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EDITORIAL COMMENTS

WOMEN'S INTERNATIONAL TRIBUNAL ON JAPANESE MILITARY SEXUAL SLAVERY

From December 8 to 12, 2000, a peoples' tribunal, the Women's International War Crimes Tribunal 2000, sat in Tokyo, Japan. It was established to consider the criminal liability of leading high-ranking Japanese military and political officials and the separate responsibility of the state of Japan for rape and sexual slavery as crimes against humanity arising out of Japanese military activity in the Asia Pacific region in the 1930s and 1940s.

The immediate background to the tribunal's establishment was a series of events commencing in 1988 when the women's movement in the Republic of Korea began to learn of the research of Professor Yun Chung-Ok. For many years Professor Yun had investigated the brutal and relentless treatment women had received at the hands of the Japanese military in the so-called comfort stations that had accompanied Japanese military operations before and during the Second World War. Women's organizations in South Korea sought the further details that soon emerged. Elderly women from across Asia began to speak out, in most cases breaking fifty years of silence in which they had suffered isolation, shame, in many cases extreme poverty, and often physical and mental ill health as a result of the injuries they had incurred. The first lawsuit for damages and compensation was filed in Japan in 1991. The issue was first raised at the United Nations Commission on Human Rights in 1992, and subsequently before other UN bodies. Public hearings were held in Tokyo and again at the Vienna World Conference on Human Rights in 1993. The International Commission of Jurists issued a research report that itemized these events,¹ examined documentary evidence, collected survivors' testimony, and provided legal analysis.

The graphic accounts were at first met with denials from the Japanese government that there was any official involvement by Japan in the establishment and operation of these facilities, which it asserted to be the responsibility of private entrepreneurs. As the number of women coming forward increased, Japan gradually shifted its ground to make some limited acknowledgment and to express remorse. However, Japan has continued to deny legal responsibility, arguing, *inter alia*, that the women were prostitutes who had consented to their recruitment; that the peace treaties concluded in the 1950s, including the San Francisco Treaty with the Allies and bilateral treaties with South Korea, Indonesia, and the Netherlands, had terminated all claims; and that in any case individuals have no rights under international law to claim reparations. Survivors have brought more lawsuits in the Japanese courts, to date with no success.² The establishment by the Japanese government in 1995—the fiftieth anniversary of the end of the Second World War—of the Asian Women's Fund, to be primarily financed by private donors,³ has been divisive and criticized by survivors as failing to engage issues of legal responsibility.⁴

¹ USTINIA DOLGOPOL & SNEHAL PARANJAPE, *COMFORT WOMEN: AN UNFINISHED ORDEAL—REPORT OF A MISSION* 11–14 (International Commission of Jurists 1993).

² *See, e.g., Japan Overturns Sex Slave Ruling*, BBC News (Mar. 29, 2001) (Hiroshima High Court overturning only successful claim for compensation in Japanese courts), at <http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1249000/1249236.stm>.

³ Radhika Coomaraswamy, *Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, UN Doc. E/CN.4/1998/54, at 12 (report of the special rapporteur on violence against women).

⁴ YAYORI MATSUI, *WOMEN IN THE NEW ASIA* 168 (Noriko Toyokawa & Carolyn Francis trans., 1999) (1996).

Frustrated by this lack of effective response and aware that time is running out for them, survivors have looked to other avenues for redress. The tribunal arose out of the work of various women's nongovernmental organizations (NGOs) across Asia. The instigator was Violence Against Women in War Network, Japan (VAWW-NET, Japan), which was founded in 1998 after the International Conference on Violence Against Women in War and Armed Conflict Situations was held in Tokyo in 1997. At the 1998 Asian Women's Solidarity Conference in Seoul, VAWW-NET, Japan proposed the establishment of the Women's International War Crimes Tribunal, which was agreed to by other delegates. The preparations for the tribunal then became an international process, while remaining based in Asia. Preparatory conferences were held in Tokyo in December 1998 and in Seoul in February 1999, where the International Organizing Committee for the tribunal was formed. The International Organizing Committee comprises three groups: the organizations of victimized countries/areas (China, Taiwan, the Philippines, Indonesia, and South and North Korea), represented by Yun Chung-Ok; the organization of the offending country (Japan), VAWW-NET Japan, represented by Yayori Matsui; and the International Advisory Committee, represented by Indai Lourdes Sajor, Asian Center for Women's Human Rights based in the Philippines. The International Advisory Council includes members from North and South America, Australia, Africa, Europe, and Asia.

The International Organizing Committee was responsible for research and investigation, drawing up the charter of the Tribunal and the preparations for the sitting in Tokyo. The organizers were motivated by the conviction that

these failures must not be allowed to silence the voices of survivors, nor obscure accountability for such crimes against humanity. [The tribunal] was established to redress the historic tendency to trivialize, excuse, marginalize and obfuscate crimes against women, particularly sexual crimes, and even more so when they are committed against non-white women.⁵

The organizers demonstrated dramatic vision in executing these objectives. Prosecution teams from ten countries presented indictments:⁶ North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands. This list alone encompasses swathes of colonial and Cold War history. The shared experience of Japanese colonization brought North and South Korean prosecutors together with a joint indictment—an expression of common purpose that continues to be unthinkable at the governmental level. The indictments from the North and South Korean, Taiwanese, and Japanese prosecutors (with respect to Okinawa) showed that women in these territories were regarded as at the disposal of the Japanese government and were transported to all places occupied by the Japanese military. In other areas the taking of women to facilities for sexual slavery accompanied military conquest and occupation. East Timor appeared before the tribunal as a separate entity and explained that the story of Timorese comfort women has only begun to be revealed since the arrival of the United Nations Transitional Administration in East Timor. The indictment arising out of the internment of Dutch civilians in Java (Dutch East Indies) and the removal of some of the youngest girls to comfort stations there recalled the European colonial past. Two lead prosecutors (Patricia Viseur Sellers⁷ and Ustina Dolgopol⁸) joined the separate-country prosecutors and presented a common indictment.

The overall prosecution strategy was simple, but subtle. The prosecutors argued that trials at the end of the Second World War with respect to the Japanese conduct of war, including

⁵ Prosecutors and Peoples of Asia Pacific Region v. Hirohito; Prosecutors and Peoples of Asia Pacific Region v. Japan, Summary of Findings and Preliminary Judgment, para. 5 (Women's Int'l War Crimes Trib. 2000, Dec. 12, 2000) [hereinafter Preliminary Judgment], at <<http://www1.jca.apc.org/vaww-net-japan/en/Dec2000/tribunal.html>>.

⁶ The word "country" is used advisedly. East Timor is not yet an independent state and the international legal status of Taiwan is contested.

⁷ Legal Adviser, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia.

⁸ Senior Lecturer, Flinders Law School, South Australia.

the proceedings of the International Military Tribunal for the Far East, were incomplete in that they had inadequately considered rape and sexual enslavement and had failed to bring charges arising out of the detention of women for sexual services. Accordingly, this tribunal could be seen as an addendum to those earlier proceedings and the named indicted persons were those who had been tried earlier. There was one major exception: this tribunal named Emperor Hirohito as an accused.

For three long days the tribunal heard prosecution statements supported by oral and documentary evidence. Over seventy-five survivors from the comfort stations were present and many gave evidence. The prosecution also submitted videos of interviews with many other survivors and affidavits in evidence to the court. These testimonies built up a picture of “recruitment” of women through force, kidnapping, coercion, and deception. Women were then transported in Japanese army and navy vehicles to wherever the authorities ordered. Once confined in the facilities, the women were subjected to lives of utter misery, fear, and brutality. Removal from their home territories isolated them and made escape impossible. Their very names were changed to Japanese names, further denying their own identity. As the war closed with Japanese defeat, the women were abandoned, killed by the Japanese, or killed by Allied bombing. Of those abandoned, some died and others returned home by various means, while still others remained permanently exiled from their homes. The tribunal was also given evidence on how the physical and mental effects of these harms had lasted throughout the survivors’ lives and on the inadequacy of the Japanese government’s response. Telling phrases made apparent the causal link between what had been done to these women during Japanese military activity and their lifelong suffering:

I don't want to die as the ghost of a virgin.
Mun Pil-gi, Korea

We went back home and we were crying. We couldn't tell anyone or we would be executed. It was so shameful so we dug a deep hole and covered it.
Maxima Regala Dela Cruz, Philippines

I lost my life. I was regarded as a dirty woman. I had no means of supporting myself and my job opportunities were extremely limited. I suffered terribly. . . .
Teng-Kao Pao-Chu, Taiwan⁹

In addition to survivors’ testimony to the atrocities they had suffered, the prosecution presented documentary and expert evidence that linked those atrocities to the organs of the Japanese state and Emperor Hirohito. At the end of the war, Japan had destroyed many documents relating to the running of the war. Nevertheless, researchers have unearthed relevant official documents, which were submitted,¹⁰ as well as memoirs and diaries by former military and civilian personnel. Their relevance was explained by experts on Japanese military and constitutional history and Japanese bureaucracy. More expert evidence was offered on the structure of the Japanese army, international law, and psychological and other kinds of trauma. Two former Japanese soldiers gave testimony on their involvement in and use of the facilities in question. Amicus briefs were presented that explained the progress of litigation in Japanese courts and told of a draft outline of a “Law for Compensation for Victims of Wartime Forced Sex,” prepared by a Japanese lawyers’ association to provide a legislative framework for redress, if the political willingness to address the issues were to change.

Matters of concern to all involved were questions of fairness and credibility. The tribunal strictly observed procedural constraints, for example, the separation of judges and prosecutors and the entering and recording of all evidence through the registry. The Japanese government

⁹ Preliminary Judgment, *supra* note 5, para. 2.

¹⁰ In 1992 Professor Yoshimi Yoshiaki, a Japanese historian, first published his findings of historical documents that showed Japan’s role in the comfort stations. DOLGOPOL & PARANJAPE, *supra* note 1, at 13. His full findings are now available in English. YOSHIMI YOSHIKAKI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II (Suzanne O’Brien trans., 2000).

was notified of the tribunal on November 9, 2000, and invited to participate. It did not respond to this invitation. In the spirit of Article 53 of the Statute of the International Court of Justice on nonappearance, the tribunal sought to engage with the arguments of Japan for its denial of responsibility. The tribunal therefore received briefs and evidence from Isomi, Suzuki, Koga and Partners, a Japanese firm appointed as *amicus curiae*, and Imamura Tsuguo, an attorney at law, setting out these arguments. It also considered other available sources, such as the decision of the Tokyo District Court denying responsibility for the Philippine comfort women.¹¹

After the closing of evidence and argument, the judges deliberated for a day and, assisted by a team of legal advisers, prepared a preliminary judgment.¹² The panel of judges embodied a balance on a broader number of criteria than many formal international tribunals. It comprised Gabrielle Kirk McDonald, former president of the International Criminal Tribunal for the Former Yugoslavia; Carmen María Argibay, a criminal law judge in Argentina and president of the International Association of Women Jurists; Dr. Willy Mutunga, a human rights lawyer from Kenya; and this author. Unfortunately, P. N. Bhagwati, formerly a judge on the Indian Supreme Court, was prevented from attending by ill health shortly before the opening of the proceedings. Overall, the panel represented a broad geographical distribution, expertise in diverse and relevant areas of domestic and international law, a mix of practitioner, judicial, and academic expertise, and, but for Judge Bhagwati's absence, an equitable gender balance. The preliminary judgment included a statement about the tribunal, an initial summary of findings, and rulings on the liability of Emperor Hirohito and the responsibility of the state of Japan. These were presented on the closing day before a packed hall of over a thousand people.

The preliminary judgment indicated that the judges had found Emperor Hirohito guilty of the charges on the basis of command responsibility, that he knew or should have known of the offenses. The evidence showed that the comfort stations had been systematically instituted and operated as a matter of military policy, that they constituted crimes against humanity under the law then applicable. The judges also indicated that they had determined Japan to be responsible under international law applicable at the time of the events for violation of its treaty obligations and principles of customary international law relating to slavery, trafficking, forced labor, and rape, amounting to crimes against humanity. Finally, the judges recommended a range of reparations and made other recommendations. A fuller judgment considering, *inter alia*, the guilt or otherwise of other indictees and providing more detailed legal analysis will be delivered in 2001.

What was the value of this exercise? Lacking legal authority, was the tribunal no more than a mock trial of little concern to serious international lawyers? I think not, for a number of reasons. It is a striking example of the developing role of civil society as an international actor. It was not, of course, the first example of a peoples' tribunal and it built upon earlier examples, such as the Vietnam war crimes trial instituted by Bertrand Russell in the late 1960s¹³ and the Permanent Peoples' Tribunal established in Italy in the 1970s by "private citizens of high moral authority" from several countries.¹⁴ The latter tribunal continued in existence over a number of years and examined a series of alleged violations of international law to which there had been inadequate official response, including the Soviet military intervention in Afghanistan, that of Indonesia in East Timor, and the alleged genocide of the Armenians. Reports were published based on the findings of the tribunal and the application of inter-

¹¹ See Ken Hijino, *Court Rejects 'Comfort Women' Claim: Tokyo Reparations Rejection Likely to Fuel Criticism of Government Handling of Wartime Brutality*, FIN. TIMES (London), Dec. 7, 2000, at 10; *High Court Says Ex-Sex Slaves Not Entitled to Compensation*, MAINICHI DAILY NEWS, Dec. 7, 2000, at 1.

¹² *Supra* note 5.

¹³ 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 United States responsibility for war crimes and genocide in Vietnam.

¹⁴ Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in THE RIGHTS OF PEOPLES 17, 28 (James Crawford ed., 1988).

national law to those findings.¹⁵ The reports provide a valuable alternative source of evidence and jurisprudence pertaining to contested applications of international law. Other ad hoc tribunals have been constituted in specific countries to consider particular issues.

Peoples' tribunals are premised on the understanding that "law is an instrument of civil society"¹⁶ that does not belong to governments, whether acting alone or in institutional arenas. Accordingly, when states fail to exercise their obligations to ensure justice, civil society can and should step in. To ignore violative conduct is to invite its repetition and sustain a culture of impunity. That a peoples' tribunal can exercise only moral authority results from the continued grip of the state on the formal institutions of international law. Such institutions are beginning to open themselves to non-state actors, for example, through the admission of amicus briefs and, in a few instances primarily in the area of expropriation, limited rights of standing. The legal response to atrocities has given rise to innovative international and national proceedings over the past decade, including the war crimes tribunals and various models for truth and reconciliation. While a peoples' tribunal admittedly cannot provide the due process guarantees of a state-administered national or international court of law, this limitation should not lessen its usefulness. There is no more reason to question the veracity of evidence given under oath to global society than to question that given before a formal court of law. A peoples' tribunal cannot impose sentences or order reparations, but it can make recommendations backed by the weight of its legal findings and its moral force. Universal condemnation of illegal acts should be recognized whether made under the aegis of member states of the United Nations or that of the "peoples of the United Nations." Where previously there was only silence and evasion, such a forum constitutes a form of public acknowledgment to the survivors that serious crimes were committed against them. Such acknowledgment has been recognized as essential to redressing feelings of shame and guilt and providing healing and closure. A peoples' tribunal can thus combine in a single process elements of both war crimes trials and truth commissions. The diversity and complexity of the situations where atrocities are committed means no single definitive response can be fashioned. Instead, processes must be devised that are feasible and conducive to the achievement of justice in each particular situation.¹⁷ Peoples' tribunals can take their place in a range of approaches.

This peoples' tribunal was founded on such convictions, in the context of international peace agreements and formal methods of closure at the end of conflict. It represented the belief that states cannot through their political agreements and settlements ignore or forgive crimes against humanity that are committed against individuals. Three further characteristics, however, distinguish it from earlier peoples' tribunals. First, it sat in Japan, the country against which the indictments were brought. Second, it was a *women's* tribunal; and third, it was established by grassroots organizers from within the victimized countries rather than by distinguished persons from outside. It focused on crimes of sexual violence and slavery, which have been routinely discounted in peace settlements and are thus effectively erased from the official records. In the same way, earlier civil-society initiatives did not focus on gendered abuses. The reliance in the earlier peoples' tribunals upon well-known persons from "cultural, legal, and religious" life¹⁸ did not ensure the inclusion of women's voices (despite the presence of Simone de Beauvoir as a judge in the Bertrand Russell tribunal).¹⁹

In the 1990s social movements for the empowerment of women and for the greater promotion and protection of human rights have drawn together, and through a range of initiatives

¹⁵ *Id.* at 28–29.

¹⁶ *Id.* at 29.

¹⁷ Naomi Roht-Arriaza, *The Need for Moral Reconstruction in the Wake of Past Human Rights Violations: An Interview with Jose Zalaquett*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 195, 197* (Carla Hesse & Robert Post eds., 1999).

¹⁸ Falk, *supra* note 14, at 28.

¹⁹ See HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 90–93 (2000).

have prompted some changes within national and international legal structures.²⁰ One such technique is that of public hearings on crimes of oppression and violence against women, including in armed conflict, for example, at the Vienna World Conference on Human Rights and the Beijing Fourth World Conference on Women, which sought to raise awareness of the extent and severity of gender-based violence.²¹ The tribunal went further in combining consciousness raising with the allocation of responsibility. It illustrates the value of devising strategies that combine traditional women's organizing methodologies of networking, consciousness raising, and alliance building with procedural initiatives that have already acquired legitimacy within civil society.

There are other points of note about the tribunal. First, their freedom from the restraints of state mechanisms for international adjudication enabled the organizers to design the tribunal uniquely to give effect to the dual objectives of assigning individual criminal culpability and state responsibility for wrongful acts under international law and the duty to accord reparation for those wrongful acts. The issues of victims' rights and reparations for atrocities committed have come to the fore in the context of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the negotiations for the international criminal court. Orders for compensation under Rule 106 of the Rules of Procedure and Evidence of the two International Criminal Tribunals have not been made, but in any case are limited to individual redress. They do not envisage other forms of reparation such as ensuring domestic education and the establishment of memorials. Where the state bears responsibility for such atrocities, it should satisfy the obligation to make reparation, in appropriate forms, regardless of whatever individual criminal culpability is also determined.

Second is the importance of the collection and compilation of the historical record. In the last decades, an explosion has occurred in the forms of collecting data on human rights abuses that can repudiate the versions of events offered by states. The record with respect to the women used for sexual services by the Japanese military was beginning to emerge across the range of countries and through several of these diverse forms—personal accounts,²² “mainstream” NGO reports,²³ and those of UN special rapporteurs and agencies.²⁴ The tribunal supplemented these records with historical data and expert evidence. For example, through his extensive researches Professor Yoshimi has located many previously unknown documents from the various Japanese ministries. Researchers across Asia and elsewhere found still more documents, which were made available to the country prosecutors. From such documents—demands for women to be sent to military garrisons, orders for their shipments, transport details such as ticketing systems and timetables, and operational data such as medical inspections—the perpetrators' perspective begins to emerge, providing a more complete picture of the extent and institutionalization of the comfort-woman system as integral to the Japanese war machine. They show that rape as practiced in the comfort stations was not an inevitable consequence of war, nor even an instrument of war, but formed part of the very engine of war in which the sexual enslavement of women was considered necessary to the pursuit of military objectives. The women's tribunal culled an exceptional array of evidence, which surpasses that collected by many of the previous investigations, and will reach its conclusions with a more thorough examination of the applicable law in its historical context than was previously possible. This exhaustiveness makes the “exercise” of this unofficial tribunal at least as relevant, if not more weighty, than those carried out by more regularly recognized forms of denunciation.

²⁰ Christine Chinkin, *Human Rights and the Politics of Representation: Is There a Role for International Law?* in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 131 (Michael Byers ed., 2000).

²¹ For an earlier example, see *CRIMES AGAINST WOMEN: THE PROCEEDINGS OF THE INTERNATIONAL TRIBUNAL* (Diana Russell ed., reprint 1984) (1976).

²² JAN RUFF, *50 YEARS OF SILENCE* (Sydney 1994).

²³ *E.g.*, DOLGOPOL & PARANJAPE, *supra* note 1.

²⁴ *E.g.*, Gay J. McDougall, Report of the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices, UN Doc. E/CN.4/Sub.2/1998/13.

Third, and flowing from the second point, the tribunal allowed consideration of the effect of militarism and military objectives on gender relations. Its analysis showed the impact of the ethos of the subordination of the will and personality of the individual (male) soldier to complete obedience and loyalty to the Japanese military machine. This culture deprived soldiers of their human rights, denied self-identity, oppressed individuality, and demanded absolute obedience on treatment of women whose bodies were made available to service men's sexual needs. While the circumstances and context of the Japanese system of military sexual slavery were unique, we can still learn important lessons about the continuing linkages between militarism and sexist attitudes that contribute to sexual abuse, for example, through the rape and sexual harassment associated with military bases and the heightened levels of domestic violence in immediate postconflict societies.

Fourth, the proceedings also presented a setting for legal analysis that both looked back to the law in 1945 when explicit reference to sexual abuses was minimal²⁵ and looked forward to reveal our current understanding that the ways women are subjugated to and abused by policies they have played no role in formulating nevertheless come within earlier proscriptions. Thus, enslavement, forced labor, and trafficking were prohibited in international law by the time of these events. So, too, was rape.²⁶ Confining women for the sole purpose of sexual service at the bidding of military personnel deprives them of the rights of ownership to their bodies—the embodiment of slavery. Further, since no one can consent to being enslaved, the issue of consent or otherwise to the sexual activities is exposed as the irrelevancy it is.

Finally, the testimony demonstrated throughout the proceedings that the pain of women who were the survivors of sexual violence was exacerbated by their rejection when they returned to their own communities. They were forced to suffer in shame and silence because of the prevailing sexist attitudes that saw them as somehow responsible for their own tragedies. It is hoped that the tribunal will contribute to the appropriate attribution of responsibility and assist in changing the worldwide pattern of sexual stereotyping that continues to be pervasive today.

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