facts or in any other manner its negligence or failure to meet its responsibility to find and disclose the truth concerning crimes referred to in Article 2;
>
> (ii) failure to prosecute and punish those responsible for said crimes;
>
> (iii) failure to provide reparations to those victimised;
>
> (iv) failure to take measures to protect the integrity, well-being and dignity of the human person;
>
> (v) discrimination based on such ground as gender, age, race, colour, national, ethnic or social origin or belief, health status, sexual orientation, political or other opinion, wealth, birth or any other status;
>
> (vi) failure to take necessary measures to prevent recurrence.

879. In considering this Application for Restitution and Reparations, this Tribunal is not limited by the law of l945 that governed the Common Indictment based on the principle of non-retroactive application of the criminal law. Rather, the obligation to prevent and repair wrongdoing, particularly wrongdoing of this horrific dimension, is a continuing one. Therefore, Japan continues to breach this obligation and its responsibility must be examined not only in light of the law applicable in 1945 but also of the current international norms respecting the duties of the violator state to prevent and repair.

880. We note that the authority of this Tribunal under Article 4 of our Charter to examine state responsibility, and the scope of reparations to victims and survivors, is fully consistent with the evolution of international law. In international practise, apart from restitution of stolen property or property acquired by criminal conduct, these issues have usually been the province of arbitral or claims commissions and, more recently, of human rights bodies, rather than international criminal tribunals.[613] We note, however, that Article 75 of the ICC Statute confers authority upon the International Criminal Court to establish principles for, and to order, reparations including "compensation, restitution and rehabilitation." On the basis of the power conferred on this Tribunal through the Charter by the peoples of civil society, especially the people of the victimised countries and those from Japan, we find that this Peoples' Tribunal may legitimately consider this Application for Restitution and Reparations. We note, in addition, that consideration of this Application is consistent with international law.

881. While this Tribunal does not possess formal legal authority to compel the state of Japan to satisfy its obligation to repair these wrongs and prevent future offences, it can nonetheless contribute to the substance of international law, articulate the harms endured by the "comfort women," declare the state responsibility of Japan under international law therefor, and recommend, as opposed to order, measures necessary and appropriate to fulfil its responsibility.

882. Accordingly, in this Part, the Judges will determine the international legal responsibility of the state of Japan for the offences presented in the Common Indictment including breaches of continuing obligations in accordance with Article 4. In Part VII we consider Japan's legal responsibility under international law to provide reparations and set forth our recommendations.

A. PRELIMINARY LEGAL ISSUES

1. The Standing of the Applicants

883. The Japanese government has argued that the individual victims of rape and sexual slavery do not have standing to bring an application for reparations under international law. The Tribunal considers, however, that all those persons falling within the class identified in the Application – victims of military sexual slavery – are entitled to bring claims for any form of reparations authorised by this Tribunal's Charter consistent with international law.

884. The Third Report of the International Law Commission's Special Rapporteur on State Responsibility addresses the situation where the primary victim is an individual or group. He recognises the importance of taking into account the wishes of the victims and that standing must be broader when individuals are the victims of internationally wrongful acts. His recommendation reaffirms the position which this Tribunal adopts:

> As to the invocation of responsibility by a State in cases where the primary victim is a non-State, the Draft Articles [on State Responsibility] should provide that any State Party to the relevant collective obligation should

[613] See, e.g., Nuremberg Charter, Article 28; ICTY Statute, Article 24(3)(l) and ICTR Statute, Article 23(3).

> have the right to invoke responsibility by seeking cessation, assurances and guarantees of non-repetition and, where appropriate, restitution.[614]

885. In his Fourth Report on State Responsibility the Special Rapporteur asserts that failure by the institutions of international law "to act in a given case should not entail that a state in breach of an obligation to the community as a whole cannot be called to account."[615] This Tribunal has been created by civil society to consider the claims of the "comfort women" for whom the formal state-based mechanisms of international law have proved inadequate. The presence before the Tribunal of many of the survivors indicates their consent to this Tribunal's hearing the claims arising out of the wrongs perpetrated upon them. Accordingly the Judges consider that Article 4 of its Charter properly allows these claims to be heard.

2. The Legal Significance of Delay in Bringing the Application

886. The passage of time since the commission of the crimes charged is relevant to the work of the Tribunal in two ways: it must consider whether the Application is precluded by the passage of time and its recommendations must be consistent with the principle of inter-temporal law. With regard to inter-temporal law, the Judges adhere to the principle that the legality of actions must be assessed in accordance with the law applicable at the time of their commission.[616] The Judgement on the Common Indictment applied the related principle of *nullum crimen sine lege* to the determination of whether the charged conduct constituted crimes as of l937-1945. In determining state responsibility, the application of inter-temporal law has been facilitated by the considerable consistency and continuity in the basic principles. In sum, where there are continuing wrongful acts, contemporary law can be applied.

887. In addressing Japan's anticipated arguments on the operation of statutory limitation periods, the Tribunal notes that time limitations play a prominent role in all legal systems. The policy consideration behind allowing a statute of limitations is the principle of finality – that is, it is generally in the public interest that lawsuits be instituted within a specified period of time or the right to sue is lost. However, in the present context, the Judges consider that the nature of the original offences as crimes against humanity, the fact that the violations are continuing, and the recent emergence of circumstances enabling the Applicants to bring their claims preclude treating these claims as time-barred.

888. The Application herein seeks to hold the state of Japan responsible to provide reparations for both the original offences and certain breaches of continuing obligations that have exacerbated the original damage and caused additional harm to former "comfort women." These include Japan's concealment of crimes and denial of wrongdoing; its failure to discharge its responsibility to prosecute the perpetrators and repair the damage through apology and compensation; its assertions, and failure to refute assertions, that the "comfort women" were voluntary prostitutes; and its failure to ensure the teaching and transmission of the historical truth. In determining whether there is an applicable limitations period, we turn to international jurisprudence, in particular, the decision of the

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614 Third Report on State Responsibility, Addendum, submitted by James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/507/Add.4 (2000), para. 378.

615 Fourth Report on State Responsibility, submitted by James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/5I7 (2000), para. 37.

616 "A judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled." Judge Huber in the Island of Palmas Case (1949) II UNRIAA 829.

International Court of Justice (ICJ) in the case of *Certain Phosphate Lands in Nauru.*[617] There, the ICJ noted that international law does not lay down any specific time limits and that it is for the Court to determine, in the circumstances of each case, whether the passage of time renders an application inadmissible. That case did not involve crimes against humanity, a factor which strengthens our determination not to treat these crimes as time-barred.

889. Given that the original offences underlying this Application constituted crimes against humanity when committed, we apply the international legal principle, formally adopted in relation to criminal proceedings, that there is no applicable period of limitations.[618] As expressed by Mr. Louis Joinet, the Special Rapporteur on Impunity of Perpetrators of Violations of Civil and Political Rights, "[p]rescription is without effect in the cases of serious crimes under international law . . . [and] cannot run in respect of any violation while no effective remedy is available."[619] Moreover, the fact that the failure to repair the original violation constitutes a continuing violation negates any question of time limits in regard to the Application for Restitution and Reparations before us.

890. To apply a limitation period would be especially inappropriate here given that neither the Allies nor Japan has allowed prosecution of the crimes of military sexual slavery.[620] Nor has Japan provided legal compensation or reparations within a reasonable time period. We note further that state practice indicates that the obligation to repair crimes against humanity is a continuing one. Despite time limits set on negotiated agreements to pay reparations for Nazi crimes committed during World War II, the recognised importance of making full compensation has led to repeated extensions of the deadlines.

891. Further, the Judges consider that the principle of finality can only become operable if the information necessary to filing suit is available to the victims. Given Japan's acts of concealment and denial of these offences, such a process could only commence in the present context following the Japanese state's acknowledgement that the offences, which form the subject matter of this claim, were committed. Explicit, albeit partial, acknowledgement of official participation and coercion in the "comfort system" was not provided by Japan until 1993. Finally, the state of Japan itself has accepted the validity of old claims, as shown by the fact that it recently concluded an official compensation agreement with a group of forced labourers.[621] Accordingly, the Judges find that this Application is not time-barred.

3. Exhaustion of Domestic Remedies

892. National remedies must usually be exhausted before there can be recourse to international justice mechanisms. This general principle of customary international law[622] has been

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617 Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 ICJ Rep. 240, para. 4 (June 26).

618 This Judgement, *supra*.

619 Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) submitted by Mr. Joinet pursuant to Sub-Commission decision 1996/119, U.N. Doc E/CN.4/Sub.2/1997/20/Rev.1, para. 31 (hereinafter "Joinet Report"). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, annexed to the Final Report of Mr. M. Cherif Bassiouni, Special Rapporteur, 18 January 2000, U.N. Doc. E/CN.4/2000/62, Section IV, paras. 6, 7.

620 The exception is the Dutch prosecution of Japanese military personnel and civilian comfort station proprietors at Batavia for crimes against Dutch women living in Dutch Indonesia under Article 4 of the l907 Hague Convention and Dutch war crimes laws. Batavia. No. 72/1947, Verdict 231 in the Name of the Queen.

621 Following the Japanese Supreme Court's dismissal on standing grounds, the Japanese Diet enacted a special compensation bill for all Taiwanese drafted by Japanese military. This Judgement, *infra*.

622 See, e.g., Interhandel (Switzerland v. United States of America) 1959 ICJ Rep. 27 (24 October); Case concerning Elettronica Sicula S.P.A (ELSI) (United States of America v. Italy) 1989 ICJ Rep. 50 (20 July).

incorporated into the rules of many international courts and tribunals, including human rights bodies.[623] This Tribunal accepts the principle as applicable to itself. However, failure to exhaust local remedies is not a bar to international proceedings where "pending proceedings have been unreasonably prolonged."[624] The Tribunal notes the numerous unsuccessful efforts of the applicants to seek redress in the courts of Japan. The fate of these cases compels the conclusion that survivors have no reasonable expectation of achieving an effective resolution of this matter in a timely manner within the courts of Japan.

893. Recognising that none of the cases has been finally settled in the Supreme Court of Japan, the Judges nonetheless find that it would be inappropriate to stay this Application pending the final disposition of these cases. To deny the Application until final adjudication in domestic courts is likely to result in a denial of justice to many of the elderly women applicants who may not survive the delay inherent in further process in Japan. Moreover, we appreciate, from the agonized demand for justice expressed by the survivors before this Tribunal that, with over 55 years having elapsed since the end of the war, the need for adjudication of this Application is urgent and that Japan's responsiveness thereto is a crucial factor to their being able to live out the rest of their lives in peace and to die in peace.

894. Notably, the decade-long effort to exhaust domestic remedies has thus far been futile. In light of the ongoing and time-sensitive nature of the harm caused by the already longstanding denial of redress, we find, consistent with international legal standards, that access to domestic remedies has been unreasonably prolonged and that the survivors are entitled to bring this Application under the Charter of the Tribunal.

4. Standard of Responsibility

895. The Judges next consider the standard of responsibility appropriate to this Application. There has been debate over whether the standard is subjective, fault-based or objective. Oppenheim asserts that state responsibility is based on fault.[625] It must normally be demonstrated that the state failed to show due diligence in preventing the injury or punishing the offender. By contrast, Brownlie takes the position that liability rests upon violation of a particular legal duty based on treaty or custom under international law, and that the test of responsibility is an objective one. He states that "objective responsibility rests on the doctrine of the voluntary act: and, thus, provided that agency and causal connection are established, there is a breach of duty by result alone."[626] Brownlie argues that the public law analogy to the *ultra vires* act (or an act exceeding the scope of legitimate authority) is more realistic than attempting to identify subjective *culpa* (or guilt) in specific natural persons who may, or may not, "represent" the legal person (the state) in terms of wrongdoing. For Brownlie, opinions in favour of the principle of fault

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623 See for example: Optional Protocol to the International Convention on Civil and Political Rights, G.A. Res. 2200A (XXI) (1976), art. 5(2)(b); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (Vol. 1) (2000) (entered into force Dec. 22, 2000), art. 4(1); International Convention on the Elimination of All Forms of Racial Discrimination, 60 U.N.T.S. 195, art. 11; Convention Against Torture, and Other Cruel, Inhumane or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 113, art. 21(1)(c); American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. 1, art. 46(1)(a), OEA/ser.L./V/II.23, doc. 21 rev. 6 (1979) (entered into force July 18, 1978); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 35(1); African Charter on Human and Peoples' Rights, 21 ILM 58 (1982), art. 50.

624 Sir Robert Jennings and Sir Arthur Watts eds., Oppenheim's International Law, 9th ed., vol. I, 1992, p. 526.

625 Sir Robert Jennings and Sir Arthur Watts eds., Oppenheim's International Law, 9th ed., vol. I, 1992, p. 509.

626 Ian Brownlie, System of the Law of Nations State Responsibility, 1983, p. 439.

are unconvincing for the following reasons: (i) such opinions produce firm propositions divorced from the evidence of diplomatic practise; (ii) international jurisprudence does not support the principle (see below); and (iii) the use of the term *culpa* or *faute* is mistaken or vacuous simply to describe a breach of a legal duty as an unlawful act.[627]

896. International jurisprudence supports Brownlie's conclusions. For example, the General Claims Commission, established by a treaty between Mexico and the United States in l923, employed objective tests of responsibility.[628] In the *Caire* claim, Verzijl, President of the Franco-Mexican Claims Commission and a noted jurist, explained:

> The doctrine of the objective responsibility of the State . . . is . . . a responsibility for those acts committed by its official or its organs, and which they are bound to perform, despite the absence of *faute* on their part . . . The State also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official organ has acted within the limits of his competency or has exceeded those limits . . . .[629]

In this view, strict liability is essentially a *prima facie* responsibility with various defences or justifications available to preclude a finding of liability.[630]

897. The relevance of fault – or the relative "strictness" of the obligation – is determined by the content of the particular international duty or rule. Although *culpa* or fault is not a general condition of liability, it may play an important role in certain contexts. For example, where the loss results from acts of individuals not employed by the state, the responsibility of the state will depend on a failure of due diligence or a failure of control.

898. The Judges note, however, that the principle of objective responsibility dictates the irrelevance of intention to harm (*dolus*) as a condition of liability. Thus state responsibility cannot be avoided based on claims that there was no intent to harm the victims. This does not mean that *dolus* or intention to harm has no role to play: proof of intent to harm on the part of leading organs of the state will solve the problem of imputing the wrong to the state in any given case.

B. ELEMENTS OF STATE RESPONSIBILITY

1. The Applicable Principles of Law

899. Under general international law, a state is internationally responsible for any wrongful act that is attributable to the state and has damaged the legitimate interests of others. Such responsibility of a state is *additional* to and exists alongside the international criminal liability of the individuals who committed crimes in violation of international law. This rudimentary principle of international law has been reaffirmed by the expert testimony of Professor Frits Kalshoven before this Tribunal as well as by the ICJ in the cases brought by Bosnia and Croatia respecting responsibility of the Federal Republic of Yugoslavia for genocide.[631] A state bears responsibility for wrongful acts when a state, either through its

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627 Brownlie, p. 440.

628 Neer (1926) R.I.A.A., iv, pp. 60, 61-62; Roberts (1926) R.I.A.A. iv, pp. 77, 80; Ciare (1926) R.I.A.A. v, pp. 516, 529-31.

629 *Ibid*. See also Brownlie, p. 39.

630 Brownlie, p. 44.

631 See Exhibit 230. See also Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Judgement on preliminary objections), 1996 ICJ Rep. para. 33 (11

own conduct or through the conduct of its agents or organs, acts in violation of an international duty and thereby commits an international wrong. It is a fundamental principle of international law that the breach of an international duty incurs an obligation to make reparation in an adequate form.[632] The duty must generally have been incumbent upon the state at the time the act complained of was committed.

900. These fundamental tenets of international law have remained constant from at least 1930. The League of Nations Codification Conference, 13 March-12 April l930 produced 10 Draft Articles on the Responsibility of States, although it failed to formally adopt them or promulgate a conference report.[633] Article 7 of the Draft Articles provided that "International responsibility is incurred by a State if damage is sustained by a foreigner as a result of an act or omission on the part of the executive power incompatible with the international obligations of the State." In addition, Article 8 stated:

> International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.
>
> International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.[634]

901. These principles were reaffirmed in Article 15 of the 1961 Harvard Draft on the International Responsibility of States for Injuries to Aliens,[635] which provides that direct state responsibility attaches both to official and authorised acts of agents and/or organs of the state and to acts committed by such persons in the ostensible exercise of their official functions, but without the state's command or authorisation or in excess of their competence according to the internal law of the state. Although neither set of Draft Articles was concluded in treaty form, their constant reiteration and application in state practice shows that they were widely accepted. These principles of state responsibility were applicable to the state of Japan at the time the military sexual slavery was committed.

902. The International Law Commission's 2001 Draft Articles on State Responsibility[636] provides the most up-to-date articulation of state responsibility in international law. Article 1 provides that "Every internationally wrongful act of a State entails the international responsibility of that State." This enunciation of the basic concept remained uncontroversial throughout the drafting process, demonstrating its acceptance in international law.

July); Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia), Application made 2 July 1999.

632 Chorzow Factory (Jurisdiction) (Germany v. Poland) 1927 PCIJ, Series No. 9, p. 21.

633 League of Nations Publication 1930, xvii at 234.

634 The International Commission's Draft Articles on State Responsibility, Part 1, Articles 1-35 (1930), compiled and edited by Shabtai Rosenne; "State Responsibility Minutes", Acts and Documents: Conference on the Codification of International Law, vol. 5, 1st, The Hague, 1930.

635 Louis B. Sohn and Richard Baxter, Draft Convention on the International Responsibility of States for Injuries to Aliens, Harvard Law School, 1961, Research in International Law, "Responsibility of States," 23 Am. J. Int'l L., Spec. Supp. (1929) (Harvard Draft), pp. 131-239.

636 U.N. Doc. A/CN.4/L.602/Rev.1, adopted by the Drafting Committee on second reading (26 July 2001) (hereinafter ILC Draft Articles 2001).

903. Thus the core constituents of state responsibility have remained largely unchanged from the early part of the 20th century. These are principles, then, that must be applied to the conduct of the state of Japan with respect to its responsibility for the "comfort system" and for violations before the Tribunal continuing to this day.

904. A state commits an internationally wrongful act when it acts in violation of international law. An act or omission that produces a result which is, on its face, a breach of a legal obligation gives rise to responsibility in international law, whether the obligation rests on treaty, custom or some other basis. An act in violation of a state's international obligations but which is lawful under its internal law is not thereby rendered lawful in international law.[637] Otherwise a state could evade its international obligations by domestic legislation.

905. The Judges have found above that, in the instigation, operation and continuation of the "comfort women" system, high-ranking Japanese military and government officials, and thus the state of Japan, have acted in violation of both its treaty obligations and its obligations under customary international law. Indeed, as the Judges have found, these violations were integral to Japan's military strategy at the highest levels during the war in the Asia-Pacific region.

2. Applicability to Colonial and Occupied Territories

906. The question then arises whether the state responsibility attaching to such violations applies to women raped and enslaved from Taiwan, Korea and Japan, or only to women considered "foreigners" or "aliens" to Japan under international law.

907. Under international law, colonies and similar dependent territories possess no separate statehood or sovereignty. It is the colonial power alone that possesses the international personality of statehood and has capacity to exercise the international rights and duties appertaining to states. Accordingly peoples from colonized territories are deemed to have no separate nationality from that of the colonial power.

908. Japan colonised Taiwan in 1895 and Korea in 1910. Credible arguments suggest that had there been no Japanese colonial domination of Korea and Taiwan, such massive numbers of women would not have been taken from these jurisdictions as "comfort women." It is undoubtedly true that the imperialist and racist assumptions of the inferiority of colonised peoples and the sexist and ethnocentric policies of the Japanese military and government contributed to the exploitation of women in these jurisdictions: the Japanese state machine regarded colonised women as at its disposal and considered it more acceptable to make colonised women "comfort women" than Japanese women.

(a) The Status of Taiwan

909. Following the Sino-Japanese War, in 1895 Japan extended its rule over Taiwan by the terms of Article II of the Shimonoseki Treaty. Japan appointed a Governor-General to administer Taiwan, and the Governor-General reported directly to Emperor HIROHITO. Taiwan remained a colony of Japan throughout the armed conflict between Japan and China in the 1930s and throughout World War II until the Japanese surrender in 1945.

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637 This principle is found in the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, T.S. No. 58, 1155 U.N.T.S. 331, art. 27.

(b) The Status of Korea

910. The domination of Korea was one of Japan's major goals in the third quarter of the 19th century. Both the Sino-Japanese War (1894-1895) and the Russo-Japanese War (1904-1905) were fought and won by Japan in order to establish its power and authority over Korea. In 1905, Korea became a Protectorate of Japan. Japan completed its domination of Korea through the Treaty of Annexation on 29 August 1910, whereby the Korean Emperor ceded all sovereign power over Korea to the Japanese Emperor. Korea was therefore annexed to Japan during the relevant time period.

3. The Position of the Japanese, Korean and Taiwanese Claims Under International Law

911. Japan has sought to deny liability in relation to Japanese, Korean and Taiwanese women on the grounds that the traditional doctrine of state responsibility rests upon the commission of an internationally wrongful act against a non-national. As colonised peoples, Koreans and Taiwanese do not come within this protection.

912. However, as discussed in the Judgement on the Common Indictment, the concept of crimes against humanity extended this basic doctrine to harm caused to any population irrespective of whether the civilians are nationals or indeed colonised peoples. This principle of liability thus applies to crimes against humanity committed by a belligerent state against its own nationals. Japan is, therefore, not exempt from liability for such international wrongful acts whether committed against the peoples it colonised or against its own nationals.

913. In addition, slavery as an international crime was not based solely on the laws of war but constituted an internationally wrongful act independent of war at the time when the crimes charged were committed. We agree with the conclusion of the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, that Japan violated customary international law "regardless of the territorial status of the Korean [and Taiwanese] peninsula at the time that the offences were committed. As a result, these norms apply equally to Korean [and Taiwanese] women, whether or not they were civilians in an occupied territory."[638] The point applies *mutatis mutandis* to the Japanese claimants.

C. JAPAN'S INITIAL VIOLATIONS OF TREATY AND CUSTOMARY LAW

906. As examined at length in the Judgement on the Common Indictment, we find that the state of Japan, through its officials and their agents (the named accused and numerous other personnel of the Japanese military, colonial and government machines), incurred criminal responsibility for – individually and through their failure as superiors to prevent, punish and protect – the internationally wrongful acts of rape and sexual slavery as crimes against humanity. We note that Japan's conduct also directly breached a number of its treaty obligations.

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638 "An analysis of the legal liability of the Government of Japan for 'comfort women stations' established during the Second World War", Appendix to the Final Report on Systematic Rape, Sexual Slavery, and Slavery-like Practices during Armed Conflict, submitted by Gay J. McDougall, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1998/13.

1. The 1907 Hague Convention Respecting the Laws and Customs of War on Land

914. Having ratified the 1907 Hague Convention IV in 1911, Japan was bound by its provisions. In addition, by the time of the Second World War, the 1907 Hague Convention had become part of international customary law governing the conduct of war on land, including the rules relating to the occupation of enemy territory. This point was expressly stated in the Judgements of the International Military Tribunals of Nuremberg and Tokyo.

915. The 1907 Hague Convention governs military conduct during the period of open hostilities and details the proper treatment of the enemy, prisoners of war and spies. It provides that belligerents must obey the "laws, rights and duties" and that commanders are responsible for the conduct of their subordinates.[639] The Judges accept the prosecution's contention that "laws and customs of war" encompassed the recognised core prohibitions and accepted doctrines of armed conflict.

916. The Nuremberg Tribunal addressed the point in relation to defence arguments concerning the application of the general participation clause of Article 2. That Article provides that the Regulations of the Convention are only applicable if all the belligerents are parties to the Convention. But not all belligerents of the Second World War were parties to the Hague Convention. The Nuremberg Tribunal ruled that where the Hague Convention could not be directly applied, it served as good evidence of customary international law existing at the time of war: "[B]y l939 these rules laid down in the Convention were recognised by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to [in the Charter of the Tribunal]."[640]

917. Similarly, the IMTFE found that the series of treaties concluded between l907 and l929 impose direct treaty obligations on states and delineated more precisely the customary law. According to Professor Kalshoven, in his expert submissions before this Tribunal, "[t]he legal opinion, expressed in either of these judgements, that at the time of the Second World War the Convention could be regarded as belonging to the body of customary international law has since been accepted generally, both in state practice and in legal literature, and it may be regarded as uncontested today."[641]

918. The Judges find that the limiting effect of the general participation clause was thus negated at the time of the violations herein charged. The 1907 Hague Convention applied to international armed conflicts, and thus was applicable to the Asia-Pacific wars. Japan and its opponents in war were "belligerent Powers." "Both the [1907 Hague] convention and, in particular Article 3, were therefore applicable to Japan as a belligerent Power participating in the Second World War, as well as, obviously, to the conduct of its armed forces in the course of military operations and during situations of occupation."[642]

919. The IMTFE found, and the evidence before this Tribunal confirms, that the state of Japan violated numerous provisions of the 1907 Hague Convention, in particular Article 1 of the Convention, and Articles 4, 5, 20 and 46 of the Regulations annexed to the Convention.

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639 1907 Hague Convention IV, Article 1(1) and 1(4).

640 IMT Judgement, pp. 220-221.

641 See Exhibit 230, Expert Supplementary Opinion by Frits Kalshoven, Article 3 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, and the Right of Individual Persons to Claim Compensation for the Acts of Members of the Armed Forces, p. 4.

642 Exhibit 230, Expert Supplementary Opinion by Frits Kalshoven.

920. Article 1 of the 1907 Hague Convention states that the Contracting Powers shall issue instructions to their armed forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention. Under the Convention, battlefield commanders, whether responsible for armies, militias or volunteers, as well as occupying authorities had to enforce the Regulations at all times and in all contexts.[643] Thus, we find that Japan had an obligation under the Convention to educate and disseminate information to military personnel regarding the laws of war and to take other measures to prevent and punish violations of the laws.

921. Among the laws subject to this obligation, as we have already discussed in our Judgement on the Common Indictment, were the prohibitions of and obligations to prevent rape and forced labour, as incorporated in the Hague Convention and the laws or customs of war. Although the Convention, by its terms, does not apply to Japan and its annexed territories Korea and Taiwan, the obligations being a part of customary law and embodied in the concept of crimes against humanity were applicable to all the women and girls affected by both the "comfort system" and the rapes at Mapanique.

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

922. Having ratified the 1921 Trafficking Convention in 1925, Japan was required under Articles 2 and 3, to take all steps necessary to discover and prosecute persons engaged in the traffic of women and children.[644] Japan's activity of forcibly recruiting, kidnapping, transporting and coercing women and girls into sexual slavery from each of its colonial and occupied territories, as demonstrated through the testimony of survivors and documentary evidence presented to the Tribunal, was in flagrant violation of the terms of the Convention.

923. We further consider that Japan's declaration, purportedly pursuant to Article 14, that the Territory of Chosun (now Korea) was not included in the scope *ratione territorii* of its acceptance of the Convention, does not legitimise the military sexual slavery system operated by Japan. We have already indicated that we view Article 14 as permitting exceptions in order to protect local customs that were not clearly condemned at that time. We note further that reservations cannot be invoked to justify violations of other international obligations and that the obligation to prevent and punish trafficking in women and girls was already of customary status by the time of the China War.[645]

3. 1929 Geneva Convention

924. Article 3 of the 1929 Geneva Convention stipulated that "Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex." The "comfort women" were not technically prisoners of war in the terms of the Geneva Convention[646] (although, in many ways, they were truly prisoners of the warfare in and for which they were used). However, the Convention, in conjunction with

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643 1907 Hague Convention IV, Article 1.

644 International Convention for the Suppression of the Traffic in Women and Children (1921), 92 UNTS 19, arts. 2 and 3.

645 We also note that many of the Korean women taken by the Japanese military were initially taken to Japan. Once they landed in Japan, the obligations of the Convention applied. This provides an additional reason why it is not necessary to examine the question of whether such a reservation is legally permissible in general.

646 Prisoners of war are defined in the Convention of July 27, 1929, Relative to the Treatment of Prisoners of War, Article 1 and the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land, of October 18, 1907, Articles 1, 2, and 3.

the other treaties, makes it clear that there was a general prohibition on abusing women. Accordingly, this provision provides additional support for the finding that Japan was not allowed to subject the "comfort women" to rape and sexual slavery, but rather was required to protect all women within its colonies and the territories it militarily occupied from sexual violence. The evidence before the Tribunal has demonstrated that the state of Japan brazenly violated its obligations under this Convention in its treatment of "comfort women" and girls.

4. 1930 International Labour Organization Convention Concerning Forced Labour

925. As noted in the Judgement on the Common Indictment, Japan ratified the 1930 ILO Forced Labour Convention in 1932.[647] Under Article 1, Japan undertook to suppress the use of forced labour in all its forms within the shortest possible period. Article 8 placed the responsibility for every decision to have recourse to forced labour on the highest civil authority in the territory concerned. As previously discussed, like the ILO Committee of Experts, this Tribunal finds that the evidence demonstrates that the state of Japan's system of military sexual slavery could not be excused under any of the 1930 exceptions and thus constituted "forced labour" in violation of the Convention.

5. Enslavement and Sexual Slavery

926. Since Japan did not ratify the 1926 Slavery Convention, it cannot be held responsible for breaching specific obligations under the terms of the Convention. However, as discussed in the Judgement on the Common Indictment, the prohibition against slavery and the slave trade was accepted as customary international law by the beginning of the 20th century.

927. This Tribunal has found that once the women from the colonised and occupied territories were removed from their homes and villages, irrespective of the method of removal, and forced to provide sexual services to the Japanese military, the women were military sexual slaves for the Japanese military. Japan thus violated the customary international law prohibiting the slave trade and the practice of slavery and is liable under international law for this grave violation.

6. Non-Discrimination Norms

928. Norms of sexual equality were emerging at the beginning of the 20th century, first through notions of protection. This is demonstrated by the inclusion in Article 37 of the Lieber Code of protection for "the persons of the inhabitants, especially those of women" and, in Article 46 of the Regulations Annexed to the 1907 Hague Convention, of the provision protecting family honour. The Hague Convention also placed a firm emphasis on the respect of all peoples as equals. Further the various treaties already discussed show that there was a longstanding international norm relating to the protection of women. In addition, the Preamble to the ILO Constitution explicitly required equality based on sex, for example in recognition of the principle of equal remuneration for work of equal value. In 1935, the Permanent Court of International Justice enunciated the principles of substantive equality and understanding difference in the context of the treatment of

647 Convention Concerning Forced Labour (1930), 39 U.N.T.S. 55.

minorities.[648] These emerging norms of race and sex equality, had fully crystallized by the time of, and were incorporated in, the UN Charter in 1945, where they are included in Articles 1(3) and 55.

929. The evidence demonstrates multiple violations of both the requirements for the protection of women as well as the prohibitions on race and sex discrimination. Most fundamentally the evidence shows that the Japanese military targeted women and girls primarily of subjugated populations viewed as inferior by Japanese Imperial culture, for the provision of forced sexual services because they were female and thus seen as disposable. As such, the "comfort system" denied women and girls their right to gender and racial equality and rights to respect for their physical, mental and sexual integrity and human dignity.[649] The creation of the "comfort women" system reflects the intersection of discrimination based on both gender and race/ethnicity, as discussed above.

D. ATTRIBUTABILITY OF INTERNATIONALLY WRONGFUL ACTS TO THE STATE OF JAPAN

1. State Responsibility for Acts of State Organs

930. For the state of Japan to be responsible under international law for the internationally wrongful acts of rape and sexual slavery for which this Tribunal has convicted the accused charged in the Common Indictment, as well as for the subsequent breach of continuing obligations, their wrongful acts must be attributable to the state. For the reasons set forth below, the Judges find that the state of Japan is responsible for the rape and enslavement of women and girls as "comfort women" pursuant to the military sexual slavery system whether such enslavement was carried out by government agents, army personnel, or civilians acting on its behalf.

931. States act through the institutions and agencies of the state, its officials and employees. Such institutions are commonly referred to collectively as *organs of the state.* Since at least 1923, it has been well established that the conduct of an organ of the state will be considered as an act of that state under international law, whether that organ belongs to the constituent legislative, executive, judicial or other power; whether or not its functions are of an international character; and whether or not it holds a superior or a subordinate position in the organisation of the state.[650] The key element is the role of the organ or official *as part of the administration of the state*. It does not matter that the application of policies is in the hands of subordinate officials. The forms of administration are secondary. The administration is for legal purposes to be seen as a *system* of government.

932. Armed forces are clearly state organs and part of the administration of the state. A state may be liable for a failure to control elements within the military structure when, under all the circumstances, it is reasonable to assume such a duty to exercise control. States may be responsible for *ultra vires* acts of their officials committed within their apparent authority or general scope of their authority. For example, the *Youmans* case stated:

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[648] See, for example, Settlers of German Origin in Territory Ceded by Germany to Poland, 1923 PCIJ (Series B) 24 (Nov. 6); Minority Schools in Albania, 1935 PCIJ (Series A/B) No. 64, p. 19 (6 April).

[649] In the Judgement on the Common Indictment, the Judges have noted that the Japanese military inflicted sexual violence on both women and men. However, the institutionalized system of "comfort" stations or facilities for sexual slavery was directed at the forced sexual servitude of women.

[650] This general approach is contained in the Draft Articles adopted by the Institute of International Law in 1927, which are in turn reflected in the ILC Draft Articles of 1973. This longstanding principle is affirmed by the ILC Draft Articles 2001, Article 4: "The conduct of any State Organ shall be considered an order of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."

> Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience to some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instruction must always be considered as personal acts.[651]

933. What matters is the amount of control that ought to have been exercised rather than the amount actually exercised. During World War II, HIROHITO was the head of the state and Supreme Commander of the Imperial Japanese Military. The other defendants were leading members of the Japanese military or government. As heads and high-ranking leaders of the organs of the Japanese state, the findings of their individual, command or superior responsibility under international law are more than sufficient evidence of internationally wrongful acts attributable to Japan.

934. The fundamental issue "is whether in the given case the system of administration has produced a result which is compatible with the pertinent principle or standard of international law."[652] As determined in the Judgement on the Common Indictment, the expert testimonies of Professors Yoshimi and Hayashi demonstrate that the structures of the Japanese military and political machines do indeed constitute such a system of administration which facilitated the egregious violations of international law. Based on the expert testimony of Professor Yoshimi and other evidence submitted to the Tribunal, the Judges find that the chains of command linked officers in the field supervising the provisioning and operation of military "comfort stations" to the highest echelons of the War and Foreign Ministries and to the Emperor himself, where the establishment of the "comfort station system" was sanctioned, organised and/or managed.

935. On many occasions, what constitutes an "organ of the state" is essentially a question of fact not related to the formal or regular tests provided by a constitution, or other pre-existing local law. Thus, the conduct of an organ of an entity, which is not part of the formal structure of the state but which is empowered to exercise elements of governmental authority, may be classified as acts of the state, providing the organ was acting in that capacity in the case in question.[653] In the same way, the conduct of a non-official, private person or group of persons is also an act of the state under international law, provided such persons were acting on behalf of the state.[654] The *Massey Claim*[655] is on point and shows these principles to have been part of international law prior to 1945. This is important in the present context in relation to the potential assertion by the state of Japan that because private individuals recruited the "comfort women" on many occasions, the state of Japan cannot be held liable.

936. On the basis of the principle articulated, the state of Japan cannot evade responsibility on this ground. The evidence has established that private individuals recruiting "comfort women" were selected, monitored, assisted and, in a substantial number of cases, directly

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651 U.N. R.I.A.A. iv, pp. 110, 116; Annex 3 (1925-6), No. 162 (1926).

652 This position is supported by the responses of states to a request for information addressed to Governments by the Preparatory Committee of The Hague Codification Conference of 1930.

653 ILC Draft Articles 2001, Article 5.

654 Article 8 of the Draft Articles by the ILC in 1973 on State Responsibility adopted on First Reading, 1980 YBILC II, part two, pp. 30, articulates this point.

655 (1927) UNRIAA iv, p. 155. Commissioner Nielsen stated: "it is undoubtedly a sound general principle that whenever misconduct on the part of [persons in private service] whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants."

accompanied by the Japanese military; their offers and demands were backed by the intimidation of military involvement. As such, the civilian recruiters were acting on behalf of the Japanese military and clearly agents of the Japanese military and their acts were attributable to the state of Japan. Japan is therefore liable for their acts or omissions under the international principles of state responsibility.

937. In addition, a state is responsible if it adopts the actions of private individuals.[656] Article 11 of the ILC Draft Articles 2001 reiterates this longstanding principle: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."[657] The Judges consider that, in addition to the illicit recruitment methods, the subsequent rape and sexual slavery imposed on the women and girls supplied to them, and regulated in minute detail by the military, constitute acknowledgement and adoption. Finally, as previously noted in the Judgement on the Common Indictment, in l993 the state of Japan explicitly acknowledged in its August 4, 1993 report that the military was involved in coercive recruitment of "comfort women" and girls either directly or through "private recruiters who acted in response to requests of the military . . . [and that the] women lived in misery at the comfort stations under a coercive atmosphere."[658]

938. Accordingly, the Tribunal finds that Japan is liable under the international principles of state responsibility for the acts and omissions of its officials involved in the military sexual slavery system at every level as well as that of the private recruiters and proprietors and others who assisted the implementation of that system and the sexual abuse and enslavement of women. It is important to note that the responsibility of Japan under international law applies not only to the institutionalisation of the system itself, but also to subsequent actions of its organs and private agents who have obstructed and failed to make full reparations for these horrific crimes and, in doing so, have perpetuated new and continuing violations against the victims and survivors.

2. Extra-Territorial Theory of Responsibility

939. Responsibility attaches to a state not only for wrongful acts and omissions within its territory but also for the wrongful acts and omissions of its organs, agencies, officials, and employees acting outside the territory of that state.[659] Thus, Japan is responsible for all violations of its international obligations perpetrated by its organs and agents throughout the Asia-Pacific region.

E. CONTINUING OBLIGATIONS AND VIOLATIONS OF STATE RESPONSIBILITY

940. In the Judgement on the Common Indictment, we found that individuals who were high-ranking officials of Japan were criminally responsible for rape and sexual slavery of the "comfort women" and rape of the women of Mapanique. Given the official positions of the accused as high-level officials of the Japanese government or military, the state of Japan is responsible for these violations and has the responsibility to make reparations, which is a broad concept examined at greater length in the next part of this Judgement.

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656 US Diplomats in Iran Case (U.S. v. Iran), 1980 I.C.J. 3; ILC Draft Articles 2001, Article 11.
657 ILC Draft Articles 2001, Article 11.
658 Exhibit 231.
659 Namibia (South West Africa) Legal Consequences Case, 1971 I.C.J. 54. See also, Harvard Draft, *supra*.

941. Article 4 of the Charter of this Tribunal gives this Tribunal jurisdiction to consider acts and omissions of the state of Japan that constitute continuing violations and obligations flowing from the original wrongful acts. For the reasons stated above, the state of Japan has additional responsibility for these continuing violations and obligations, both active and passive, which have caused significant additional physical and mental suffering to the survivors. As previously discussed, to the extent that these violations or obligations continue until today, the Judges find it appropriate to utilise not only the law existing from l937–1945, but also the law as it has developed to this time.

1. Denial, Concealment, and Distortion

942. A related continuing obligation of the state is to acknowledge and disclose the truth of crimes against humanity and war crimes. While trials and prosecutions may serve this goal in part, it must also be achieved in other ways. States have an obligation to declassify information concerning past wrongs and provide means for its preservation, analysis and accessibility to the public, both lay and scholarly. The right to know the truth is a derivative of the right to ensure human rights; it is a precondition to the effective use of remedies for violations and a deterrent against future wrongdoing.[660] The Judges note the increasing use of national and international truth commissions and public inquiries to uncover past crimes.

943. Based on the evidence delineated below, the Judges find that the state of Japan has not only failed to fulfil this obligation, but that it has in fact repeatedly acted to obstruct the disclosure of the truth of the "comfort station" system, including up to the present day. We have already made reference to the actions of the state of Japan after World War II to destroy evidence of the "comfort station" system. In addition, Japan has failed to conduct and publicise a full investigation into the system.

(a) Destruction and Concealment of Documents in the Immediate Aftermath of the War

944. At the time that the Japanese government accepted unconditional surrender around 15 August 1945, it tried to destroy evidence of its war crimes and crimes against humanity. The evidence indicates that the General Staff and the Army Ministry instructed all Army units to burn confidential documents. Documentary evidence demonstrates that the Navy issued a similar order to all naval units.

945. Professor Yamada testified that at the end of the war, the Japanese government ordered the destruction of evidence by burning and concealment of documents in order to exempt the Emperor from responsibility and protect state officials from incrimination for war crimes and crimes against humanity. In an affidavit prepared for the Tribunal, another expert, Professor Yoshida Yutaka, referred to the 1978 statements of Hirose Toyosaku, the Finance Minister at the time of surrender, in which he declared: "Immediately after the end of the war, I also burned documents according to the government policy. This is

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660 UN Special Rapporteur Cherif Bassiouni states that one form of reparation victims are entitled to is "verification of the facts and full and public disclosure of the truth." United Nations Commission on Human Rights, The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report submitted by Mr. M. Cherif Bassiouni, Special Rapporteur, Annex, UN Doc. E/CN.4/2000/62, 18 January 2000, para. 25(b). The Annual Report for 1985-86 of the Inter-American Commission on Human Rights also states, "Every society has the inalienable right to know the truth about past events, as well as the motive and circumstances in which aberrant crimes came to be committed in order to prevent a repetition of such acts in the future." Quoted in Mendoza et al. v. Uruguay, cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Report No. 29/92, Inter-Am. C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993), paras. 37-38.

what we decided at a Cabinet meeting."[661] According to Professor Yoshida, Oyama Fumio, former Army Lieutenant-General in charge of Legal Affairs, confirmed in response to the Justice Ministry's postwar survey that documents were destroyed under a government order. Professor Yoshida's affidavit also includes a 5 December 1960 public statement by Okuno Seisuke, a Home Ministry employee during the war. Participating in a Jichi University radio program entitled "The Talk of the Days of Home Minister Yamazaki," Okuno Seisuke said that he had been ordered to destroy official documents related to the war at the end of World War II.[662] Professor Yoshida drew the conclusion from the available materials that the Cabinet ordered the burning of official documents and concealment of other confidential materials, and that the government orally instructed recipients to destroy evidence of the order itself. Another expert, Professor Arai Shinichi, documented that, just after the declaration of surrender, the General Staff Office, the Army Military, and the Navy gave notice to all units to have confidential documents burned, and that the Ministry of Home Affairs burnt public documents.[663]

946. Based on the expert opinion, and the declarations against interest by government officials, the Tribunal finds that the government of Japan adopted and carried out a deliberate policy of incineration as well as concealment of documents relating to their crimes. These acts represent recognition by Japan itself of its wrongful acts and the Judges accept Professor Arai's opinion that "such actions taken right after the defeat were clearly carried out in order to obliterate evidence that could have been used by war crime tribunals."[664]

947. Evidence submitted by the Netherlands Prosecution indicates that the Japanese government was also specifically concerned to conceal the existence of the "comfort station" system even before the end of the war. Survivor-witness Jan Ruff-O'Herne testified that when the Japanese military returned the Dutch "comfort women" to civilian prisoner of war camps towards the end of the war, the military not only segregated them but also threatened their lives and the lives of their families in the event that they broke their silence and spoke of the crimes committed against them in the "comfort stations."

948. The Tribunal finds that not only were measures taken to disguise the existence of the "comfort stations" but also documents concerning the establishment and operations of the "comfort women" system were systematically destroyed in the final days of the war. We base this finding on the evidence just discussed as well as on the fact that the surviving documentation makes clear that the "comfort system" was the subject of extensive, documented communications. The evidence, reviewed in the Judgement on the Common Indictment, of instructions regarding the regulation of the "comfort stations" and authorisations for even individual travel permits illustrates this point. We agree with the U.N. Special Rapporteur that the incriminating documents available "not only . . . reveal beyond doubt the extent to which the Japanese forces took direct responsibility for the comfort stations and were intimately connected with all aspects of their organization, but they also clearly indicate how legitimised and established an institution the stations had become."[665] That some incriminating documents survived the systematic destruction of

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661 Exhibit 213-E, Destruction and Concealment of Official Documents and Exemption from the Emperor's Responsibility, Expert opinion submitted to the Tribunal by Professor Yoshida Yutaka.

662 Exhibit 220-S-2, Documentary Evidence submitted by Professor Yoshida Yukata.

663 Exhibit 217, Expert Opinion of Professor Arai Shirichi.

664 Exhibit 217.

665 Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, Addendum to the Report of the Special Rapporteur on violence against women, its

evidence by the Japanese at the end of the war indicates that many more must have been destroyed.

949. Accordingly, the Judges find that the state of Japan systematically destroyed documentation concerning the "comfort system" and undertook, thereby, to obstruct both the possibility of prosecution and the disclosure of truth. As such, the program of destruction constituted a continuing violation of state responsibility to investigate and publish the truth and bring the perpetrators to justice.

(b) Continuing Concealment of Documents

950. The scarcity of official documentation on the "comfort women" system has been exacerbated by the continuing resistance of the Japanese government to revealing even those documents that survived the pre-surrender destruction. According to Professor Yoshimi, a group of documents written prior to 1942 did survive, however, and were later brought to the United States because the arrival of the Allied forces interrupted their scheduled incineration in the final days of the war.[666] His historic disclosure of "comfort women" documents was made possible because "[n]o one knew that this collection contained documents relating to the comfort women."[667]

951. The Judges note that the Japanese government has recently rejected the principle that the state has a duty to disclose fully documents concerning human rights violations, war crimes and crimes against humanity. In the final report submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Special Rapporteur Theo van Boven, proposed that every state must make readily available all evidence in its possession concerning human rights violations.[668] In response, Japan stated: "It would not be practical to expect every state to make readily available to the public all evidence in its possession concerning human rights violations without exception. For instance, it is impossible for any State to disclose fully information which concerns national security or individual's privacy . . . . Thus, it is not necessarily appropriate only to demand that States make available all evidence in their possession."[669]

952. According to Professor Yoshimi, many documents remain secret, namely, "police records, documents of the Department of Overseas Affairs and Home Ministry relating to the colonies, the huge collection of diaries of officials and personnel accompanying the military held by the Defence Agency, materials relating to the war crimes trials held by the Justice Ministry and the Foreign Ministry, and Welfare Ministry documents relating to demobilization and support."[670] The Tribunal does not have the withheld documents before us to examine nor do we have Japan's particularised objections to disclosure. The fact, however, that the violations at issue in this proceeding occurred over 56 years ago and related to a system of sexual slavery precludes any claim of national security. Moreover, respect for the privacy of individual victims can be consistent with disclosure of wrongdoing.

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causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/1995, UN Doc. E/CN.4/1996/53, Add.1, 4 January 1996, paras. 20-21.

666 Yoshimi, Comfort Women, p. 35.

667 Yoshimi, Comfort Women, p. 63.

668 Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedom, Final report submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, para. 137.

669 Information submitted by Japan included in Report of the Secretary-General prepared pursuant to Sub-Commission resolution 1993/29, Addendum, UN Doc. E/CN.4/Sub.2/1994/7/Add.1, 22 July 1994, paras. 28-29.

670 Yoshimi, Comfort Women, p. 39.

953. The Judges find that the Japanese government has continued to the present to withhold documentation of the responsibility of Japanese officials (or anyone else) and, by attribution, the state of Japan for the "comfort system." As discussed below, the fact that the government's limited revelations have come only after independent researchers discovered incriminating documents subjecting Japan to political and diplomatic pressures, supports our finding that Japan has violated its international obligations through continuing concealment of documents.

(c) Continuing Denial and Failure to Fully Disclose the Truth

954. The Japanese government's statements related to the "comfort women" issue follow a pattern of revealing information only under domestic or international pressure and/or in response to the publication of new documents. Until 1992, the Japanese government officially denied involvement of the military or the state in the "comfort system", as well as coercion of women and girls, claiming there were no documents revealing who was responsible. Only when the victims began to speak out and Japanese and other scholars came forward with government documents to prove that the Japanese military drafted and held women against their will for sexual slavery, did the Japanese government begin reluctantly and partially to admit government involvement.[671]

955. In April 1990, Kim Hak-Sun, now deceased, was the first survivor to break the silence and come forward to testify to her ordeal as a "comfort woman." In connection with the visit to Japan of Korean President Roh Tae Woo in May, 1990, Korean women's groups issued a joint public statement demanding an apology and compensation from the Japanese government. This generated domestic and international pressure upon Japan to conduct an investigation and to issue an apology regarding the "comfort system."[672]

956. The Japanese government initially denied that the "comfort stations" were run by the military or state, and claimed that there was no documentation revealing who was responsible. It soon became apparent, however, that there was substantial documentation of official involvement. Evidence was found and disclosed by scholars, the South Korean government, and individuals who had come into contact with the system.

957. The first denial of the state responsibility took place on 6 June 1990 at the Budget Committee meeting at the House of Councillors, where Motooka Shoji, a member of the Socialist Party and the Upper House of the Diet, demanded that the Japanese government conduct an investigation into the actual conditions endured by the comfort women.[673] Shimizu, Chief of the Occupation Securement Bureau, Ministry of Labour, answered: "[C]ivilian brokers were the ones who transported the 'comfort women' along with the military . . . [Hence,] the investigation cannot be carried out."[674] Similarly, when Motooka Shoji again demanded a response to an open letter from a Korean women's organization at the Budget Committee meeting on 1 April 1991, Yano Sakutaro, Chief of

671 The evidence considered in this section is based on Exhibit 219, the compilation of newspaper reports of governmental statements and comments prepared for the Tribunal by Kim Puja, a researcher at Kanto Gakuin University. See also Yoshimi, Comfort Women, pp. 33-36.

672 Yoshimi, Comfort Women, p. 33.

673 Exhibit 219; see also Yoshimi, Comfort Women, p. 34, quoting Dai 118 kai kokkai sangiin yosan iinkai kaigiroku [118th Diet House of Councillors Committee on the Budget minutes] 19 (6 June 1990).

674 Exhibit 219.

the Asian Affairs Bureau of the Ministry of Foreign Affairs, answered: "the investigation was carried out but no material that lends any clues was found."[675]

958. After Kim Hak-Sun and other Korean former "comfort women" filed suit in the Tokyo District Court in December 1991 seeking apology and compensation from the Japanese government, a Japanese newspaper reported that Chief Cabinet Secretary Kato Koichi stated at a press conference on December 6, 1991 that "comfort stations" had existed but there was no proof that the government was involved in recruitment."[676]

959. The first significant admission of the government admitting military involvement in the "comfort system" came in response to Professor Yoshimi's public disclosure on 11 January 1992 of six incriminating documents in the Asahi Shimbun, as previously discussed. On 13 January 1992, Secretary Kato Koichi issued a public statement acknowledging the Japanese military's involvement in the "comfort system."[677] Still, there was no acknowledgement of the sexual violence and slavery inflicted upon the "comfort women."

960. The most complete acknowledgement of state participation in the "comfort system" to date came with the publication of an official report on 4 August 1993, in connection with the consideration of the issue of Japan's military sexual slavery by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Cabinet Councilors' Office on External Affairs released a report, entitled "On the Issue of Wartime 'Comfort Women,'" containing the findings of the government investigation and document survey as well as an official statement.[678] The report states, in part, that the military was involved in recruiting "in some areas," that the women "lived in misery at the comfort stations under a coercive atmosphere," and that this "severely injured the honour and dignity of many women." The report and accompanying statement by the Chief Cabinet Secretary have been reproduced in full, *supra.*

961. In the eight years since 1993, it appears that the government has not offered any new information or conducted any further investigations or surveys of official documents to shed light on the nature of government involvement. Rather, the subsequent statements of the Japanese government on the "comfort system" have been, at best, reiterations of the August 1993 statement.[679]

962. The Judges find that, taken together, this report and the various official statements do not reflect either a thorough investigation or a full and unambiguous acknowledgement of the participation of the state of Japan in the "comfort system" or its legal responsibility for the rape and sexual slavery committed therein. Rather, the government substitutes understatement, ambiguity, and euphemism for full disclosure and acknowledgement of official responsibility for, and conditions suffered by, women and girls in the "comfort system." The inadequacy of these statements is exacerbated by the fact that they followed a series of denials of official responsibility, coercion, and sexual violence inflicted upon the women. These reports and statements were also unaccompanied by full

675 Exhibit 219.
676 See, e.g., Mainichi Shimbun, 7 December 1991.
677 Exhibit 219.
678 Exhibit 231. Excerpts from the report are reproduced in the Judgement on the Common Indictment, *supra*.
679 See, e.g., The Ministry of Foreign Affairs of Japan, "Recent Policy of the Government of Japan on the Issue Known As 'Wartime Comfort Women,'" August 2001 (http://www.mofa.go.jp/policy/women/fund/policy0108.html (last visited 14 September 2001)).

disclosure of the pertinent documents, and further diluted by inadequate statements of "apology," discussed *infra.*

963. In considering the inadequacy of the government surveys and statements, we note Professor Yoshimi's point that these documents were based on hearings into the situation of only some of the Korean "comfort women" and that, notwithstanding that Korean women were disproportionately represented among the "comfort women," a thorough investigation requires examination of the impact of the system on women of all affected nationalities and ethnicities.[680] We call attention as well to the importance of devoting particular attention to the question of discriminatory treatment of minorities or indigenous women and girls.

964. Although the 1993 statement finally acknowledged the involvement of the military and the presence of coercion, we find that the statement obfuscates rather than reveals the full responsibility of Japan. In particular, while acknowledging the participation of the military, the statement minimises its direct role, contrary to the documents and testimony available to this Tribunal which demonstrate that civilian recruiters and proprietors were clearly acting as agents of the military and that the military controlled and was often present in the recruitment process. By acknowledging only that the "comfort women" lived under a "coercive atmosphere," the statement conceals the direct and utter brutality to which the Japanese military knowingly and intentionally subjected the "comfort women" as an integral part of its war effort. Furthermore, by stating that the women "lived in misery" and suffered "injury to their honour and dignity," the government avoided admitting that they were raped repeatedly and subjects of a system of sexual slavery.

965. While we understand that the expression "injury to honour and dignity" may have been a veiled reference to rape in use at the time, such euphemisms are unacceptable. "Comfort women" and girls were raped until they bled and could not walk. They were made sterile by forced abortion and "treatments" for sexually transmitted diseases. The victims were hung naked from trees in freezing cold weather. The evidence before this Tribunal shows that their treatment was not only harm to honour and dignity. The victims were subjected to physical and emotional torture. Such continued euphemistic references to rape and sexual slavery are particularly offensive in light of other official statements, discussed *infra*, labelling "comfort women" as prostitutes.

2. Failure to Prosecute and Punish Those Criminally Responsible

966. As previously discussed, crimes against humanity are subject under customary international law to universal jurisdiction and exempt from the effect of any statute limiting the time within which prosecution is permitted.[681] When it was recognised that wartime sexual violence inflicted upon the "comfort women" and such other atrocities as the rapes at Mapanique had not been prosecuted in the IMTFE, Japan should have initiated domestic prosecutions of those responsible, at all levels, as well as those who took advantage of the system. Japan's failure to investigate and disclose the truth about past war crimes and crimes against humanity thus resulted in blanket impunity for the perpetrators. We find it significant that Japan has not pursued one prosecution for crimes committed during the war.

680 Yoshimi, Comfort Women, p. 37.
681 This Judgement, *supra*.

967. Moreover, we note that the Japanese Ministry of Justice denied the only petition filed by former "comfort women" seeking criminal investigation and prosecution. Twenty-seven Korean "comfort women" and supporters from the Korean Council for the Women Drafted for Military Sexual Slavery by Japan submitted a criminal complaint to the Tokyo Prosecutor's Office on 7 February 1994. In response, the Japanese government refused even to consider it on the grounds that "the names of the perpetrators were not known in every detail." It also asserted, in blatant contradiction to international law, that the statute of limitations had run.[682]

968. By contrast to the performance of Japan, it is reported that between the end of the Second World War and 1988, the Federal Republic and the Democratic Republic of Germany together tried over 91,000 individuals for crimes committed under Nazism.[683]

969. States, including successor governments, have an obligation to ensure that those who violate such norms are brought to justice. This concept of the due diligence of the state arises from the duty to prevent and prosecute the crimes constituting internationally wrongful acts and repair the harm. Preventive and remedial obligations are thus themselves obligations for the breach of which the Japanese state bears direct responsibility.[684]

970. The obligation to investigate and prosecute crimes of this dimension was well settled before the Japanese aggression in the 1930s. The 1926 Slavery Convention and the Trafficking Conventions articulated the obligation to investigate and punish.[685] So did the ILO Forced Labour Convention (Article 25). This obligation, in relation to the crimes committed here, was one of customary status by the time of the Japanese aggression. The universal obligation to investigate and punish "grave breaches" of the laws of war, as adopted in Articles 146 and 147 of the Fourth Geneva Convention, codified pre-existing customary international law.

971. The 1925 *Janes Case*[686] articulated and applied this notion of due diligence, further reflecting the applicability of this principle at the time of the events charged herein. The claim was made by the US against Mexico to the US/Mexican Claims Commission in respect of Laura Janes, the widow of a murdered American citizen. The US claimed compensation on behalf of Laura Janes for the failure by Mexico to take steps to investigate and prosecute the murder of her husband. The Commission awarded $12,000 on the basis of a denial of justice resulting from the failure of Mexico to fulfil its international obligations to prosecute and punish the offender. The judgement underlined the significant injury suffered by the individual.

972. The principle that the state has an obligation of due diligence to prosecute human rights violations is firmly established. For example, the more recent and widely cited *Caso*

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682 Exhibit 21, Won Soon Park, Japanese Reparations Policy and the "Comfort Women" Question, Positions: E. Asia Cultures Critique, Spring 1997, p. 125.

683 Axel Marschik, The Politics of Prosecution: European national approaches to war crimes, in T.L.H. McCormack & G.J. Simpson, eds., The Law of War Crimes: National and international approaches, 1997, pp. 65, 74.

684 See, e.g., Diane Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale Law Journal, 1991, p. 2537. See also the Annual Report for 1985-86 by the Inter-American Commission on Human Rights, *supra*.

685 This Judgement, *supra*.

686 Laura Janes et al. (USA) v. United Mexican States, 16 November 1925. Reports of International Arbitral Awards, vol. IV, (1926), p. 82.

Velasquez-Rodriguez v. Honduras, [687] the Inter-American Court of Human Rights reiterated the principle, demonstrating that the standard of due diligence has been accepted since at least 1925 to the present day. Further, Article 14(2) of Chapter III of the ILC's Draft Articles 2000 incorporates the long-standing customary rule that a breach of an international obligation having a continuing character "extends over the entire period during which the act continues and remains not in conformity with the international obligation." There is no statute of limitations for crimes of this gravity and the obligation of due diligence is a continuing one.

3. Failure to Provide Reparations

973. As we will discuss in the following section, the broad concept of reparations as it has evolved in international law includes all of the aspects of state responsibility discussed in this Part as continuing obligations. The Charter of this Tribunal identifies the failure to provide reparations to the victimised as a separate category, which, in context, we understand to encompass the issues of apology and compensation, as discussed below.

(a) Continuing Failure to Make a Full and Genuine Apology

974. A key issue relevant to Japan's state responsibility for the sexual slavery system is whether it has made a valid apology on behalf of the state to the victims. In their testimony at the hearings, the survivors emphasised the importance of receiving a full apology directly from the Japanese government and from perpetrators who remain alive. They also fervently rejected the apologies made to date. The issue of apology has caused significant confusion outside of Japan, largely because linguistic differences make translation imprecise. The Judges consider that it is important to be precise about both the efforts that Japan has made to date to apologize and the shortcomings of these efforts, particularly as identified by the survivors and their advocates, so that the Japanese government cannot hide behind unfounded assertions that the matter is settled. As the statements discussed below illustrate, although Japanese officials have issued statements of regret concerning the suffering of the "comfort women," these "apologies" have been grossly deficient.

975. While several high level Japanese officials made statements prior to 4 August l993 purporting to apologise to the victim-survivors of the "comfort system", the Tribunal considers these of no significance in light of the utter failure to acknowledge that the "comfort system" was involuntary and that the "comfort women" were subjected to sexual violence.[688] Pressured by rising international criticism on account of the "comfort

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687 Velasquez-Rodriquez Case, 4 Inter-Am. Ct. H.R. (Ser.C), No. 4; OAS/ser. L/V/III; 19, doc. 13 (29 July 1988) para. 174. ("the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation").

688 We note, for example, that a leading Japanese newspaper published the 1992 statement of Secretary Kato which, while not acknowledging Japan's responsibility for sexual slavery, purported to apologize for the vaguely described military involvement in the comfort system in January 1992:

> I would like to take up the present opportunity to express wholeheartedly my feelings of apology [owabi] and self-examination of past wrongs [hansei] to those people who had suffered pain and suffering beyond any expression as military comfort women.

Asahi Shimbun, 13 January 1992. Prime Minister Miyazawa Kiichi publicly apologized for the "pain and suffering" of Korean comfort women and girls during an official visit to South Korea in January, 1992, stating:

> I express my sincerest feelings of remorse and apology [owabi] and that the people of Korean peninsula experienced unbearable pain and suffering. Recently, the issue of so-called military comfort women came to light, which I find really painful, and feel very sorry about this.

Asahi Shimbun, 18 January 1992.

women," the observer for Japan made reference to these attempts of apology at the 8th meeting of the Working Group on Contemporary Forms of Slavery of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. He asserted that "the Government of Japan had expressed its sincere apology and remorse to all those, irrespective of nationality or origin, who had indescribable pain and suffering as so-called 'comfort women.'"[689]

976. In a statement accompanying the 4 August 1993 report "On the Issue of Wartime 'Comfort Women,'" which contains Japan's partial acknowledgement of the complicity of the Japanese military in the "comfort system," Chief Cabinet Secretary Kono Yohei also extended "apologies" and expressed "remorse:"

> The Government of Japan would like to take this opportunity once again to extend its sincere apologies [owabi] and remorse [hansei] 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.[690]

977. In 1994, Prime Minister Murayama Tomiichi expressed his "profound and sincere remorse [hansei] and apologies [owabi]" for Japan's "acts of aggression, colonial rule, and the like that caused such unbearable suffering and sorrow for so many people."[691] In 1995, on the fiftieth anniversary of the end of the Second World War, Prime Minister Murayama again offered his "profound apology [owabi] to all those who, as war time comfort women, suffered emotional and physical wounds that can never be closed."[692]

978. This Tribunal finds that the efforts at apology outlined above are deficient in several key respects. First, a genuine apology must acknowledge full legal responsibility. As previously discussed, the statements of Japanese officials obscured the true extent of wrongdoing and harm and, most significantly, used words that express only regret and not legal responsibility. Second, the apology is deficient as a matter of process.

979. The Prosecutors contend that the language chosen by Japanese officials did not constitute a genuine apology for or acknowledgement of official responsibility for the crimes inflicted upon the "comfort women." The Japanese word[s] used – owabi and hansei – have been translated into the English words "apology" and "remorse." But, the Japanese language includes several terms for apology, reflecting different levels of gravity and responsibility. Understanding the different meanings of the Japanese terms for "apology" illuminates the survivors' vehement rejection of these statements as genuine apologies.

980. Professor Yoshimi explains that "owabi," the Japanese word in the government statements that has been translated into English as "apology", "denotes a sense of apology slightly more weighty than an 'Excuse me,' offered when one bumps shoulders with

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689 Report of the Working Group on Contemporary Forms of Slavery on its eighteenth session, Chairman-Rapporteur Mr. Ioan Maxim, U.N. Doc. E/CN.4/Sub.2/1993/30, 23 June 1993, para. 84.

690 Exhibit 231. For the original statement in Japanese, see http://www.mofa.go.jp/mofaj/area/taisen/kono.html (last visited 24 November 2001).

691 Statement by Prime Minister Tomiichi Murayama, 31 August 1994, http://www.mofa.go.jp/announce/press/pm/murayama/state9408.html (last visited 6 November 2001).

692 Statement by Prime Minister Tomiichi Murayama, July 1995, http://www.mofa.go.jp/policy/women/fund/state9507.html (last visited 6 November 2001).

someone on the subway. He recognizes that "it is an expression with a wide scope for interpretation that can range from a very minor sense of being sorry to "shazai," a serious acknowledgement of wrongdoing and proffering of an apology."[693] He opines, however, that since the Japanese government has not acknowledged any crime, the Prime Minister's "owabi" can only be interpreted as referring to something trivial.[694]

981. Despite the fact that the English translations of the Japanese government statements all contain the word "apology," the victims do not recognize the use of "owabi" as opposed to "shazai" as an official apology and their governments take the same position. We note that word "shazai" is significant because in Japanese, Chinese and Korean it contains the word for "guilt" (zai). The Japanese original statements use such expressions that are the equivalent of sorry, remorse or atonement, but never "shazai."[695]

982. This Tribunal accepts the view of survivors and the explanation of the expert, Professor Yoshimi, that for an apology to be adequate and respectful, the government must make official statements using the word "shazai." Accordingly, this Tribunal does not accept the Japanese government's contention that it "has expressed its sincere apologies and remorse to former comfort women on many occasions."[696] We note that these weak and often patronizing "apologies" are particularly problematic in light of the fact that they were made after a long history of concealment and denial, followed by ambiguous and partial admissions. The fact that Japanese officials have not repudiated continuing official denials, as discussed *infra*, further undermines the adequacy of the "apologies" made to date.

983. In terms of process, we note that statements of "apology" were not made directly and individually to the survivors and their families or close associates but rather to the public at large in a variety of political and diplomatic contexts. Statements made in domestic political arenas or in the international arena do not substitute for apologies made directly to the individuals whose lives have been profoundly affected. As discussed *infra*, the Peace Treaties, which were concluded without taking into consideration the interests of the victims of the Japanese sexual slavery system and other atrocities cannot be considered a bar to their claims for reparations. Similarly, statements of apology that are restricted to the world of statesmen and stateswomen and are not conveyed to the victims themselves are inadequate. We find it significant that many of the survivors who testified at the hearings did not acknowledge any apology being offered by Japanese officials. We consider this a result of the inadequate content of the "apologies" as well as the manner in which the statements of apology to date have been made.

984. Finally, it is contended that the "apologies" issued by Japanese officials have never been accompanied by a commitment to provide compensation from the state of Japan. Such a commitment would have lent more sincerity to the statements of apology. The initiatives of the Japanese government with respect to compensation are addressed in the next section.

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693 Yoshimi, Comfort Women, p. 25.

694 Yoshimi, Comfort Women, p. 25.

695 Yoshimi, Comfort Women, p. 25.

696 Umezu Itaru, Japan Has Faced Its Past, Far Eastern Economic Review, 10 Aug. 2000, available at http://www.mofa.go.jp/j_info/japan/opinion/umezu.html (last visited 14 Sept. 2001). We consider this article as representing the Japanese government viewpoint on two grounds: Umezu Itaru contributed this article in his official capacity as the Consul-General of Japan in Hong; and the Japanese Ministry of Foreign Affairs posted this piece on its official website along with the other government documents.

(b) Continuing Failure to Make Official and Fair Compensation

985. In 1995, the Japanese government made public their plan to have the Asian Women's Fund ("the Fund") pay compensation to victims of Japanese military sexual slavery. In a press conference in August 1994, Prime Minister Murayama had stated that he "would like to find out, together with Japanese people, an appropriate way which enables a wide participation of people so that we can share such feelings."[697] On 14 June 1995, Chief Cabinet Secretary Igarashi Kozo announced the projects of the "Asian Peace and Friendship Foundation for Women" as a follow up to Prime Minister Murayama's statement.[698] The activities of the Foundation were, *inter alia*, to "raise funds in the private sector as a means to enact the Japanese people's atonement [tsugunai] for former wartime comfort women" and "to support those conducting medical and welfare projects and other similar projects which are of service to former wartime comfort women, through the use of government funding and other funds."[699] An accompanying statement by Prime Minister Murayama asserts that the Fund "is an expression of atonement on the part of the Japanese people" toward the "comfort women."[700] The Fund sought to raise 100 billion yen (about $8 million US dollars) in private donations and the Japanese government pledged to contribute 500 million yen (about $4.1 million) to cover the administrative costs of the Fund and to finance medical and social welfare programs for the surviving victims.[701] In the end, the Fund raised only 483 million yen (approximately US$4 million), permitting the allocation of 2 million yen (or about $16,667) to each survivor.[702]

986. Many survivors have rejected this monetary gesture from private donations and demand direct state compensation for the crimes of sexual slavery committed by the state military as they want "honour and dignity, not charity money."[703] Nonetheless, the Fund began to distribute the "atonement money" in the Philippines in 1996 over "the vigorous and consistent protests and refusals from many victims and NGOs in the Republic of Korea, Taiwan and the Philippines."[704] The Fund met with the similar bitter protests of the Korean and Taiwanese governments and public when it secretly paid 7 Korean victims in 1997 and started to implement welfare programs in Taiwan.[705] In a report to the Committee of Experts of the International Labour Organization, the Japanese government asserted that, as of 1997, approximately 85 to 90 "comfort women" had accepted "atonement money" from the Fund and that some had expressed their gratitude in various ways.[706] Experts assert, however, that most of the victims in the Philippines, Taiwan, Republic of Korea and Indonesia have refused to accept monies from the Fund and that the five Filipino comfort women who accepted the money have returned an apology letter from Prime Minister Hashimoto because it was not "recognition of the government

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697 Statement by Prime Minister Tomiichi Murayama, 31 August 1994, *supra*.

698 Statement by the Chief Cabinet Secretary, June 14, 1995, *supra*.

699 *Ibid*.

700 Statement by Prime Minister Tomiichi Murayama, July 1995, *supra*.

701 Exhibit 218, Postwar responsibilities: Non-fulfillment of obligations for apology, compensation, and punishment, Expert Opinion to the Tribunal submitted by Attorney Totsuka Etsurou, p. 4; see also Yoshimi, Comfort Women, p. 24. Given the current dollar-yen exchange rate, $4.1 million would be a more accurate approximate although the figure of $5.7 million was used in the Coomaraswamy Report and quoted in turn by Totsuka Etsurou.

702 Yoshimi, Comfort Women, p. 24.

703 Exhibit 219.

704 Exhibit 218, p. 3.

705 Exhibit 218, p.3. Attorney Totsuka reports that the Japanese government and the Fund have been criticized for employing the means of persuasion that caused "enormous stress among many victims."

706 International Labour Conference 87th Session 1999, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Organization, para. 7 (CEACR 1999 Report); Yoshimi, Comfort Women, p. 24.

admitting its official accountability for the abuses committed against them by the military."[707]

987. The Prosecutors contend that the Asian Women's Fund does not satisfy the state of Japan's responsibility to compensate victims for the harm inflicted and note that this attempt to compensate former "comfort women" ended up infuriating and dividing many of them. As Attorney Totsuka Etsurou indicates in an expert opinion submitted to this Tribunal, the Fund was viewed as expressing the government's understanding that "the State of Japan had no legal responsibility and that the State could not take its state responsibility."[708] We note that the government itself has repeatedly emphasized that the Fund is a private foundation. In 1996, Foreign Ministry Spokesman Hashimoto Hiroshi asserted in a press conference, "[T]he donation itself it now handled by a civil organization called the Asian Fund for Women. The Fund . . . itself will eventually decide the amount of the contribution, and the timing of distributing donations. . . . [T]he collection and distribution of the donations is not handled by the Government itself."[709] The rejection of the Fund by many of the survivors is also reported by the UN Special Rapporteur on Violence against Women, Ms. Coomaraswamy, who concluded that the Fund is "a clear statement denying any legal responsibility" and merely "an expression of the Japanese government's moral concern for the fate of 'comfort women'"[710]

988. The Judges find that the Asian Women's Fund does not constitute an acceptable mechanism for compensating victims for the wrongs inflicted by the state. We agree with Ms. Coomaraswamy: While the initiative from a moral perspective is "a welcome beginning, [the Fund] does not vindicate the legal claims of 'comfort women' under public international law."[711] Privately raised funds cannot be used in lieu of official compensation in satisfaction of the state's obligation, particularly where there has been for decades no financial barrier to the state's ability to provide the compensation from the public fisc.[712] The inadequacy, indeed, discriminatory nature of this privatised "moral" approach to compensation is further underscored by contrasting it with the official diplomatic and legislative attempts Japan has made to respond to the compensation claims of some male victims of the Japanese conscription and forced labour program.[713]

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707 CEACR 1999 Report, para. 4; Exhibit 218, pp. 3-4.

708 Exhibit 218, p. 3. We take note as well of Professor Yoshimi's view that such payments made out of the money amassed through private citizens' donations enable the Japanese government "to maintain its position of not paying out even one yen in reparations" and also leave it "free to emphasize in private that while it does have some 'moral responsibility' to former comfort women, the brunt of that responsibility rests with private citizens." Comfort women, p. 25.

709 Press Conference by Press Secretary, 23 April 1996, http://www.mofa.go.jp/announce/press/1996/4/423.html (last visited 14 Sept. 2001). This statement came in response to a media speculation that the government would make up the difference when the Fund failed to reach the proposed goal. For the government announced in 1995 that it would do its utmost "to ensure that the goals of the Fund are achieved." See Prime Minister Murayama's statement of 1995, *supra*.

710 See, Coomaraswamy Report, *supra*.

711 Coomaraswamy Report, *supra*.

712 The Fund proponents themselves also appear divided over the issue of official compensation as indicated in their appeal for donations that states: "Some of us proponents differ in our views. Some, for example, believe government compensation is absolutely necessary, while others believe such compensation will be difficult to realize in a prompt manner because of legal and practical impediments." An Appeal for Donations for the Asian Women's Fund, 18 July 1995, http://www.mofa.go.jp/policy/women/fund/appeal9507.html (last visited 14 September 2001). The proponents included former government officials, academics, attorneys and journalists.

713 This Judgement, *infra*.

(c) Continuing Opposition to Formal Claims for Reparations Initiated by Survivors

989. Opposition by the state of Japan to legal efforts by groups of survivors to obtain acknowledgement of legal wrongdoing and compensation is further evidence of its failure to discharge its legal responsibility to make reparations. Survivors have pressed their claims in numerous cases in Japanese courts and also before the International Labour Organisation. Responding to the pleas of victim-survivors and their advocates, two United Nations' Special Rapporteurs have investigated and condemned both the original crimes and the subsequent response of the government of Japan. In all these contexts, Japan has opposed responsibility on legal grounds which we reject herein.[714] Beyond that, the duty to provide compensation and reparations does not depend, however, upon being enjoined to do so by an adjudicative body. It is a positive obligation. Nonetheless, Japan has consistently refused to utilize the occasion of these initiatives to officially acknowledge and settle the survivors' claims.

(i) Opposition to Court Cases

990. According to the *amicus curiae* brief submitted to this Tribunal by Suzuki Isomi, the number of civil cases filed in the Japanese courts seeking compensation on account of the Japanese state's violation of humanitarian law during the Second World War totaled more than sixty as of December 2000.[715] Surviving "comfort women" had filed a total of ten complaints: four pending in Prefectural (or trial or district courts), two in High Courts (or appellate courts), two on appeal to the Supreme Court, and two pending review in the Supreme Court. The Supreme Court of Japan, the highest authority for judicial review, has yet to rule on this issue. Two appellate courts have dismissed four claims on the ground of lack of standing. Only one court, the Shimonoseki branch of the Yamaguchi Prefectural Court, ruled against the government. This ruling was reversed by the Hiroshima High Court.[716]

991. On 27 April 1998, the Shimonoseki court ruled in favor of the lawsuit filed by three former comfort women and other female forced labourers from the city of Pusan, Korea, against the Japanese government demanding an official apology and compensation.[717] Japan argued that individuals have no right to compensation under public international law to which only the states are parties; and that, even if they had any such right, any legal obligation to provide compensation to the Korean victims of forced labour was resolved completely and finally by the 1965 Treaty on Basic Relations between Japan and the Republic of Korea. Japan also argued that "some private agents . . . assembled

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714 Japan has consistently argued that only the states are parties under international law and that individuals have no independent rights to compensation. Alternatively, it contends that even if an individual has a right of action, a series of bilateral treaties between Japan and her neighboring countries extinguished any potential claim for individual damages. See discussion of these claims this Part, *supra* and *infra*.

715 See Exhibit 226, Suzuki Isomi, *Amicus* Brief on the Position of the Defendants Concerning the State Responsibility for Individual Claims, Exhibit 226, p. 2.

716 See Exhibit 229, Fujita Hisakazu, et al. eds., "List of Post-War Compensation Trials in Japan" in War & the Rights of the Individual: Renaissance of Individual Compensation, Nippon Hyoron-sha, App., pp. 125-131. See Fn. 12, *supra*, for the current status of the ten civil lawsuits filed by former comfort women against the Japanese government in the courts of Japan.

717 Taihei Okada, trans., "The 'Comfort Women' Case: Judgement of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan," Pacific Rim Law and Policy Journal, vol. 8, No. 1 (Jan. 1999), pp. 66-69. This decision consolidates three cases with different sets of plaintiffs and one common defendant, Japan, and their court case numbers are: 4th year of Heisei (1992, "Wa" No. 349 ["Ko Incident"]; 5th year of Heisei (1993), "Wa" N. 373 ["Otsu Incident"]; and 6th year of Heisei (1994), "Wa" No. 51 ["Hei Incident"]. *Id.*, 108 n.1. The Tokyo High Court also dismissed three (3) claims.

["comfort women"] and they followed wherever the armed forces went."[718] The court rejected the private agent argument based on the findings that "[i]n many places, the armed forces requested establishment of the comfort stations. . . . Even if private agents ran the comfort stations, the Imperial Japanese Forces influenced the management by setting the hours of operation, service fees, and regulations for the comfort station management."[719] Accordingly, the court defined the "comfort women" as "sex slaves [who] were brought to the comfort stations through deception and forcefully turned into 'comfort women' by rape [and] . . . forced to have sex with the Imperial Japanese soldiers." The court found that the "comfort station" was an institution "designed just for sex and the release of sexual desire."[720] Although the Hiroshima High Court dismissed the case on appeal on the ground of lack of standing, it did not disturb the trial court's findings as to sexual slavery.[721]

992. The Shimonoseki court also held that the "comfort women" had standing to seek reparation under Japanese law. The court ruled that post-war Japan has "fundamental identity as Imperial Japan" and, therefore, a duty to provide restitution for the acts committed by the Imperial government. It also found that the "comfort women" system violated Article 13 of the post-war Constitution that provides, "All people should be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other government affairs."[722] The court found that "Japanese Diet members, especially since the government published the informal remarks of the Cabinet Secretary and acknowledged 'moral responsibility' in August 1993, had a legal responsibility to establish legislation providing for compensation," and had not done so for a reasonable period.[723] The court concluded that the government violated Article 1 of the State Liability Act ("Kokka baishoho"), Law No. 125 of 1947, that provides individuals a right to demand compensation from the government "when public servants violate their professional legal duties and inflict damage on such Individuals."[724] Accordingly, the court ordered that each woman be awarded 300,000 yen (about $2,500) in damages.[725] The Hirsohima High Court reversed the Shimonoseki judgement on the ground that that individuals lack standing under international law. Not only does this Tribunal disagree with the Hiroshima court ruling as a matter of international law; we note also that, as a matter of principle, international law does not extinguish domestic law or remedies that are more protective of human rights.[726]

993. Moreover, we emphasise that the survivors' lawsuits provided an opportunity to the government of Japan to attempt positively to discharge its state responsibility to disclose the truth and provide reparations. Unfortunately, neither the executive branch nor the

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718 Taihei Okada, *supra*, p. 67.

719 Taihei Okada., p. 67.

720 Taihei Okada, pp. 76, 99-100.

721 Similarly, when the Tokyo District Court dismissed a compensation claim made by the Dutch comfort women and internment camp inmates on lack of standing, it nonetheless found that the plaintiffs suffered various injuries "in violation of relevant rules of international law." Claim for Compensation from Japan Arising from Injuries Suffered by Former POWs and Civilian Internees of the Netherlands, Matter of Claim for Damages, No. 1218 (Civil), Decision of 20 November 1998 (following oral arguments of 18 May 1998), Civil Division No. 6 of the Tokyo District Court, rpt. in Fujita, p. 118.

722 Taihei Okada, p. 100. Further, the court opined that "the 'comfort woman' phenomenon could have been a violation of the International Treaty Concerning the Slave Trade of Women and Children (1921) or the International Labor Treaty (1930)."

723 Taihei Okada, p. 98.

724 Taihei Okada, pp. 96, 103.

725 Taihei Okada, p. 103.

726 See, e.g., Convention Against Torture, *supra*, Articles 14(2) and 16(2); International Covenant on Civil and Political Rights, *supra*, Article 5(2).

legislature took up this opportunity. This Tribunal disagrees with the decisions of the Japanese courts dismissing the claims of former "comfort women" on the grounds that individuals have no right to claim compensation under public international law, and notes that these decisions appear to have contributed little to the clarification of the executive branch's responsibility. The resistance to the positive obligations of state responsibility affected the political branches as well. Subsequent responses by the Japanese society further affirm the failure of the Japanese government to accept its past wrongdoing and make genuine reparation. We note that the rationale of the court decisions prompted some Japanese civic groups and politicians to demand domestic legislation to compensate the comfort women and to identify and prosecute those who were liable for the "comfort station system," but that these efforts were unsuccessful.[727]

(ii) Opposition to the Reports of the International Labour Organisation (ILO) Committee of Experts

994. As previously noted, the ILO Committee of Experts has repeatedly determined that the "comfort station" system of the Japanese Imperial Forces is sexual slavery in violation of the 1930 Convention Concerning Forced or Compulsory Labour (No. 29) ratified by Japan in 1932.[728] Ruling that compensation is an appropriate remedy under the Convention, the Committee urged Japan to provide compensation voluntarily. Pursuant to the Convention, the Committee opined that only a government can provide compensation and wages and that the Committee does not have the power to order the relief.[729] Furthermore, the Committee has suggested that, "in view of the time that has elapsed since these events, the government will give proper consideration to this matter expeditiously"[730] and compensate the victims "before it is too late to do so."[731]

995. Japan has defended its position based, in part, on its having satisfied its international legal obligations under the peace treaties, its "verbal apologies" and the Asian Women Fund initiative.[732] The 2001 report of the Committee concluded that the Peace Treaties extinguished individual claims,[733] a position with which this Tribunal disagrees for the reasons stated hereinafter. Noting the rejection of the Fund monies by the majority of

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727 Yoshimi, Comfort Women, p. 27. Submissions to this Tribunal indicate that a group of legislators who formed the League of Diet Members for the Establishment of a Fact-Finding Law for the Sake of Lasting Peace "to focus exclusively on the single issue of the establishment of fact-finding committees" submitted a draft bill for war reparations, which did not pass the Diet. Exhibit 228, Draft Outline of Legislation for War Reparations. The Japanese Federation of Bar Associations also recommended in 1995, 1997 and 1998 that the government "establish legislation to provide for an investigation into the facts of the comfort women issue, an apology, and compensation." Yoshimi, Comfort Women, p. 27. The Federation also opined that the China-Japan Joint Communique of 29 September 1972 in which China renounced its demands for war reparations from Japan "in the interest of the friendship between the Chinese and Japanese peoples" had not waived the right of Chinese nations to demand reparations for their losses and damages. JFBA, "Supplementary Explanation of the Recommendation on the Issue of 'comfort women'", June 1995, pp. 10-12, quoted in Exhibit 218, p. 13. Attorney Toksuka reports that JFBA's demand was also unsuccessful. See Joint Communique of the Government of Japan and the Government of the People's Republic of China, Japanese Ministry of Foreign Affairs official website, http://www.mofa.go.jp/region/asia-paci/china/joint72.html (last visited 21 November 2001.)

728 See International Labour Conference, 83rd Session, Report III (Part 4A), Convention 29 on Japan, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Organization (1996) (CEACR 1996); 85th Session, CEACR 1997; 87th Session, CEACR 1999; and 89th Session, CEACR 2001.

729 *Ibid*. (common to all four reports). Further, the Committee reminded Japan "the illegal exaction of forced or labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying the Convention to ensure that the penalties imposed by law are really adequate and strictly enforced." *Ibid*. para. 14. The Committee also noted that indecency through compulsion and rape were punishable offences before the war under the then Penal Code of Japan (Act No. 45 of 24 April 1907). CEACR 1997. See, e.g., para. 15.

730 CEACR 1996.

731 CEACR 2001, para. 10.

732 Report of the Japanese government, 31 May 1996, as quoted in CEACR 1997, para. 5.

733 CEACR 2001, para. 3.

survivors, however, the Committee also ruled that the circumstances suggest "that the expectations of the majority of the victims have not been met"[734] and urged that the Japanese government "find an alternative way . . . to compensate the victims . . . in a manner that will meet their expectations."[735] But here again, Japan has devoted considerable efforts and resources to defeating the "comfort women" claims rather than satisfying them.

(iii) Opposition to the Reports of UN Special Rapporteurs

996. The Japanese government has also refused to accept and indeed has actively opposed the recommendations made in 1996 by the UN Human Rights Commission's Special Rapporteur on Violence against Women, Radhika Coomaraswamy, and in 1998, by the UN Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices in Armed Conflict, Gay J. McDougall, appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Both reports urged, among other things, that the government pay compensation to individual victims of Japanese military sexual slavery and identify and punish perpetrators involved in the establishment, recruitment, maintenance and institutionalisation of "comfort stations".

997. Ms. Coomaraswamy found that the Japanese Imperial Forces committed military sexual slavery in violation of then prevailing international law; and that Japan has a legal responsibility to compensate the victims and to punish the perpetrators.[736] Accordingly, she recommended that Japan apologize individually to each of the surviving women; recognize the systematic and forcible drafting of women by and/or with the knowledge of the government; recognize the systematic recruitment of women for purposes of sexual slavery as a crime against humanity and a gross violation of international humanitarian law; accept moral and legal responsibility for such crimes; and pay compensation from governmental resources to the surviving victims.[737] The Japanese government responded to the Coomaraswamy recommendations before the UN Commission on Human Rights by challenging the report and demanding that the Commission reject it.[738] But the Commission rejected Japan's demand, welcomed her work and took note of this report including her mission report on Japan's military sexual slavery in its resolution on the elimination of violence against women.[739] Nonetheless, an official of Japan's Foreign Ministry attempted to undermine its force by claiming that the Commission did not adopt the report because the expression "take note" used by the Commission has no positive meaning.[740]

998. Similarly, in l998, the UN Special Rapporteur, Ms. Gay McDougall, concluded that Japan's military sexual slavery violated international law and that the Japanese government has yet "to take the necessary final steps to provide adequate redress" which she found to be legally required."[741] Specifically, Ms. McDougall concluded that "it is

734 CEACR 1999, para 9.
735 CEACR 2001, para. 10.
736 Coomaraswamy Report, U.N. Doc. E/CN.4/1996/53/Add.1 (4 Jan. 1996).
737 Coomaraswamy Report.
738 Exhibit 218 (Totsuka), p. 4.
739 The elimination of violence against women, U.N. Commission on Human Rights resolution, 1996/49, U.N. Doc. E/CN.4/RES/1996/49 (19 April 1996), para 1.
740 Exhibit 218, p. 4 (Totsuka), quoting a testimony dated 16 May 1996 by Kazuo Asakai, a Foreign Ministry official, to the Committee of Legal Affairs of Japan's House of the Councillors.
741 United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Systematic rape, sexual slavery and slavery-like practice during armed conflict Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1998/13 (12 August 1998), Appendix, para. 69 (McDougall Final Report).

improper for Japan to argue that the settlement agreements or any other post-war treaties intended to resolve all claims involving the 'comfort women'" since Japan concealed during the negotiating period the military involvement in the comfort stations and continues to deny legal liability.[742] Ms. McDougall further expressed her opinion that "the rights and obligations of States and of individuals . . . cannot, as a matter of international law, be extinguished by treaty, peace agreement, amnesty or by any other means."[743] While welcoming the creation of the Fund "out of a sense of moral responsibility to the 'comfort women'," the Special Rapporteur found that "anything less than full and unqualified acceptance by the Government of Japan of legal liability and the consequences that flow from such liability is wholly inadequate."[744] Accordingly, the Special Rapporteur recommended, among other things, that Japan should establish a new administrative fund with appropriate international representation to provide legal compensation.[745] The Japanese delegate rejected Ms. McDougall's recommendations before the Sub-Commission on 14 August 1998.[746] Her recommendations were endorsed by the Sub-Commission in its resolution.[747]

4. Failure to Take Measures to Protect the Integrity, Well-being and Dignity of the Human Person

(a) Abandonment of Women Post-War

999. The evidence demonstrates that at the end of the war, Japan killed or abandoned "comfort women" and girls. To the extent the military undertook to repatriate the "comfort women", the expert evidence indicates that it was almost exclusively confined to Japanese women.[748] The failure of the Japanese state at the end of the Second World War to return the "comfort women" to their own countries constituted a violation of Article 20 of the 1907 Hague Regulations that required the repatriation of prisoners of war to their country as soon as possible after the conclusion of peace. As discussed in the Judgement on the Common Indictment, *supra*, we consider that the Regulations reflected minimum and elementary standards of humanity and that the "comfort women" were entitled to at least the same protections as prisoners of war.[749]

(b) Continuing Failure to Repudiate Denials of Coercion by High-Ranking Government Officials

1000. The Prosecutors have provided information indicating that on a number of occasions since 1993, high-ranking Japanese officials have made public statements that reiterated and resuscitated the earlier false and stigmatising accusation that the "comfort women" were volunteers or prostitutes. For example, on 4 May 1994, Minister of Justice Nagano

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742 McDougall Final Report, paras. 56-57.
743 McDougall Final Report, para. 57.
744 McDougall Final Report, paras. 64, 69.
745 McDougall Final Report, paras. 63, 65.
746 Totsuka, p. 12. The Japanese delegate stated:

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

747 U.N. Doc. E/CN.4/Sub.2/1998/18, paras. 5, 6, 9.
748 Professor Yoshimi reports that the Army issued a repatriation order in September 1944 and sent back Japanese women but did not return other women except in a few exceptional cases. Yoshimi, Comfort Women, p. 32.
749 IMTFE Judgement (Roling), pp. 416-417.

Shigekato stated that the "comfort women were licensed prostitutes at the time, so one cannot apply today's standard whether it constituted discrimination against women and/or Koreans."[750] This statement prompted violent protests from China, Korea and Vietnam and consequently Nagano resigned on May 7.[751]

1001. Further, on 4 June 1996, Itagaki Tadashi, a member of the Upper Diet (or the House of Councillors), stated in response to citizens' groups: "It is hard to believe that the military forced the women into becoming 'comfort women.' And these women must have been paid."[752] On the same day, Okuno, a member of the Lower Diet (or House of Representatives) remarked at a press conference, "Comfort women were there to make money. There was no forced recruitment."[753] On 24 January 1997, Chief Cabinet Secretary Kajiyama Seiroku also stated, "it is not appropriate to teach about 'comfort women' without offering knowledge of the social background of the time such as that of licensed prostitution system."[754] Less than two weeks later, on 5 February, Shimamura, a member of the House of Representatives and former Minister of Education, stated at a roundtable meeting with the press, "In many cases the local dealers who are often Chinese or Koreans gathered women. There are women who chose to become 'comfort women'."[755]

1002. As part of its responsibility to tell the truth, make reparations and prevent recurrence, the state of Japan has an obligation publicly to repudiate statements by government officials purporting to deny that the "comfort system" was one of sexual slavery. In our view, it should also publicly call upon the declarants to repudiate such lies and, if not, to leave office. On the record before us, this Tribunal finds that the government, having allowed these statements to stand, is in breach of these obligations. We emphasise further that these statements, which implicitly or explicitly label "comfort" women as prostitutes, heap new suffering upon the survivors through stigmatising them in the eyes of the Japanese society, and the societies in which they live, and through attempting to undermine the legitimacy of their demands for apology and compensation.

1003. The failure to fully disclose the truth and accept responsibility has the further effect of obstructing the physical and mental recovery and social re-integration of many of the survivors of the sexual slavery system. Their heartrending testimony before this Tribunal makes clear that the failure of Japan, in the immediate aftermath of the war and for over 50 years thereafter, to acknowledge that the system was coercive and to take measures to repair this gross violation has contributed to perpetuating and exacerbating the suffering and isolation of many of the survivors and constitutes a continuing violation of state responsibility.

5. Discrimination

1004. The "comfort system," and its aftermath to this day, has been riddled with discrimination: The original selection of women reflected intersections of ethnic/racial, wealth and gender discrimination. While the conditions of rape and sexual enslavement suffered generally by the "comfort women" were horrific, there is some evidence in this record that those of non-Japanese or non-European origin were generally treated even worse in

750 Exhibit 219, pp. 2-3.
751 Exhibit 219, p. 3.
752 Exhibit 219, p. 3.
753 Exhibit 219, p. 3.
754 Exhibit 219, p. 4.
755 Exhibit 219, p. 4.

terms of conditions of life in the "comfort stations." There is also some evidence that indigenous women were treated most brutally of all. The difficulties "comfort women" faced in terms of escape, return home and recapturing the lives stolen from them were likewise related to and exacerbated by their gender and race, ethnicity, age and poverty. We note also that it was recently disclosed that, in 1937, Japan tried and punished those who abducted and trafficked Japanese women[756] to a Navy "comfort station " in l932. As a result, the Director General in charge of police of Interior Ministry issued a strict order in 1938 that prohibited transportation of Japanese women for prostitution from the Inland Japan to outside areas. No comparable order against trafficking was issued as to any other women, in particular Korean and Taiwanese women.[757] Instead, Japan claimed a reservation to exclude Korean women from the protection of the 1921 Trafficking Convention.[758] Even today, the Fund sets different amounts for medical and welfare expenses among the comfort women, depending on their national origins: 2 million yen for Chinese and Korean women and only 1 million for the "comfort women" of other national origins.[759]

1005. The contrast between the Japanese government's failure voluntarily to redress the claims of former "comfort women" and their voluntary settlements with other, primarily male, victims of forced labour and consumption indicates continuing discrimination. In 1970, a group of Korean men who had been forcefully taken to the Sakhalin Island and put into involuntary labour filed a lawsuit seeking repatriation and reparations.[760] Years later, the plaintiffs withdrew the complaint as the governments of Republic of Korea, Japan and Russian Federation sought a diplomatic solution.[761] Prime Minister Murayama stated on 31 August 1994: "this issue cries out for [the government's] attention particularly from a humanitarian perspective, and the government intends to decide upon the support policies as soon as possible."[762] Thereafter, Japan agreed to arrangements for the permanent repatriation of ethnic Koreans residing in Sakhalin to either country of their choice at government expense.[763]

1006. In another case, a group of Taiwanese victims, who had been drafted by the Japanese military during the Second World War, and their descendants filed a suit in 1977 to demand reparations for their war-related injuries and death pursuant to Japan's "Engo-ho" (compensatory law for war-related injuries and death) and "Onkyu-ho" (state employees benefits law).[764] The victims argued that the nationality provision in the two statutes excluding veterans of the Korean or Taiwanese origin who were members of the Imperial Army violated the non-discrimination clause in Japan's post-war Constitution.[765] After 15 years of litigation, Japan's Supreme Court dismissed the claim in 1992 on the grounds that the legislature has discretion to determine eligibility for government benefits and that it was reasonable for the government to treat former citizens of Japan differently and deny them benefits. Despite having no legal obligation to provide compensation, Prime

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756 Exhibit 218, p. 11.

757 Exhibit 218, p. 11. In another apparent act of discrimination, the Dutch Military Tribunal at Batavia prosecuted the rape and enslavement crimes against Dutch women while ignoring those against native Indonesian women. Batavia Judgement, *supra*.

758 This Judgement, *supra*.

759 An Appeal for Donations, *supra*.

760 Exhibit 229, p. 126.

761 Exhibit 21; p. 125.

762 "Statement by Prime Minister Tomiichi Murayama," of 31 August 1994, Press Release, http://www.mofa.go.jp/announce/press/pm/murayama/state9408.html (last visited 14 September 2001).

763 Exhibit 21, p. 125.

764 Exhibit 21, p. 125. See also Exhibit 229, p. 126.

765 Exhibit 229, p. 126.

Minister Murayama announced in 1994 that "the government intends to work to meet these obligations as soon as possible" as the claimants were increasingly aging.[766] In 2000, the Diet enacted a law on the payment of condolence to the bereaved families residing in Taiwan of Taiwanese military personnel who died or were injured during the war to offer benefits for a limited period. The victims were each provided two million yen (about $18,000). Thus, Japan made diplomatic and political efforts to settle, using public funds, with the unsuccessful claimants, who, with the exception of a few female military nurses, were men, while offering the "comfort women," whose suffering was at least comparable, only empty words of condolence and private money. This Tribunal finds that Japan's treatment of the "comfort women" – both during the war and post-war – constitutes discrimination based on gender, race, nationality and/or ethnic origin.

6. The State, Militarism and Gender

1007. In attributing state responsibility to Japan, the Prosecutors have drawn attention to the impact of militarism in general, and the military structure designed by the state of Japan in particular, upon women as a gender.

1008. By the time of the Second World War, militarism had pervaded the ethos of Japanese society (as well as of many other states) at every level. As the expert evidence of Professor Kasahara has demonstrated, "the Japanese army was an organisation of rigid and pre-modern class system based on military rank."[767] The golden code was to "take your superior's orders as the Emperor's orders". The Japanese army demanded absolute obedience to the hierarchical chain of command. This enabled senior officers to tyrannise lower ranks and ordinary soldiers became thus part of "a mere 'war machine' that moved at their superior's order." This form of militarism, which denied soldiers' human rights, oppressed their individuality and demanded absolute obedience, can be directly linked with the brutal treatment and sexual violence inflicted upon women and girls in the mass rapes, such as at Nanking and Mapanique, and in the "comfort stations." The effects of the dehumanising treatment of Japanese soldiers pervaded society, encouraging a culture of brutality.

1009. The capacity of the Japanese military system, its leaders, soldiers and civilian agents, to subordinate and oppress women into sexual slavery flowed, at the same time, from a view of women as inferior, lacking in rights and existing for the purpose of serving others. Cultural acceptance of the dehumanization of women – and particularly women of classes, nationalities and/or or races viewed by the dominant group as inferior or subhuman – is in no way unique to Japan. The written opinion of expert witness Minamoto Junko, however, reveals how the elements of Japanese imperial ideology and norms were heightened in the military context. This ideology underpinned the unimaginable inhuman and discriminatory treatment to which the "comfort women" were subjected. Minamoto explains that according to the principle of "kunshin ittai," ultimate harmony lies in the subjects' obedience and devotion to the Emperor as one. According to the principle of "messhi houkou," an individual was supposed to live his or her life for the sake of the Empire. Women were directly subjected to Imperial rule, at the same time as they were subjected to the rule of men in their family, where the male head of household was the "Emperor" of the household. Numerous political and social restrictions on women meant they had little choice about whether to obey men. Poor families sometimes sold their daughters into licensed prostitution, and it was considered "filial duty" to take customers.

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766 See Statement of Murayama, 31 August 1994, *supra*.
767 Exhibit 212.

This ideology of female subordination thus combined with the claimed necessities of the Imperial war effort to produce one of the most brutally mysogynist chapters in history.

1010. The Tribunal considers that this direct link between militarism and the abuse of women and gender must be further researched, explicitly acknowledged and addressed in educational and cultural programs. It must be understood as relevant to all concerts of war including internal armed conflicts and other forms of contemporary conflict. Only then can such abuse be realistically challenged and its recurrence in armed conflict in the future, limited.

1011. Moreover, it is clear from the evidence that the Japanese military saw women's sexuality and sexual integrity as a justifiable sacrifice for the war effort. More generally, the seizure and control of women for military purposes was inherent in the very conduct of war, and women were subjugated to military objectives and grotesquely made the "prize." Thus, the sexual slavery facilities were first established to prevent resistance in China and growing anti-Japanese sentiment internationally, following publicity of the Rape of Nanking. The notorious conduct of General MATSUI's troops became internationally known and diplomatically condemned. The Japanese government, in an attempt to avoid further unfavourable attention as that generated by the Nanking atrocities, took the decision to institutionalise rape on an unprecedented scale through the establishment of "comfort stations" system.

1012. The Tribunal heard evidence from Professor Yoshimi that the "comfort stations" were in fact an attempt on the part of the military high command to prevent rapes committed by Japanese soldiers in occupied territories and the spread of sexually transmitted diseases among the troops. The "comfort station" system thus institutionalised and legitimated sexual violence against the "comfort women" in an attempt to curb unauthorised sexual violence. Professor Yoshimi explained to the Tribunal that this strategy, however, failed miserably. Rather than discourage rape, the Japanese military encouraged both officers and troops to see rape as one of the few 'benefits' and an entitlement of military life. The reluctance of military commanders to try soldiers accused of rape enabled both "authorised" and unauthorised forms of sexual violence against women to proliferate under the auspices of the Imperial Japanese military. The notion that women could be offered to salve the brutality of military life or protect the integrity of the war mission is unfortunately an old one. In this case, the unprecedented scope, institutionalisation and brutality of the "comfort system" is the product of a culture of objectification of and discrimination against women, cruelly exacerbated as to women from cultures considered inferior by the aggressors, and taken to extremes as part of the culture of militarism.

1013. The Tribunal notes the egregious nature of this institutionalisation of rape, where the previously rampant rape of women by Japanese military personnel throughout the regions they conquered was deliberately translated into covert, organised, managed rape in the "comfort stations". This bizarre "privatisation" and systematisation of rape in the "comfort station" system demonstrates the discriminatory purpose of the Japanese military and, by extension, the responsibility of the state of Japan, for gross discrimination. This Tribunal considers that Japan has a continuing obligation to take strong measures to address the discriminatory roots of this atrocity, which persist in the culture of militarism and gender inequality, and that Japan has violated that obligation in failing to make a genuine apology, provide compensation, prosecute wrongdoers, reveal the truth, and take vigorous measures to prevent recurrence.

7. Failure to Take Necessary Measures to Prevent Recurrence: History Textbooks

1014. The state of Japan's failure to face the truth of its past crimes is reflected in the dearth of official memorials, research institutions, cultural explorations, and special medical and rehabilitative services and programs and institutes for the survivors and their families. It is also reflected, perhaps most pointedly in the inadequate treatment of the history of the "comfort women" in the school textbooks approved by the Japanese Ministry of Education and used in Japanese schools. The record indicates that after taking some steps to make still inadequate references to the "comfort women" in the past few years, Japan has recently regressed by allowing the removal of even these references.[768] The failure to acknowledge and educate the public, particularly children, about the wrongfulness of these crimes inflicts a continuing wrong upon the survivors of the system. It also creates doubt whether such crimes would be prevented from happening again. Based on the evidence put forward by the Japanese prosecution team, this Tribunal finds that the Japanese government has not only failed to make affirmative efforts to educate the public and future generations of Japan, but has also obstructed positive efforts of textbook authors by removing references to the crimes.

1015. Evidence submitted by the Japanese Prosecution and prepared by the Committee for Truth and Freedom in Textbooks et al. indicates that Japanese textbook companies have eliminated the previous references to "comfort women" "as a result of powerful pressure from the government and the Ministry of Education."[769] Previous versions by the seven companies that produce junior high school textbooks referred to the "comfort women." However, four out of the seven textbooks being screened by the Ministry of Education for use in April 2002 have eliminated the references to "comfort women" and these four currently dominate the textbook industry, having an eighty percent share of the market.[770] Of the three textbooks that retain references to the "comfort system," only one places it in the "Postwar Compensation" section, while two treat it as something wholly of the past in the "Japan-China War, Asia-Pacific War" section. Only one textbook actually uses the term "comfort women"(*ianfu*), while the other two refer to more impersonal "comfort stations"(*ianfu shisetsu*).[771] The Committee reports that, since 1999, senior Ministry officials asked the managers of textbook companies "to make the context more balanced" and "to rethink the line-up of authors." Other government officials joined in the pressure as shown in the 31 July 1998 statement by Minister of Agriculture and Forestry Nakagawa: "it is questionable whether it is good to publish the issue of 'comfort women' in a textbook as a fact."[772] The Committee further reports that one company president confirmed that, in December 1999, sources in the Prime Minister's office contacted the presidents and told them that "we have been reliably informed that you have been asked to deal with the sections on 'comfort women.'" The Japanese government contended that the deletion of references to "comfort women" is the free decision of textbook companies and it could not order the authors to revise the content. On this record, the Judges accept

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768 Exhibit 220-S-2, The falsification of history under the guise of 'self-censorship' has been forced onto textbook publishers, Report prepared for this Tribunal by Tawara Yoshifumi, Secretary-General of Children and Textbooks Japan Network 21. (12 September 2000)

769 Exhibit 220-S-2, p. 3. The Committee explains that the companies submit the content of textbook manuscripts prior to the production of the draft edition to the Ministry and the schools decide which textbook(s) are to be used among the Ministry-approved textbooks.

770 Exhibit 220-S-2, p. 1.

771 Exhibit 220-S-2, p. 1.

772 Exhibit 219, p. 4.

the Committee's conclusion, however, that political pressure from the government has compelled at least some of the companies to decide to practice "self-censorship."

1016. The Judges also note that the Supreme Court of Japan has held that "the government has an affirmative duty to ensure that the history textbooks adequately and sufficiently address its wartime atrocities" and that "Japan's school textbooks should include descriptions of the suffering Japan's past aggression had caused its neighbours, and that such inclusion constituted a positive educational consideration."[773] Ienaga Saburo filed a lawsuit in 1984 challenging the constitutionality of government screening of textbooks when the Ministry of Education requested him to revise his textbook and eliminate, *inter alia*, the reference to the rape of Chinese women by Japanese soldiers in Nanking. Finding that government screening of school textbooks is constitutional, the Court nonetheless held that the Ministry abused its discretion in ordering the elimination of the reference to Japan's wartime atrocities where there is sufficient research supporting the material.[774]

1017. Furthermore, the obligation to reveal and transmit the truth to future generations and prevent recurrence is a fundamental guarantor of human rights and thus, like other international human rights obligations, takes priority over domestic law. As such, Japan's international obligations of state responsibility compel the government to ensure the teaching and discussion of Japan's past crimes against the "comfort women" in the schools as well as communities. It can do this through minimal regulation of the content of textbooks or through developing and publishing the necessary material itself. Accordingly, the Tribunal finds that the deterioration in Japanese textbook content and Japan's failure to take affirmative steps to inform children of the state's responsibilities are violations of its positive duty to take necessary measures to prevent recurrence; the fact that the deterioration appears to have been encouraged by the state adds to its wrongfulness.

8. Contemporary State and International Practice Relating to Continuing Legal Responsibility

1018. There is growing state practice affirming the continuing responsibility of states for redressing crimes against humanity even when many years have passed since the violation. The Tribunal refers in particular to the decisions of Germany to pay reparations, beyond that required by treaty or law to victims of the Nazi aggression and Holocaust, including those subjected to forced labour.[775] This example is especially pertinent as the crimes committed against the "comfort women" were crimes of forced and compulsory (sexual) labour. It makes no difference whether the labour was in the factories and slave camps producing material for the war effort or in the rape camps of the "comfort women" purportedly maintaining soldiers combat-ready. The Swiss Bank and other settlements respecting property looted by Nazis provide further recent examples of agreements to compensate World War Two victims in Europe.[776] Japan's refusal to act likewise is contrary to this trend.

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773 The "jokoku" (appeal from a High Court) case of Ienaga Saburo claiming compensation, the 3rd Petty Branch of the Supreme Court, Docket Nos. (o)1119 of Heisei 6 nen (1994) (29 August 1997).

774 The "jokoku" case of Ienaga Saburo.

775 See, e.g., Information submitted by the Government of Germany included in Report of the Secretary-General pursuant to Sub-Commission resolution 1993/29, Addendum, U.N. Doc.E/CN.4/Sub.2/1994/Add. 1 (22 July 1994).

776 See also McDougall Final Report, para. 78.

1019. The recent *Pinochet* decision handed down by the House of Lords (UK) [777] and subsequently re-affirmed by the domestic courts of Chile provides powerful precedent regarding the limits of sovereign immunity, which has been held not to extend to crimes of torture allegedly committed by former heads of state. This case reinforces the importance of the exercise of universal jurisdiction with respect to egregious crimes even many years after the event. Current international law requires an end to the continuing denial of justice suffered by the "comfort women", including through the introduction of a reparative legislative framework.

F. DEFENCES TO STATE RESPONSIBILITY: THE PEACE TREATIES

1020. State responsibility can be counteracted by circumstances precluding wrongfulness. According to the International Law Commission such circumstances include consent, self-defence, legitimate countermeasures, *force majeure*, distress and necessity.[778] None of these circumstances were applicable to Japan's commission of the internationally wrongful acts described above. However, Japan has raised other specific defences which we now consider. As the Tribunal has already noted, Japan contends that any individual claims that the "comfort women" may have had for compensation have been fully satisfied by peace treaties and international agreements between Japan and other states following the end of the Second World War (the "Peace Treaties"). These Agreements contain provisions that in various terms purport to waive Japan's liability for further claims arising out of the war. There is little doubt that this was intended by the Allied Powers for political reasons. Among the asserted reasons for attempting to limit Japan's liability were concern that the punitive nature of the Versailles Treaty had contributed to the rise of the Nazis and thus to World War II and the negotiation of these political agreements in the Cold War environment were dominated by fear of Communist (Soviet and, after 1949, Chinese) expansion. The Japanese government has maintained in various contexts that it has legally settled all claims under the terms of the various treaties and diligently fulfilled the obligations and, accordingly, that there is no basis for further claims such as those before this Tribunal.

1021. The Judges will thus address the impact and relevance of the Peace Treaties signed by Japan following the end of World War Two. In the event that Japan's arguments on this point prove sustainable, the Applicants would be effectively precluded from claiming individual restitution or reparations against the state of Japan.

1. The Impact of the Treaties on the Settlement of Claims

1022. Following its defeat during the Second World War, Japan signed a number of multilateral and bilateral Peace Treaties with the Allied Powers and the states of the Asia Pacific. As a preliminary point, it should be noted, as discussed in the Judgement on the Common Indictment, that the Peace Treaties contain no provisions for amnesties. As such, no restrictions on prosecution exist. The only question is whether these Agreements constitute final settlement of all claims against Japan, including those presented here. The precise relationship between Japan and the various countries differs with the wording of the Treaties. The Peace Treaties insofar as relevant to the current proceedings are excerpted below.

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777 See, e.g., Regina v. Bartle et al., Ex Parte Pinochet, House of Lords, Judgement, 25 Nov. 1998; In Re Pinochet, Opinions of the Lords of Appeal for Judgement in the Cause, 17 Dec. 1998.

778 ILC Draft Articles 2001, Articles 20-25.

(a) The San Francisco Peace Treaty

1023. The relevant articles of the San Francisco Peace Treaty provide:

Preamble

Whereas Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights . . .

Article 2

Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet . . .

Article 10

Japan renounces all special rights and interests in China . . .

Article 11

Japan accepts the judgements of the International Military Tribunal for the Far East and other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan . . .

Article 14

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

Therefore,

(1) Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done . . .

(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 during the course of the prosecution of the war, and claims of the Allied Powers for . . . military costs of occupation.

Article 22

If in the opinion of any Party to the present Treaty there had arisen a dispute concerning the interpretation or execution of the treaty, which is

> not settled by reference to a special claims tribunal or by any agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice . . .
>
> Article 26
>
> . . . Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantage than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.[779]

1024. The Definition of Allied Powers provided by Article 23 of the Peace Treaty included Australia, Canada, Ceylon (present day Sri Lanka), France, Indonesia, the Netherlands, New Zealand, Pakistan, the Philippines, the United Kingdom and the United States. Portugal (the colonial power over East Timor) was not a party to the Agreement. Neither the Peoples' Republic of China nor the Republic of China (Taiwan) were invited to the San Francisco Peace Conference or became parties to the Agreement.

(b) Treaty of Peace Between Japan and Taiwan

1025. In the separate Treaty of Peace signed between Taiwan and Japan, Article 11 states that the San Francisco Peace Treaty will apply to any disputes between the two nations:

> Unless otherwise provided for in the present Treaty and the documents supplementary thereto, any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty.[780]

(c) Treaty of Peace and Friendship Between Japan and China

1026. Japan and the People's Republic of China did not sign a formal peace treaty. Rather, on September 29, 1972, they signed a "Joint Communique" aimed at normalising relations and containing Article 5, which stated that the People's Republic of China "renounces its demand for war reparations." These terms were later incorporated and formalised in the Treaty of Peace and Friendship between China and Japan.[781]

(d) Settlement Between Netherlands and Japan

1027. The Settlement between the Netherlands and Japan explicitly addresses the issue of the claims of Netherlands nationals and provides in pertinent part:

> Article I
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> For the purpose of expressing sympathy and regret for the suffering inflicted during the Second World War by agencies of the government of Japan upon Netherlands nationals, the government of Japan shall

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779 Treaty of Peace with Japan, signed at San Francisco 8 Sept. 1951, entered into force 28 April 1952, 3 UST 3169 (San Francisco Peace Treaty) (emphasis added).

780 Treaty of Peace between Taiwan and Japan, 1858 UNTS. 38, signed at Taipai on 28 April l952.

781 Settlement and Treaty of Peace and Friendship between Japan and the People's Republic of China, signed 12 Aug. 1978, 1984 UNTS 269. The Joint Communique of the Government of Japan and the Government of the Peoples' Republic of China is available through the official website of Japan at http://www.mofa.go.jp/region/asia-paci/china/joint72.html (Last visited 21 Nov. 2001).

> voluntarily tender as a solatium the amount of Pounds Sterling equivalent to US$10,000,000 to the Government of the Kingdom of the Netherlands on behalf of those Netherlands nationals.
>
> Article III
>
> The Government of the Kingdom of the Netherlands confirms that neither itself nor any Netherlands nationals will raise against the government of Japan any claim concerning the sufferings inflicted during the Second World War by agencies of the government of Japan upon Netherlands nationals.[782]

1028. By Article III, the state of the Netherlands is arguably precluded from pursuing any further claims against Japan for its actions and the actions of its agents affecting Netherlands nationals during World War II.

(e) Reparations Agreement Between the Philippines and Japan

1029. The Reparations Agreement provides, in pertinent part:

> Article 1
>
> Japan, by way of reparations, shall supply the Republic of the Philippines with the services of the Japanese people and the products of Japan in the form of capital goods, the total value of which will be . . . equivalent to five hundred and fifty million United States dollars . . .
>
> Article 12
>
> 2. Any dispute between the two Governments concerning the interpretation and implementation of the present Agreement shall be settled primarily through diplomatic channels . . .[783]

1030. We note that there is no express waiver of individual claims clause contained in this Agreement. It was only after reaching this Agreement that the Philippines ratified the San Francisco Agreement.

(f) Treaty on Basic Relations Between Japan and the Republic of Korea

1031. The Republic of Korea was not a party to the San Francisco Treaty, although that Treaty confirmed the independence of Korea. It is not, therefore, bound by Article 14. Japan's colonization of the Korean peninsula meant that there were particular issues to be resolved. The Treaty on Basic Relations between Japan and the Republic of Korea consists of only 6 substantive articles and was entered into to clarify the basic features of relations between the two countries. Article IV of the Treaty provides in pertinent part:

> (a) The High Contracting Parties will be guided by the principles of the Charter of the UN in their mutual relations.

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782 Settlement Between the Government of the Kingdom of The Netherlands and Japan Concerning Certain Types of Private Claims of Netherlands Nationals, 13 March 1956, 252 UNTS 3.

783 Reparations Agreement between the Philippines and Japan, 9 May 1956.

> (b) The High Contracting Parties will cooperate in conformity with the principles of the Charter of the UN in promoting their mutual welfare and common interests.[784]

1032. The two states differ on the construction and interpretation of several of the key articles. In addition, the government of Japan, whilst not doubting the legitimacy of the Republic of Korea, has been keen to emphasise that it does not deny the existence of another authority in the northern part of the Korean Peninsula.

1033. The Agreement on the Settlement of Problems concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea, deals with claims. Article II states:

> (1) The Contracting parties confirm that [the] problem concerning property, rights and interests of the two contracting Parties and their nationals . . . and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the [San Francisco] Treaty of Peace with Japan . . . is settled completely and finally.
>
> (2) [N]o contention shall be made with respect to the measures on property, rights and interests of either contracting Party and its nationals which are within the jurisdiction of the other contracting party on the date of the signing of the present Agreement, or with respect to any claims of either Contracting Party and its nationals against the other contracting Party and its nationals arising from the causes which occurred on or before the said date. [785]

1034. It can be questioned whether 'property, rights and interests' includes claims such as those of the "comfort women" against Japan. The two states adopted Agreed Minutes of their negotiation of the Peace Treaty in which they agreed that "property, rights and interests means all kinds of substantial rights which are recognized under law to be of property value."[786] This would appear to exclude the "comfort women's" extensive claims. Korea submitted an outline of claims of the Republic of Korea (called the Eight Items) at the negotiations. There is no evidence that this list included the claims of the comfort women for crimes against humanity committed against them and indeed the Treaty provisions encompass "either the disposition of property or the regulation of commercial relations between the two countries, including the settlement of debts."[787]

2. The Issue of the Peace Treaties' Waiver of Individual Claims

(a) Waiver as to Crimes Against Humanity

1035. As we stated earlier in this Judgement, the Peace Treaties raise the question of the state having the power to waive the rights and claims of individual victims. The Judges consider that the principle that the harm in this context is harm to the state constitutes a

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784 Treaty on Basic Relations between Japan and the Republic of Korea, signed at Tokyo on 22 June 1965, 583 UNTS 33.

785 Agreement on the Settlement of Problems concerning Property and Claims and on Economic Cooperation between Japan and Korea, 583 UNTS 258, 22 June 1965.

786 Agreed Minutes, 583 UNTS 290, para. 2(a), 22 June 1965.

787 International Commission of Jurists, Comfort Women, An Unfinished Ordeal, Report of a Mission (1994), pp. 164-65 (submitted in evidence).

legal fiction that was developed to permit states to assert state responsibility for the commission of internationally wrongful acts against individuals and to control the assertion of claims. Such reasoning is not relevant to crimes against humanity where the harm is to the individual members of the targeted civilian populations and the perpetrator may be the individual's state itself. This position is reflected in human rights theory and, increasingly, in human rights practise where the individual can bring a claim on her or his own behalf before an international body after exhausting local remedies for the violation incurred. These developments also reflect the emergence of the recognition of the individual as a central actor in international law.

1036. In addition, the *Pinochet* litigation before the UK House of Lords has established that crimes such as torture, due to their very nature, can never be legitimate acts of state and, thus, there can be no immunity from accountability.[788] By extension, this principle must apply to rape, also recognised as a serious crime and a form of torture, and to sexual slavery as well as to crimes against humanity generally. Further, as a corollary to the refusal of immunity from accountability for the commission of such crimes, no state can waive the liability of another state for crimes against humanity. On this basis, the state of Japan is prevented from attempting to evade liability for violations of crimes against humanity by hiding behind the terms of the Peace Treaties. In particular, the waiver included within the San Francisco Peace Treaty is invalid on the ground that neither the Allies nor those victimised states which accepted in some form the terms of the treaty, had legal power or right to waive the liability of Japan for crimes against humanity, including the rape and sexual slavery committed against the former "comfort women" or other victims of crimes against humanity.

1037. Nevertheless, in order to further explain the basis of this Tribunal's legal judgement in relation to the legal arguments surrounding the Peace Treaties, we make the following additional comments in relation to the application of the Peace Treaties and additional legal arguments pressed by Japan in other contexts.

(b) Waiver as to Claims Not Presented

1038. The Judges attach weight to the fact that the claims forming the subject matter of these proceedings (that is, the internationally wrongful acts committed against the "comfort women") were not explicitly discussed during the Peace Treaty negotiations. As such, we are persuaded that even if the waiver of claims by the Allied Powers articulated in Article 14 of the San Francisco Peace Treaty were subsequently held to be valid, the normal principles of treaty interpretation would preclude a finding that this waiver was intended, by either party, to include the claims relating to the current proceedings. Further, the lump-sum agreements in the various treaties were, as discussed below, motivated by a desire to sharply limit Japan's liability for economic and geopolitical reasons.

(c) Waiver as to Victim States Not Participating

1039. We also note that the Peace Treaties were concluded between states. It is an axiomatic principle of international law that treaties are only legally binding on those states which are Parties to them.[789] The fact that some of the victimised states were not parties to the San Francisco Peace Treaty negotiations and never acceded to them precludes any claim of waiver as to their nationals under international law.

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788 See In Re Pinochet, *supra*.

789 Vienna Convention on the Law of Treaties, 23 May 1969, Article 34, 8 ILM 679.

1040. The principle that these treaties were negotiated by, and are binding only upon states has further significance here, given that the process excluded the victimised people. The Tribunal finds it very troubling that the states of which the women victimised by rape and sexual slavery, crimes against humanity were nationals, did not put these claims forward in the post-war negotiations. Their failure to do so, however, does not negate the accountability of Japan to make proper efforts to repair the harm inflicted, nor the obligation of these and other states to use all available means to press for recognition and satisfaction of the claims.

(d) Waiver and the Principle of Obligation Erga Omnes

1041. The Judges recognise that, as a general matter, the injured state may waive responsibility and, as a result, the claim is extinguished. However, as already noted, crimes against humanity by definition are committed against individuals and not against states. Moreover, as obligations owed *erga omnes,* they constitute an offense against the entire world community. As was asserted by the International Court of Justice:

> [A]n essential difference should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-a-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive . . . from the principles and rules concerning basic rights of the human person, including protection from slavery and racial discrimination.[790]

1042. The examples of such obligations given by the Court – slavery and racial discrimination – are especially applicable to the facts before this Tribunal. In his Third Report on State Responsibility, the Special Rapporteur on State Responsibility made clear that the category of norms which are generally accepted as universal in scope and non-derogable as to their content, and in the performance of which all states have a legal interest, is *small* but that it includes "the prohibition of the use of force in international relations, the prohibitions of genocide and slavery, the right of self-determination, and those other human right and humanitarian law obligations which are recognised as non-derogable by general international law."[791]

1043. This analysis supports the position that it is legally impossible, in our view, for a state to waive the claims of the individuals injured because the injury is done to all. Article 48(1)(b) of the ILC Draft Articles 2001[792] also allows any state – irrespective of whether it is the injured state – to invoke responsibility and demand accountability where the obligation is owed to the international community as a whole. And Article 48(2)(b) provides that such a state may claim reparations for the "beneficiaries of the obligation breached." Accordingly, it is legally impossible for bilateral or multilateral agreements, even agreements concluded by states of which the victims are nationals, to waive the interests of non-participating states in redressing a crime done to all.

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790 Barcelona Traction, Light and Power Co. Ltd. (New Application: 1962) (Belgium v. Spain) 1970 ICJ Rep. 3, paras. 33-34 (5 February).

791 U.N. Doc A/CN.4/507/Add.4, 4 August 2000.

792 ILC Draft Articles 2001.

1044. Beyond this, the people of the world – and not only states – have a compelling interest in establishing accountability for crimes against humanity. While acknowledging that the ILC Draft Articles 2001 refer to states that are not directly injured by the breach of an *erga omnes* obligation, the Tribunal rejects the proposition that the international community is comprised only of states. We note that the International Law Commission's Special Rapporteur on the Draft Articles did not accept a definition of the international community that was restricted to states. Instead, he opined that "the international community includes entities in addition to States."[793] He gave as examples such entities as the European Union and the International Committee of the Red Cross, but there is no reason why the *omnes* – (or all) – should not refer to all people particularly those peoples and people who are the victims of the offending conduct. Thus the failure of any state, be it a victimised state or one interested as part of the world community or *omnes,* to recognise or press the claims of those victimised by crimes against humanity cannot, in law, extinguish those claims.

1045. Moreover, this Tribunal, deriving its authority from the peoples of the Asia-Pacific region victimised by the Japanese military aggression and its military sexual slavery system, and ultimately from the people of the world, sits and renders judgement to give voice to the unextinguished claims. Among its purposes is to encourage the states of the world – many of whom have, in various contexts, expressed their condemnation of Japan's military sexual slavery system and its resistance to making reparations to the survivors – to discharge their responsibilities as part of the community of nations and accelerate their efforts to achieve a just resolution and ensure the accountability of the Japanese state.

3. Treaties Not an Articulation of the Traditional Doctrine of Diplomatic Protection

1046. The Tribunal has been persuaded in the current proceedings by Professor Kalshoven's careful analysis of the position of the Peace Treaties. It attaches weight to the Professor's assertion that the Peace Treaties and their provision for negotiation of lump sum compensation do not represent a formal articulation of the traditional doctrine of diplomatic protection. As he stated:

> [L]ump-sum agreements have nothing to do with diplomatic protection. Diplomatic protection is the conscious decision by a government to 'espouse' the case of its national who has attempted, and failed, to get satisfaction from the foreign State in the course of a procedure in which he has exhausted all local remedies. Lump-sum agreements are generally concluded without even an attempt to find out whether potential individual claimants have followed this road of exhaustion of local remedies. And once again, individuals could only have done this if they had a right, and the opportunity, to bring claims against the other State before the courts of that State.[794]

4. The Peace Treaties as Political Rather Than Legal Settlements

1047. The Tribunal is also persuaded by Professor Kalshoven's analysis that lump-sum agreements are concluded for political reasons, rather than to compensate individual

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793 Fourth Report on State Responsibility, submitted by James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/5I7 (2000), para. 36 (4th Report).

794 Exhibit 230, Fritz Kalshoven, Supplementary Expert Opinion, dated 18 November 1999.

damage and injury.[795] Given that the damage and injury caused to individuals by the Japanese military sexual slavery system and rape such as at Mapanique was not acknowledged or considered at the time of the conclusion of the Peace Treaties, this Tribunal finds persuasive Professor Kalshoven's assertion that:

> Lump-sum agreements are inter-State agreements; they are concluded for political reasons and are not, or at most only very partially, based on the damage and injury suffered by individual persons of the nationality of the State that receives money under the agreement. Often, the individual damage and injury are unknown at the time of the conclusion of the agreement, and therefore simply cannot have been taken into account in 'calculating' the payment under the agreement.[796]

1048. The political nature of the settlements contained within the Peace Agreements is starkly apparent in this case. In addition to not wanting to punish Japan economically for its war of aggression and the devastation it wreaked, the Allies, and particularly the United States, had as their overarching goal to prevent Soviet influence in the region. The United States acknowledged this recently in its "Statement of Interest" filed in the United States federal court, presenting claims of former "comfort women" from the Philippines, China, Taiwan and South Korea. The Statement of the United States argued against recognition individual claims in these terms:

> The [San Francisco] Treaty was considered as a part of a package, … relating to the Pacific region, reflecting the United States' view of the Treaty as an integral part of its political and foreign relations goals in that region.
>
> The Allies' intent was to effect as complete and lasting a peace with Japan as possible by closing the door on litigation of war-related claims, and instead effecting the resolution of these claims through political means. This policy decision was made in order to allow Japan as a nation to rebuild its economy and become a stable force and strong ally in Asia …. To that end, the United States actively facilitated and encouraged Japan's efforts to enter into peace treaties and/or claims settlement agreement with non-signatory nations such as China, Korea, Burma and Indonesia.[797]

This is a transparent admission of the political nature of this effort to extinguish individual claims for war-related injury. It is also an effective warning of the danger to the principle of accountability of permitting a geopolitical negotiating process to extinguish the claims of the injured.

5. Changed Circumstances

1049. There is further significance today to the fact that the restriction of the reparation claims against Japan at the time of the Peace Treaties was based on Japan's economic weakness. The wording in Article 14(a) of the San Francisco Peace Treaty that "the resources of Japan are not *presently* sufficient" indicates that this was not envisaged, at the time, as permanent, but rather was considered a temporary bar on claims because of the special

795 Exhibit 230.
796 Exhibit 230.
797 Hwang Geum Joo, et al. v. Japan (Civil Action No. 00-CV-2288), renumbered CO-CV-2233 (D.D.C. filed 18 Sept. 2000).

circumstances then prevailing in Japan. The requirements for the application of the doctrine of fundamental change of circumstances (*rebus sic stantibus*) for the termination of a treaty are laid out in Article 62 of the Vienna Convention on the Law of Treaties. The requirements are that: "(a) 'the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty." It might be argued that the fundamental change of Japan's economic circumstances in terms of its now powerful economic strength and the changed political circumstances after the collapse of the Soviet Union go to the basis of the waiver provision and change the obligations of the San Francisco Treaty.

1050. The Judges further take judicial notice of media reports of subsequent agreements made by Japan to pay reparations for damages caused by its illegal wartime activities.[798] Such agreements might activate Article 26 of the San Francisco Agreement allowing for further reparations at the behest of the parties. The same might be argued of the Treaty with the Philippines, which did not include a waiver clause. As this argument has not been made to the Tribunal the Judges will not explore it further, except to note the potential for consideration of the issues by the International Court of Justice, under Article 22. We support the often asserted view that there can be "no peace without justice." The long and courageous battle for reparations waged by the aging survivors of the "comfort system" attests to the necessity of accountability if the survivors are to have peace. It also makes clear the crucial importance of the principle we affirm here: that as to crimes against humanity, the bargains of states cannot extinguish the claims of injured people.

6. The Gendered Nature of the Peace Treaties

1051. We also find persuasive the arguments of the co-Chief Prosecutors regarding the inherent gender bias underlying the Peace Treaties. We note that women, either as individuals or as a group, did not have an equal voice or equal status to men at the time of the conclusion of the Peace Treaties, with the direct consequence that the issues of military sexual slavery and rape were left unaddressed at that time and formed no part of the background to the negotiations and ultimate resolution of the Peace Treaties. The Tribunal considers that such gender blindness in international peace processes contributes to the continuing culture of impunity for crimes perpetrated against women in armed conflict.

7. Article 3 of the 1907 Hague Convention

1052. The Tribunal further notes that Article 3 of the 1907 Hague Convention provides an additional foundation for recognising compensation claims by individuals,[799] and that, in accordance with our earlier findings, it is applicable to the state of Japan. We note that the state of Japan takes the position that Article 3 does not confer a direct, individual right of compensation, but refers only to the responsibility between states. While recognising that the Japanese courts have accepted Japan's contention, this Tribunal is not in accord. Rather, based on the negotiating history and the text, this Tribunal accepts the expert view of Professor Kalshoven and other experts that Article 3 was intended to confer an

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[798] Steven Clemons, "Recovering Japan's Wartime Past – and Ours," The New York Times, 4 September 2001, p.A-27. Clemons also refers to a recently declassified secret exchange of letters between Japan and the Netherlands affirming that the latter had not expropriated the private claims of its nationals by becoming a party to the San Francisco Peace Treaty.

[799] Article 3 provides: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

independent individual right to compensation for victims of violations of the annexed Regulations. We find it further significant that Article 3 was so drafted to provide an additional sanction against an occupying state in order to enhance adherence to the Hague Regulations with respect to persons under its jurisdiction. As Professor Kalshoven explains:

> [I]t should be understood that the liability for compensation provided in Article 3 [of the Hague Convention] means State responsibility, and was set forth, for the purpose of making armed forces and their members strictly adhere to the Regulations, as a sanction against the belligerent party whose armed forces or its members have committed acts in violation of the regulations in order to make the provisions more effective. *It should not be understood further than to mean that it provides individual victims, who have been inflicted damage as a result of acts in violation of those provisions, with the right to claim compensation directly against the belligerent State* (emphasis supplied).[800]

G. CONCLUSION

1053. For the above reasons, the Judges find that the application for state responsibility is valid and that the Japanese government is liable for the harm inflicted by the Japanese military sexual slavery system. With respect to Japan's reliance on the Peace Treaties, the Tribunal finds that the negotiating parties had no power to waive the claims of individuals for harm suffered as a result of the commission of crimes against humanity and we reject the assertion that these claims were effectively or permanently waived. Further, we find that Article 3 of the 1907 Hague Convention was intended to protect the right of the victimised persons and those who are permitted to claim on their behalf to seek compensation as individuals.

[800] Exhibit 230. The Kalshoven interpretation is supported by Eric David, Professor of International Law, International Criminal Law and Law of Armed Conflict, University of Bruxelles, in War and the Rights of Individuals: Renaissance of Individual Compensation (Josalazu Fujita, Isomi Suzuki, Kantaro Nagano (eds.)) (2000).

PART VII – REPARATIONS

A. INTRODUCTION

1054. Reparation is a crucial form of redress which should be afforded to victims of crimes. The obligation to respect and enforce international law has been the subject of many reports[801] and there is no doubt that every state has the legal duty to respect and enforce human rights and humanitarian law. This obligation includes the duty to "afford remedies and reparation to victims."[802] In the 1928 *Chorzow Factory* case, the Permanent Court of International Justice regarded the obligation to make reparation for an international wrongful act as "a general principle of international law."[803] That general principle has developed into a legal and moral duty.[804]

1055. Any violation of human rights or humanitarian law gives rise to a right of reparation for the victim, although "[p]articular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide, slavery and slavery-like practices . . . and systematic discrimination, in particular based on gender."[805]

1056. In accordance with our finding that the crimes committed against the "comfort women" were international wrongful acts attributable to the government of Japan, the state incurs civil and criminal responsibility for the violations. In conformity with the longstanding principle of international law that the state must provide a remedy for its wrongs,[806] the government of Japan is accordingly obliged to provide reparation to the former "comfort women" for the crimes committed against them by or with the complicity of the Japanese government and military.

1057. In addition, in light of the continuing violation, we apply the evolving concept of reparations under international law. Thus, having identified the rape and sexual slavery committed herein as internationally wrongful acts during 1937-1945, we examine the state's responsibility to provide compensation, restitution, rehabilitation, satisfaction, and

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801 Most particularly, the subject of reparations has been addressed by Mr. Theo van Boven, who was tasked by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of human rights abuses (E/CN.4/Sub.2/1993/8 of 2 July 1993), and this draft report resulted in two subsequent reports on basic principles and guidelines (E/CN.4/Sub.2/1996/17 of 24 May 1996; E/CN.4/1997/104 of 16 January 1997.) The reports of Mr. Louis Joinet, Special Rapporteuer of the Sub-Commission on the question of impunity of perpetrators of violations of human rights also elaborated basic principles and guidelines on impunity, including two reports addressing reparation for victims of human rights violations (E/CN.4/Sub.2/1997/20 of 26 June 1997; and E/CN.4/Sub.2/1997/20/Rev. 1 of 2 October 1997). Additionally, the Commission on Human Rights commissioned Mr. M. Cherif Bassiouni to report on the basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (E/CN.4/1999/65 of 8 February 1999; and E/CN.4/2000/62 of 18 January 2000.)

802 Van Boven Principles, 1996, principles 1 & 2, and Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, 24 May 1996, Annex, Basic Principles and Guidelines on the Right to Reparation for United Nations Commission on Human Rights, Victims of Gross Violations of Human Rights and Humanitarian Law, principles 1 & 2 [Revised Basic Principles, van Boven, 1996].

803 Chorzow Factory (Indemnity) Case, (Germany v. Poland), 1928 PCIJ, Series A, No. 17, at 29 (Sept. 13).

804 *See*, *e.g.*, 2001 Draft Articles on State Responsibility (2001) Article 30.

805 United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Basic Principles and Guidelines on the right of victims to reparation, U.N. Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, at 7-8 [van Boven Guidelines, 1993].

806 United Nations Commission on Human Rights, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, U.N. Doc. E/CN.4/2000/62 (18 January 2000) [Bassiouni Final Report], paras. 3(e), 16.

guarantees of non-repetition as these concepts have been articulated in more recent UN documents.

1058. In examining the scope of the government of Japan's obligation to provide reparations, we refer to a fundamental principle of international law that "the breach of an international duty involves an obligation to make reparation in an adequate form."[807] To fulfil this obligation, the reparation must be "adequate, effective and prompt."[808] In order to be deemed fair, the reparations or other remedies provided must be "proportional to the gravity of the violations and the harm suffered."[809]

1059. The form of reparations due is dependent upon the particular facts of the case, but may include restitution, compensation, rehabilitation, and satisfaction. These encompass such things as an acknowledgement of illegality and responsibility, a formal apology, access to justice (criminal, civil, and administrative), and access to factual information concerning the violations. The government must also take steps to protect the identity of those survivors/victims who do not want to be identified.

1060. The applicants are seeking reparations for two kinds of harm inflicted on the survivors of Japan's military sexual slavery: harm that flows from the original violations and harm incurred from subsequent acts and omissions that are contrary to the Japanese government's obligations to provide full and adequate reparations. This case gives powerful meaning to the concept of continuing violation and indeed the testimony of the survivors reveals the constant reiteration of pain and the reinforcement of secrecy and shame as a result of the government of Japan's concealment, denials, and obfuscation of the truth and its failure to fulfil its fundamental responsibility. We note that for over 56 years, successive governments of Japan have continually failed in their obligation to provide remedies expeditiously.[810]

1061. We agree that the victim/survivor is the appropriate "moral and conceptual point of departure" for the development of a legal framework of international guidelines governing the right to reparation.[811] Atrocities perpetrated intentionally, systematically, and against a huge number of victims, as here, are especially egregious and deserve proper censure.

1062. Reparations promote justice by providing certain means of redress for the violations.[812] Reparations may be claimed by direct victims, their immediate families, dependants, or "other persons or groups of persons connected with the direct victim."[813] A "victim" is one who, individually or collectively, has suffered harm. This harm encompasses, among

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807 Chorzow Factory (Jurisdiction) Case, op cit at n 1. *supra* Chorzow Factory (Merits), Permanent Court of International Justice (PCIJ), Judgement No. 13, Series A, No. 8-17, 1927.

808 Bassiouni Final Report, para. 15.

809 Bassiouni Final Report, para. 15.

810 Bassiouni Final Report, para. 15.

811 United Nations Commission on Human Rights, Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43, UN Doc. E/CN.4/1999/65 (8 February 1999) [Bassiouni 1999 Report], paras. 83, 84.

812 Bassiouni Final Report, para. 15. The Joinet Report (E/CN.4/Sub.2/1997/20, 26 June 1997) refers to and treats somewhat separately "the right to know," "the right to justice," and "the right to reparation."

813 United Nations Commission on Human Rights, Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, UN Doc. E/CN.4/Sub.2/1996/17, para. 6 [van Boven Principles, 1996].

other things, "physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights."[814]

1063. The law of state responsibility "requires a state to make reparations when it fails to comply, through an act or omission attributable to it, with an obligation under international law."[815] Moreover, the forms of remedies available from the state are not necessarily discretionary, particularly when the violation is the result of intentional state wrongdoing. That the crimes were committed by or attributable to the state is especially disturbing. This is not a case of a state failing to protect – the state of Japan aggressively and intentionally caused the harm. Thus, "[t]he remedies afforded should reflect the breach of trust involved because, in general, the more outrageous the wrongdoer's conduct, the more outraged and distressed the victim will be and the greater the harm that will be suffered."[816] The reparations should be comprehensive and include any or all forms that are applicable to the situation and cover all injuries suffered by the victims.[817]

1064. The most common forms of reparation – satisfaction, restitution, compensation, and rehabilitation – must all be considered, as the needs of the large victim group may vary greatly. Further, the extended period of time over which the crimes occurred, covering years in some instances, coupled with the excessive time period during which additional violations have accrued as a direct result of the failure of the government of Japan to take responsibility for the crimes and provide reparation after the war, necessitates a broad scope of applicable remedies, including reparation.

1. Satisfaction

1065. The concept of satisfaction encompasses public acknowledgement of the state's wrongdoing together with concrete steps to repair the relationship between the victim and the state and civil society as a whole. Satisfaction encompasses symbolic measures taken for "moral and collective reparation," and arises in part from the "duty to remember."[818] Satisfaction can include any or all of the following measures, which are not exhaustive:

(a) Cessation of continuing violations;
(b) Verification of the facts and full public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
(c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;

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814 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. A/RES/40/34, 29 November 1985, Annex, at Principle 1.

815 Dinah Shelton, Remedies in International Human Rights Law, 1999, p. 93.

816 Dinah Shelton, Reparations for Victims of International Crimes, in International Crimes, Peace, and Human Rights (Shelton ed., 2001), p. 140.

817 Bassiouni Final Report, paras. 21, 22, 23, 24, 25; Joinet Report, Annex, Principle 39.

818 United Nations Commission on Human Rights, Question of the impunity of perpetrators of human rights violations (civl and political), Final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, U.N. Doc. No. E/CN.4/Sub.2/1997/20 (26 June 1997) [Joinet Report], Annex, Principle 2 and Principle 44. For an analysis of the "moral responsibility" of the government of Japan, see Report on the mission to the Democratic People's Republic of Korea, the Republic of Korean and Japan on the issue of military sexual slavery in wartime, Addendum to the Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, UN Doc. E/CN.4/1996/53, Add.1, 4 January 1996, paras. 125-135.

(d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely associated with the victim;
(e) Apology, including public acknowledgement of the facts and acceptance of responsibility;
(f) Judicial or administrative sanctions against persons responsible for the violations;
(g) Commemorations and tributes to the victims;
(h) Inclusion of an accurate account of the violations that have occurred in international human rights and humanitarian law training and in educational material at all levels;
(i) Preventing the recurrence of violations . . . [819]

2. Official and Full Acknowledgement

1066. As previously set forth in this Judgement, successive governments of Japan have continually violated the duty to acknowledge its wrongdoing concerning the "comfort system." This violation continues until this day. The guarded admissions of the state of Japan continue to minimise the harm inflicted while its failure to countermand the denials continues to exacerbate the survivors' suffering. Many of the survivor-witnesses underscored their need for a meaningful apology. A sincere apology fully acknowledging the wrongdoing and clearly accepting full legal responsibility is required. Verifying the facts and publicly disclosing the truth must be done "to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others."[820] Revealing the truth is a fundamental requirement of justice.[821]

1067. Despite its obligations, the Tribunal finds that the official position of Japan has moved from the destruction of inculpating documents to denial to acknowledgment of culpability that remains partial and ambiguous. Confronted with allegations, instead of acknowledging the crimes the government of Japan initially denied any involvement in the "comfort stations," and implied that the women were voluntary prostitutes. Only in the face of undeniable evidence of the government of Japan's military involvement in the "comfort stations" did the government belatedly offer a general "apology" while simultaneously denouncing that it had incurred or continued to owe any legal responsibility.

1068. The Tribunal finds that the state of Japan's continuing resistance to fully acknowledging its wrongdoing and its efforts to shift blame onto the victims has perpetuated the shame and silence, inflicted indescribable pain upon the survivors, and deprived them of the possibility of living in peace with themselves and with their families and communities. As the Secretary-General of the United Nations recently said in relation to an historic judgement of the International Criminal Tribunal for Rwanda: "There can be no healing without peace, there can be no peace without justice, and there can be no justice without

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819 Bassiouni Final Report, para. 25. In addition, satisfaction includes preventing the recurrence of violations by such means as: Ensuring effective civilian control of military and security forces; …; strengthening the independence of the judiciary; protecting persons in the legal, media and other related professions and human rights defenders; conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials; promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises; creating mechanisms for monitoring conflict resolution and preventive intervention. Bassiouni Final Report, para. 25(I).

820 Bassiouni Final Report, para. 25(b).

821 See e.g., van Boven 1993 Final Report.

respect for human rights and the rule of law."[822] The partial admissions of the state of Japan continues to minimize the harm inflicted while its failure to countermand the denials continues to exacerbate the survivors' suffering. Until the government of Japan acknowledges that it was the victimizer and that the "comfort women" were innocent and blameless pawns victimised by the state and its military, full redress is impossible.

3. Preservation of Memory

1069. Closely related to apology, which facilitates healing and acknowledges responsibility, preservation of memory concerns disclosing fully the factual records and other evidence of the "comfort system" and creating a public historical record for telling, investigating, and retelling the full story. During this process, efforts must be made to ensure that the privacy of victims is respected. Accurately recording and preserving the memory of wrongdoing and the harm to victims serves to rehabilitate the victims in the public eye and ensure the non-recurrence of such horrific behaviour in future generations.

1070. The Tribunal finds that the efforts of the government of Japan to educate the people of Japan and future generations are sorely lacking in regard to the formal education through text books, official memorials, and commemorative days devoted to examining the history and engendering respect for the victimised women. Jose Zalaquett, a member of the Chilean Commission for Truth and Reconciliation, noted that if the "ghosts of the past [are] not exorcised to the fullest extent possible, [they] will continue to haunt the nation."[823] This was true in Latin America and it is true in Asia and elsewhere.

4. Gender Training, Empowerment, and Equality

1071. The brutal expropriation of women's bodies, sexuality, youth, fertility, self-esteem, security, future and hope is more likely to occur in a culture that devalues females and which sanctions the subordination and dehumanisation of girl-children and women. This treatment is usually based on women's gender as well as their perceived inferiority and vulnerability due to national and racial identity, including indigenous status, and poverty. Unfortunately, the Japanese culture of rendering women, particularly outside the home, invisible or less significant than men, is not at all unique.

1072. It is critical that the sexual enslavement of the "comfort girls and women" not be treated as an anomaly. Rather, the underlying ideology and political, economic and social structures which combine to validate women's inequality and subordination and, thereby, immunise violence against women and girls in the public and private arenas and must be addressed at all levels of society. Efforts must be made to expose the attitudes and conditions contributing to the devaluation of women and to reverse such attitudes through broad education, training and support to women and girls to enable them to overcome the legacy of gender inequality.

5. Access to Judicial Redress

1073. In addition to civil remedies, it is appropriate to apply criminal sanction to individuals who commit crimes. Fundamental responsibility rests with those responsible for establishing and maintaining the "comfort system" and their agents, physical perpetrators,

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822 Secretary-General of the UN, Kofi Annan, Press Release, Secretary General/S6/sm/668/L/2896, 2 September l998.

823 Jose Zalaquett, Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," 43 Hastings LJ (1992), pp. 1425, 1429.

station owners or managers, and superiors on the hierarchical ladder who had a duty to prevent, halt, or punish crimes committed by subordinates under their authority and control, but who failed to take the necessary and reasonable steps to do so. Administrative sanction, truth-telling and public shaming may in some circumstances be more appropriate than criminal prosecution.

6. Restitution

1074. The purpose of restitution is to "restore the victim to the original situation before the violations…occurred."[824] It includes restoration of liberty, ... enjoyment of family life and citizenship, return to one's place of residence, restoration of employment, and return of property."[825] In the law of remedies, restitution is preferable when possible, so as to restore the victim to her pre-injury position. When restitution is impossible, money is usually awarded as a substitute. Clearly, a state cannot bring a dead person back to life, "nor can a rape or torture victim have the rape or torture expunged. In such cases, money becomes a substitute for the pre-injury status."[826] While it is impossible to restore the former "comfort women" to their situation before the violence inflicted upon them, it may be possible to return them to their country of residence if they wish; to provide them with some of the material well-being including long-delayed health care, they might otherwise have enjoyed; and to erase any criminal records of, for example, prostitution or unlawful immigration, which may have resulted from their victimisation as "comfort women."

1075. It is incumbent on the government of Japan to take vigorous measures, in consultation with the survivors, to restore the honour and social status of survivors. They must be restored in not only their own eyes, but also the eyes of society. Additionally, restitution of material losses, such as repatriation of survivors who wish to be, return of any property taken, or return of the remains of the deceased, would also provide a measure of remedy.

7. Compensation

1076. This form of remedial provision is appropriate for "any economically assessable damages" both material and emotional, which includes physical or mental harm, including pain, suffering and emotional damage from the initial violence and enslavement and continuing violations; lost opportunities, including education; material damages, including loss of education and earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services.[827] Physical and emotional suffering should be recognized as encompassing the lifelong loss of pleasure from sex or sexuality, the loss of reproductive capacity or health and the harm to children, the loss of security in the world and trust in others, the loss of the sense of integrity and belonging in one's body, and the long period of isolation from family and society, and the impact of this atrocity on future generations.

1077. To be in compliance with international law, compensation must come from the source of the wrongdoer, the government of Japan and any other responsible party. The

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824 Bassiouni Final Report, para. 22.

825 Bassiouni Final Report, para. 22.

826 Dinah L. Shelton, Reparations to Victims at the International Criminal Court, in The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79): Recommendations for the Court Rules of Procedure and Evidence (Center on International Cooperation, New York University), prepared for the 26th July – 13 August 1999 ICC Prep. Com., available at www.nyu.edu/pages/cic/pubs/ReparVictimsNew.html.

827 Bassiouni Final Report, para. 23. Article 3 of 1907 Hague Convention IV recognizes that states may be required to pay compensation for violations of international humanitarian law.

compensation must be adequate to the material harm, lost opportunities and emotional suffering of the victims, their families and close associates for the crimes committed and the ensuing harms resulting from the denial of truth and timely remedial measures. The Tribunal considers that the Asian Women's Fund, vehemently rejected by many of the survivors, is neither appropriate nor adequate. Determination of the proper amount of compensation should be made in consultation with survivors, the families of those who are deceased, and appropriate advocates and experts, and may draw upon international practice for similar or related atrocities.[828]

1078. The Inter-American Court of Human Rights recognised that abuses committed by governments may have a more harmful effect on the victim than abuses committed by non-state actors. In *Loayza Tomayo v. Peru (Reparations),* the Court emphasised that the state has a duty to protect individuals and it found that crimes committed by the state are exceptionally egregious and destructive.[829]

1079. The Tribunal finds that the delay in making reparations and acknowledging the crimes exacerbated the injuries and caused additional and continuing suffering in the nature of shame, ostracism, anger, sorrow, despair, isolation, the inability to find peace, economic hardship and impoverishment, loss of companionship, and unredressed health problems. These profound losses are also subject to compensation to the present, as are the lost opportunities.

8. Rehabilitation

1080. Rehabilitation may include services afforded to both the victim and the victimizer. It includes medical and psychological care as well as legal and social services.[830] In the present case, the continuing nature of the violations intensifies the need and urgency for all applicable forms of reparation. The murder or abandonment of the women at the end of the war, the destruction of evidence that would reveal the full extent of these crimes, the denial and attempted erasure of the women's experience of sexual slavery and rape by naming it "prostitution," the refusal to take legal or moral responsibility for the crimes or to provide fair reparations, have inflicted an additional layer of harm on the survivors and other victims. Trauma, especially when resulting from mass violence and sexual violence, often results in long-lasting post traumatic stress which may require special care and treatment.

1081. The conditions to which the "comfort women" were subjected were extreme and some of the most vile imaginable: Many survivors reported seeing their families abused, being raped in front of their family members, being abducted or tricked and taken to a different country, being enslaved to effectuate continuous rape over a period of weeks, months, or years, and then being shunned by society, left without a means to support themselves. The assistance that would need to be provided to survivors of such atrocities is considerable. The physical violence alone would typically result in severe damage to the body, such harm having been exacerbated by aging without health care.

1082. Rehabilitation may require educating, training, and treating the victimiser to ensure that the victimisation will not continue or be repeated. Victimisers too may need to come to

828 For a full review of state and international practices regarding remedies for violations of human rights and humanitarian law, see Shelton, Remedies in International Human Rights Law.

829 Loayza Tomayo v. Peru, Judgement of Nov. 27, 1998, 43 Inter-Am. Ct. H.R. (ser.C)(1998).

830 Bassiouni Final Report, para. 24; van Boven Principles, 1996, para. 14.

terms with their guilt and the causes of the crimes and their participation in them, in order to be more productive members of society.

1083. The testimony of the survivors demonstrates that the physical and mental violence inflicted upon the "comfort women" has not healed, and that efforts need to be taken to ensure that, to the extent possible, comfort and reduction of pain is finally afforded after all these years. This may also include providing living conditions that are comfortable and supportive, and supplies that ensure an adequate standard of living. This is particularly important as the victims were denied educational opportunities and work experiences that would have facilitated their earning capacity. The abuses also resulted in many survivors having difficulty in marrying; particularly in patriarchal societies where males are given job preference and unmarried women are scorned in public and private life, such results would have devastating consequences.

1084. It has previously been recognized that there is no statute of limitations for gross violations of human rights, whether committed during wartime or peacetime: "Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law. Civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations."[831]

1085. In sum, we find that the government of Japan owes a duty to provide reparation in various forms. There should be a dialogue between the government, the survivors and their representatives, and experts to ensure that the general and specific voices and needs of all women are heard. An appropriate remedy for one may not be appropriate for another. Individual needs and wants of the victim-survivors should be taken into account. The magnitude and scope of the harm demand extraordinary efforts to reverse long denied redress.

[831] van Boven Principles, 1996, Principle 9.

B. RECOMMENDATIONS

1086. The Tribunal holds that in order to fulfil its responsibility, the government of Japan must provide each of the following remedial measures:

1. Acknowledge fully its responsibility and liability for the establishment of the "comfort system," and that this system was in violation of international law.

2. Issue a full and frank apology, taking legal responsibility and giving guarantees of non-repetition.

3. Compensate the victims and survivors and those entitled to recover as a result of the violations declared herein through the government and in amounts adequate to redress the harm and deter its future occurrence.

4. Establish a mechanism for the thorough investigation into the system of military sexual slavery, and allow for public access and historical preservation of the materials.

5. Consider, in consultation with the survivors, the establishment of a Truth and Reconciliation Commission that will create an historical record of the gender-based crimes committed during the war, transition, occupation, and colonisation.

6. Recognize and honour the victims and survivors through the creation of memorials, museums, and libraries dedicated to their memory and the promise of "never again."

7. Sponsor both formal and informal educational initiatives, including meaningful inclusion in textbooks at all levels and support for scholars and writers. Efforts should be made to educate the population and, particularly, the youth and future generations concerning the violations committed and the harm suffered; research should endeavour to examine the causes of the crimes, societies ignoring of the crimes, and ways to prevent reoccurrence.

8. Support training in the relationship between the military and gender inequality and the prerequisites for realizing gender equality and respect for the equality of all the peoples of the region.

9. Repatriate survivors who wish to be repatriated.

10. Disclose all documents or other material in its possession with regard to the "comfort stations."

11. Identify and punish principal perpetrators involved in the establishment and recruitment of the "comfort stations."

12. Locate and return the remains of the deceased upon the request of family members or close associates.

1087. The Tribunal further recommends that the former Allied nations:

1. Immediately declassify all military and governmental records concerning the establishment and operation of the "comfort system" and the reasons why it was not prosecuted before IMTFE.

2. Immediately declassify all military and governmental records concerning the failure to prosecute the Emperor HIROHITO before the IMTFE.

3. Acknowledge their own failures to investigate and prosecute the crimes committed against the former "comfort women" initially in the post-war trials and in the intervening 56 years, and take measures to investigae, disclose and, in appropriate cases, prosecute surviving perpetrators.

1088. The Tribunal further recommends that the United Nations and all the states thereof:

1. Take all steps necessary to ensure that the government of Japan provides full reparations to the survivors and other victims and those entitled to recover on account of the violations committed against them.

2. Seek an advisory opinion of the International Court of Justice as to the illegality and continuing liability of the government of Japan in regards to the former "comfort women."

PART VIII – CONCLUSION

1089. Repeatedly in history, states have ignored crimes of sexual and gender violence committed against women in armed conflict violence. This failure is particularly reprehensible where justice is provided for other offenses. The failure of the of Allies to prosecute Japan's military sexual slavery system denied the victimised women equal access to the law and perpetuated the view that their suffering did not merit equal disapprobation or that they were willing participants. This exclusion from justice in the immediate aftermath of the war played an unpardonable role in silencing and shaming the survivors and impeding their healing.

1090. It is our hope that the moral force of this Women's International Tribunal and this Judgement will engage states as well as peoples of the world to bring Japan to recognise its responsibility to repair these atrocities, to right these wrongs, and to enable future generations to go forward on the basis of respect for women's equality and dignity.

1091. The courage of the survivors, their yearning for justice, and their solidarity has inspired a worldwide movement for women's human rights and against gender violence to ensure that such crimes never again be overlooked nor allowed to occur. That crimes against women have begun to be prosecuted in the recently established international criminal tribunals and have been codified in the Rome Statute of the International Criminal Court is one of the fruits of their efforts and has laid the foundation for ending impunity for violence against women.

1092. This Tribunal makes clear that if states fail to fulfil their duty to investigate, prosecute, condemn and punish the perpetrators of crimes against women and to provide the full range of reparations to victims in timely fashion, then the women and peoples of the world will step into the chasm and call both the wrongdoers and the world to account. Survivors, their families and loved ones, activists, researchers, lawyers, translators and scholars from many countries, including, importantly, Japan the victimiser country, have united to make this Tribunal possible. In doing so, they have shaped a new and powerful mechanism of justice.

1093. The crimes committed against these survivors remain one of the greatest unacknowledged and unremedied injustices of the Second World War. There are no museums, no graves for the unknown "comfort woman," no education of future generations, and there have been no judgement days, for the victims of Japan's military sexual slavery and the rampant sexual violence and brutality that characterised its aggressive war.

1094. Accordingly, through this Judgement, this Tribunal intends to honour all the women victimized by Japan's military sexual slavery system. The Judges recognise the great fortitude and dignity of the survivors who have toiled to survive and reconstruct their shattered lives and who have faced down fear and shame to tell their stories to the world and testify before us. Many of the women who have come forward to fight for justice have died unsung heroes. While the names inscribed in history's page have been, at best, those of the men who commit the crimes or who prosecute them, rather than the women who suffer them, this Judgement bears the names of the survivors who took the stand to

tell their stories, and thereby, for four days at least, put wrong on the scaffold and truth on the throne.[832]

Judge Gabrielle Kirk McDonald, Presiding

Judge Carmen Argibay

Judge Christine Chinkin

Judge Willy Mutunga

832 Compare the quotation of James Russel Lowell, "Truth forever on the scaffold, Wrong forever on the throne."

APPENDICES

Appendix A

Charter of the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery

(INCORPORATING MODIFICATIONS AGREED UPON DURING THE HAGUE MEETING, 26-27 OCTOBER 2000)

Preamble

Witnessing the passage of the 20th century without any justice done to women victims and survivors of sexual slavery committed by the Japanese Military in various Asian countries under its colonial domination and military occupation before and during the Second World War, being one of the most horrendous forms of wartime sexual violence known in this century;

Witnessing *also* that violence against women, especially during armed conflicts, continues to be unabated in many parts of the world today;

Noting that violence against women has received further international attention through the Vienna Declaration adopted at the World Conference on Human Rights in 1993 and the Beijing Platform of Action adopted at the Fourth World Conference on Women in 1995, which explicitly stated that violence against women during armed conflict, including rape and sexual slavery, was a war crime, and that its truth should be identified and disclosed, the victimised properly redressed, and the perpetrators punished;

Taking note that the International War Crimes Tribunals for the former Yugoslavia and Rwanda, established by the United Nations in the early 1990s, have prosecuted those who were responsible for violence against women and the International Criminal Court covers, under its jurisdiction, violence against women during war and armed conflicts committed after the entry into force of its Statute;

Whereas the Japanese Military Sexual Slavery has been a particularly grave and egregious form of violence against women in violation of the then existing principles of international law and deeply shocking the conscience of humanity;

Noting that the military tribunals conducted by the Allied Powers throughout Asia following the end of the Second World War seldom prosecuted Japan's Military Sexual Slavery and other cases of sexual violence against women as war crimes, and that, in the subsequent decades, the existing national and international systems of justice have failed to bring the perpetrators to justice;

Cognizant that women survivors of the Japanese Military Sexual Slavery continue to suffer, both physically and psychologically, from these violations and from the failure to provide justice, including individual compensation and other reparations, and prosecution of the perpetrators of these crimes;

Aware that after the long and torturous silence, survivors of this slavery have demanded in the 1990s that justice be done and their long denied human rights be restored to them;

Alarmed that even after half a century after the crimes were committed, the survivors do not receive a word of acknowledgement of the crimes by the perpetrators, nor is there any genuine apology made or reparations provided by those responsible for the crimes committed against them while one survivor after another is passing away without any redress;

Mindful of the moral responsibility of every member of the global civil society and also a common task for the international women's movement to restore justice for the women victims and survivors of wartime sexual violence, including sexual slavery;

Determined to restore justice, human rights, and dignity to all victimized women, to contribute to ending the cycle of impunity for violence against women in wartime and armed conflict situations, and thereby to prevent repetition of such crimes;

Convinced that this effort will also contribute toward creating a 21st century and a new millennium free of war and violence against women by making the full documentation public to the world as indelible records of the 20th century history;

Desiring to hold a Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, the primary task of which will be to bring out truths and to establish the legal responsibility of states and individuals involved in sexual violence, especially the sexual slavery of "comfort women" at "comfort stations" perpetrated by the Japanese Imperial Army in connection with Japan's colonial domination and war of aggression throughout the Asia-Pacific region;

Convinced that the Tribunal is competent to render its Judgements respecting responsibility for the commission of crimes against women in light of the principles of law, human conscience, humanity and gender justice that were an integral part of international law at the time of the offenses, and that should have been applied by, the International Military Tribunal for the Far East, as well as taking into account the subsequent developments in international law, particularly in relation to women's human rights, which have come to be recognized by the international community as a priority matter as the result of brave struggles of many people, including women survivors themselves, insofar as these developments illuminate the proper application of international law to the crimes against women and embody evolving principles of state responsibility for past violations;

Mindful that while the Tribunal, as a people's and women's initiative, has no real power to enforce its Judgements, it nonetheless carries the moral authority demanding their wide acceptance and enforcement by the international community and national governments;

Urging once again that States and intergovernmental organizations take necessary measures to bring to justice the persons responsible for the crimes and to provide reparation, including apology, compensation and rehabilitation.

The International Organizing Committee, composed of organizations from the offending country (Japan), organizations from areas where people were victimized (South and North Korea, China,

Taiwan, the Philippines, Indonesia, Malaysia, and others); and the International Advisory Committee (comprising eminent scholars and human rights activists)

Adopts hereby the Charter of Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery.

Article 1
Establishment of the Women's International War Crimes Tribunal

The Women's International War Crimes Tribunal ("the Tribunal") is hereby established. It shall have power to exercise jurisdiction over individuals and States pursuant to the provisions of the present Charter. It shall conduct a public trial on such dates and places as may be determined by the International Organizing Committee.

Article 2
Jurisdiction of the Tribunal

The Tribunal shall have jurisdiction over crimes committed against women as war crimes, crimes against humanity and other crimes under international law and shall cover all countries and regions that were colonized, ruled or under the military occupation and to all other countries that were similarly victimized by Japan before and during the Second World War. These crimes include, but are not limited to, the following acts: sexual slavery, rape and other forms of sexual violence, enslavement, torture, deportation, persecution, murder, and extermination.

The Tribunal shall also have jurisdiction over acts or omissions of States in violation of international law with respect to the crimes as referred to in the above paragraph.

The Tribunal shall also have jurisdiction over claims involving State responsibility under international law as referred to in Article 4.

The jurisdiction of the Tribunal shall extend to the present day.

Article 3
Individual criminal responsibility

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 of the present Charter shall be individually held responsible for the crime. Those who have concealed the crimes in Article 2 shall be individually held responsible.

The fact that such a crime referred to in Article 2 of the present Charter was committed by a subordinate does not relieve his superior or military commander of criminal responsibility if that superior or commander knew, or had reason to know, that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent or repress their commission or submit the matter to the competent authorities for investigation and prosecution.

Article 4
State responsibility

State responsibility arises from the following:

(a) commission of crimes or acts as referred to in Article 2 by military forces, government officials and those individuals acting in their official capacity.

(b) acts or omissions by States such as

(i) concealment, denial or distortion of the facts or in any other manner its negligence or failure to meet its responsibility to find and disclose the truth concerning crimes referred to in Article 2;

(ii) failure to prosecute and punish those responsible for said crimes;

(iii) failure to provide reparations to those victimized;

(iv) failure to take measures to protect the integrity, wellbeing and dignity of the human person;

(v) discrimination based on such ground as gender, age, race, color, national, ethnic or social origin or belief, health status, sexual orientation, political or other opinion, wealth, birth or any other status; and

(vi) failure to take necessary measures to prevent recurrence.

Article 5
Official Capacity and Superior Orders

The official position of any accused person, whether as the Emperor, the Head of the State or Government, a military commander or a responsible government official, shall not relieve such person of criminal responsibility, nor mitigate punishment.

The fact that the crimes are committed pursuant to an order of a superior or of a Government alone shall not relieve a person of criminal responsibility.

Article 6
Non-applicability of the statute of limitations

The crimes within the jurisdiction of the Tribunal shall not be subject to any statute of limitations.

Article 7
Organization of the Tribunal

The Tribunal shall consist of the following organs:

(a) Judges;

(b) Prosecutors; and

(c) A Registry.

Article 8
Qualifications and election of judges and prosecutors

The judges and the prosecutors shall be appointed by the International Organizing Committee among internationally renowned persons in the field of human rights, taking due consideration of the following:

(a) gender balance;

(b) regional balance; and

(c) contribution in advocacy, protection and promotion of women's human rights.

Article 9
Rules of procedure and evidence

The judges of the Tribunal shall decide matters concerning the rules of procedure and evidence for the conduct of the trial, the protection of victims and witnesses and other appropriate matters of the Tribunal as they deem necessary. The following shall be admitted as evidence:

(a) documentation: Written evidences such as official documents, affidavits/depositions, signed statements, diaries, letters/notes or other documents, experts' views, photos and other visual documents;

(b) personal evidence: Written or oral testimonies of survivors and witnesses, statements of expert witnesses; and

(c) material evidence: Other relevant physical and material evidence.

Article 10
The Registry

The International Organizing Committee establishes a Registry to the Tribunal. The Registry shall be responsible for the administration and servicing of the Tribunal.

Article 11
Prosecutors: Investigation and Indictments

1. The Prosecutors shall be responsible for the investigation and prosecution of the crimes referred to in Article 2 of the present Charter, taking into account gender and cultural issues and the trauma faced by the victimized.

2. The Prosecutors shall initiate investigation on the basis of information received from individuals, survivors, non-governmental organizations, or any source, and shall have the

power to question suspects, those victimized and witnesses, to collect evidence and to conduct on-site investigations in order to establish the truth.

3. The prosecutors shall submit indictments to the Tribunal if, upon investigation, there is a reasonable basis for a prosecution.

Article 12
Trial Proceedings

1. The Tribunal shall read the indictments from the prosecutors at the commencement of the trial, and shall ensure a fair and expeditious trial.

2. The hearings shall be held in public.

Article 13
Participation and protection of those victimized and witnesses

The Tribunal shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of those victimized and witnesses of sexual violence and any other person at risk on account of their testimony, having regard to the nature of crimes being dealt with and taking trauma into account. Such protection measures shall include, but shall not be limited to, audio-visual proceedings and other protective measures to safeguard the identity of those victimized, wherever necessary.

Article 14
Judgements

1. The judgement shall be delivered in public and rendered by a majority of the judges of the Tribunal. The judges may issue a separate opinion, concurring in or dissenting to the judgement.

2. The judgement shall state clearly whether the accused has been found guilty or not guilty of the alleged crime or whether there is insufficient evidence available to the prosecutors upon which such a determination, according to a majority of the judges may be based, and the Tribunal shall give reasons for the particular judgement.

3. The judgement may make a recommendation to a person or State held responsible to offer redress to those victimized, including apology, restitution, compensation and rehabilitation.

4. Copies of the judgement shall be sent to the survivors, the accused or their attorneys, the government of Japan, the governments of the States concerned, and international agencies including the United Nations High Commissioner for Human Rights, and shall be widely distributed throughout the world as historical documents.

Article 15
Cooperation

1. The Tribunal may ask every individual, nongovernmental organization, Government, intergovernmental organization, United Nations organs and other international bodies to cooperate fully with the Tribunal in the investigation and prosecution of persons and states responsible for acts referred to in Article 1 of the present Charter.

2. The Tribunal may ask every individual, non-governmental organization, Government, intergovernmental organization, United Nations organ and any other international body to respect any request for assistance or a judgement issued by the Tribunal, including, but not limited to:

   (a) The identification and whereabouts of persons or the location of items;

   (b) The taking of testimony and the production of evidence;

   (c) The voluntary appearance of persons as victims, as witnesses or as experts before the Tribunal;

   (d) The examination of places or sites;

   (e) The provision of relevant information, records and documents, official or otherwise, and the full opening of wartime archives;

   (f) The protection of victims and witnesses and the preservation of evidence;

   (g) Facilitating or conducting the investigation and prosecution of the persons responsible for the crimes in compliance with its respective international obligations;

   (h) The provision of reparation, including apology, compensation and rehabilitation in compliance with its respective international obligations; and

   (i) Any other type of assistance with a view to facilitating the objectives of the Tribunal.

Appendix B

THE WOMAN'S INTERNATIONAL WAR CRIMES TRIBUNAL 2000 FOR THE TRIAL OF JAPANESE MILITARY SEXUAL SLAVERY

THE PROSECUTORS

v.

EMPEROR HIROHITO et al.

COMMON INDICTMENT - AMENDED

1. The Prosecutors of the Women's International War Crimes Tribunal on Japanese Military Sexual Slavery (hereinafter the "Tribunal"), pursuant to their authority granted under Article 2 of the Charter of the Women's International Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery (hereinafter, the "Charter"), charge the accused, Emperor Hirohito, Iwane Matsui, Shunroku Hata, Hisaichi Terauchi, Seishiro Itagaki, Hideki Tojo, Yoshijirou Umezu, Seizo Kobayashi, and Rikichi Ando with:

Crimes Against Humanity: Sexual Slavery and Rape

as recognized in Article 2(l) of the Charter.

2. The Prosecutors of the Tribunal further, pursuant to their authority granted under Article 2 of the Charter, charge the accused Emperor Hirohito and Tomoyuki Yamashita with:

as recognized in Article 2(1) of the Charter.

3. The Prosecutors of the Tribunal further allege, pursuant to their authority under Article 4 of the Charter, that reparations and compensation for violations of international law are owed to the remaining survivors or descendants of deceased victims based on the state responsibility of:

THE GOVERNMENT OF JAPAN

as recognized under Article 4 of the Charter.

FACTUAL BACKGROUND

INTRODUCTION

4. From the late nineteenth century to the mid-twentieth century the Japanese government pursued expansionist policies in north and southeast Asia that culminated in the Asia-Pacific War and the unconditional surrender of Japan in 1945. Japan colonized Taiwan in 1895 and subsequently subjugated Korea in 1905. In 1931, Japan invaded Manchuria, followed by Shanghai in 1932 and Nanking in 1937. In direct response to the notorious scale of sexual violence inflicted upon Chinese women by the Japanese invading troops, Japan instituted a system of "comfort stations." Between 1937 until Japan's military defeat in 1945, the Japanese government and the Japanese Army and Navy enslaved Korean, Chinese, Filipino, Indonesian, Timorese, Burmese, Malay, Taiwanese, Eurasian, Pacific Islanders, Dutch and Asian aboriginal women in order to furnish Japanese troops engaged in active military service with sexual recreation. From 1937 through 1945, the period of time covered by this indictment, an estimated tens of thousands of women from Asian countries that were occupied, colonized or subjugated by Japan were forced to serve as military sexual slaves in "comfort stations" authorized by the Japanese government.

TAIWAN

5. In 1895, as the result of the Japanese-Sino war, Japan extended its rule over Taiwan by the terms of Article II of the Shimonoseki Treaty.[1] Japan appointed Governors-General[2] to administer Taiwan. Taiwan remained a colony of Japan during the armed conflict between China and Japan in the 1930's and throughout the Asia-Pacific War until the Japanese surrender in 1945.[3] Commencing in 1937, Taiwanese women were abducted, forcibly removed, falsely

1 Taiwanese Indictment paragraph 3.

2 Taiwanese Indictment paragraphs 11, 45 - 47.

3 Taiwanese Indictment paragraph 41.

recruited or otherwise deceived or coerced into servitude at the "comfort stations."[4] The Japanese government, in tandem with the Governor-Generals of Taiwan, and the Japanese Armed Forces transported and "stationed" Taiwanese women in comfort stations located in Hainan Island and Kwantung (Guandong) Province in occupied China, Hong Kong, Singapore and Lasho province in Burma.[5] Although many Taiwanese women were sent to "comfort stations" in Japanese occupied territories, others were coerced into providing sexual services to the Japanese Army stationed in Taiwan.[6] The Taiwanese women endured sexual slavery and other forms of inhumane treatment and at times death at the hands of the Japanese armed forces.[7]

KOREA

6. In 1905, Korea became a Protectorate of Japan. In the 1910 Treaty of Annexation, the Korean Emperor ceded all sovereign power over Korea to the Japanese Emperor, who completely subjugated the Korean population.[8] Japan ruled Korea until 1945 through a succession of Japanese appointed Governors-General and the Korea Army. From 1937 until 1945, the Japanese government enacted the Act of State General Mobilization and forcibly conscripted Korean men into the Japanese Army and Korean women into the National Labour Service Corp.[9] Within this context, and by the ruse of deceitful recruitment, as well as abduction and kidnapping, many Korean women were sent to "comfort stations" in China, Burma and southeast Asia.[10] The Governors-General of Korea as well as other Japanese army commanders and governmental officials participated in enslaving Korean women.[11] Due to Korea's complete subjugation, Korean women constituted the majority of women forced into military sexual enslavement by the Japanese Government. In the "comfort stations," Korean women were thus subjected to sexual torture, including rape, as well as to starvation, physical maiming other inhumane acts, and, at times, death.[12]

CHINA

7. The military invasion and eventual political domination of China was a Japanese strategic objective in the first half of the twentieth century.[13] When Manchuria "fell" to Japan in 1931, soon followed by Shanghai,[14] Nanking[15] and the remaining territory of China, the Japanese government swiftly moved to establish "comfort stations" to redress the acknowledged problem of massive rapes committed by the Japanese troops against Chinese women.[16] "Comfort stations" were set up in Manchuria, Shanghai,[17] Zhejiang, Hunan, Fujian and various locations in the south

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4 Taiwanese Indictment paragraphs 53 - 55.

5 Taiwanese Indictment paragraphs 8 & 47.

6 Taiwanese Indictment pages 4, 6 & 11

7 Taiwanese Indictment pages 6 - 8.

8 Japan annexed Korea in 1910, thereby indirectly increasing Japanese rights in China, since Korean settlers in Manchuria thereby became the subjects of the Japanese Empire. The number of Koreans in Manchuria by 1 January 1928 amounted to 800, 000 people. See II The Tokyo Judgement 38 (Dr. B.V.A. Rőling ed. 1977) (hereinafter "Tokyo Judgement").

9 Korean Indictment page 3-4.

10 Korean Indictment paragraphs 49 & 50.

11 Korean Indictment pages 4-5 & 8.

12 Korean Indictment, paragraphs 63, 65, 67, 69, 71 and 74 respectively.

13 Chinese Indictment page 2; see also the Tokyo Judgement at 53-54.

14 Chinese Indictment page 8.

15 Chinese Indictment page 9.

16 Chinese Indictment pages 3 –6

17 Taiwanese Indictment page 4.

and north of China.[18] As part of the conquered population, Chinese women were frequently captured, kidnapped, ordered to leave their villages, and forcibly retained in the "comfort stations."[19] In 1938, the Guangzhou area of occupied China alone reportedly had over one thousand women enslaved in "comfort stations." By 1945, the Japanese Army operated a system of military sexual enslavement throughout occupied China.[20] Notwithstanding the Japanese government's administrative response to massive rapes, Chinese women continued to be sexually assaulted by Japanese occupational forces.[21]

INDONESIA

8. Indonesia, known as the Dutch East Indies, was a colony of the Netherlands until 1947.[22] In 1941, the official Japanese war strategy included the planned invasion and occupation of Indonesia. The Japanese forces that landed in Java on March 8, 1942, overthrew Dutch sovereignty and divided Indonesia into military occupation zones.[23] The Japanese Army, under the command of the Southern Expeditionary Forces, controlled the islands of Java, Sumatra and Borneo[24] and the eastern region of Indonesia. Japanese occupation policies centered on conscription of Indonesian men and women as a means to sustain the Japanese war effort.[25] Under such programs, many Indonesian females between 13 and 17 years of age were forcibly and deceptively sent to "comfort stations."[26] The Japanese occupiers meanwhile incarcerated the Dutch population of Indonesia in several local detention camps.[27] Some Dutch women were then removed from detention camps and placed in "comfort stations" to serve Japanese officers.[28] Taiwanese and Korean women who were enslaved by the Japanese army were sent to "comfort stations" in Indonesia, while many Indonesian women were sent abroad to "comfort stations" in Burma, Singapore and the Philippines.[29]

THE PHILIPPINES

9. At the conclusion of the nineteenth century, the Philippines became a U.S. protectorate.[30] On December 8, 1941, one day after the Japanese attack on Pearl Harbor in the Hawaiian Islands, the Japanese Army attacked Mindanao Island in the Philippines.[31] The Japanese Army invaded Manila on January 2, 1942, effectively defeating the Filipino forces and subjugating the Filipino population to four years of military occupation.[32] In accordance with Japanese governmental policy, "comfort stations" were established wherever sizeable Japanese Army garrisons existed.[33] The successive Commanders of the 14th Area Army, under the command of the Southern Expeditionary Forces, established "comfort stations" in Manila, Iloilo, in the Panay Island and

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18 Chinese Indictment pages 8-14 and 16-17.

19 Chinese Indictment page 7.

20 Chinese Indictment pages 18 and 20.

21 Chinese Indictment pages 15-16.

22 Indonesian Indictment page 2.

23 Id. See also Netherlands Indictment page 1 paragraphs 2 and 3.

24 Indonesian Indictment page 5.

25 Indonesian Indictment page 2

26 Id.

27 Id. See also Netherlands Indictment paragraph 4.

28 Id. See also Netherlands Indictment paragraph 12.

29 Id. See also Netherlands Indictment paragraph 9.

30 Filipino Indictment page 2.

31 Filipino Indictment pages 2 - 3.

32 Filipino Indictment page 3.

33 Filipino Indictment paragraph 16.

Tacloban in Leyte Island.[34] Filipino women were forced to sexually serve the Japanese soldiers in other stations such as Cayagan de Oro City, Butuan, and Masbate.[35] In some cases, the Japanese Army administered the "comfort stations" yet licensed civilians to operate them.[36] Due to the presence of the Japanese occupational forces, Filipino women were frequently captured and raped for several days or longer by Japanese soldiers at locations where formal "comfort stations" had not been established.[37] Thus the creation of "comfort stations" did not eradicate massive sexual violations by Japanese soldiers. A notorious planned mass rape occurred in Mapanique, on November 23, 1944. In that military operation, Japanese forces executed Filipino men and then proceeded to rape the village women at the nearby army garrison in the infamous Bahay na Pula (Red House).[38]

EAST TIMOR

10. The Portuguese colonized the island of Timor in 1702.[39] In 1896, East Timor became a separate colony ruled by the Portuguese while the remaining part of Timor came under Dutch rule. Allied troops landed in East Timor on December 17, 1941, and retreated in 1942 when the Japanese forces invaded Dili, the capital, and then occupied the country.[40] After evacuation of the Allied forces, in January 1943, the Japanese military conducted punitive expeditions against the Timorese inhabitants who were suspected sympathizers of the Allied forces.[41] The Japanese military occupation resulted in the establishment of "comfort stations" in places such as Suku Fatubosa, Bobnaro, Aileu and Dili. East Timorese girls and women were forcibly recruited from various parts of the island to serve Japanese military personnel sexually and as forced laborers.[42] The "comfort stations" were facilitated through the Liurajs, traditional kings, who during occupation were compelled to turn over their residences to the Japanese military for use as "comfort stations."[43] The women and girls were made to endure multiple acts of sexual violence, at times committed by more than one Japanese soldier.[44] Women from China and Indonesia were also made to serve in comfort stations in East Timor.

MALAYSIA

11. The Japanese attacked Malaysia on December 8, 1941, shortly after the attack on Pearl Harbor.[45] After capturing Singapore on February 15, 1942, the Lieutenant-General of the 25th Army set up a military government and ruled the occupied territories.[46] Japanese troops entered towns demanding that community leaders provide women for the "comfort stations" to serve soldiers' sexual needs.[47] Soldiers also forcibly kidnapped young girls and women from their homes.[48] Comfort stations were set up in various locations including Kuala Pilah, Negri

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34 Filipino Indictment paragraph 19.8.
35 Filipino Indictment paragraphs 20 - 21.
36 Filipino Indictment paragraph 18.
37 Filipino Indictment paragraph 25.
38 Filipino Indictment pages 25 - 31.
39 East Timor indictment, see page 2.
40 East Timor indictment, see page 3.
41 Id.
42 Id. at 10.
43 East Timor indictment, see page 4.
44 Id.
45 Malaysia indictment, see page 2.
46 Malaysia indictment, see page 3.
47 Malaysia indictment, see page 4.
48 Id.

Sembilan, Penang, Kuala Lumpur, Malacca, Johore Bahru, Port Dickson and other locations.[49] Women were subjected to sexual slavery including continuous and multiple rapes accompanied by other physical violence.[50] The Japanese government knew that this system of sexual slavery existed.

SYSTEM OF COMFORT STATIONS

12. The overall Japanese strategy aimed to militarily defeat its enemies and to expand Japanese political domination into east and southeast Asia. The establishment of facilities of sexual slavery or "comfort stations" was integral to the military strategy and was authorized at the highest military and political levels.[51] There were several military objectives behind the "comfort stations." The most clearly documented objective was the intent to deter Japanese soldiers from raping local women and thus contain the anti-Japanese sentiments among the occupied population.[52]

13. In 1932, in the aftermath of the takeover of Shanghai, the frequency of rapes of Chinese women caused Japan to be concerned about its international image and the security of its occupation forces.[53] After 1937, as the Japanese military actions escalated in Shanghai, Nanking, Hankou and Kwantung (Guandong) areas of China, the forcible or deceptive recruitment of non-Japanese women intensified.[54] From 1941 until the unconditional surrender of Japan in 1945, "comfort stations" proliferated alongside of Japanese military operations.[55] The War Ministry institutionalized the military sexual slavery system.[56]

14. Concomitantly with the military operations, the Commander of the Central Chinese Area Army and the Commander of the Kwantung (Guandong) Army, and the North China Area Army, through their Chiefs of Staff directed the setting up of "comfort stations."[57] In July 1941, the Commander of the Kwantung (Guandong) Army through his Staff Officer requested that 20,000 comfort women from the Korean peninsula be transported to China in preparation of the Guandong Army Special Exercise.[58] Thus, between 1937 and 1945, successive Commanders of

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49 Id.

50 Malaysia indictment, see page 7.

51 Japanese Indictment Pages 4-5 (stating that the core organs of the Japanese army came to control the comfort stations as of the outbreak of the Asia-Pacific War on December 8 1941); Japanese documents linking the Emperor to the system of comfort stations; Filipino Indictment paragraph 19 and sub-paragraphs following (detailing rules and regulations issued through official channels to govern comfort stations); Taiwanese Indictment paragraph 9; Korean Indictment paragraphs 40-41; Chinese Indictment page 6; Indonesian Indictment paragraph 11; see also Ustinia Dolgopol & Snehal Paranjape, Comfort Women an Unfinished Ordeal: Report of a Mission 29-30 (International Comm'n of Jurists 1994) (hereinafter "ICJ Report"). The research on which this report is based was carried out by the authors, at the request of the International Commission of Jurists, by visiting the Philippines, the Republic of Korea, the Democratic People's Republic of Korea and Japan. The authors interviewed survivors of the system of "comfort stations," as well as soldiers, governmental officials, representatives from non-governmental organizations, lawyers, academics and journalists and reviewed relevant documents. See id. at 7.

52 See ICJ Report at 31.

53 Japanese Indictment page 3; Chinese Indictment page 5; Taiwanese Indictment paragraph 5; see also ICJ Report at 25.

54 Id.

55 Japanese Indictment pages 2, 4 - 5 & 9; Chinese Indictment page 11; Korean Indictment paragraphs 36 - 44 (detailing criminal responsibility for the planning and implementation of the comfort stations); Filipino Indictment paragraph 19 and following sub-paragraphs; Indonesian Indictment paragraphs 11 - 14.

56 Japanese Indictment pages 4 - 5.

57 Japanese Indictment page 3; Chinese Indictment page 6.

58 Japanese Indictment page 2.

the China Expeditionary Armies authorized and otherwise participated in recruitment for "comfort stations" and their subsequent operation.[59]

15. The establishment of "comfort stations" in China involved high-level Japanese military and cabinet figures as well as the Governors-General of Taiwan and Korea.[60] In 1938, the Commander of the 21st Army requested a shipment of several hundred Taiwanese women. Continuing throughout 1939, the succeeding Commander of the 21st Army continued the policy of "comfort stations" by accepting previously "ordered shipments" of women and by initiating new requests. Those new requests were then relayed by the Japanese prefectural governors via the Home Ministry.[61] In 1941, the War Minister was also the Prime Minister of Japan.[62] The constitutional responsibilities of the Prime Minister included informing and advising the Head of State about the execution of governmental policies.[63]

16. In 1942, the Commander of the Japanese Southern Expeditionary Army directed a request to the War Ministry to authorize the Japanese army in Taiwan to deliver 50 women to Borneo.[64] As a result, the War Ministry approved the hiring of three civilian brokers to secure the Taiwanese women who would satisfy the sexual needs of the Southern Expeditionary Army.[65]

17. The Allied Report on the Amenities in the Japanese Armed Forces, based upon captured Japanese documents, unfailingly demonstrates that "comfort stations" were highly regulated as a matter of official policy.[66] For example, the "comfort stations" in the occupied Shanghai South Sector were obliged to: keep a fixed rate chart; conduct weekly venereal examinations and physical inspections; issue licenses to "brothel entertainers"; ensure that the private parts of the women were washed after each act; and submit detailed work statements to the Billet Commander every Saturday.[67] The Allied Report's description of "comfort stations" run by civilians in the Philippines confirmed that the Officer-in-Charge of the Manila Sector Line of Communications, with the sanction of the Army Commanding General, regulated all aspects of the "comfort stations" including: approval of the selection of managers; location of the establishment; admission, according to rank of army personnel; access of designated civilians; and hours of operation.[68]

18. The hierarchy of rank recognized in the Japanese Armed Forces was imprinted on the regulation of "comfort station."[69] The Allied Report documents that officers were permitted to use the "comfort stations" in the evening with the "right" to spend the night.[70] Non-commissioned officers and enlisted men or civilian laborers were confined to shorter access,

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59 Japanese Indictment pages 3 – 4; see also ICJ Report at 30-47(detailing the documentary evidence describing the system of comfort stations).

60 Japanese Indictment pages 1 - 2 & 7 - 8; Chinese Indictment pages 7 – 13; see also ICJ Report at 29 & 41.

61 See Expert Opinion of Professor Yoshimi.

62 Id. (noting that General Hideki Tojo held both positions at that time).

63 Japan Const. art. 55 (1889).

64 Japanese Indictment page 5; Indonesian Indictment paragraphs 12 - 13 (actually stating that the request was for forty women to be sent to Borneo); see also ICJ Report at 41.

65 Japanese Indictment page 5.

66 Allied Research Report on Amenities in the Japanese Armed Forces 9-20 & 27 (15 November 1945) ("Allied Report") as cited in the ICJ Report at 32-41. The Allied Report is a summary of information gathered by the United States Army at the close of World War II based mostly on captured documents and interviews with prisoners of war. See Allied Report at preface page (not numbered).

67 Id. at 12-13.

68 Id. at 9-12; see also Taiwanese Indictment paragraphs 19.7 - 19.8.4.

69 See Allied Report at 18.

70 Allied Report at 10 & 13; see also Taiwanese Indictment paragraph 19.6.

either in the morning or afternoon.[71] Other hierarchical constraints intoned the overt racism of the Japanese policies. European-Dutch women were supplied to "comfort stations" that served Japanese officers, aboriginal Asian women mostly serviced laborers or low-ranking servicemen.[72]

19. Irrespective of national origin, racial background, class status, or the type of "comfort station," the enslaved women suffered untold physical and mental torture. Starting with forced or deceitful recruitment or abduction,[73] often accompanied by threats, beatings, humiliating examinations and initial rapes,[74] Japanese policies generated continuing crimes upon women from subjugated or occupied countries. Upon arrival at any one of the hundreds of "comfort stations" the women were reduced to slaves, made to endure daily sexual violence including countless rapes, subjected to constant confinement in narrow cells, death threats, starvation rations, social isolation, countless beatings, maiming, and at times exposed to enemy fire and even murdered by retreating Japanese forces.[75] As a consequence of the Japanese military slavery system, numerous women contracted venereal diseases and urinary infections. Some endured unsafe medical procedures such as abortions or removal of their sexual organs and suffered chronic mental disorders.[76]

THE ACCUSED

20. The accused are **Emperor Hirohito, Iwane Matsui, Shunroku Hata, Hisaichi Terauchi, Seishiro Itagaki, Hideki Tojo, Yoshijirou Umezu, Seizo Kobayashi, Rikichi Ando, and Tomoyuki Yamashita**.

Positions and Authority of the Accused

21. From 1937 until 1945 the accused, **Emperor Hirohito**, was the invested Head of State of Japan, under the provisions established by the Meiji Constitution.[77] As Head of State, **Emperor Hirohito** was the *de jure* leader of Japan. His political powers were independent from and superior to the legislative, judicial and administrative powers of the Japanese government.[78] His political position was superior to that of the Prime Minister, the Ministry of War, the Home Ministry, and other cabinet members.[79] As his subordinates, the Ministers were bound by the

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71 Id.

72 The Netherlands Indictment paragraphs 9 - 11.

73 Japanese Indictment pages 2 & 4; Chinese Indictment pages 6 - 7, 23 - 24; Taiwanese Indictment paragraphs 12-17; Filipino Indictment paragraphs 21 - 21.4.4, 30.1, 31.2; Indonesian Indictment paragraph 16; Korean Indictment paragraphs 45 - 55.

74 Japanese Indictment pages 2 & 4; Chinese Indictment pages 6 - 7, & 19, 23 - 24; Taiwanese Indictment paragraphs 18 - 20; Filipino Indictment paragraphs 21 - 21.4.4, 23, - 26, 30.4; Indonesian Indictment paragraphs 19 – 23, 31.4; Korean Indictment paragraphs 45 - 55.

75 Id.

76 Japanese Indictment pages 13 - 14; Chinese Indictment pages 23 - 24; Taiwanese Indictment paragraphs 18 - 23; Indonesian Indictment paragraphs 20 - 26; Korean Indictment paragraphs 63 - 68 & 74 - 75.

77 Japan. Const. arts. 1 & 4.

78 Id.

79 Id.; see also Japan Const. art. 55.

constitution to serve **Emperor Hirohito** and to advise him about domestic and international political relations and military operations of Japan.[80]

22. As Head of State, **Emperor Hirohito** was also the Supreme Commander of the Japanese Army and Navy.[81] The Supreme Commander was superior to and held command responsibility over the military Chiefs of Staff, their commanding generals and other armed forces personnel.[82] **Emperor Hirohito** exercised ultimate command authority of the Japanese Army, including direct jurisdiction over each of Japan's Expeditionary Armies and Japan's Area Armies that invaded and occupied China, Indonesia (the Dutch East Indies), the Philippines, Malaysia and Burma.[83] As Supreme Commander, **Emperor Hirohito** possessed the authority to instruct the Imperial Military Headquarters to formulate national war policies, to plan and conduct military operations, to supervise support of military operations as well as to ensure the overall war making capacity of Japan.[84]

23. As Head of State and Supreme Commander, **Emperor Hirohito** also exercised ultimate political and military rule over the Japanese ruled territories of Korea and Taiwan.[85] Japanese army divisions permanently stationed in these possessions were subordinate to the command of the Chiefs of Staff and to Supreme Commander, **Emperor Hirohito**.[86] Each Japanese possession was administered by a Japanese appointed Governor-General who obligatorily reported directly to **Emperor Hirohito**.[87] As such, the accused was apprised of the governing policies, military operations, and general status of Japanese interests in each colony during the time period at issue in this indictment, 1937 to 1945.[88] The Governors-General were in a subordinate position to the accused, **Emperor Hirohito**.

24. In addition to his *de jure* authority as Head of State and Supreme Commander, the accused, **Emperor Hirohito**, had and exercised *de facto* authority. He was revered as a spiritual leader and ruled Japan and the Japanese people by divine provenance.[89] His orders, decisions, directives and policies were as such, unquestioned and unconditionally obeyed by members of the Japanese government, the Japanese armed forces and the Japanese people.

25. Accused **Iwane Matsui** held two positions between 1937 and 1938. In 1937, he was recalled from retirement to command the Shanghai Expeditionary Forces.[90] Also in 1937, he was appointed Commander of the China Expeditionary Force, a position directly subordinate to the Emperor.[91] He remained Commander of the China Expeditionary Force only until February 1938.[92] In these positions, **Iwane Matsui** commanded the troops that captured Nanking in 1937.[93] In the Tokyo Judgement, he was found guilty of the atrocities committed in Nanking.[94]

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80 Japan Const. art. 55.

81 Japan Const. arts. 11 & 12.

82 Id.

83 Id.; see also Japanese Indictment pages 5, 9-10; Taiwanese Indictment paragraphs 32 - 34; Indonesian Indictment page 21.

84 Id.

85 Korean Indictment paragraph 1; Taiwanese Indictment paragraph 3.

86 Id.

87 Taiwanese Indictment paragraphs 4, 11 & 34; see also Expert Opinion of Professor Yoshimi.

88 Japanese Indictment 9-10 and supporting documents.

89 Japan Const. art. 3.

90 See Tokyo Judgement at 453.

91 Id.

92 Id. at 277.

93 Id. at 453-54

26. In February 1938, accused **Shunroku Hata** was appointed to be Commander of the Central China Expeditionary Forces.[95] Three days after that appointment, he became leader of all Expeditionary Forces in China.[96] During a brief period of time sometime during the spring or summer of 1939, **Shunroku Hata** served as the Aide-de-Camp to the Emperor.[97] In August 1939, **Shunroku Hata** became the Minister of War and remained in that position until July 1940.[98] From March 1941 until November 1944, **Shunroku Hata** returned to the field as Commander of the China Expeditionary Forces.[99]

27. From 1937 to 1945, the accused **Hisaichi Terauchi** held two high-ranking positions in the Japanese government.[100] In 1938, **Hisaichi Terauchi** was the Commander of the North China Area Army. In addition, from November 1941 until the end of the war in 1945, **Hisaichi Terauchi** was also the Commander of the Southern Expeditionary Forces.[101] As such, he commanded the Japanese Army in the Philippines, Indonesia, Malaysia, Timor and Burma.

28. From 1937 to 1945, accused **Seishiro Itagaki** held a number of high-ranking positions. From June 1938 until August 1939, **Seishiro Itagaki** was the War Minister and as such was responsible directly to the Emperor.[102] As of September 1939, **Seishiro Itagaki** held the position of Chief of Staff of the China Expeditionary Force.[103] From July 1941 until April 1945, **Seishiro Itagaki** served as Commander of the Korean Army.[104] From April 1945 until Japan's surrender, **Seishiro Itagaki** commanded the 7th Area Army, which operated in the areas of Java, Sumatra, Malaya, Borneo and other surrounding islands in Indonesia.[105]

29. During the relevant time period, accused **Hideki Tojo** held successive positions in the Japanese government. In 1937, **Hideki Tojo** was Chief of Staff of the Kwantung (Guandong) Army.[106] In May 1938, **Hideki Tojo** became Vice Minister of War.[107] From 1941 until July 1944, **Hideki Tojo** held three positions simultaneously: Prime Minister, War Minister, and Head of the Home Ministry.[108] As Prime Minister, **Hideki Tojo** was in a position to review the actions of all governmental ministries involved in the war effort. **Hideki Tojo** was responsible under the Meiji Constitution to report to and to advise the Emperor about the functioning of the government.[109]

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94 Id.

95 Tokyo Judgement at 277.

96 Id.

97 Id. at 446 (stating that Hata was the Emperor's Aide-de-Camp during the Nohoman Incident) & 152 (stating that the attack on Nohoman began in May 1939 and concluded in September 1939).

98 Id. at 445-46.

99 Id. at 446.

100 In addition, General Terauchi held high positions of power prior to 1937. He was the Commander of the Taiwan Forces in 1934 and Minister of the Army in 1936. From August of 1936 until January 1937, he was the Minister of War.

101 Korean Indictment paragraph 21.

102 Japanese Indictment page 4; Korean Indictment paragraph 19 (incorrectly stating that Itagaki was the Vice-Minister of the Army); see also Tokyo Judgement at 152.

103 Korean Indictment paragraph 19.

104 Id.; see also Tokyo Judgement at 449.

105 Tokyo Judgement at 449.

106 Korean Indictment paragraph 15.

107 Tokyo Judgement at 462 (please note that the Korean Indictment refers to this position as the Vice Minister of the Army.)

108 Id.

109 Korean Indictment paragraphs 39-43.

30. From March 1936 until May 1938, accused **Yoshijirou Umezu** was Vice Minister of War.[110] **Yoshijirou Umezu** was then Commander of the 1st Army in May 1938, and finally Commander of the Kwantung (Guandong) Army from September 1939 until July 1944 and Chief of Staff in July 1944.[111]

31. Accused **Seizo Kobayashi** was the Governor-General of Taiwan from 1936 until 1940.[112]

32. Accused **Rikichi Ando** was the Commander of the 21st Army from at least November 1938 until sometime in 1942.[113] From 1942 until 1944, **Rikichi Ando** served as Commander of the Taiwan Army.[114]

33. The accused **Tomoyuki Yamashita** was the Commanding General of the 14th Army from September 1944 to September 1945.[115] In this position, he commanded and was responsible for the troops operating in the Philippines during that period.[116] **Tomoyuki Yamashita** issued the guidelines[117] and was responsible for the attack of the 14th Army directed against the inhabitants of Mapanique, which included massive sexual violence against the female population.[118]

GENERAL ALLEGATIONS

34. Unless otherwise specified, all criminal acts or admissions set forth in the indictment were committed between 1937 and 1945 in the countries indicated in the predicate paragraphs that precede the charges.

35. In each Count alleging crimes against humanity, the acts or omissions were committed as part of a widespread or systematic attack directed against the civilian population.

36. The attack against the civilian population occurred during the armed conflict between China and Japan from 1932 to 1941. The attack continued during the Asia-Pacific War of 1941-1945.

37. The accused, **Emperor Hirohito**, **Iwane Matsui**, **Shunroku Hata**, **Hisaichi Terauchi**, **Seishiro Itagaki**, **Hideki Tojo**, **Yoshijirou Umezu**, **Seizo Kobayashi**, **Rikichi Ando**, and **Tomoyuki Yamashita** are individually responsible for the crimes alleged against them in this indictment, pursuant to Article 3 of the Charter. Individual Responsibility includes planning, instigation, ordering, committing or otherwise aiding and abetting in the planning, preparation, or execution of a crime in Article 2.

38. The accused, **Emperor Hirohito** exercised the ultimate political and military authority in Japan. He commanded the Japanese Army and Navy, including the Japanese Expeditionary Forces and Japanese Area Armies, and controlled the entire populations of occupied, colonized

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110 See Tokyo Tribunal at 463.

111 Korean Indictment paragraph 22; see also Chinese Indictment page 11.

112 Taiwanese Indictment paragraph 45.

113 Japanese Indictment page 4.

114 Id. page 5.

115 Filipino Indictment paragraph 12.

116 Id.

117 Id. at paragraph 35.2

118 Filipino Indictment paragraphs 35.1 - 36.

and subjugated countries. Inasmuch as the accused was in a position of superior authority, pursuant to Article 3 of the Charter, he is criminally responsible for the acts of his subordinates, including members of the armed forces, members of the Japanese Cabinet, the Governors-General of Korea and Taiwan, and civilians authorized to act on behalf of his military and political subordinates.

COUNTS 1-2

"COMFORT STATION" CRIMES

39. From 1937 through 1945, during the armed conflict between China and Japan and throughout the Asia-Pacific War, the Japanese government, and armed forces, led by **Emperor Hirohito**, instituted a system of military sexual slavery to provide sexual services to the Japanese armed forces. Referred to by the Japanese authorities as "comfort stations," these establishments were set up throughout the conquered and occupied countries and controlled by the Japanese Army and the Japanese Navy, including, but not limited to China, Indonesia, the Philippines, Taiwan, East Timor, Malaysia and Burma.

40. Thousands of women were enslaved, and subjected to continuous mental and physical suffering, countless acts of sexual violence, including countless rapes, other forms of sexual torture, starvation, threats, confinement, isolation, other forms of inhumane acts and at times death at the hands of the Japanese Army, the Japanese Navy and their agents.

Specific Charged Acts

41. In December 1937, shortly after the Central China Area Army invaded Nanking under the command of **Iwane Matsui**, and following the international outcry regarding the massive number of rapes committed during that invasion, **Iwane Matsui** oversaw the setting up of "comfort stations" in the cities and towns between Nanking and Shanghai in an attempt to control the behavior of his troops.[119] At least twenty "comfort stations" were established in Nanking.[120]

42. In March 1938, Vice-Minister of War **Yoshijirou Umezu**, acting on the authority of the Minister of War, set up "comfort stations" in northern China. Continuing the establishment of "comfort stations," in June 1938 when **Hisaichi Terauchi** commanded the North China Area armies, similar orders were issued to establish "comfort stations" to serve each unit under his command.[121] He thus oversaw the implementation of the policy of "comfort stations." **Hisaichi Terauchi** therefore bears responsibility for those orders and the actions taken to carry them out. The Vice Minister of War, **Yohshijirou Umezu**, also bears responsibility for these actions.

43. In November 1938, **Rikichi Ando**, upon becoming Commander of the 21st Army, assumed responsibility for the continuing recruitment, establishment and development of "comfort stations" initiated by his predecessor. His predecessor had requested the Home Ministry to recruit women to staff "comfort stations" for the troops of the 21st Army.[122] The Home Ministry had referred a request that the Governor-General of Taiwan provide women for "comfort stations" and drafted plans to supply the 21st Army with women for the "comfort

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119 See Expert Opinion of Professor Yoshimi.

120 Chinese Indictment pages 8-9.

121 See Expert Opinion of Professor Yoshimi.

122 Id.

stations." [123] **Seizo Kobayashi**, the Governor-General of Taiwan, and **Rikichi Ando**, Commander of the 21st Army, thus bear responsibility for those acts.[124]

44. In or around July 1941, **Yoshijirou Umezu**, as Commander of the Kwantung Army, oversaw the plan to recruit as many as 20,000 "comfort women" for the troops preparing to invade the U.S.S.R. [125] With assistance from the Governor-General of Korea, and the Commander of the Korea Army, **Seishiro Itagaki**, at least 3,000 women were forcibly "recruited" and deported from Korea to northeastern China to be military sexual slaves.[126] For these actions, **Yoshijirou Umezu**, and **Seishiro Itagaki** bear responsibility. As War Minister at the time, and thus as overall Commander of the war effort, **Hideki Tojo** also bears responsibility for these actions.

45. From 1941 through 1944, **Shunroku Hata**, as Commander of the Central China Expeditionary Forces, was responsible for actions of troops under his command. The Tokyo Judgement found that **Shunroku Hata's** troops, while moving south through China in the areas of Hankow and Kwelin in 1944, "recruited women labor [sic] on the pretext of establishing factories [then] forced the women thus recruited into prostitution for Japanese troops." [127] **Shunroku Hata** is responsible for that fraudulent recruitment and the subsequent crimes committed against women forced to work in the "comfort stations" created to serve his troops in Central China. As War Minister at the time, and thus as overall Commander of the war effort, **Hideki Tojo** also bears responsibility for these actions.

46. In March 1942, **Hisaichi Terauchi**, then Commander of the Southern Expeditionary Army in southeast Asia, requested that the War Ministry, then headed by War Minister **Hideki Tojo**, provide "comfort women" from Taiwan for facilities in Borneo.[128] **Rikichi Ando**, head of the Army in Taiwan, **Hisaichi Terauchi** and **Hideki Tojo** bear responsibility for those actions. **Hisaichi Terauchi**, as Commander of the Southern Army also bears responsibility for the "comfort stations" established and operated throughout Japanese occupied southeast Asia between 1941 until 1945.

47. As Supreme Commander of the Army and Navy, as well as the *de jure* and *de facto* Head of State for Japan during all of the incidents listed in paragraphs 39 through 45, **Emperor Hirohito** bears responsibility for each incident in addition to each defendant listed therein.

48. Taken together, and with the additional evidence that the Prosecutors will introduce to describe the existence and functioning of the overarching system of military sexual slavery, the incidents described in paragraphs 38 through 46 provide sufficient facts to find that each defendant planned, participated in and/or condoned or omitted to act in regard to the illegal system of military sexual slavery perpetuated through the "comfort stations" from 1937 through 1945. In addition, each defendant is also responsible for the rapes perpetrated against the "comfort women" in perpetuation of the system of "comfort stations."

49. The Prosecutors reallege and incorporate the general allegations in paragraphs 34-39, and paragraphs 39 through 48 insofar as they relate to **Emperor Hirohito**, **Iwane Matsui**, **Shunroku**

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123 Id.

124 Id.

125 Id.

126 Id.

127 Tokyo Judgement at 393.

128 See Expert Opinion of Professor Yoshimi; see also Taiwanese Indictment paragraph 12.

Hata, **Hisaichi Terauchi**, **Seishiro Itagaki**, **Hideki Tojo**, **Yoshijirou Umezu**, **Seizo Kobayashi** and **Rikichi Ando**.

50. For their direct participation, as pursuant to Article 3 of the Charter, **Emperor Hirohito**, **Iwane Matsui**, **Shunroku Hata**, **Hisaichi Terauchi**, **Seishiro Itagaki**, **Hideki Tojo**, **Yoshijirou Umezu**, **Seizo Kobayashi**, and **Rikichi Ando** are charged with Crimes Against Humanity as listed below. In addition, **Emperor Hirohito** is charged in the alternative for his position as a superior and as the Supreme Commander, pursuant to Article 3 of the Charter with Crimes Against Humanity:

C**ount 1: SEXUAL SLAVERY**, as recognized by Article 2(l) of the Charter,
Count 2: RAPE, as recognized by Article 2(l) of the Charter.

COUNT 3

MASS RAPE AT MAPANIQUE

51. In 1942, the invasion of the Philippines was notorious for the rapes inflicted upon the female population of Manila. These rapes prompted the Japanese government to institute and later to intensify the military sexual slavery system. Nevertheless, rapes of the local women by the Japanese occupational forces continued in the Philippines. In addition, women were captured and taken to make-shift locations or the individual barracks for the purpose of sexual abuse by the Japanese soldiers, where they were forced to stay for days, weeks or months.

52. The notorious mass rape of Filipino women in Mapanique, on November 23, 1944, at the army garrison in the infamous Bahay na Pula (Red House) was planned and executed by the Japanese Army. While the Filipino men suspected of being guerrilla fighters were tortured and executed, the women and children were sexually tortured, including forced nudity, gang rapes and public rapes. In addition, the women were subjected to egregious forms of mental suffering, witnessing relatives killed, tortured and raped.

53. Paragraph 8, and the general allegations in paragraphs 34-38, as well as paragraph 51 and 52, insofar as they relate to **Emperor Hirohito** and **Tomoyuki Yamashita**, are hereby re-alleged and incorporated.

54. For their participation in the Mapanique mass rapes as pursuant to Article 3 of the Charter, and or in the alternative for their positions as superiors and commanders as pursuant to Article 3 of the Charter, **Emperor Hirohito** and **General Tomoyuki Yamashita** are charged with Crimes Against Humanity:

COUNT 3: RAPE as recognized by Article 2(l) of the Charter.

Appendix C

The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery

APPLICATION INSTITUTING PROCEEDINGS
filed in the Registry of the Court on 20 November 2000

Women survivors and victims of Japan's Military Sexual Slavery
(The People of the Asia-Pacific Region v. Japan)

Re: Application for Restitution, Reparations and Satisfaction

By: The People of the Asia-Pacific Region through their representatives who seek to protect the rights of women in the Asia-Pacific Region

Against: Japan

The People of the Asia-Pacific region respectfully request that Japan be ordered to make full restitution and pay reparations for all material and moral damages done by officials of Japan.

Subject of Dispute

1. As set out in the paragraphs of the common and country indictments submitted to the Tribunal various officials of the State of Japan violated the rights of the women who are survivors and victims of Japan's military sexual slavery. These violations constitute breaches of Japan's international obligations.

2. After numerous attempts to achieve a satisfactory resolution to this issue, the People of the Asia-Pacific region file this application with the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery with a view to obtaining a finding that Japan is guilty of serious violations of international law committed upon the person of each and every woman subjected to military sexual slavery.

Basis for Jurisdiction

3. Sovereignty ultimately resides in the people of each state and territory and therefore the region. This Tribunal has been given jurisdiction over this application by the People of the Region so that it may adjudicate this matter.

4. Women from Japan have been included in the Application because they have no reasonable hope of achieving a resolution of this matter within their own country and they are part of the larger class of women who bring this application through their representatives.

Legal Grounds

5. The People as the ultimate holders of sovereignty have the right to require States to adhere to their international obligations, particularly those that relate to the protection of the individual and concern serious breaches of international humanitarian law, international human rights law and customary norms of international law.

6. The Women are entitled to have their rights asserted by the global community, as it is a fundamental tenet of modern international law that certain rights transcend national boundaries.

7. The People of the Asia Pacific region are entitled to institute proceedings against Japan as it has violated major principles of international law that profoundly affect the dignity of the human person.

8. The particulars of those legal violations are as follows:

8.1 Officials of the Japanese government and military consciously decided to establish and maintain a system of military facilities for sexual slavery. All acts necessary to build this system were authorised by those acting in their official capacity. Such acts included but were not limited to: the recruitment of women by force and deceit; the building of facilities or the use of existing structures for such facilities; the allocation of material resources such as furniture, bedding and clothing; and the use of medical personnel of the armed forces to facilitate the operation of these facilities. Acts committed by officials that are attributable to the State of Japan and constitute violations of its international obligations are set out in the common and country indictments. All these acts were done either with knowledge of the consequences or with reckless disregard for the consequences that included rape, torture, murder, slavery, mutilation and inhumane treatment. Such acts were in violation of Japan's obligations pursuant to international humanitarian law, the international law of human rights and general international law.

8.2 In carrying out the plan to establish and maintain a system of military facilities for sexual slavery, officials of the State of Japan engaged in acts which constituted the trafficking of women and children contrary to Japan's international obligations.

8.3 At the time the system for military sexual slavery was put into place, the international community had accepted that men and women were to be treated equally. The creation of a system that allowed the systematic rape, torture, murder, mutilation and brutalisation of women was a breach of Japan's international obligations.

8.4 Equality among the races was a fundamental tenet of the League of Nations and was a customary norm of international law. The creation and maintenance of the system of military sexual slavery violated Japan's international obligations as it was sustained on the basis that non-Japanese people were inferior to Japanese people.

8.5 In violation of its obligations concerning the treatment of civilian detainees, the State of Japan took women from civilian internment camps and placed them into facilities for military sexual slavery knowing that they would be raped, tortured and treated inhumanely.

8.6 Officials of the Japanese government engaged in a course of conduct designed to destroy evidence of the war crimes and crimes against humanity committed by its military contrary to its obligations under international law.

8.7 The failure to prosecute those responsible for war crimes and crimes against humanity is a violation of Japan's obligations under international law.

8.8 The forcible and deceitful taking of women was a violation of Japan's obligations under the Convention Concerning Forced or Compulsory Labour.

8.9 By its ongoing refusal to investigate these matters thoroughly, the State of Japan continues to violate the obligations it has to the international community.

8.10 The State of Japan further violated its international obligations by refusing to acknowledge its participation in the above acts when presented with evidence that officials of the former government had engaged in the course of conduct set out in paragraphs 8.1 to 8.6 above. This violation was exacerbated by the repeated refusal of the government to heed the requests for satisfaction and reparations made by the international community through the offices of the United Nations, in particular Special Rapporteurs on human rights matters appointed by duly constituted bodies of the United Nations.

8.11 The State of Japan has allowed members of the government and supporters of the government to engage in acts which have as their purpose the destruction of the reputation of the women whose lives have been affected by the system of military sexual slavery. Its failure to control the acts of these individuals displays a contemptuous disregard for the rights of women. This continuing violation is a reflection of the gender and racial bias that permeates the government's actions in this area.

8.12 The State of Japan has further breached its international obligations by displaying a contemptuous disregard for the human rights mechanisms of the United Nations, in particular the right of the international community to monitor compliance with human rights norms and practices.

8.13 The refusal of the State of Japan to compensate directly all women affected by the system of military sexual slavery is an act of gender bias and therefore is itself a breach of Japan's international obligations.

8.14 By allowing members and supporters of the government to make comments that suggest rape in war is not a breach of international law, the State of Japan is in breach of its obligations under the Geneva Conventions of 1949 and the general principles of international humanitarian law in that it has failed to ensure respect for the provisions of those Conventions. The obligation to ensure respect for the Conventions places an affirmative obligation on the government to educate the public as well as the Armed Forces about the types of conduct prohibited by international humanitarian law.

Factual Basis of Claim

9. The facts demonstrating the above violations of Japan's international obligations will be proved at trial and are particularised in the common and country indictments.

Decision Requested

10. The People of the Asia-Pacific region request that Japan be declared in breach of its international obligations and that it be ordered to make appropriate forms of restitution, reparations and satisfaction. The orders for restitution and reparations should be in keeping with the nature of the harms inflicted by the Government of Japan, particularly the ongoing nature of those harms.

11. The harms inflicted by the State of Japan on the women subjected to the system of military sexual slavery include but are not limited to the following:

11.1 Systematic and repeated rape

11.2 Torture

11.3 Mutilation

11.4 Slavery

11.5 Sexual Slavery

11.6 Murder

11.7 Inhumane treatment

11.8 Emotional Trauma

11.9 Psychological illness

11.10 Physical illness

11.11 Isolation

11.12 Interference with or destruction of family relations

11.13 Pain and suffering, including recurrent nightmares

11.14 Damage to reputation

11.15 Loss of opportunities, such as education

11.16 Loss of earnings and earning capacity

11.17 Damage to Personal Dignity

11.18 Permanent deprivation of the enjoyment of life

11.19 Interference with sense of community and sense of belonging to a given society

11.20 Being subjected to gender discrimination

11.21 Being subjected to racial discrimination

11.22 Costs required to obtain legal and other forms of expert assistance.

11.23 Costs associated with medical and other health related services, social services and medicine.

12. The People of the Asia Pacific region request the Tribunal to take into account the aggravation of the injuries suffered by the women as a result of the failure of the government of Japan to address this issue in an appropriate fashion as of 1992.

13. It has not been possible for the applicants or the women to exhaust local remedies as the law as applied in Japan is not in keeping with international law.

14. The specific forms of relief requested by the Applicants are as follows:

14.1 The issuance of an apology and guarantees of non-repetition.

14.2 The establishment of a mechanism for the thorough investigation into the system of military sexual slavery and the creation of a designated archive.

14.3 A full and frank public disclosure of the truth and acceptance of responsibility.

14.4 Restoration of the Honour of the Victims and Survivors through the creation of Memorials and a Museum.

14.5 Taking of steps to educate the Japanese public about the system of military sexual slavery.

14.6 Creation of scholarships and grants for those wishing to research this and related issues.

14.7 The payment of compensation adequate to redress the harm.

14.8 Return of the Bones of the Deceased

14.9 Repatriation of Survivors who wish to be repatriated.

14.10 Bringing to justice those responsible for war crimes and crimes against humanity.

14.11 Strengthening the independence of the judiciary.

Respectfully requested by the People of the Asia Pacific Region through their representatives who seek to protect the rights of women in the Asia-Pacific Region

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