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Peoples' Tribunals: Legitimate or Rough Justice

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PEOPLES' TRIBUNALS: LEGITIMATE OR ROUGH JUSTICE

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The article examines the use of Peoples' Tribunals in seeking access to justice where none has been possible through more formal methods. It uses as illustration the Women's International War Crimes Tribunal *that sought justice for the so-called comfort women, the primarily Asian women who were subjected to sexual slavery by the Japanese military before and during World War Two. The article briefly recounts the fate of the comfort women and then considers the legal and practical obstacles they faced in accessing justice at the end of the War. It outlines how towards the end of the 20th century the survivors broke their silence about these events and unsuccessfully sought justice through national and international mechanisms. The* Women's Tribunal *was created out of the failure to receive appropriate redress. From this particular example the article discusses more generally the concept of Peoples' Tribunals in delivering justice (especially gender justice) and assesses whether such institutions of civil society have any legitimate and effective role in providing justice where none has been given by the state.*

Cet article examine l'utilisation de Tribunaux populaires pour rechercher l'accès à la justice lorsque cela n'a pas été possible par des méthodes plus formelles. Il utilise comme illustration le Tribunal international des femmes pour les crimes de guerre *qui visait la justice pour les soi-disant femmes de confort, les femmes surtout asiatiques qui ont été assujetties à l'esclavage sexuel par les militaires japonais avant et pendant la Deuxième grande guerre. L'article relate brièvement le sort des femmes de confort puis considère les obstacles légaux et pratiques qu'elles ont dû envisager pour accéder à la justice à la fin de la guerre. Il décrit comment, vers la fin du vingtième siècle, les survivantes ont brisé le silence au sujet de ces événements et ont recherché en vain la justice par le biais de mécanismes nationaux et internationaux.* Le Tribunal des femmes *a été créé suite à l'insuccès à obtenir des réparations appropriées. À partir de cet exemple particulier, l'article discute de façon plus générale la notion de Tribunaux populaires pour rendre justice (surtout la justice en rapport avec le sexe) et examine la question à savoir si de telles institutions de la société civile ont un rôle légitime et efficace à jouer pour faire justice où l'état ne l'a pas faite.*

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I. INTRODUCTION

This article addresses a very particular aspect of access to justice that is the use of informal mechanisms not supported by the institutions of the state to seek redress where none has been possible through more formal methods. I am going to do this primarily through the attempts at accessing justice for a group of women who suffered gross violations of crimes against humanity some 60 years ago, the so-called comfort women: the some 200,000 primarily Asian women who were subjected to sexual slavery by the Japanese military before and during World War Two. In other words I am discussing access to justice for those who have not received justice and who face apparently insurmountable obstacles in their quest to do so.

What I will do in this narrative is first to set the scene by briefly recounting the fate of the comfort women and then consider the obstacles they faced in accessing justice at the end of World War Two. I will then outline how survivors broke their silence at the beginning of the 1990s and attempted to redress the official silence that then persisted, in particular through the Women's International War Crimes Tribunal that sat in Tokyo in December 2000. From this particular example I will discuss more generally the concept of what have been termed Peoples' Tribunals in delivering justice and assess whether such institutions of civil society have any legitimate and effective role in providing justice where none has been given by the state.

II. THE COMFORT WOMEN

I will start by setting the scene and describing some of the atrocities endured by the comfort women. So much has now been written about the plight of the comfort women that it is perhaps hard to remember that some 15–20 years ago they had vanished from the pages of history, if indeed they had ever been there, but barriers such as those of diplomacy and politics, the lack of available legal arenas and the powerlessness of those who are marginalised by their gender, class, nationality and poverty all ensured their continued invisibility for some 50 years.

The first military comfort station was apparently established in 1932 in Shanghai after the Japanese invasion of China.[1] In an institutionalization of providing women for the sexual services of their military men, women were "recruited" through various means, including deception, coercion and brutal force from all points where Japanese authority held sway, either as a colonial power (Korea and Taiwan) or through military occupation. The women were then typically transported in Japanese army and navy vehicles to wherever the authorities ordered and detained in often makeshift premises (for example barracks, caves, houses, local facilities) to provide sexual services on demand to members of the Japanese military. They were mostly Asian (the great majority were Korean) although there were also Dutch women who were taken from the Dutch East Indies (present day Indonesia).[2] It is important to understand that

1 G. Hicks, *The Comfort Women* (St Leonards, Australia: Allen and Unwin, 1995) at 19.

2 J. Ruff, *50 Years of Silence* (Sydney: Tom Thomson, 1994).

the use of comfort women was not an incidental side effect of war but rather that procuring women and forcing them into what has been termed military sexual slavery became an integral part of the Japanese war strategy, core to their aggressive campaign. The motives were mixed: to deter widespread non institutionalized rape in occupied territory, to limit anti-Japanese resistance among the local populations, to avoid international opprobrium (such as had been roused by the "rape" of Nanking), to limit security leaks through soldiers' access to local women for sex, and to protect Japanese soldiers from venereal disease.[3]

Once in the stations, women were exposed to lives of utter misery, fear and brutality. Removal from their home territories meant that they were isolated and made escape impossible even where they were not physically detained. Many suffered internal and external injuries through beatings, mutilations, forced abortions and violent sex. They suffered further ill-health through malnutrition, lack of medical care and the atrocious conditions they were forced to endure. Their very names were changed to Japanese names, further extinguishing their own identities. As the war ended with Japanese defeat, the women were abandoned or told to flee, killed by the Japanese or killed by allied bombing. Among those who survived, some had no option but to continue in their former role with occupation forces,[4] some managed by various means to return home across war-devastated Asia, while others remained permanently exiled, often in the place to which they had been transported. The physical and mental effects of their detention and the subsequent lack of treatment of the trauma they had endured lasted throughout many of the survivors' lives.

III. INTERNATIONAL JUSTICE AFTER THE SECOND WORLD WAR

In 1945 allied attention was given to retribution and Japanese reparations for violations of the laws of war and crimes against humanity. This should have been the moment for the comfort women to receive at least the justice of acknowledgment of crimes that had been committed against them and some compensation. One allied response to Japanese war crimes was the establishment of the International Military Tribunal for the Far East (IMTFE) to determine criminal charges against accused individuals.[5] The Tribunal had jurisdiction over crimes against humanity, which were defined as:

> *murder, extermination, enslavement, deportation, and other inhu*mane acts committed against any civilian population, before or dur-

3 Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al and the Government of Japan*, Summary of Findings, 12 December 2000, VAWW-NET Japan. Oline: <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/oraljudgement.pdf>.

4 G. Hicks, *supra* note 1 at 118–122.

5 This was in addition to war crimes trials held by particular states. For example Australian military courts held trials in eight venues: Labuan, Wewak, Morotai, Rabaul, Darwin, Singapore, Hong Kong, and Manus Island; Australian Government, National Archives of Australia, Fact Sheet 6, Australian Government, National Archives of Australia Online: <http://www.naa.gov.au/publications/fact_sheets/fs61.html>.

> ing 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.[6]

While not explicitly listed, rape and other forms of sexual violence committed against civilians can be brought within this definition. Such crimes were prosecuted at Tokyo but not with respect to the comfort women.[7] In contrast the Batavia Trial, held in Indonesia in 1948, did include the trial of Japanese military personnel who forced about 35 interned Dutch women to work as comfort women. However this was an isolated trial which was not followed up with further criminal proceedings.[8]

The second approach was payment of reparations and compensation for prisoners of war and others who had suffered war crimes as provided for in the various peace agreements with Japan. The 1951 San Francisco Agreement between most of the allied powers and Japan was adopted against the background of the need for Japanese support against the Peoples' Republic of China (PRC) after the latter's victorious ascent to power in October 1949 and the desire not to weaken Japan economically in the changed political environment of the Cold War. The Agreement allowed for individual claims and provided for indemnity to those "who suffered undue hardships" during the war[9] but was limited to members of the armed forces who had served as "prisoners of war". There was no provision for compensation for violations of human rights suffered by civilians and the governments concerned waived all further claims. [10] The comfort women's legal claims were thus waived without being even acknowledged and without any representation or participation in the negotiations.[11] Subsequent agreements[12]

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6 Charter of the International Military Tribunal for the Far East, 19 January 1946, article 5 (c). The IMTFE was established by Special Proclamation of General McArthur, the Supreme Commander for the Allied Powers, in accordance with the Cairo Declaration, 1 December 1943, the Potsdam Declaration, 26 July 1945 and the Instrument of Surrender, 2 September 1945.

7 P. Viseur-Sellers, "The Context of Sexual Violence as Violations of International Humanitarian Law" in G. Kirk McDomnald and O. Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law*, vol. 1 (The Hague, Netherlands: Kluwer Law International, 2000) 263 at 277–293.

8 Hicks, *supra* note 1 at 128, states that this was because of conditions in Indonesia during the war of independence, 1945–50 and the decision of the Western allies to terminate war crimes trials after 1949.

9 Treaty of Peace with Japan, 8 September 1951, San Francisco, 3 UST 3169, art. 16.

10 Article 14 (2) (V) (b) states that: "Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation."

11 Women are rarely included in negotiations for peace agreements or post-conflict reconstruction, an issue addressed in Security Council Resolution 1325, 31 October 2000 on Women, Peace and Security.

12 The Treaty of Peace with Japan, 8 September, 1951, article 26 obliged Japan to enter into bilateral agreements with non-Allied states "on the same or substantially the same terms as are provided for in the present Treaty."

between Japan and other countries such as the Philippines,[13] Taiwan,[14] South Korea[15] and the PRC[16] also did not deal with the issue of compensation for individuals for human rights violations and in variously phrased provisions purported to waive any further claims.

This failure to provide redress to the comfort women was not because of lack of allied knowledge about their plight. Some comfort women had been repatriated by the allies and shortly after Japan's unconditional surrender General McArthur had commissioned a report entitled "Amenities in the Japanese Armed Forces", which contained detailed documentation on the Japanese military comfort stations. We therefore have to ask why they were not considered for compensation alongside prisoners of war and others who had suffered from the commission of war crimes. The comfort women had been subjected to sexual slavery because they were women,[17] because of their race,[18] because of their status as colonised or defeated peoples,[19] and in many instances because they were poor; all factors that militated against their receiving justice. Despite the strictures against racism in the definition of crimes against humanity within the jurisdiction of the IMTFE, there was the "niggling thought that the sufferings of the comfort women did not matter enough for an issue to be made out of them."[20] In addition there was in many cases their own silence, fearing the shame and rejection that attaches to raped women in many parts of Asia and thus the unwillingness of their own societies to support their cause or to accommodate them. Most comfort women after the end of the war were abandoned at the bottom of the economic heap: "their wartime experiences ruined many comfort women's chances of a stable family life".[21] Some married but many did not. Poverty and isolation were common characteristics of the remainder of their lives.

13 Philippines and Japan Reparations Agreement, 1956. The Philippines as an allied power was also party to the 1951 Treaty of Peace with Japan.

14 138 UNTS 37.

15 Agreement on the Settlement of Problems Concerning Property and Claims Between Japan and the Republic of Korea, 1965, 583 UNTS 258.

16 1225 UNTS 269.

17 These same factors caused many comfort women to be raped by occupation forces: Hicks, *supra* note 1 at 120. This was perhaps another reason for exclusion of reparations for the harms they had suffered from the peace settlements.

18 The comfort women were not the only ones who suffered racial discrimination with respect to compensation for war crimes. Former Gurkhas who were Japanese prisoners of war during the Second World War were denied the ex-gratia payment paid to British soldiers. In *R (on the application of Purja) v. Ministry of Defence*, [2003] EWHC 445 Admin, Sullivan J. found there had been racial discrimination which is repugnant to the "principle of equality which is at the cornerstone of our system." The MOD withdrew its appeal when further evidence of discrimination was produced by the claimants.

19 The majority of the comfort women were from Korea, then a colony of Japan. While there were some Japanese comfort women, many were from the southern island of Okinawa which was not seen as Japan "proper" and others were perceived as prostitutes.

20 Hicks, *supra* note 1 at 229.

21 *Ibid.* at 125.

IV. SEEKING ACCESS TO JUSTICE

A. National Institutions

Some forty years after the end of World War Two the comfort women began to break their silence and to tell of the wrongs they had suffered. They also began to seek access to justice. This raises the questions of why they began to look for justice – after all, the perpetrators were by this time mostly dead – and what their quest entails. No-one can speak for anyone else but important factors appear to be the desire to live out the remainder of their lives in the dignity that comes from formal acknowledgment of the crimes committed against them, coupled with a meaningful apology, as well as the need for physical, personal and economic security for the last years of their lives. But where does one seek justice for offences that were committed some forty to fifty years ago, often in foreign countries and in wartime conditions? A first place of call was appeals to the Japanese government, but in this context new obstacles to their receiving justice were created.

When the comfort women first began to speak out – from about 1990 – the Japanese government responded in different ways. It initially dismissed their claims arguing that private entrepreneurs rather than the government or military were responsible for running and supplying the comfort stations and that the women were voluntary prostitutes. However more pressure was brought to bear upon the Japanese government through larger numbers of women breaking their silence and independent historical research, notably that of Professor Yoshimi, who in 1992 published his findings about the direct role of the Japanese military in maintaining the comfort stations. This led to the first admission in 1992 that the Japanese Imperial Army had been in some way involved in running military brothels. The Japanese government then turned to legal arguments that all claims had been settled under the peace treaties and that under The Hague Convention Japan was under no legal obligation to pay compensation to individual victims.[22] The government continued to reject any legal responsibility for the fate of the comfort women. Although it established the Asian Women's Fund in 1995, this was essentially a private arrangement paid for through private contributions that offered some payments to individual survivors, but rejected government responsibility. While some women have accepted payments from the Fund, it has been unacceptable to many others who want the government to accept legal responsibility for the commission of crimes against humanity.[23] Various forms of apology that have been made by different government officials

22 Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, article 3 states: "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." The argument is that this is an inter-State treaty that gives no rights to individuals.

23 In its Concluding Comments to Japan's second periodic report the UN Committee on Economic, Social and Cultural Rights expressed concern that the Asian Women's Fund had not been deemed an acceptable measure by the women concerned. UN Doc. E/C.12/1/Add.67, 24 September 2001, para. 26.

have also been deemed inadequate, or have been undermined by subsequent statements.

Lawsuits in national courts have been pursued alongside these political demands. Japanese courts have consistently rejected such claims. To huge disappointment, on March 29, 2001 the Hiroshima High Court overturned the only previously successful ruling, that of the Yamaguchi district court in 1998 that had ordered the Japanese government to pay $7,260 to claimants. The High Court held that abducting the women to use them as forced labourers and sex slaves was not a serious constitutional violation.[24] On 18 March 2005 the Tokyo High Court rejected a compensation claim by two Chinese former comfort women.[25]

There has also been litigation in the United States where exceptionally there is jurisdiction for civil suits brought by aliens for violations of the law of nations committed abroad by non-US nationals. In 2000, fifteen former comfort women filed a class action before the United States District Court for the District of Columbia under the Alien Tort Claims Act[26] for violations of international law.[27] The US Department of State intervened to support the Japanese government's motion to dismiss the case, arguing that the Japanese government is entitled to sovereign immunity and that through the "waiver clause', the 1951 Peace Treaty resolved any and all claims against Japan. On October 4, 2001 the Court for the District of Columbia dismissed the lawsuit, essentially accepting the sovereign immunity argument. [28] On June 27, 2003 the United States Court of Appeals for the District of Columbia affirmed the dismissal of the class action lawsuit.[29] However, in July 2004 the Supreme Court vacated the Court of Appeal's judgment in light of another decision on sovereign immunity[30] requiring the Court of Appeal to reconsider the case. In June 2005 the action was rejected for the second time by the US Court of Appeal,[31] this time on the basis that the issue of whether the claims were waived by the terms of the peace treaties between Japan and the claimants' states presented a non-justiciable political question. The Court would not inquire into the correct meaning of an international treaty between foreign states. The Court's ruling on the political question meant it did not have to consider the US government's argument that the Japa-

24 Online: CNN.com/WORLD <http://edition.cnn.com/2001/WORLD/asiapcf/east/03/29/japan.comfort.women/>.

25 Online: China Daily <http://www2.chinadaily.com.cn/english/doc/2005-03/19/content_426304.htm>. See also The International Movement against all Forms of Discrimination and Racism (IMADR), "Contemporary Forms of Japanese Nationalism and Racism: The Issue of "Comfort Women" and Wartime Victims", online: The International Movement against all Forms of Discrimination and Racism <http://www.imadr.org/attention/attention.japan1.html>.

26 28 U.S.C. § 1350.

27 *Hwang Geum Joo et al. v. Japan* 172 F. Supp. 2d 52 (DDC 2001).

28 172 F. Supp. 2d 52 (DDC 2001).

29 332 F. 3rd 680.

30 *Republic of Austria v. Altmann*. 541 US 677 (Judgment of 7 June 2004).

31 *Hwang Geum Joo et al v. Japan, Minister Yohei Kono, Minister of Foreign Affairs*, 413 F. 3rd No 1, 45 (Judgment of 28 June 2005).

nese government enjoyed "absolute immunity" from the jurisdiction of US courts because of the non-commercial nature of the activities.

B. International Institutions

Failure in national legal and political institutions has led surviving comfort women and their supporters to seek access to justice within international institutions. The options are, however, limited. International adjudication is not possible as the International Court of Justice is open only to states and by the 1990s the post-World War Two military tribunals had long ceased to exist. There was no possibility of an ad hoc international criminal tribunal being established[32] and the International Criminal Court (ICC) was still in the future. Even once it came into being in 2002, the ICC had no retrospective jurisdiction.[33] In the early 1990s, however, a strong women's NGO movement targeted UN institutions for recognition of women's rights as human rights[34] and in particular for the acceptance of gender-based violence against women as a human rights concern.[35] Sexual violence against women in armed conflict in the early nineties in the former Yugoslavia and elsewhere focused attention on this form of violence and the lack of accountability it typically entails.[36] At the Vienna World Conference on Human Rights in 1993 the campaign on violence against women achieved a considerable success through the assertion within the Programme of Action that:

> Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.[37]

It was therefore unsurprising that the issue of the comfort women would be raised before UN human rights institutions, including the Commission on Human Rights (CHR) and its Sub-Commission on the Prevention of Discrimination and Protection of Minorities (since 1999 the Sub-Commission on the Promotion and Protection of Human Rights) and the Working Group on Con-

32 The Security Council has established ad hoc criminal tribunals with respect to the Former Yugoslavia (SC Res. 827, 25 May 1993) and Rwanda (SC Res. 955, 8 November 1994).

33 Rome Statute for the International Criminal Court, 1998, article 11 (1).

34 For descriptions of this movement see H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analaysis* (Manchester: Manchester University Press, 2000) ch. 7; K. Askin and D. Koenig, eds., *Women and International Human Rights Law* (Ardsley, N.Y.: Transnational Publishers, 1999).

35 C. Bunch, "Women's Rights as Human Rights: Towards a Revision of Human Rights" (1990) 12 Human Rights Quarterly 486; R. Coomaraswamy, "To Bellow Like a Cow", in R. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennyslvania Press, 1994).

36 C. Chinkin, "Rape and Sexual Abuse of Women in International Law" (1994) 5 E.J.I.L. 326.

37 Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, II, para. 38. The Vienna Conference also stressed the importance of eliminating violence against women outside the context of armed conflict.

temporary Forms of Slavery. The CHR and sub-commission mandated two special rapporteurs to look specifically at the issue – the special rapporteur on violence against women[38] and the special rapporteur on sexual slavery during wartime.[39] These rapporteurs submitted detailed factual and legal reports, with recommendations,[40] but Japanese political pressure at the CHR meant that the responses were muted. For example, the Commission merely took note of the 1996 report from the special rapporteur on violence against women.[41] The sub-commission welcomed the report from its special rapporteur but made no mention of its appendix that dealt explicitly with the comfort women issue.[42] The Commission is essentially a political body[43] that is susceptible to pressure from leading countries and unwilling to make strong statements that they perceive to be against their political interests. The issue was also raised through the state reporting system before the UN human rights treaty bodies, for example, by the Committee on the Elimination of Discrimination against Women. However, the Committee noted only "its disappointment that the Japanese report contained no serious reflection on issues concerning the sexual exploitation of women from other countries in Asia and during the Second World War."[44] Although stronger language might have been hoped for from the specialist UN Committee on women's human rights, the ethos of "constructive dialogue" with states parties rather than confrontation militates against this.

In addition to the Vienna Conference the comfort women campaign was continued through other global summit meetings that were a feature of the 1990s. The Beijing Platform for Action adopted at the Fourth World Conference on Women stipulates rape, systematic rape, sexual slavery and forced prostitution to be violations of international human rights and humanitarian law and demands investigation, prosecution of perpetrators, and redress to the vic-

38 The mandate for the special rapporteur on violence against women was adopted by the UN Commission on Human Rights resolution 1994/45.

39 For the history of the creation of this position, see Report of the special rapporteur on contemporary forms of slavery, Ms. Gay MacDougall: *Systematic rape, sexual slavery and slavery like practices during armed conflict*, Appendix: An analysis of the legal liability of the government of Japan for "Comfort Women stations" established during the Second World War, UN Doc. E/CN.4/Sub.2/1998/13, 12 August 1998, paras 1–6.

40 Report submitted by the special rapporteur on violence against women: *Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military slavery in wartime*, UN Doc. E/CN.4/1996/53.Add 1, 4 January 1996; Report of the special rapporteur on contemporary forms of slavery, Ms. Gay MacDougall; *ibid.*

41 Commission on Human Rights resolution 1996/49, The elimination of violence against women, 19 April 1996.

42 Sub-Commission resolution 1998/18, 21 August 1998.

43 The Secretary-General of the UN has noted that the work of the UN CHR is undermined by its politicisation and selectivity. He has proposed the establishment of Human Rights Council in its place; Report of the Secretary-General, *In larger freedom: towards development, security and human rights for all*, UN Doc. A/59/2005; see especially Addendum 1, Human Rights Council, Explanatory Note by the Secretary-General, 14 April 2005, online: United Nations <http://www.un.org/largerfreedom/add1.htm>. The General Assembly accepted the proposal in the 2005, World Summit Outcome, UN. Doc. A/60/L.1, 15 September 2005, para. 157. The Human Rights Council was established by UNGA Res. 60/251, 3 April 2006.

44 Concluding Observations of the Committee on the Elimination of Discrimination Against Women, Japan, UN Doc. A/50/38, 31 May 1995, para. 633.

tims.[45] But it was at the NGO parallel fora to the global summit meetings that the comfort women made the greatest impression through bearing personal testimony before large numbers of women as to the violence committed against them.

V. CIVIL SOCIETY RESPONSES

The pursuit of justice through UN human rights mechanisms therefore generated some detailed reports and careful analyses and some generally sympathetic, albeit non-specific statements about the position of the comfort women, but no concrete progress in either determining Japan's responsibility under international law or achieving redress for the survivors. A particular feature of the search for justice for the comfort women has been the role of civil society movements, as first national[46] and then international[47] NGOs targeted national and international state institutions for some form of redress. Alongside efforts within the formal processes of national and international law, further strategies have been devised that have used what might be called freestanding civil society processes, that is efforts that share no symbiotic relationship with state or international institutions but lie solely in the domain of civil society. These are what are loosely termed peoples' courts or tribunals in which the survivors' testimony takes centre stage.

A. Peoples' Tribunals

I want to divert for a moment and have an excursus into the concept of peoples' tribunals that have proliferated over the past few decades. In the words of Justice Kirby of the High Court of Australia:

> The growth of the activities of Peoples Tribunals is, in one sense, a response to the inadequacy of the institutions of the International Community. In another sense, it is an assertion of the rights of peo-

45 Fourth United Nations World Conference on Women, Beijing Declaration and Platform for Action, September 1995, UN Doc. A/CONF. 177/20, especially paras 132,133, 135, 143 (c); 144 (b); 145 (e); see also Gender Equality, Development and Peace for the 21st Century. Special Session of the General Assembly, 5–9 June 2000, GA Res. S-23/3, 10 June 2000 (Outcome Document, Beijing +5), para. 19.

46 For example, in November 1990 an NGO, the Korean Council for the Women Drafted for Sexual Slavery by Japan, was formed in the Republic of Korea; in July 1992 an NGO was formed in the Philippines, the Task Force on Filipino Comfort Women, online: Comfort-Women.org <http://www.comfort-women.org/v2/history.html>. In 1998 VAWW-NET Japan (Violence Against Women in War-Network Japan) was formed with the objective, *inter alia* of "call[ing] for the restoration of honor and justice for women victimized by Japan's military sexual slavery before & during WWII, and for the Japanese government to fulfill its war and post-war responsibilities", online: VAWW-NET Japan. <http://www1.jca.apc.org/vaww-net-japan/english/aboutus/aboutus.html.>

47 The International Commission of Jurists undertook an investigative mission into the comfort women in 1994; U. Dolgopol and S. Paranjape, *Comfort Women: an unfinished ordeal* (Geneva: Report of a Mission, 1994)

> ples themselves which are different from the rights of states and of international organisations.[48]

There are now a number of different models of Peoples' Tribunals that have been established to address a range of legal, moral and philosophical issues.[49] The first cited Peoples' Tribunal was the Russell Tribunal founded in 1966 to investigate and sit in judgment on American war crimes in Vietnam. This was followed up by the Permanent Peoples' Tribunal which started in June 1979 under the Lelio Basso Foundation and which is characterised by the ideological pluralism of the members of the jury, selected on the basis of their moral, academic and literary qualities.[50] Most recently the Peoples' Tribunal concept has been utilised in the context of the war against Iraq. The origins of the World Tribunal on Iraq (WTI) lie in the frustration felt by the failure of state institutions to address the legality of the invasion and occupation of Iraq in 2003 and the continuing violations of international law during occupation and after the transfer of power to the Iraqi Transitional Government in June 2004. The concept of the WTI was discussed through a series of anti-war meetings in 2003, leading to the setting up of a working group at the meeting of European Peace and Human Rights Networks Conference of the Bertrand Russell Peace Foundation in Brussels in June 2003. An international coordinating group moved the project forward at a meeting in Istanbul in October 2003 and from then the WTI has held over twenty sessions in different parts of the world to hear testimony and to evaluate the actions of especially (but not exclusively) the US and UK against legal and moral criteria. The WTI culminated in a final session in Istanbul in June 2005 to summarise the findings of the preceding sessions on the legal, political, social and ethical wrongs committed against the people of Iraq through analysis of specific crimes and violations. The Jury of Conscience[51] heard extensive witness testimony, expert statements and legal advocacy. It considered charges, made a series of findings, named those who should be subject to investigation and made recommendations.[52]

A major advantage of a Peoples' Tribunal is that there is no set formula and no predetermined process. There are major differences in form, issue and process

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48 Justice Michael Kirby, "Peoples Tribunals and Due Process", First International Conference of People's Tribunal, Colombo, Sri Lanka, December 1994, online: Law and Justice Foundation of New South Wales. <http://www.lawfoundation.net.au/resources/kirby/papers/19941216_peoples.html>.

49 See E. Haslam, "Non-Governmental War Crimes Tribunals: A Forgotten Arena of International Criminal Justice", in C. Harding and C. Lim, *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Netherlands: Martinus Nijhoff, 1999) at 153.

50 Lelio Basso International Foundation for the Rights and Liberation of Peoples, Permanent Peoples' Tribunal, http://www.grisnet.it/filb/tribu%20eng.html#composizione

51 Members were Arundhati Roy, India, Spokesperson of the Jury of Conscience, Ahmet Öztürk, Turkey, Ayºe Erzan, Turkey, Chandra Muzaffar, Malaysia, David Krieger, USA, Eve Ensler, USA, François Houtart, Belgium, Jae-Bok Kim, South Korea, Mehmet Tarhan, Turkey, Miguel Angel De Los Santos Cruz, Mexico, Murat Belge, Turkey, Rela Mazali, Israel, Salaam Al Jobourie, Iraq, Taty Almeida, Argentina.

52 World Tribunal on Iraq, Istanbul, 23–27 June 2005, Declaration of Jury of Conscience, online: World Tribunal on Iraq <http://www.worldtribunal.org/main/?b=91>.

between the different models. Nevertheless, Peoples' Tribunals share some common characteristics: they seek to raise moral consciousness to respond where national and international mechanisms have failed and to this end are set up through civil society movements and not through state or international governmental agencies. They do not have the authority or power of the state behind them but rather seek to find new ways to speak truth to power.[53] They investigate some issue of international concern and in doing so draw heavily on truth telling through oral testimony presented to a panel or "jury of conscience". They need not be forced into the straitjacket of formal court proceedings and can be readily adapted to the particular issue at hand. Nor are they bound by courtroom rules of evidence and procedure and may thus be innovative, for example in the use of video and documentary testimony. Witness testimony is supported by legal argument presented by advocates. Peoples' Tribunals are an act of defiance against official silence by bringing the issues to a concerned public and thus seeking to mobilise public opinion worldwide. They aim to achieve consensus across diverse peoples. They also look forward, both through the making of recommendations based on perceptions of justice and ethical values and through seeking to influence the development of international law.

B. Courts of Women

There is a danger that despite their democratising tendencies, reliance on political and intellectual elites in Peoples' Tribunals will replicate the gendered power structures of states and fail to take adequate account of the concerns of women. Focus on women is the additional element that has been added by the Courts of Women. The Courts of Women project has been described as "a dream of many years ago"[54] whereby women's experiences and women's stories can be heard in proceedings by, and for, women. Courts of Women seek to "listen to women survivors, and to those that resisted violence, that is to hear the voices of survivors". They provide a "place where women can tell their stories in a safe place."[55] They are very much an initiative of the global south having their origins in Asia. Through the Asian Women's Human Rights Council seven Courts of Women have been held since the first in 1993 in the Asia Pacific region, followed by others developed in conjunction with regional women's groups in Africa, Central America and the Arab world.[56] They have examined, through women's testimony, presented in public to a jury called a Council of Wisdom, issues such as domestic violence (Lahore, Pakistan, 1993), reproduc-

53 Joan Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights" (2003) 14 E.J.I.L. 241.

54 Asian Women's Human Rights Council and El Taller International, *Singing in the Dark Times Women Remember* (Cape Town: Asian Women's Human Rights Council and El Taller International, 2001) at 437.

55 This is the description given by the International Co-ordinator of the World Court of Women held in Cape Town, 2001, Corinne Kumar, online: African Gender Institute <http://web.uct.ac.za/org/agi/pubs/newsletters/vol8/worldc.htm>.

56 Arab women have established their own Mahkamet El Nissa (Permanent Court of Women in the Arab World); *ibid.* at 438.

tive rights and genetic engineering (Cairo, Egypt, 1994),[57] the violence of development (Bangalore, India, 1995), trafficking (Kathmandu, Nepal, 1996), nuclear issues (Aotearoa, New Zealand, 1999) and in what developed into a World Court of Women, war and peace (Cape Town, South Africa, 2001). Through their sessions Women's Courts seek to extend the human rights discourse from a gender perspective, break new ground, create a new discourse and move towards new political imagery.[58]

In light of the failures of national and international institutions to provide appropriate and adequate relief for the comfort women it is perhaps not surprising that the comfort woman and their supporters have turned to the informal processes of a Peoples' Tribunal and Women's Court. Oral testimonies from the comfort women were heard at the NGO forum at the World Conference on Human Rights in Vienna in 1993. This was followed by the second Court of Women on the Violence of War against Women in Tokyo in 1994 where former comfort women, along with other women survivors of war from around the world, again offered their stories.

As the decade continued, with growing frustration at the lack of formal response and realisation that time was growing short for the ageing comfort women, the idea developed of combining the different approaches to transitional justice that were being pursued by states and international organisations[59] with the models of civil society – peoples' tribunals, the Courts of Women, forms of truth commissions[60] – into a Women's International War Crimes Tribunal to provide some form of justice where none had been available. Adaptation of these models would create a forum to "adjudicate" upon Japanese responsibility for the crimes committed against the comfort women and individual criminal responsibility of Japanese military and political leaders.

VI. THE WOMEN'S INTERNATIONAL WAR CRIMES TRIBUNAL

In 1998, at the 5th Asian Solidarity Conference on "Comfort Women" Seoul, VAWW-NET Japan proposed establishing a Women's International War Crimes Tribunal. An international organising committee[61] was formed in February 1999 and an international advisory committee in May of the same year. Throughout 2000, tasks such as the appointment of judges and national and

57 This was held during the International Conference on Population and Development in Cairo, in 1994.

58 Asian Women's Human Rights Council and El Taller International, *supra* note 54 at 440.

59 For example criminal justice models through the international ad hoc criminal tribunals, *supra* note 32,and the ICC, and differing models of truth and reconciliation commissions, in particular those favouring narrative and victim testimony.

60 NGOs have also founded such bodies: P. Hayner, "Fifteen Truth Commissions 1974–1994: A Comparative Study" (1994) 16 Hum. Rts. Q. 597.

61 The Committee comprised NGOs from a number of the victimised countries. It is important that the inspiration and operation of the Women's Tribunal came from within Asia and from grassroots women's organisations, not elites from outside the region. This distinguishes it from other Peoples' Tribunals and emphasises the connections with the Courts of Women. The WTI is also closer to this model.

international prosecutors, the drafting of the Charter setting out the process, rules of procedure and jurisdiction and determination of prosecution policy were undertaken to prepare for the proceedings in Tokyo in December 2000.

In addition to logistic and structural preparations, considerable attention was given to the difficult question of evidence. The events had taken place over fifty years previously and across an entire continent. Much had been destroyed both during the war and through deliberate destruction at its end. Enormous efforts were put into the collection of historical archives from the remaining materials. These proved extensive and included testimony and writings of former Japanese military personnel, records of military and local administrators within occupied states and Japan, official records and receipts of transport movements, shipping of supplies, requisitioning of property, financial accounts relating to soldiers' pay and deductions for their use of the comfort women[62] and personal memoirs and diaries. Such archives were to supplement and support the oral testimony from survivors. However, it could not be assumed that all oral testimony could be given in person. Many of the survivors were by now very old, often in poor health and unable physically or emotionally to undertake the journey to Tokyo. There was a strong desire to ensure that the statements of as many survivors as possible were captured and preserved and thus video testimony was taken from a considerable number of women. Other activities included finding experts who would go through in detail the records of the tribunals and trials that were held in the immediate post-war years as part of the research into international law as it was in 1945, as well as historical research into constitutional and political affairs in Japan.

The Women's International War Crimes Tribunal sat for five days.[63] Legal argument and testimony were presented to the panel of four judges over three days. One day was taken for the judges' deliberation and a summary judgment with preliminary findings of fact and law was delivered on the fifth day.[64] A lengthy formal judgment was prepared over the following twelve months and was handed down in the Hague in December 2001. A written statement and summary of judgment was submitted to the Sub-Commission on the Promotion and Protection of Human Rights of the UN CHR.[65]

The panel determined that the evidence proved that Emperor Hirohito and other named defendants were guilty of rape and sexual slavery as a crime against humanity and that the government of Japan incurred responsibility under international law for its establishment and maintenance of the comfort system. It made a number of detailed recommendations to the government of Japan.

62 Although soldiers were charged for their use of the comfort women, the women did not always receive the money or when they did receive it were not always able to use it. A former Japanese soldier who testified at the Women's Tribunal stated that because of the high costs to them of these payments they would sometimes access the comfort women without going through the official methods.

63 For more details see C. Chinkin, "The Women's International Tribunal on Japanese Military Sexual Slavery" (2001) 95 Am. J. Int'l L. 335.

64 *Supra* note 3

65 UN Doc. E/CN.4/Sub.2/2002/NGO/27, 4 August 2002.

Throughout the proceedings, the large conference centre was packed with well over a thousand people attending. Especially striking was the large numbers of young people, many of them students from Japanese universities who assisted in many roles and often expressed that they felt the need to be part of a process that looked at the injustices caused by their own society.

VII. THE LEGITIMACY OF PEOPLES' TRIBUNALS

If Peoples' Tribunals are perceived, as in some sense, plugging a gap in the formal justice systems, a crucial question must be whether they can assert any legitimacy, or whether the very concept is an anarchic one lacking any authority to castigate state behaviour. To whom and for whom can a Peoples' Tribunal legitimately speak? How does a Peoples' Tribunal respond to the criticism that it seeks to access justice at the expense of due process?

Peoples' Tribunals conform to neither national nor international rules for the establishment of courts and tribunals. They must therefore seek legitimacy elsewhere. The organisers, prosecutors and judges of the Women's International Tribunal sought to overcome the lack of formal legitimacy through a number of devices.

First, the Tribunal was constructed as a derivative from the IMTFE, a formal international judicial forum. Holding the Women's Tribunal in Tokyo symbolically represented this continuity but this was also furthered in a more strategic way. The prosecution tactic was to present the claims of the comfort women as a continuation of what had been left undone at the IMTFE, that is consideration of charges arising out of sexual slavery and abuse. In accordance with this strategy, the accused were those who had been convicted at Tokyo. This allowed the Tribunal to take as a matter of proved historical record their movements and presence in particular places in the context of those war crimes and crimes against humanity of which they had been found guilty. The "add-on" charges of sexual slavery were considered under the law applicable at the time of the commission of the offences, in accordance with the principles of inter-temporal law and "nullum crimen, nulla poena sine lege".

The only exception made to the principle that indictments be limited to those convicted by the IMTFE was with respect to Emperor Hirohito. It was considered that political reasons had prevented him from being indicted in 1945, that his status as Emperor was a matter of historical record and that as the Women's Tribunal did not seek to place him in any particular theatre of war but rather to assert his superior responsibility on the basis of what he knew or should have known about the comfort women system, this earlier omission was no obstacle to the proceedings in 2000.

Second, while no person with a mandate from the UN Commission on Human Rights was involved in the Tribunal in any official capacity, the use made of the reports and conclusions noted and adopted by such bodies added some international institutional formality and weight. Third, the Tribunal observed ritualistic and formal court room procedures, associating it with the indicia of state judicial legitimacy. These included all witnesses taking a solemn, public oath, preparing opening prosecution statements, oral testimony supplementing written evidence, routine entering of all evidence through the Registry,

full legal argument, expert testimony and explanation of historical context. Fourth, legitimacy was sought through the reputation and quality of work of the lawyers involving both the prosecutors and judges. The contributions of eminent public figures have always been core to the moral authority of Peoples' Tribunals. Such people as Jean-Paul Sartre, Simone de Beauvoir, Stokely Carmichael and of course Bertrand Russell participated in the Russell Tribunal, along with Parliamentarians, other people from the arts and sciences, lawyers and human rights workers from Asia, Europe and the Americas. The Women's Tribunal was addressing specifically legal issues and accordingly the organisers sought panel members with recognised expertise in international law, international criminal law and crimes of violence against women. The Panel had both male and female members[66] from Africa, North and South America and Europe.[67] The President of the Court, Judge MacDonald, was a former President of the ICTY and one of the international prosecutors was legal advisor for gender related crimes in the office of the prosecutor at the ICTY.[68] National prosecutors were qualified lawyers within their own jurisdictions. They shared common understandings of legal systems across Asia and had expertise in their own legal system. Fifth, the Women's Tribunal delivered a lengthy, fully reasoned and referenced legal decision that brought together the historical record, factual testimony and legal reasoning.

Sixth, and in common with other Peoples' Tribunals, is the power of personal testimony given to a public audience in conditions of solemnity. Legitimacy derives from the strength of narration, supplemented by expert evidence, objective documentation and the full historical context. Above all, this provides the legitimacy of hearing those voices that are silenced by international and national judicial arenas[69] and the moral legitimacy of victims – not state elites,

66 While "representation of the main forms of civilization and of the principal legal systems of the world" has been considered an important requirement for an international court (Statute of the International Court of Justice, 1945 article 9) gender balance has not been required until the Rome Statute of the International Court, article 36 (8) (a). The low representation of women on international courts may be thought to undermine their legitimacy. See J. Lineham, *Women and Public International Litigation* (London, Project on International Courts and Tribunals, 2001), online: Project on International Courts and Tribunals <http://www.pict-pcti.org/publications/PICT_articles/Women1.pdf>.

67 They were Gabrielle Kirk McDonald, former President of the Yugoslavia War Crimes Tribunal (USA), Carmen Maria Argibay, President of the International Women's Association of Judges (Argentina), Christine Chinkin, Professor of International Law at the London School of Economics and Expert on Gender and International Law (United Kingdom) and Willy Mutunga, President of the Commission on Human Rights (Kenya). It was planned that there would also be a Judge from Asia but unfortunately the selected person was taken ill shortly before the Tokyo hearing.

68 Patricia Viseur-Sellers. The other international prosecutor, Tina Dolgopol, is an Associate Professor at Flinders University, South Australia.

69 It might be noted that the legitimacy of formal proceedings is weakened when the voices of the victims are not heard. *In the Case Concerning East Timor* (Portugal v. Australia) before the International Court of Justice, Judge Vereshchetin noted that there was no evidence that the people of East Timor supported Portugal's application. He considered that this constituted an additional reason why the Court should not hear the case. 1991 ICJ Reports 135 (separate opinion Judge Vereshchetin).

nor legal representatives – speaking for themselves. Unfettered by rules of evidence and procedures, victims are able to tell their stories in their own way and to bring out what is of most importance to them. This is the most important basis of legitimacy.

Professor Franck has explained legitimacy as the sense of a rule "which *derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.*"[70] He has suggested four indicators of rule legitimacy in the international community: determinacy, symbolic validation, coherence and adherence to a normative hierarchy.[71] Applying these same indicators to the Women's Tribunal, it can be argued that the outcome of the process provided textual certainty and legal clarity and the process itself was both coherent and high on symbolic validation. Nevertheless there are at least two strong arguments against the legitimacy of Peoples' Tribunals which were applicable to the Women's Tribunal. First, the proceedings offered no opportunity for the defence to give its case and that it is thus a form of 'kangaroo court'. Second, that it was not established by any recognised bodies of international or national law, that is, it lacked "rule legitimacy in the international community:" In response to the first claim it should be noted that this is not solely a defect of Peoples' Tribunals. The defence does not appear in all national judicial proceedings, for example in litigation under the Alien Tort Claims Act in the United States and indictment proceedings before the ICTY under Rule 61 (f).[72] In both cases the defence is invited to appear but failure to do so does not invalidate the proceedings. Japan too was invited to participate in the Women's International Tribunal and every effort was made to address the legal arguments that Japan had put forward in other arenas. A Japanese lawyer provided an amicus brief on Japan's behalf. The Tribunal gave full consideration to these arguments.[73] Further, the Tribunal could not impose sentences or order reparations but only make recommendations backed by its moral force.

In response to the second argument it might be asked in whose eyes must proceedings be legitimate? Who is the actor, whose perception that a rule or institution ought to be obeyed, is required? Under classic international law the crucial actor is the state and if states are taken to be the only actors for determining legitimacy, Peoples' Tribunals must be deemed illegitimate. If, however, we look more broadly to civil society there may be a different response. Much civil society action is premised on the proposition that law is an instrument of civil society and does not belong exclusively to states. Where the state fails to assert

70 T. Franck, "Legitimacy in the International System" (1988) 82 Am. J. Int'l L. 705 at 706.

71 *Ibid.* at 712.

72 E.g. *Prosecutor v. Radovan Karadzic, Ratko Mladic* IT –95-5-R61; IT –95-18-R61. In determining whether there were reasonable grounds for believing that the accused committed one or all of the charges in the indictment the Trial Chamber heard witnesses and two amici curiae. The accused were not present. Review of the Indictments Pursuant to Rule 61 of the rules of procedure and evidence, 11 July 1996.

73 It should also be noted that the Statute of the International Court of Justice, 1945, article 53 allows the Court to continue in the absence of a party but requires it to satisfy itself that the claims of the applicant state are well-founded.

the law – and thereby weakens or erodes its authority – civil society can and should step in to reaffirm that authority. This position is supported by reference to the opening words and preamble of the United Nations Charter: "We the Peoples of the United Nations determined ... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." In similar language, the Jury of Conscience of the World Tribunal on Iraq, asserted its legitimacy to be – "located in the collective conscience of humanity."[74] It is also coupled with a belief that states cannot claim a monopoly over responses to crimes against humanity, which are by definition committed against people not states, and that it is illegitimate for states to waive liability for commission of such acts because of the exigencies of a Peace Agreement, or for other political ends.

There can be no definitive answer. Peoples' Tribunals in general and this Tribunal in particular may be disregarded as illegitimate by those who deny any parallel and complementary role to civil society institutions and who consider that application of legal principles must remain a state prerogative. Other objections may be added: the requirements of due process defence rights must be paramount and a "Women's Tribunal" is inherently biased. Further, those who establish such Tribunals are self-appointed, messianic, single issue-based, undemocratic and are themselves unaccountable.[75] Legitimacy in many ways is a code word for differentiating "good" or "bad" civil society movements and for purporting to clothe subjective internalisation with objective criteria: terrorist activities show that there may be an unbridgeable divide between perceptions of legitimacy.

VIII. CONCLUSION

There is perhaps a more damaging criticism than lack of legitimacy. This is that Peoples' Tribunals are self-serving and ineffective, that they do not offer any access to justice. They are a form of mock trial, or at best another mode of advocacy or lobbying without any appropriate outcome. They are a waste of time and energy and lack even the "naming and shaming" force of proceedings before intergovernmental international institutions. They offer more to the victims than they can deliver. In this vein it must be admitted that despite a great deal of publicity, including within the Japanese media, concrete responses from the Japanese government have been limited. The Japanese government's continued stance is well summarised by its response to mild criticism of the Asian Women's Fund made by the UN Committee on Economic, Social and Cultural Rights in 2002. The Government somewhat testily reminded the Committee that it had:

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74 Online: World Tribunal on Iraq <http://www.worldtribunal.org/main/?b=91>.

75 E. Haslam, "Non-Governmental War Crimes Tribunals: A Forgotten Arena of International Criminal Justice" *supra* note 49, at 153. For similar arguments in the context of NGO law-making activities see K. Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society" (2000) 11 E.J.I.L. 91.

> repeatedly explained ... the Asian Women's Fund (AWF) has been offering the atonement, which expresses sincere feeling of the Japanese people and the Government, to 285 former "wartime comfort women" acknowledged by the governments of the Philippines and South Korea, the authority of Taiwan, or related organizations which are entrusted by these governments and the authority. In addition, the AWF has been implementing projects related to the former "wartime comfort women" in Indonesia and Netherlands. These projects have been accepted appreciation of the former "wartime comfort women". Therefore, the Committee's claim that "the compensation ... has not been deemed an acceptable measure by the women concerned" is not correct. Furthermore, the Committee's claim that AWF is "primarily financed through private funding" is not appropriate, because the Government of Japan has been bearing all costs for the AWF's operation and management, other than atonement which is original from the fund raised by the Japanese nationals. With regard to the issues of reparation, property and claims relating to the last war including the issue known as "wartime comfort women", the Government of Japan has sincerely fulfilled its obligations in accordance with the San Francisco Peace Treaty, bilateral peace treaties, and other relevant treaties and agreements. On the other hand, the Government recognizes that the issue known as "wartime comfort women" was a grave affront to the honour and dignity of a large number of women. Based on this recognition, the Government will continue its effort to render maximum support to the AWF through which the Government of Japan, together with the people of Japan, expresses its sincere sentiment to the issue known as "wartime comfort women", so that it can fulfill its objectives.[76]

The words "sorry", "legal responsibility" and "crimes against humanity" remain conspicuously missing. The crime against the comfort women is described as an "affront" to their "honour and dignity"[77] not as violence to their bodily integrity and personal autonomy. But perhaps it is wrong to judge a Peoples' Tribunal by the criteria of effectiveness we expect from formal courts. Access to justice might have different meanings and what is clear is that women frequently fail to find justice through formal tribunals.[78] Despite the jurisprudence of the ad hoc international criminal tribunals on rape and sexual violence as a war crime and a crime against humanity, the effectiveness of war crimes tri-

76 UN Doc. E/C.12/2002/12, 29 November 2002, para. 2(4).

77 This language is reminiscent of that of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, article 27: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

78 Report submitted by the special rapporteur on violence against women, its causes and consequences, Yakin Erturk, UN Doc. E/CN.4/2004/66, 26 December 2003, *Towards an effective implementation of international norms to end violence against women*, para. 57 on access to justice.

bunals for providing women survivors of such violence with justice has been questioned.[79] Similarly, truth and reconciliation commissions have taken little account of women's lived experiences in the period under review. The number and frequency of Courts of Women suggest that the formal justice systems are failing to provide women with spaces where their voices can be heard. The informal procedure has at least provided a global arena where survivors have exercised their agency, have been acknowledged as such and have been vindicated by members of civil society. Their narratives have been documented and preserved. A Peoples' Tribunal offers public hearings and is a forum for human rights education. As such "[it] is proving to be an extremely sensitive and powerful media"[80] to inform a wider and more diverse audience than would be reached, for example, through university classes. The reports and findings of such bodies offer a valuable alternative source of thinking on contested issues by international lawyers, to those found in the classic texts. A Peoples' Tribunal and in particular a Women's Tribunal "contributes to a body of knowledge that will help to question, transform and initiate alternative institutions and instruments that seek to address the violations of women's human rights at the regional, national and international level".[81] This educative role means at least that the crime of silence does not continue down the generations. This may be a limited form of justice but it should not be discounted.

79 R. Dixon, "Rape as a Crime in International Humanitarian Law: Where to from Here?" (2002) 13 E.J.I.L. 697.

80 Asian Women's Human Rights Council and El Taller International, *Singing in the Dark Times Women Remember* (Cape Town: Asian Women's Human Rights Council and El Taller International, 2001) at 439

81 *Ibid.* at 440.