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Proposals for Japan and the ROK to Resolve the "Comfort Women" Issue: Creating trust and peace in light of international law 日本と韓国への提言「従軍慰安婦」問題の解決策：国際法を踏まえて、信頼と平和を築く

Totsuka Etsuro

Why did ROK President Lee, Myung-Bak, changing his position on the issue of "comfort women", forcefully demand for the first time in December 2011 in Kyoto that Japan's Prime Minister Noda Yoshihiko act to settle this issue? The reason is that the ROK government was compelled to do so by the August 30, 2011 decision of the Korean Constitutional Court.[1] As of January 2013, however, there has been no tangible Japanese action on the issues. This article considers possible ways to resolve the issues that continue to poison relations between two neighbors with extensive economic, financial and cultural bonds.

The Decision of the Korean Constitutional Court[2]

The Constitutional Court, on August 30, 2011, by a 6 to 3 vote, held that the failure of the government to act on the issue of the comfort women was unconstitutional. The ruling emphasized the obligation to undertake dispute settlement procedures defined in Article 3 of the 1965 Agreement on the Settlement of Problems Concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (hereinafter referred as the "Agreement"). Specifically, the ROK government was obligated to pursue settlement of the dispute over the right of the claimants, the wartime military comfort women, to file for damages against Japan. The issue is whether such rights had been terminated under Article 2 Paragraph 1 of the Agreement between the two countries.

The Court decision virtually ordered the ROK government to take action in accordance with the provisions stipulated in Art. 3 of the said agreement, namely to start diplomatic negotiations against Japan's "treaty defense" on the issue of comfort women, and, if unsuccessful, to settle the dispute through international arbitration as stipulated in Art. 3.

Japan's Ministry of Foreign Affairs (MOFA) responded to the demands made in September 2011 by the ROK's Ministry of Foreign Affairs and Trade (MOFAT) by refusing to negotiate, invoking the "treaty defense". MOFA insisted that all claims had been resolved by the 1965 Japan-ROK treaty normalizing relations. Then, during the Kyoto summit meeting in December 2011, President Lee, who had never raised the issue of comfort women, strongly demanded that Prime Minister Noda Yoshihiko settle the issue, which had recently gone viral in the electronic and print media in South Korea. Noda, who seemed shocked by this strong demand, rather than apologizing, counterattacked. He demanded that President Lee remove the bronze statute of a young girl seated across the road in front of the Japanese Embassy in Seoul. The statue was unveiled during a mass rally on December 14, 2011 on the occasion of the 1000th weekly demonstration by the comfort women and their supporters. Lee immediately rejected Noda's demand and warned that second and third statues might be erected if Japan failed to resolve the issue. At present, the issue remains stalemated at a time when Japan-ROK relations are tense as a result of territorial conflict over ownership of the Dokdo/Takeshima islet.

Comfort women in Seoul on the 1000th demonstration in front of the Japanese Embassy.

Since the debates on this issue started at the UN Commission on Human Rights (HRC) in February 1992, the UN experts and human rights meetings made reports and resolutions, which found, using the terms "sexual slavery", that the conduct of the Japanese military against many women victims violated prohibitions of slavery under then customary international law. The International Labor Organization similarly found that Japan had violated the prohibition of women as forced labour under the ILO 29 Forced Labour Convention. Japan is virtually the only country to argue that the prohibition of slavery was not customary international law before World War II, disregarding the fact that Japan had ratified ILO Convention 29 in 1932.

In June 2012, the UN Working Group of the Committee on Economic, Social and Cultural Rights (CESCR) sent a list of issues to the Japanese government on the issue of comfort women.[3] As recently as April 2012 Japan, in its sixth government report to the HRC, had repeated its claims that the actions of the non-governmental but government supported Asian Women's Fund (AWF), had resolved the issues, despite the fact that this approach was rejected by most Korean victims and their supporters who demanded an official Japanese government apology and reparations.[4]

In the years 2000 to 2009 the DPJ, then an opposition party, had worked hard to achieve settlement of the issue through legislation. However, the DPJ, after winning power in September 2009, failed to table the Bill that the victims had welcomed earlier. Rather, it worked behind the scenes to suppress the issue. The government's decision not to provide state compensation for the victims of war was aired by NHK TV in 2010 in a program entitled "Let's Open Pandora's Box."[5]

Opportunity to Develop a Mechanism for the Peaceful Settlement of Conflicts

While not widely known, in 1965 in the course of normalization of relations, Japan and the ROK agreed in principle to mediation as a means to settle disputes. The problem is that no rules and procedures were established for mediation and recommendations are not binding. Nevertheless, in the case of the comfort women, Art. 3 of the 1965 agreement could provide a basis for reaching agreement by arbitration, as the Korean Constitutional Court held.

In a legal opinion[6] on the issues submitted to the Korean Constitutional Court in April 2009, I emphasized the fact that Art. 2(1) of the 1965 Agreement did not put an end to Japan's responsibilities toward the comfort women.[7] This becomes clear when we recall that the Convention concerning Forced or Compulsory Labour (No. 29) adopted by the International Labour Organization in 1930

was ratified by Japan in 1932. The first sentence of Article 2 prohibits forced labour of women. The Japanese Government has acknowledged that coercion was widely employed in recruitment and treatment of the comfort women. Article 25 stipulates that "The illegal exaction of forced or compulsory labor shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced."

The International Convention for the Suppression of the White Slave Traffic adopted in 1910 by the International Conference in Paris was acceded to by Japan in 1925. This convention is not applicable in colonies and territories unless a notice to do so was registered by a State party (Art. 2). However, it is applicable to the cases of the comfort women from Korea for the following reasons.

The comfort women system was conceived, planned and supervised by the Supreme Headquarters of the Japanese Imperial Forces and the Japanese Government in Tokyo. Orders, authorizations and permissions for various actions in relation to the comfort women were directed by the authorities from Japan. In many cases, the women were transported in Japanese ships which are considered Japanese territory. The recruitment, enslavement, transport, treatment and supervision of many of the women was directed by personnel of the Japanese Imperial Forces and/or those instructed by them. These personnel were under the jurisdiction of the Japanese Empire.

Article 1 of the Convention explicitly provides for punishment of those who solicited, drew into or abducted a juvenile (younger than 21 years old) for the purpose of prostitution (even if they obtained her consent). Article 2 also explicitly provides that those who solicited, drew into or abducted an adult woman using deception or means of violence, coercion, abuse of authority or any other coercive measures should be punished. Furthermore, Article 3 stipulates the obligations of the States parties to take necessary measures to ensure punishment of the perpetrators of the crimes defined by Articles 1 and 2, including relevant legislation.

Many of the abductees were juveniles when they were taken to become comfort women. Japan has acknowledged that almost all of the women were taken by deception or coercion. The obligations for punishment[8] continue to bind the current Japanese Government.

The actions against the comfort women were punishable even by domestic law at the time of the Japanese empire. However, Japan may argue that it is not possible to prosecute perpetrators under the penal law of the time because of the statute of limitation under the Criminal Procedure Act of the time. However, there is no statute of limitation with respect to the obligations of Japan under international law.[9]

Despite its obligations under international law, except for the rare cases mentioned below, Japan has failed to investigate and punish even a single perpetrator of the crimes committed against the comfort women. This non-punishment should be condemned as one of the worst examples of *de facto* impunity in world history.

The author wishes to draw the attention of both governments to the historical event of February 7, 1994. The Tokyo District Prosecutors' Office refused to receive a formal submission calling for punishment of the perpetrators. The documents were brought from the ROK by a team of six victims, lawyers and the Korean Council for the women drafted by Japan for military sexual slavery.[10] This symbolizes the total neglect of Japan's duty to punish under international law.

Under then Japanese domestic criminal law, abductions by deception of women to military designated comfort stations was punishable. Although actual punishment was rare, the author found cases of punishment of perpetrators as early as 1936.[11]

Concerned Japanese lawyers including the author, who worked for the victims of gross violations of human rights, learned some vital legal principles of international law from the final report submitted by the Special Rapporteur of the Sub-Commission on compensation and rehabilitation for victims of gross violations of human rights by Professor Theo van Boven (E/CN.4/Sub.2/1993/8). It was based on State responsibility under international law. Paragraph 137 of the report, article 2[12] of his proposed General Principles makes clear that a State is bound by the obligation to make reparation, namely compensate, if the State breaches the obligation to punish. The UN General Assembly's resolution (60/147 of 16 December 2005), based on the continuous considerations that followed the proposed Principles and Guidelines mentioned above, includes the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[13]. Professor Ian Brownlie of Oxford University, in his *Principles of Public International Law* (Oxford: Clarendon Press, 1990, pp. 464-465), also supports this view, citing the Janes case in the 1920s.

However, the Japanese Government refused to admit any legal obligation to compensate the comfort women on the ground that "the claims issues between Japan and the Republic of Korea had been resolved by an agreement, signed on 27 June 1965 on the settlement of the problems concerning property and claims, and on the economic cooperation between Japan and the Republic of Korea." The obligations for punishment, however, were not resolved by the said agreement, as the terms of the agreement limit the scope within "the issues as regards properties, rights and interests..." (art. 2 of the agreement). Therefore, Japan cannot argue that the continuous obligation for compensation on the grounds of non-punishment was resolved by the 1965 agreement, which has no provision for any criminal matters. It is clear that it did not relinquish the Japanese government's obligation for punishment.

Japan and the ROK are involved in many international disputes including the issue of comfort women. As the ROK Court ruled, not only is arbitration available to resolve outstanding disputes over the comfort women involving Japan and the ROK, but the ROK government is duty bound to enter arbitration if diplomatic negotiations fail.

The Peace Monument Controversy

As mentioned above, the Japanese government has demanded that the ROK government remove the Peace Monument commemorating the comfort women from the front of the Japanese embassy in Seoul. The legal basis of the Japanese demand is Art. 22(2) of the **Vienna Convention on Diplomatic Relations**,[15] to which both are a Party. Japan and the ROK, as parties of the Optional Protocol, could in respect of any dispute arising out of the interpretation or application of the Convention, request a binding ruling of the International Court of Justice.

Appendix

The author presented an earlier Japanese version of the above paper to an International Symposium in Tokyo on September 22, 2012 for settling the comfort women question through negotiation between Japan and the ROK. The symposium was organized by the Center for Research and Documentation on Japan's War Responsibility (Nihon no Senso Sekinin Shiryo Senta).

The Center invited three panelists and a coordinator:

Panelists:

1. Ms. Ustinia Dolgopol, Associate Professor, Flinders University, Australia
   International Human Rights Law; Member of the International Commission of Jurists on the comfort women.

2. Mr. Abe Koki, Professor, Kanagawa University, Law School, Japan.
   International Law.

3. Mr. Kim Chang-Nok, Professor, Kyungpook National University, Graduate School of Law, Korea.
   Japanese Law.

Coordinator:
Mr. Totsuka Etsuro, Former Professor of Ryukoku University, Law School, Japan.

International Human Rights Law; General Secretary, Research Institute of International Human Rights Policies; Main-Representative of Japan Fellowship of Reconciliation, Geneva.

The following recommendations for both governments were made by the panelists and coordinator on September 23, 2012 and submitted to them on September 24.

Recommendations from the International Symposium on settling the issue of the 'Comfort Women' through negotiation between Japan and the ROK

1. It is important that all discussions relating to the 'Comfort Women' issue be undertaken in light of the UN Charter, particularly its emphasis on maintaining peaceful and friendly relations. In addition both parties should conduct discussions bearing in mind the requirement under the Charter that disputes areto be settled in accordance with objective and recognized principles of international law that promote the peaceful settlement of disputes.
2. In the view of the legal experts present at the symposium a dispute exists with respect to the word 'claims' under the 1965 Agreement Concerning the Settlement of the Problems of Property and in Regard to Property and Claims and Economic Cooperation between the Republic of Korea and Japan. That Agreement contains a clause requiring the parties to negotiate and if negotiations do not succeed, to submit their dispute to arbitration.
   a. At present the negotiations appear to be deadlocked, bearing in mind the statement of the International Court of Justice that the issue of whether or not an international dispute exists is a matter for objective determination. The mere denial of the existence of dispute does not prove its non-existence (BELGIUM v. SENEGAL ICJ, 20 July 2012, para. 57). This suggests that the parties should proceed to arbitration.

   b. However, Japan may decide that it wishes to put a proposal to the government of the Republic of Korea in an effort to restart the negotiations.

   c. If no proposal is forthcoming in next two months, the parties should proceed immediately to arbitration.

3. Again, in keeping with the Treaties between the ROK and Japan, the UN Charter and as a sign of respect for the Constitutional Court of Korea, the government of Japan should make public all documents in its possession relating tothe negotiations that preceded the adoption of the 1965 Agreement.
4. Another possible way forward is for the parties to give serious consideration to their commitment to the rights of women and to acknowledge that the international community has developed a better understanding of the impact of armed conflict on women and that therefore it is in their mutual interest to adopt a new agreement with respect to the 'Comfort Women' that acknowledges the importance of promoting women's rights to the maintenance of a sustainable peace in the East Asian region. Such an agreement must take into account the views of the women who experienced the 'Comfort Women' system.
5. Should the Japanese Diet accept the draft Bill entitled 'Promotion of Resolution for Issues concerning Victims of Wartime Sexual Coercion', this matter could be resolved without further negotiation or the adoption of a new agreement.It should be noted that the Draft Bill is in keeping with the wishes of the women who have experienced the 'Comfort Women' system. It is important that the language of the Bill be consistent with UN resolutions concerning systematic rape and sexual slavery.
6. Finally, it is the view of the participants that the government of Japan and the Republic of Korea should set up a mechanism for an ongoing dialogue about the effect of Japan's colonization on the Republic of Korea. Establishing such a mechanism would assist the two countries in maintaining the friendly and peaceful relations they have enjoyed over the past few decades and assist the peoples of each country to better understand their history and to develop a greater appreciation of each other's culture. It also would demonstrate each country's commitment to the Charter of the United Nations including its call for the respect of human rights, and might serve as model for other countries wishing to find a mechanism for meaningful reconciliation.

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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Written statement submitted by the International Fellowship of Reconciliation, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

"Comfort women": a case of impunity

1. This statement approaches the question of impunity treated in the report which Mr. Joinet and Mr. Guissé submitted to the Sub-Commission in 1993 (E/CN.4/Sub.2/1993/6) in relation to the so-called "comfort women" or sexual slaves for the military, recruited by the Japanese Imperial Forces during the Second World War. The International Fellowship of Reconciliation requests the Commission to encourage Mr. Guissé and Mr. Joinet, as well as the Sub-Commission on Prevention of Discrimination and

Protection of Minorities, to take into consideration the following information and recommendations for further study.

2. In a statement to the Sub-Commission in August 1993, Japan acknowledged the wartime enslavement of the "comfort women" by the Japanese Imperial Forces and Government. Japan acknowledged that the Asian, mainly Korean, women were recruited directly by the Japanese Imperial Forces or those who were instructed by them; that the methods of the recruitment of the women were coercive or deceptive in general; that they were transported or deported by the Japanese Imperial Forces, which used various methods including deportation in Japanese ships; that the victims were taken to so-called "comfort houses" which were established by the Japanese Imperial Forces and that the victims were forced into sexual slavery by the Japanese Imperial Forces.

Legal analysis: customary international law

3. The facts admitted by Japan mentioned above fall within the meaning of "enslavement", "deportation", "inhumane acts" and "persecution on political or racial grounds", which are the elements of crimes against humanity. As a result, IFOR has no hesitation in joining the NGOs which in United Nations human rights meetings have defined the actions of the Japanese Imperial Forces against the "comfort women" as crimes against humanity. IFOR also believes that these actions violate the prohibition against slavery and the slave trade under international customary law, practices established as crimes well before the actions in question took place.

4. Under these two categories, the actions of the Japanese Imperial Forces are punishable under international law with no statute of limitations. As a matter of natural justice, Japan is required to take the necessary measures to punish those who were responsible for the crimes mentioned above.

Multilateral treaties

5. The Convention concerning Forced or Compulsory Labour (No. 29) adopted by the International Labour Organization in 1930 was ratified by Japan in 1932. The first sentence of article II totally prohibits any forced labour of women. The Japanese Government acknowledged that coercion was, in general, employed in recruitment and/or treatment of the "comfort women" victims. Article 25 stipulates that "The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced."

6. The International Convention for the Suppression of the White Slave Traffic adopted in 1910 by the International Conference held in Paris was acceded to by Japan in 1925. This convention is not applicable in colonies and territories unless a notice to do so was registered by a State party (art. II). However, it is applicable to the cases of the "comfort women" from Korea for the following reasons.

7. The planning of the "comfort women" system was conceived and supervised by the Supreme Headquarters of the Japanese Imperial Forces and the centre of the Japanese Government, whose seats were inside Japan, namely at Tokyo. Thus, orders, authorizations and permissions for various kinds of actions and omissions in relation to the "comfort women" were directed by the authorities from mainland Japan. In many cases, the "comfort women" were deported in Japanese ships which are considered as Japanese territory. In all cases, recruitment, enslavement, deportation, treatment and supervision of the "comfort women" were committed by the personnel of the Japanese Imperial Forces and/or those who were instructed by them. These personnel were under the jurisdiction of the Japanese Empire.

8. Article 1 of the Convention explicitly provides that those who solicited, drew into or abducted a juvenile woman (younger than 21 years old) for the purpose of prostitution (even if they obtained consent from the woman) should be punished. Article 2 also explicitly provides that those who solicited, drew into or abducted an adult woman using deception or means of violence, coercion, abuse of authority or any other kind of coercive measures should be punished. Furthermore, article 3 provides the obligations of the States parties to take necessary measures in order to ensure punishment of the perpetrators of the crimes defined by articles 1 and 2, including relevant legislation.

9. Many "comfort women" were juveniles when they were taken. Japan acknowledged that almost all of the "comfort women" were taken by deception or by coercive measures. Thus these obligations for punishment still bind the current Government.

Time limitations

10. The actions against the "comfort women" were punishable even by the domestic law at the time of the Japanese empire. The problem is that Japan may argue that it is not possible for the Japanese authorities to prosecute any perpetrator by applying the penal law of the time because of the statutes of limitation under the Criminal Procedure Act of the time. However, there is no statute of limitation as regards the obligations of Japan under international law.

11. The Japanese legislature may raise legal issues under articles 31 and 39 of the Japanese Constitution which guarantee due process of law and the prohibition of retrospective penal legislation. However, article 15 (1) of the International Covenant on Civil and Political Rights, to which Japan has been a party since 1979, prohibits retrospective penal law in general but allows conviction of any act or omission which constituted a criminal offence under international law. Furthermore, article 15 (2) allows "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". (See M. Novak, "UN Covenant on Civil and Political Rights - CCPR Commentary", N.P. Engel, p. 281). De facto impunity

12. Despite its obligations under international law, Japan has failed to punish even a single perpetrator of the crimes committed against the "comfort women", who are estimated to number about 200,000. This non-punishment should be condemned as one of the worst examples of de facto impunity in world history.

Discrimination against Asian women

13. The punishment by the war crimes tribunals of the Allied Forces was accepted by Japan. (Art. II of the San Francisco Peace Treaty of 1951). The punishment, including one death sentence, of 10 personnel of the Japanese Imperial Forces who had enslaved 35 Dutch "comfort women" victims in Indonesia, was carried out by the Dutch Military Tribunal in 1948. Thus Japan admitted the principles that actions against the "comfort women" constituted serious offences, which deserved a death penalty when the "comfort women" were white women. In contrast, Japan has never acknowledged that the very same crimes when against Asian, mainly Korean, "comfort women" constituted an offence. This attitude should be condemned as shameless contempt of and discrimination against Asian women.

Compensation on the ground of non-punishment

14. The final report submitted by the Special Rapporteur of the Sub-Commission on compensation and rehabilitation for victims of

gross violations of human rights, Professor Theo van Boven (E/CN.4/Sub.2/1993/8), is based on traditional international law as regards State responsibility. In paragraph 137 of the report, article 2 of the proposed General Principles implies that a State is bound by the obligation to compensate if the State breaches the obligation to punish. Professor Ian Brownlie of Oxford University, in his *Principles of Public International Law* (Oxford: Clarendon Press, 1990, pp. 464-465), also supports this view by citing the Janes case in the 1920s.

15. However, the Japanese Government representative refused to admit any legal obligation to compensate the "comfort women" of South Korea saying that "the claims issues between Japan and the Republic of Korea have been resolved by an agreement, signed on 27 June 1965 on the settlement of the problems concerning property and claims, and on the economic cooperation between Japan and the Republic of Korea". The obligations, however, for fact-finding and punishment were not at all resolved by the said agreement, as the terms of the agreement limit the scope within "the issues as regards properties, rights and interests ..." (art. 2 of the agreement). Therefore, Japan cannot argue that the obligation for compensation on the grounds of non-punishment was resolved by the agreement, as the obligation for punishment has no time limitation and can never be blocked by the agreement.

16. Many experienced lawyers in Japan point out that victims ordinarily spend from 10 to 20 years to exhaust the civil law procedures leading to a judgment of the Supreme Court. Considering that the age of the youngest of the "comfort women" is now 63, the Japanese Government is invited to accept the demand for expeditious arbitration.

17. IFOR wishes to point out the existence of the Permanent Court of Arbitration which can offer its services in cases where one party is not a State.

18. IFOR wishes to recommend to the Japanese Government immediately to take the necessary steps to abide by the obligations under international law: (a) To face faithfully the demands being made by the organizations representing the "comfort women" victims and to take necessary steps to respond to the demands in accordance with obligations under international law; (b) To investigate all cases of impunity as regards the alleged "comfort women" cases and to make public all information obtained, unless the victims wish otherwise; (c) To take all measures, including necessary legislation, investigation, prosecution, trials and punishment in order to fulfill the obligations under international law for punishment of the perpetrators of the crimes committed against the "comfort women" victims; (d) To pay adequate compensation to all of the "comfort women" victims on the grounds of the past non-punishment; (e) To accept the demand to settle the dispute between the "comfort women" victims and Japan before any arbitration body, such as the Permanent Court of Arbitration, if this demand is made by any of the victims.

Office of the United Nations High Commissioner for Human Rights

Geneva, Switzerland

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• Kikue Tokudome *"The Japanese Apology on the "Comfort Women" Cannot Be Considered Official: Interview with Congressman Michael Honda"*

• Rumiko Nishino *"The Women's Active Museum on War and Peace: Its Role in Public Education"*

Notes

[1] 2006Hun-Ma788.

http://www.ccourt.go.kr/home/view2/xml_content_view02.jsp?seq=24034&cname=□□□&eventNo=2006□□788&pubflag=0&eventnum=17450&sch_keyword=&cid=01030002.

[2] "Constitutional Court Decision (Summary)" provided by Mr. Choi, Bong-Tae. The author wishes to express sincere gratitude to Mr. Choi, one of the leading lawyers who represented the "comfort women" victims before the KCC.

The following "Constitutional Court Decision (Summary)" was provided by Mr. Choi, Bong-Tae, to whom the author wishes to express sincere gratitude. He is one of the leading lawyers who represented the "comfort women" victims before the KCC.

Summary of the Decision:

The Constitutional Court, on August 30, 2011, by 6 (majority) to 3 (dissenting), held that the omission by the respondent is unconstitutional. The omission refers to the non-exercise of effort toward the dispute settlement procedure under Article 3 of the Agreement on the Settlement of Problems Concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan (hereinafter referred to as the "Agreement") with the purpose of settling the dispute on whether the claimants' right of claims, as Japanese Military Sexual Slaves, against Japan has terminated under Article 2 Paragraph 1 of the Agreement.

Article 10, Article 2 Paragraph 2 and the Preamble of the Constitution of the Republic of Korea and Article 3 of the Agreement should be taken into account in order to determine whether this omission infringes on the Constitution. On the basis of these provisions, the possibility of serious infringement on the basic rights guaranteed by the Constitution, such as property rights and fundamental rights to human dignity and worth ("Constitutional rights"), and the urgency and possibility of relief should be reviewed.

Considering the above, the obligation of the respondent to resort to the dispute settlement procedure under Article 3 above is not only an 'obligation to act' that is derived from the Constitution, but also an obligation which is specifically stipulated by Statute and Order. The non-exercise of such obligation does not fall under the discretion of the respondent, nor has the respondent implemented the obligation faithfully. This omission by the respondent, therefore, violates the Constitution and infringes on the Constitutional rights of the claimants.

A separate opinion was also set forth stating that the Government also has the responsibility to completely compensate the claimants. This compensation, according to the separate opinion, should cover the damage caused by the fact that right of claims for damage against Japan cannot be made by the claimants due to the Agreement.

The dissenting opinion states that this constitutional complaint should be rejected. It argues that specific obligation to resort to the dispute settlement procedure under Article 3 of the Agreement does not arise out of the provisions of Article 10, Article 2 Paragraph 2 and the Preamble of the Constitution and Article 3 of the Agreement.

[3] http://www2.ohchr.org/english/bodies/cescr/cescrwg49.htmVisited on June 25, 2012.

The ICESCR posed this question: "7. Please provide information on remedial and educational steps taken to address the lasting effects of the exploitation of women as 'comfort women' on the enjoyment of economic, social and cultural rights by victims, in particular the measures taken to satisfy the moral and material interests of the victims."

[4] http://www.mofa.go.jp/mofaj/gaiko/kiyaku/pdfs/40_1b_6.pdf Visited on June 25, 2012.

[5] ① 戸塚悦朗「 パンドラの箱を開けよう～希望に満ちた未来をひらくために～」朝日関西スクエア127号、2010年9月。② 戸塚悦朗「「パンドラの箱」をあけよう　菅政権は国連勧告を尊重して未来を拓くことができる」季刊『中帰連』４８号（「これからの戦後責任問題」特集、2010年11月）、30-37頁。

[6] 戸塚悦朗「元日本軍「慰安婦」被害者申立にかかる事件に関し大韓民国憲法裁判所へ提出された意見書: いわゆる「条約の抗弁」について」龍谷法学第42巻第1号（2009年6月）、193-222頁。

http://repo.lib.ryukoku.ac.jp/jspui/handle/10519/768 Visited on June 25, 2012.

[7] The author submitted a written statement to the UN Commission on Human Rights on this matter. UN Doc. E/CN.4/1994/NGO/19 of 4 February 1994. See attached material.

[8] The Japanese Higher Court admitted that there were violations of obligations for punishment under the Forced Labour Convention and the International Convention for the Suppression of the White Slave Traffic. Judgment of Tokyo Higher Court of November 30, 2000 on the Son Shindo Case（東京高裁平成11年（ネ）第5333号. The Higher Court rejected the victim's claim on the ground of statute of limitations. The Supreme Court, on March 28, 2003, endorsed the Higher Court's judgment by rejecting the victim's appeal, but mentioned nothing about the above-mentioned legal interpretation of international law.

[9] This is notably so in case of gross violations of international human rights law and international humanitarian law. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which was adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[10] Six survivors including Ms. Kang Dok-Kyon accompanied by five representatives of the Korean council for the women drafted for military sexual slavery by Japan including its then Secretary General, Ms. Lee Mi-Gyon (currently a Member of the Korean National Assembly) and its then legal advisor, Mr. Park Woon-Sun (currently Mayor of Seoul) visited the Tokyo Public Prosecutor's Office to demand official investigation and punishment of the crimes against humanity under international law. They were not received by any prosecutor. Six Japanese lawyers including the author, 5 interpreters and 9 caretakers witnessed these events.

[11] The author found and obtained the earliest district court and appeal court judgments of the Japanese criminal court against ten private entrepreneurs, who deceived and trafficked in Japanese women in Nagasaki to a Japanese Navy "comfort station" in China. The panel of three judges ruled that the defendants deceived and trafficked in 15 Japanese women in Nagasaki to a Japanese Naval "comfort station" in Shanghai, China and that they were guilty of committing crimes defined by Art. 226 (1) and (2) of the Penal Code. The judges sentenced them to penal servitude for periods up to three years and six months. The Supreme Court later endorsed the judgments of the district court and the appeal court. Lower court judgments, however, were not found. See: Etsuro Totsuka, "Could Systematic Sexual Violence against Women during War Time Have Been Prevented?--Lessons from the Japanese Case of "Comfort Women," In: Ustinia Dolgopol and Judith Gardam, eds., *The Challenge of Conflict*, Koninklike Brill BV (2006).

[12] (General Principle) 2. Every State has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims. States shall ensure that no person who may be responsible for gross violations of human rights shall have immunity from liability for their actions.

[13] See: The 2005 Principles and Guidelines, in particular I.(4), IV.(6), & IX.(15).

http://www2.ohchr.org/english/law/remedy.htm.

[14] Art. 22(2). The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. UN Treaty Series, 1964, page 108. http://treaties.un.org/doc/publication/UNTS/Volume%20500/v500.pdf

[15] Art. 1. Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol. UN Treaty Series, 1964, page 242. URL: Same as above.