

of three children, who was in the last stage of pregnancy, and raped her. After violating her, the Germans cut her throat, stabbed her through both breasts, and sadistically bored them out.⁴⁰²

574. In some instances every woman in the village was raped. Many were forced into sexual slavery in brothels. Often the victims were murdered afterwards:

Women and young girls were vilely outraged in all the occupied areas. In the Ukrainian village of Borodayevka,...the fascists violated every one of the women and girls. . . . In the village of Berezovka,...drunken German soldiers assaulted and carried off all the women and girls between the ages of 16 and 30. . . .In the city of Smolensk the German Command opened a brothel for officers in one of the hotels into which hundreds of women and girls were driven; they were mercilessly dragged down the street by their arms and hair. . . . Everywhere the lust-maddened German gangsters break into houses, they rape the women and girls under the very eyes of their kinfolk and children, jeer at the women they have violated, and then brutally murder their victims. . . . In the city of Lvov, 32 women working in a garment factory were first violated and then murdered by German storm troopers. Drunken German soldiers dragged the girls and young women of Lvov into Kesciuszko Park, where they savagely raped them. . . . Near the town of Borissov...75 women and girls attempting to flee at the approach of the German troops, fell into their hands. The Germans first raped and then savagely murdered 36 of their number. By order of a German officer named Hummer, the soldiers marched L. I. Melchukova, a 16-year-old girl, into the forest, where they raped her. A little later some other women who had also been dragged into the forest saw some boards near the trees and the dying Melchukova nailed to the boards. The Germans had cut off her breasts in the presence of these women.⁴⁰³

575. Recognising the enormity of the horrors documented at trial, the Nuremberg Judgement does not contain extensive detail of atrocities as a general matter and does not explicitly state that any of the 22 defendants was convicted on the basis of evidence of rape or other crimes of sexual violence. Nonetheless, it is logical to conclude, in light of the law in force at the time and the evidence documented at trial, that various forms of sexual violence were integrated into the broad language of 'ill-treatment', 'mistreatment', 'atrocities' and 'brutalities' contained in the Judgement. Surely, the evidence demonstrates convincingly that sexual violence was extremely prevalent. It has been suggested that among the reasons for leaving sexual violence implicit instead of explicit was the fact that Allied soldiers had also commonly committed rape against enemy women.⁴⁰⁴
576. Gender related violence was a peripheral subject in several war crimes trials held under CCL10. In particular, the trials regarded such crimes as forced sterilization, forced

⁴⁰² IMT Docs, Vol 7, p. 455.

⁴⁰³ IMT Docs, Vol 7, pp. 456-457.

⁴⁰⁴ For example, one of the most systematic, enormous, and tolerated examples of mass rape was that committed by the Russian armies against Eastern European and German women at the close of the Second World War. See, e.g., Geoffrey Robertson, *Crimes Against Humanity: The Struggle For Global Justice* (1999), p. 306; Attina Grossman, *A Question of Silence: The Rape of German Women by Soviet Occupation Soldiers*, in Nicole Dombrowski (ed) *Women And War In The Twentieth Century* (Garland, 1999).

abortion, and sexual mutilation as forming part of the war crimes and crimes against humanity committed by the Nazi regime.⁴⁰⁵

577. There is no question that rape and other forms of sexual violence were afforded inadequate treatment in the post-war proceedings, and the failure to prosecute the sexual slavery of some 200,000 “comfort women” is the most outrageous case in point. Nonetheless, both the codified and customary laws of war developed prior to 1937, as well as the jurisprudence of the Tribunals, leave no doubt that rape and other forms of sexual violence were recognised as international crimes prior to 1945.

(d) *Post-War Developments*

578. The Judges note that although rape and other forms of sexual violence have increasingly been prohibited since the Middle Ages, the failure to name them explicitly as prosecutable crimes has contributed to their invisibility and undoubtedly encouraged their perpetration. The inclusion of extensive evidence of rape and other forms of sexual violence in the IMTFE proceedings began the process of making the implicit explicit. The post-war 1949 Geneva Convention IV articulated the obligation to especially protect civilian women from “rape, enforced prostitution, or any form of indecent assault.”⁴⁰⁶ The 1977 Additional Protocols each contain a prohibition on sexual violence, although regrettably still classified not as violence but as “outrages against personal dignity.”⁴⁰⁷ The Protocols also protect honour and consider freedom from adverse distinction based on sex as an overarching fundamental guarantee.⁴⁰⁸
579. Explicit recognition of the severity of rape and other forms of sexual violence has increased in the last decade, largely as a result of efforts to redress sexual violence inflicted as an official or unofficial strategy of war and instrument of terror. Sex crimes are directed disproportionately or exclusively against women,⁴⁰⁹ who tend to be the mainstay of civil society in times of war. Such violence works insidiously on family and community relations, still shaped by deeply entrenched patriarchal assumptions of female chastity and male possession of women. As in the wars in the former Yugoslavia and genocide in Rwanda to name but a few recent and horrific examples, sexual violence has been used as a weapon to destroy women and the “enemy” group with which they are associated, by causing physical, mental, sexual, and reproductive harm to the women; by causing them and their families to flee their homes and lose their livelihoods and

⁴⁰⁵ See especially *US v. Karl Brandt, et al.*, 1-2 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10 (*Medical Case*) – includes forced sterilisation and castration; *US v. Oswald Pohl, et al.*, 5 Trials of War Criminals (*Pohl Case*) – mentions brothels in concentration camps, evidence of forced abortion; *US v. Ulrich Greifelt, et al.*, 4-5 Trials of War Criminals (*RuSHA Case*) – refers to forced abortions, efforts to interfere with reproduction.

⁴⁰⁶ For the protective provision, see Article 27, Convention Relative to the Protection of Civilian Persons in Time of War, (1949) 75 U.N.T.S. 135. In that Convention, rape and sexual assault were generally understood as subsumed with common Article 3’s prohibition on “outrages against personal dignity, in particular humiliating and degrading treatment” rather than the prohibition on crimes of violence in internal conflict; in international armed conflict, the Convention’s prohibition on inhuman treatment was likewise available.

⁴⁰⁷ Article 75(2)(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) prohibited “enforced prostitution and any other indecent assault” as part of “outrages upon personal dignity.” Article 4(2)(e) of Protocol II had a similar provision which included rape. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) 1125 U.N.T.S. 609 (Additional Protocol II). Additional Protocol I also contained strengthened protective provisions requiring the separation of female from male prisoners and female supervision of women inmates (Article 75(5)) as well as protection from rape, forced prostitution and any other form of indecent assault (Article 76).

⁴⁰⁸ Additional Protocol I, Article 76(1); Additional Protocol II, Article 4(1).

⁴⁰⁹ Forced pregnancy or forced abortion would be examples of sexual violence committed exclusively against females.

community ties; by stigmatizing the women as contaminated and casting men as powerless defenders; and by subjecting children to indelible horrors and enduring insecurity.⁴¹⁰

580. Currently, largely as a result of the mobilisation and work of the international and grass roots non-governmental women's human rights movement,⁴¹¹ the contributions of feminists and jurists who are committed to examining gender issues,⁴¹² and the commitment of gender-inclusive prosecutors and judges,⁴¹³ rape and other forms of sexual violence are becoming explicitly criminalised and increasingly prosecuted. Following its inclusion in CCL10, the Statutes of the Rwanda and Yugoslav Tribunals list the crime of rape as a crime against humanity.⁴¹⁴ Only the ICTR formally lists rape in its enunciation of war crimes, although it remains linked with "outrages upon personal dignity."⁴¹⁵ Most significantly, the Judgements of the Tribunals have emphasised the crime of rape as among the gravest forms of violence. Not only have the ICTY and ICTR convicted several defendants of rape as a crime against humanity, they have also affirmed the seriousness of sexual violence by recognising it as a form of torture, enslavement, persecution, and inhumane acts and as an act of genocide when the requisite elements of the crimes have been proved.⁴¹⁶
581. Building upon these developments, the Rome Statute of the ICC explicitly codifies and allows prosecution of rape, sexual slavery, forced pregnancy, enforced prostitution, enforced sterilisation and other forms of sexual violence as war crimes and crimes against

⁴¹⁰ See especially the *Akayesu* case in the Rwanda Tribunal and the *Kunarac* case in the Yugoslav Tribunal.

⁴¹¹ See e.g. Charlotte Bunch and Naimh Reilly, *Demanding Accountability, The Global Campaign and Vienna Tribunal for Women's Human Rights* (1994).

⁴¹² As but a small sample, see e.g., Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, in *Mass Rape, The War against Women in Bosnia-Herzegovina* (Alexandra Stiglmayer ed., 1994), p. 197; Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 *European J. Intl L.* (1994), p. 326; Patricia Viseur Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, in *Substantive and Procedural Aspects of International Criminal Law* (Gabrielle Kirk McDonald and Olivia Swaak-Goldman eds., vol. I, 2000), p. 263; Indai Sajor, *Common Grounds, Violence Against Women in War and Armed Conflict Situations* (1998); Kelly Dawn Askin, *War Crimes Against Women* (1997); Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 *Am. Journal Intl Law* (1993), p.424; Ustinia Dolgopol, *Rape as a War Crime – Mythology and History*, in *Common Grounds* (Indai Sajor ed., 1998), p. 122-147.

⁴¹³ The inclusion of females as judges, prosecutors, and investigators in the ICTY/R have made an enormous contribution to developing the gender related jurisprudence in the Tribunals. On the significance of having women in high level positions in the Tribunals and the appointment of Patricia Viseur Sellers as the gender issues legal advisor in the Prosecutor's Office, see discussion in Kelly Askin, *Women's Issues in International Criminal Law*, in *International Crimes, Peace, and Human Rights* (Dinah Shelton ed., 2001)(contributions of women to the Tribunals generally); Kelly Dawn Askin, *The ICTY: An Introduction to its Origins, Rules and Jurisprudence*, in *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (May, Tolbert et al. eds, 2001)(contributions of President Gabrielle Kirk McDonald to the Tribunals); Askin, *Women and International Humanitarian Law*, *Ibid.* (contributions of Patricia Sellers as gender issues legal advisor).

⁴¹⁴ Rape is included in Article 5 of the ICTY and Article 3 of the ICTR on crimes against humanity, but is not explicitly included within the ICTY's Article 2 on grave breaches of the Geneva Conventions or Article 3 on war crimes. In the ICTR Statute, rape and "enforced prostitution" are listed under Article 4, covering violations of Common Article 3 and Additional Protocol II. The ICC Statute recognises rape and other forms of sexual violence as, *inter alia*, grave breaches of the Geneva Conventions, violations of Common Article 3, and crimes against humanity.

See the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. Doc. S/25704, (1993), Article 5(g) [ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955 (1994), Article 3(g) [ICTR Statute].

⁴¹⁵ ICTR Statute, Article 4(e).

⁴¹⁶ *Akayesu* Trial Chamber Judgement; *Celebici* Trial Chamber Judgement; *Furundzija* Trial Chamber Judgement; *Kunarac* Trial Chamber Judgement; *Krstic* Trial Chamber Judgement; *Kvocka* Trial Chamber Judgement. As recognised by the Judgements of the ICTR and ICTY, rape and sexual violence crimes can be prosecuted under each article of the Tribunals' Statutes, including as war crimes, crimes against humanity, and genocide, even when the crime is not explicitly enumerated.

humanity.⁴¹⁷ At the same time, the ICC Statute prohibits gender discrimination in the interpretation and application of the Statute.⁴¹⁸ It also affirms the principle of gender integration – that is, of treating gender violence as constituting other crimes where it satisfies the elements thereof – as developed in the jurisprudence of the *ad hoc* Tribunals.⁴¹⁹ This dual treatment will hopefully redress the historical tendency to ignore or minimise the prosecution of these crimes notwithstanding the fact that they have been repeatedly condemned and criminalised for well over a century. The Judges note that the *Kvočka* Judgement additionally recognises molestation, sexual mutilation, forced marriage, and forced abortion as other prosecutable gender related crimes committed during periods of armed conflict.⁴²⁰

582. The Judges agree with the approach taken by contemporary sources in emphasising the non-consensual nature of rape and the necessity to take account of coercive circumstances, including particularly the abuse of official authority and the presence of armed agents in the vicinity. We consider that once a girl or woman was brought against her will to a “comfort station,” or confined there after arrival based on false representations, she was denied the opportunity to exercise her will to refuse sex with Japanese soldiers and officers. The witnesses before this Tribunal testified in detail about the rapes they endured. For many of them, rape was especially traumatic because they had had no prior sexual experience and were very young.
583. The Tribunal recognises essentially two contexts in which the rapes charged in the Common Indictment occurred: the institutionalised rape as part of the sexual slavery system (Counts 1-2) and the mass rape of local women as part of a military campaign at Mapanique (Count 3). Like the IMTFE, we deem it unnecessary to detail elements of rape since it is clear that the sexual penetration and other forms of sexual violence was committed against the will of the women. The testimony demonstrates that in both contexts rape, gang rape, and continuous rape was committed by force, threat of force, or coercion of the most extreme dimension. In relation to the “comfort system,” the testimony also indicates that rape was accomplished as a function of the coercive environment of the system of military sexual slavery. Therefore, in the sections below, we examine the law relevant to institutionalised rape, and hence sexual slavery, committed as part of the “comfort system.”

4. International Law Regarding Slavery and Sexual Slavery

(a) Introduction

584. The situations of slavery discussed in the IMT and IMTFE cases demonstrate some common or recurring characteristics which inform our understanding of the essence of the crime of slavery.

⁴¹⁷ Rome Statute, Articles 7(g); 8(2)(b)(xxii) and 8(2)(e)(vi). The various provisions recognize rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or other forms of sexual violence.

⁴¹⁸ ICC Statute, Article 21(3).

⁴¹⁹ See e.g., Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 McGill L.J. (2000), p. 217; Kelly Dawn Askin, *Crimes Within the Jurisdiction of the International Criminal Court*, 10 Criminal Law Forum (1999), p. 33.

⁴²⁰ *Kvočka* Trial Chamber Judgement, para. 180 and fn 343.

585. Freedom is the “birthright of every human being”⁴²¹ and a basic human right. It is both central to and interdependent with other human rights. Many other rights derive from this one, including the right to protect, control, and determine the disposition of one’s body and self in relation, for example, to work, sexuality, and reproduction; to practice one’s religion or spirituality; to express one’s opinions, to form intimate relationships of one’s choice and to decide whether and when to have children; to vote, to join trade unions, and participate in the political, economic, social and cultural life of one’s community; and to have social security and the economic, social and cultural support necessary to human dignity and the full and free development of one’s potential. Slavery is the antithesis of freedom. It is a basic tenet of the rule of law that freedom cannot be relinquished. That is why no one can consent to enslavement. To say that no one can consent to enslavement is not an exercise of paternalism. It is fundamental to the nature of freedom itself.
586. Freedom and equality under international law are based on the concept of the human person as free and able to fulfil her or his capabilities. Freedom requires protection of individual autonomy, respect for every person’s potential and development and the presence of enabling economic, social and cultural conditions. Consent, to be valid, must be based on knowledge, and sustained by reason, and the ability to make and carry out free and informed choices. Consent is not valid when it is not knowing and free; when there is distorted or deceptive information, or no information at all; when there is violence, coercion, or the threat thereof; when the victim is subject to inhumane and debilitating conditions; when she is kept isolated from social support, denied the means of survival or without access to means of communication, assistance, or redress; or when there is exploitation of the victim’s vulnerability. Consent is not free when the victim’s every little act that reflects or may spark rebellion threatens grave danger to her physical or mental integrity.

(b) *The Historical Development of International Law Prohibiting Slavery*

587. Slavery, as one of the most profound violations of a human being’s inherent freedom and dignity, was one of the first crimes to be proscribed under international law. The international norm against slavery, which encompasses sexual slavery, developed in at least five parallel contexts well before the institutionalisation of the “comfort system” by the government of Japan.

(i) *Slavery as an International Crime*

588. The 1926 Slavery Convention was the culmination of a century-long development of the norms against slavery, the slave trade, and forced labour.⁴²² A series of multilateral declarations and treaties prohibited slavery and the slave trade and increasingly strengthened the penal nature and the universal obligation to prosecute slavery.⁴²³

⁴²¹ 1926 Slavery Convention, Preamble, para 1.

⁴²² Slavery Convention, 1926, LNTS 253, entered into force 9 March 1927.

⁴²³ For example, the 1815 Declaration Relative to the Universal Abolition of the Slave Trade [Congress of Vienna, Act XV] proclaimed that the slave trade was “repugnant to the principles of humanity and universal morality and created a duty to prohibit and punish it.” 2 Martens Nouveau Recueil 432, *reprinted in* 63 Parry’s T.S. 473 (1969). States also undertook to prevent and repress the slave trade and to punish those engaging in slavery and the slave trade in the 1822 Declaration Respecting the Abolition of the Slave Trade (Congress of Verona), 6 Martens Nouveau Recueil 139, *reprinted in* 73 Parry’s T.S. 32. The 1841 Treaty for the Suppression of the African Slave Trade (Treaty of London), 2 Martens Nouveau Recueil 392, *reprinted in* 92 Parry’s 437 and the 1885 General Act of the Conference Respecting the Congo (General Act of Berlin). 10 Martens Nouveau Recueil (ser. 2) 414, *reprinted in* 3 American Journal of Int’l Law (1909). See e.g. Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict

589. A 1944 survey of a representative group of states demonstrated that virtually all had prohibited slavery as a matter of national law. Whereas Japan's criminal code did not specifically address slavery before 1944, in a 1972 case in which Peruvian slave-traders were convicted, Japan appears to have declared that it had always prohibited the slave trade. By 1937, the Slavery Convention was understood as declaratory of customary international law⁴²⁴ and, therefore, binding upon Japan, regardless of whether it had ratified the 1926 Convention.
590. Article 1 of the 1926 Slavery Convention, applicable under all conditions and to state officials and individuals alike, defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." Article 1 recognised a broad range of acts as constituting the "slave trade":

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him [or her] to slavery; all acts involved in the acquisition of a slave to selling or exchanging him [or her]; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

591. In addition, Article 5 of the Convention prohibited "compulsory or forced labour," and recognised the likelihood that such labour involves "conditions analogous to slavery." Thus to avoid such conditions, Article 5 restricts the use of forced labour to that which is authorised by competent public authorities for public purposes or, if for private purposes, permits such labour only when it is performed on an exceptional basis, is adequately remunerated, and does not require the person to be removed from their home. Article 6 called for imposing severe penalties for any infractions of laws or regulations. Interpretations of these provisions are discussed *infra*.

(ii) Forced Labour as a War Crime

592. A second source which allows us to recognise the crime of sexual slavery during the Second World War is the 1907 Hague Convention IV and annexed Regulations, which codified the customary law prohibition on making slaves of prisoners of war or occupied civilian populations. Japan ratified the 1907 Hague Convention on December 13, 1911.
593. Article 5 of the Convention prohibits using prisoners of war for forced labour that is "excessive" or "connected with the operations of the war."⁴²⁵ With regard to civilian populations, Article 52 of the Hague Regulations is stricter in stipulating protections to be afforded to the civilian population and preventing an invading army from using the conquered people to support the war:

Neither requisitions in kind nor services can be demanded from communities or inhabitants except for the necessities of the army of

(E/CN.4/Sub.2/1998/13), Report to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities by Gay McDougall, Special Rapporteur, 22 June 1998. Appendix: An Analysis of the Legal Liability of the Government of Japan for "Comfort Women Stations" established during the Second World War. This study notes the existence of 20 international agreements by 1932 prohibiting slavery.

⁴²⁴ See e.g. Bassiouni, *Enslavement*, in *International Criminal Law* (M. Cherif Bassiouni, 2nd ed., vol. I, 1999), pp. 663, 663-704.

⁴²⁵ Convention (IV) Respecting the Laws and Customs of War on Land with Annex of Regulations (18 October 1907), 3 Martens Nouveau Recueil (ser. 3) 461, entered into force 26 January 1910, Article 5 ("1907 Hague Convention IV").

occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.⁴²⁶

594. This exception can never be interpreted to include sexual servitude. Slavery, and hence sexual slavery, cannot legally constitute military necessity. Further, the 1907 Hague Convention prohibits rape and emphasises the prohibition in Article 46, which requires respect for “family honour.” When read together, these provisions of the 1907 Hague Convention prohibited, amongst other things, what is now understood as the crime of sexual slavery.
595. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, signed by Japan, reinforced and broadened this protection of prisoners of war. Article 29 provides: “No prisoner of war may be employed at labours for which he is physically unfit;” and Article 32 stipulates: “It is forbidden to use prisoners of war at unhealthful or dangerous work.”⁴²⁷ Sexual slavery is obviously dangerous and unhealthy and falls within the purview of protections.

(iii) ILO Convention Concerning Forced Labour

596. The 1930 Convention Concerning Forced Labour (ILO No. 29),⁴²⁸ which Japan signed in 1932, provides a third source of the prohibition on sexual slavery. The 1930 Convention defined “forced or compulsory labor” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁴²⁹
597. This Convention elaborated on the Slavery Convention’s exception of forced labour for authorised public purposes.⁴³⁰ It also prohibited all forced labour for the benefit of private individuals (art. 4) and required, for example, that the public purpose be “of important direct interest for the community called upon to do the work or render the service,” as a matter of “imminent necessity” (art. 9). Further, it called for strict protection of the workers’ health (art. 17(1)), prohibited more than sixty (60) days of such work in a year (art. 12(1)), and required working conditions and overtime pay comparable to voluntary workers (arts. 13-15).

⁴²⁶ 1907 Hague Convention IV, Article 52.

⁴²⁷ Geneva Convention (III) Relative to the Treatment of Prisoners of War, signed 27 July 1929, 118 L.N.T.S. 343, entered into force 19 June 1931. Japan was a signatory, although not a State Party.

⁴²⁸ Forced Labour Convention, 1930 (No. 29), UNTS 55, entered into force 1 May 1932.

⁴²⁹ ILO No. 29, Article 2(1).

⁴³⁰ Article 2 permits forced labour as follows:

- (a) compulsory military service [limited to] work of a purely military character; normal civic obligations of the citizens of a fully self-governing country;
- (b) Any work or service exacted from any person as a consequence of a conviction in a court of law, [when done under supervision of a public authority and not hired out to private businesses or individuals];
- (c) Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
- (d) Minor communal services in the direct interest of the said community [which are] normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

598. Significantly, in 1997, the ILO Committee of Experts ruled that Japan's system of military sexual slavery violated the Forced Labour Convention.⁴³¹ It rejected Japan's contentions that irrespective of whether or not it had violated the Convention, it had fulfilled its obligations regarding issues of reparations and settlement of claims relating to the war, including those of the former "comfort women," in accordance with the relevant international agreements. The Committee of Experts stated that Article 2(a), which permits compulsory military service, does not apply to the "comfort women" system because exception applies only to "work of a purely military character." Further, it found no warrant in invoking Article 2(c), which permits compulsory labour in the event of war or other calamities which threaten the safety or well-being of the population. The Committee found that this exception is strictly limited to genuine public emergencies requiring immediate action and that the scope and purpose of the involuntary labour must be restricted to those meeting the exigencies of the situation. Women's sexual integrity and sexual autonomy may never be sacrificed in the name of public "emergency."
599. In respect of the "comfort women" system, the Judges note that other fundamentals of permissible forced labour under the ILO Convention were also violated even though their observance in this case would not have rendered the "comfort system" legal. For example, medical attention was not designed to protect the health of the women and women were subjected to dangerous "treatments" which in many cases resulted in severe and long-lasting health damage (art. 17(1)). Nor did regulations even purport to limit their horrific servitude to 60 days in a year (art. 12(1)). Instead, most women did continuous service limited only by their own incapacity to continue or the end of the war.
600. The Tribunal endorses the ILO Committee's 1997 holding, and emphasises that sexual servitude can never be a permissible form of compulsory labour. There is no "necessity" argument that can justify subjecting a person – female or male – to sexual violence. Nor can rape, sexual bondage, or other forms of sexual violence ever be rendered acceptable by payment, by providing amenities, health care or rewards, or by limiting the days of service. In this sense, forced sexual labour is different from other forms of forced labour, which may be permissible under narrowly defined circumstances, because forced sex *ipso facto* constitutes an exercise of ownership over a person.

(iv) The Suppression of Trafficking

601. The international prohibition on trafficking in persons, in particular for sexual purposes, is the fourth source of the international prohibition of sexual slavery extant prior to 1937. The Trafficking Conventions of 1904,⁴³² 1910,⁴³³ 1921⁴³⁴ and 1933⁴³⁵ provide further evidence that sexual slavery was considered an international criminal offence before and during the Second World War. The 1910 Convention provides, in Article II, that parties must punish those who use fraud, violence, threats, abuse of authority, or any other means of constraint to "procure, entice or lead away" a girl or woman for "immoral purposes,"

⁴³¹ CEACR: Individual Observation concerning Convention No. 29, Forced Labour, 1930 Japan (ratification: 1932), published: 1999.

⁴³² International Agreement for the Suppression of White Slave Traffic, 1904, 1 L.N.T.S 83, reprinted in 195 Parry's T.S 326, entered into force 18 July 1905.

⁴³³ International Convention for the Suppression of White Slave Traffic, 1910, 7 Martens Nouveau Recueil (ser.3) 242, reprinted in 211 Parry's T.S 45, entered into force 15 September 1911 (hereinafter "the 1910 Convention").

⁴³⁴ International Convention for the Suppression of the Traffic in Women and Children 1921, 9 L.N.T.S 45, reprinted in 18 Am. Journal Int'l Law (Supp. 1924), p. 130, entered into force 22 June 1922.

⁴³⁵ International Convention for the Suppression of the Traffic in Women of Full Age, 1933, 150 L.N.T.S 431, entered into force 24 August 1934.

which was a reference to prostitution. To traffic a woman or girl against her will or by deception was an aggravating circumstance requiring greater punishment than trafficking with her consent.⁴³⁶

602. The 1921 International Convention for the Suppression of the Traffic in Women and Children is particularly relevant as Japan ratified it in 1925 and all the conventions are cumulative in the sense that the later conventions reaffirmed the earlier ones. We note that Japan was a party to the 1921 Convention. When Japan ratified the 1921 Convention, it did not include Chosen, Taiwan, the leased territory of Kwantang, the Japanese portion of the Saghalien Islands and Japan's mandated territory in the South Seas.
603. Under Articles 2 and 3, states parties were required to take all steps necessary to discover and prosecute persons engaged in the traffic of women and children. We do not consider that Article 14, permitting states to make exceptions to this Convention for certain territories, undermines the Convention's importance as a source of prohibiting the sexual slavery institutionalised by the Japanese military. We find the expert opinion of Professor Kalshoven convincing that the provision was inserted due to concern about practices which had continued as local customs, e.g., payment of dowry and "bride price", in many territories controlled by the then colonial powers.⁴³⁷ We reject any contention that Article 14 could justify reservations for conduct that constitutes the crime of sexual enslavement under international law.
604. In addition, the General Assembly of the League of Nations considered the prohibition on trafficking in women and girls to have become part of customary international law by the time of the Second World War.⁴³⁸ Thus both conventional and customary law provide forceful evidence that sexual slavery was a crime well before Japan instituted the system of military sexual slavery.

(v) [En]forced Prostitution as a War Crime

605. The fifth source of the prohibition on sexual slavery at the time of the wars in the Asia-Pacific was the customary humanitarian law prohibition on forced prostitution. The 1919 War Commission Report of World War I listed "abduction of girls and women for the purpose of enforced prostitution" as a serious war crime. With the exception of the post-war Allied military proceedings, the prosecution of war crimes was treated largely as a domestic matter. After World War II, the Dutch Military Tribunal at Batavia (now Jakarta) prosecuted and convicted Japanese defendants on charges of "enforced prostitution" as a violation of the Dutch war crimes statutes, for crimes related to Japan's system of military sexual slavery committed against some of the Dutch women living in Dutch Indonesia during the war.⁴³⁹

⁴³⁶ Convention for the Suppression of the Traffic in Persons for the Prostitution of Others, 1949, approved by General Assembly Resolution 317 (IV) of 2 December 1949, entered into force on 25 July 1951, Final Protocol. Japan ratified the Convention, without reservation, on 1 May 1958.

⁴³⁷ The International Commission of Jurists has also taken the position that Japan may be held responsible for having violated its obligations under the Convention vis-à-vis women taken from the Korean peninsula as a matter of construction of Article 14.

⁴³⁸ Report of the 6th Committee to the Assembly of the League of Nations 1926, League of Nations Official Journal, Sixth Supplement No. 44, p. 416.

⁴³⁹ Temporary Court-Martial in Batavia in the case of the Judge-Advocate *ratione officii* versus 12 unnamed defendants, No. 72/1947 (hereinafter *Batavia case*).

606. At the same time as this Tribunal views the prohibitions on trafficking and forced prostitution as sources of the international crime of sexual slavery, we note the vehement objection of many “comfort station” survivors to classifying the crimes committed against them as forced prostitution.
607. In sum, based on these five overlapping sources of law, the Judges find that in 1946 there was an ample basis under international law to prosecute Japanese officials for the crime of sexual slavery, even though the terminology is of more recent vintage.

(c) *Post-War Jurisprudence*

608. The Charters and jurisprudence of the post-war Tribunals confirm the status of enslavement and forced labour as international crimes and outline conditions in the context of non-sexual forced labour that were also prevalent in the context of the military “comfort women” system.
609. The Charters of both major post war Tribunals conferred jurisdiction over “enslavement” as a crime against humanity.⁴⁴⁰ With respect to war crimes, the IMTFE Charter does not enumerate prohibited acts, but the IMTFE Indictment charges forced labour and enslavement.⁴⁴¹ The IMT Charter included as a war crime “deportation to slave labour or for any other purpose of civilians in or of occupied territory”⁴⁴² and the Indictment of the IMT charged both “enslavement” and “deportation to slave labour.”⁴⁴³ The CCL10 also included enslavement and deportation to slave labour as crimes against humanity, and deportation to slave labour as a war crime.⁴⁴⁴ The Tribunals did not endeavour to distinguish these offences in their Judgements.
610. The IMTFE found that Japan had operated a brutal slave labour system, using prisoners of war and civilian internees and members of the occupied populations who were conscripted “by false promises and by force” for various war-related purposes. Labourers were “transported to and confined in camps” and “used to the limit of their endurance.” They were deprived of the basic human needs for food, clothing, shelter, and medical supplies, and made to work under dehumanizing conditions and in dangerous places, including on military installations and in war zones.⁴⁴⁵
611. Similarly, the Nuremberg Tribunal and the CCL10 proceedings found that Nazi Germany operated a slave labour system in which forced labourers were taken by deception or force, deported to the aggressor country, deprived of all right to control the conditions of their labour, forced to work under dangerous conditions, and deprived of the rights associated with ordinary community living, such as the right to choose one’s residence, live with one’s family, and participate in public life. As with Japan’s system, labourers who were sick, injured, or otherwise unproductive were starved to death or killed outright because they had outlived their usefulness.⁴⁴⁶ On these findings, using the same criteria,

⁴⁴⁰ Article 5(c) IMTFE Charter; Article 6(c) IMT Charter.

⁴⁴¹ Count 53, Sections Two and Twelve, Appendix D.

⁴⁴² Article 6(b) IMT Charter.

⁴⁴³ Counts One, Three, and Four of the Nuremberg Indictment. IMT Docs, Vol. I.

⁴⁴⁴ CCL10, Article II(c) and II(b).

⁴⁴⁵ IMTFE Judgement (Roling), pp. 413-417. It is notable that the IMTFE, finding that the conscripted labour was subject to the same conditions as the civilian internees, treated the former as part of the civilian internees.

⁴⁴⁶ IMTFE Judgement (Roling), p. 415.

the Nuremberg Tribunal convicted defendants of forced labour as a war crime and enslavement as a crime against humanity.⁴⁴⁷

612. The post-war Tribunals further found that both the German and Japanese slave labour systems were governmentally organised. The IMTFE convicted TOJO for his participation in the slave labour policies, noting his instructions that prisoners who did not work should not be allowed to eat. The Tribunal held that application of this policy “account[ed], at least in part, for the constant driving [of sick, wounded and malnourished prisoners] to labour upon military works until they died of hunger, disease or exhaustion.”⁴⁴⁸ Similarly, Germany’s slave labour program was found to have exploited people “to the highest extent, and at the lowest expenditure.” Indeed, defendant Himmler had expressed regret that the Nazis had allowed hundreds of thousands of Russians to starve to death before using them first as “raw material” for labour power.
613. With limited exception, the post-war proceedings did not define slavery or enslavement; nor did they attempt to define or draw clear distinctions between slavery, forced labour, and the slave trade. The *Pohl* case defines slavery as “involuntary servitude” and describes its essence as “compulsory uncompensated labour.” The decision makes clear that it is not necessary to prove ill-treatment: “Slaves may be well fed, well clothed and comfortably housed, but they are still slaves if, without lawful process, they are deprived of their freedom by forceful restraint. Involuntary servitude, even if tempered by humane treatment, is still slavery.”⁴⁴⁹
614. The detailed treatment and prosecution of both the Japanese and German slave labour systems stands in sharp contrast to the absence of consideration of its gender analogue: the “comfort women system.” Nonetheless, the jurisprudence of the post-war Tribunals make clear that the “comfort women” system was in fact a slavery system, as discussed below, and should have been prosecuted as such. Indeed, largely at the insistence of the “comfort women” survivors, the nomenclature “sexual slavery” has been widely recognised today, most significantly in the Statute of the International Criminal Court, which has been signed by more than 120 countries.⁴⁵⁰ For the reasons set forth below, the Judges find that this crime was unquestionably encompassed by the accepted understanding of slavery, rape, and forced labour prevailing during the Second World War.

(d) The Crime of Sexual Slavery

615. As neither the IMTFE nor the IMT was presented with charges of sexual slavery, it falls to this Tribunal to adjudicate this crime. In doing so, we review recent developments in international humanitarian law, international criminal law, and international human rights law to the extent that it is useful to our analysis in examining the content and scope of laws in effect from 1937-1945.

⁴⁴⁷ Thus, the defendant von Schirach was convicted only of crimes against humanity and held responsible for the slave labour program based on the same law and underlying facts discussed in relation to slavery as a war crime.

⁴⁴⁸ IMTFE Judgement (Roling), pp. 414, 416.

⁴⁴⁹ *US v. Oswald Pohl and Others*, Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. V, pp. 958, 970. The IMT also convicted Speer in connection with the Nazi slave labour program, notwithstanding that “he insisted that the slave labourers be given adequate food and working conditions so that they could work efficiently.” P. 579.

⁴⁵⁰ Rome Statute, art. 7(1)(g) and arts. 8(2)(b)(xxii) and 8(2)(e)(vi).

(i) Concepts of Chattel Slavery and Forced Labour

616. Considering the various international sources of law in 1937-1945, it is clear that enslavement is built upon two interrelated forms of subordination: chattel slavery and forced labour. Likewise, sexual slavery combines, in particularly egregious form, both concepts of slavery.
617. Chattel slavery exists when a person is treated as an object or property subject to use or disposal by another person, whether for economic, recreational, domestic or other purposes. For example, a person is treated as chattel if she is regarded as an item of property or economic value while her humanity is disregarded. When a person's body is placed at the disposal of another to use sexually without their valid or genuine - that is knowing and voluntary - consent, that is a form of chattel slavery. Sexual slavery is particularly heinous because using a person as, or reducing a person to, sexual property violates the physical and mental integrity of the victim on the most profoundly personal plane. The victim is deprived of control over not only her body, but also her sexual activity and autonomy, which denies some of most fundamental components of human dignity. Moreover, because of the sexual nature of this form of enslavement, the victim often suffers either in silence or from socially induced opprobrium and marginalisation.
618. Forced labour exists, with rare exceptions indicated earlier (i.e., legitimate public emergency purposes), when a person is made to perform labour against her will. Forced labour involves fundamental disregard for a person's right to self-determination, physical, mental and spiritual integrity, livelihood and human dignity. Depriving a person of control over sexuality and denying her sexual integrity in order to satisfy the demands of another is a particularly atrocious form of forced labour, using and abusing the victim's body and spirit. As previously stated, the Tribunal considers it axiomatic that rape and other forms of sexual violence or abuse can never be viewed as legitimate forms of labour. Neither remuneration nor the satisfaction of one's survival needs mitigate the conditions involving servitude.

(ii) Essential Elements of Sexual Slavery

619. The 1926 Slavery Convention, which defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised," provides the overarching and enduring element of slavery. This definition incorporates both the chattel and forced labour concepts discussed above and applies with full force to sexual slavery. Based on the 1926 Convention, we also recognize that acts involved in the acquisition of persons for the purposes of enslaving them constitute slavery.
620. We find that the *actus reus* of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy.⁴⁵¹ Thus, we consider that control over a person's sexuality or sexual autonomy may in and of itself constitute a power attaching to the right of ownership. The *mens rea* is the intentional exercise of such powers.

⁴⁵¹ We note that this corresponds to the findings of the ICTY Trial Chamber in the *Kunarac* Trial Chamber, Judgement, paras. 539-540. That Judgement concerned a situation of sexual slavery charged both as "rape" and "enslavement" under the ICTY Statute.

621. Accordingly, the Tribunal finds that the crime of “sexual slavery” is a form of enslavement and forced labour and constituted a crime under international law between 1937 and 1945, even though the terminology “sexual slavery” was not then used. Our conclusion is buttressed by the fact that rape and forced prostitution were already articulated as international crimes at that time. Thus, trying the accused for the crime of sexual slavery committed between 1937 to 1945 does not violate the principle of *nullum crimen sine lege*.

(iii) Recent Approaches to Sexual Slavery

622. We note that our approach to the elements of the crime of sexual slavery is also confirmed by more recent jurisprudence and the writings of jurists. It differs, however, from the elements of sexual slavery adopted in the non-binding Elements Annex to the Rome Statute of the International Criminal Court, as discussed below.
623. The groundbreaking *Kunarac* Judgement issued earlier this year by a Trial Chamber of the ICTY reaches a conclusion similar to our own, and it also provided a sound foundation for the subsequent prosecution of the crime of sexual slavery.⁴⁵² Because the ICTY Statute does not distinguish sexual slavery as a separate crime, two of the accused in *Kunarac* were instead charged with both “rape” and “enslavement” as crimes against humanity. The indictment charged that these defendants enslaved women and young girls and subjected them to repeated rape and other forms of sexual violence, including forced nudity over a period of weeks or months.⁴⁵³ In addition to the sexual servitude, many victims were also required to perform domestic labour.
624. The *Kunarac* Judgement adopted the 1926 Slavery Convention’s definition of enslavement,⁴⁵⁴ and it went on to illustrate what is meant in broad terms by “the powers attaching to the right of ownership:”

[I]ndications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, not all labour or service by civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The “acquisition” or “disposal” of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however,

⁴⁵² Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Judgement, IT-96-23-T & IT-96-23/1T, 22 February 2001 (*Kunarac* Trial Chamber Judgement).

⁴⁵³ The original indictment in the case was the first devoted exclusively to a broad range of crimes confronting women during periods of armed conflict, and the sexual slavery was but one part of the trial held against three of the eight accused who were within the custody of the Tribunal. Guilty verdicts were rendered against two accused for both “rape” and “enslavement” as crimes against humanity.

⁴⁵⁴ *Kunarac* Trial Chamber Judgement, para. 542.

is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor [whose] importance will depend on the existence of other indications of enslavement.

[The basic factors include] the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, *control of sexuality* and forced labour.⁴⁵⁵

625. These are all factors “to be taken into account in determining whether enslavement was committed.”⁴⁵⁶ Significantly, the *Kunarac* Judgement does not rank factors and it treats “control of sexuality” as an exercise of a power of ownership every bit as much as more traditional factors such as control of movement or forced labour.
626. We endorse the *Kunarac* Trial Chamber’s holding that control of sexuality is itself an indicator of the general crime of enslavement. We consider that control over sexuality is an indicium of slavery regardless of whether the enslavement encompasses the usage of a person as sexual property or for forced sexual labour. Otherwise, the definition of enslavement would erroneously exclude one of the most common forms of servitude imposed upon women, sexual servitude.
627. The Judges note that, where the exercise of control over sexuality is an essential factor in the enslavement, this can, but need not be, the dominant factor. Such exercise of sexual control will usually entail some other indicators of the status or condition of being enslaved, such as control over movement, coercion, repetition, or duration. Where control of sexuality is a factor in enslavement, the crime of sexual slavery can also be charged separately.⁴⁵⁷ In our view, both sexual slavery and enslavement should be charging options because both crimes may be applicable as their elements and the interests they protect are distinct. Sexual slavery recognises the specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves. Moreover, victims of the crime of sexual slavery may need somewhat different forms of protective measures or redress than victims of other forms of slavery.
628. This approach to the essential elements of sexual slavery finds support in the reports of the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, by Gay McDougall, a leading expert in international law.⁴⁵⁸ In her Final Report to the UN Commission on Human Rights, she defines “sexual slavery” as:

the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access

⁴⁵⁵ *Kunarac* Trial Chamber Judgement, paras. 542 & 543 (emphasis supplied).

⁴⁵⁶ *Kunarac* Trial Chamber Judgement, para. 543.

⁴⁵⁷ We note that, in a case involving, for example, forced labour during the day and sexual servitude at night, both enslavement and sexual slavery could be charged because the elements of the two crimes and the interests protected would be different. See e.g., *Celebici* Appeals Chamber Judgement, paras. 400, 412-413; *Kunarac* Trial Chamber Judgement, paras. 556-557.

⁴⁵⁸ Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13 of 22 June 1998; and the Update to the final report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/2000/21 of 6 June 2000.

through rape or other forms of sexual violence. Slavery, when combined with sexual violence, constitutes sexual slavery.⁴⁵⁹

629. The Special Rapporteur's approach is also to recognise that the violation of sexual autonomy through rape or other forms of sexual violence is a power attaching to the right of ownership over a person. Further, the Update to the Final Report explained:

The Special Rapporteur understands that based on customary law interpretations of the crime of slavery, and thus sexual slavery, there are no requirements of any payment or exchange; of any physical restraint, detention or confinement for any set or particular length of time; nor is there a requirement of legal disenfranchisement. Nonetheless, these and other factors may be taken into account in determining whether a "status or condition" of slavery exists. While the most commonly recognised form of slavery involves the coerced performance of physical labour or service of some kind, again, this is merely a factor to be considered in determining whether a "status or condition" exists which transforms an act, such as rape, into sexual slavery. It is the status or condition of being enslaved which differentiates sexual slavery from other crimes of sexual violence, such as rape.⁴⁶⁰

630. By contrast, we view the approach suggested to the International Criminal Court to be inconsistent with a proper recognition of the breadth of factors that constitute enslavement and the relationship of sexual slavery thereto as a matter of customary international law. The ICC Statute includes the crime of sexual slavery but contains no definition of the crime. The Statute does define "enslavement" as "the exercise of any or all of the powers attaching to the right of ownership over a person," and "significantly provides that enslavement includes the exercise of such power in the course of trafficking in persons, in particular women and children."⁴⁶¹ Subsequent to the adoption of the Statute, however, the Preparatory Commission negotiated an Elements Annex to guide the ICC in interpreting the crimes within its jurisdiction.⁴⁶² In our view, the Elements Annex adopts an unreasonably narrow definition of enslavement that it then extends to sexual slavery, and hence the elements adopted do not adequately reflect the crime under international law.⁴⁶³
631. The Judges consider that the general enslavement element defined in paragraph 1 is inconsistent with the international concept of slavery articulated in the 1926 Slavery Convention. We find no warrant for limiting "any or all of the powers attaching to the right of ownership" to situations involving commercial exchange or "similar deprivation of liberty."⁴⁶⁴ We note that the commercial element is contrary to the 1926 Convention

⁴⁵⁹ Update to the final report submitted by Ms. Gay J. McDougall, para. 47.

⁴⁶⁰ Update to the final report submitted by Ms. Gay J. McDougall, para. 50.

⁴⁶¹ Rome Statute, Article 7(2)(c).

⁴⁶² Report of the Preparatory Commission for the International Criminal Court, Addendum Part II: Finalised draft text of the Elements of Crimes, PCNICC/2000/Add.2, 6 July 2000.

⁴⁶³ The Elements Annex defines the *actus reus* of sexual slavery as:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons or by imposing on them a similar deprivation of liberty.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

⁴⁶⁴ While this aspect of the ICC definition contains potential flexibility (the "such as" language preceding the enumeration of "purchasing, selling, lending or bartering" and the footnote reference broadening the meaning of deprivation of liberty), the

which explicitly applies to “all acts involved in the capture, acquisition or disposal of a person with intent to reduce h[er] to slavery,”⁴⁶⁵ and that the ICC Element’s footnote linking the phrase “other deprivation of liberty” to “servile status,” does not embrace all the possible contexts of enslavement encompassed by the 1926 Convention.

632. While the ICC Elements can be applied to embrace the system of sexual slavery in this case, the narrow approach adopted may serve to exclude legitimate cases of enslavement, and particularly sexual slavery, in the future.⁴⁶⁶ We note that the ICC Statute itself contains the broader definition drawn from the 1926 Convention and that the Elements Annex is not intended to be binding on the future ICC but is specifically for guidance only.⁴⁶⁷
633. In sum, consistent with international law in effect during 1937-1945 and with the principle of legality, this Tribunal endorses the jurisprudential approach of the *Kunarac* Judgement and the Special Rapporteur, which recognise that commercial exchange and deprivation of liberty are not mandatory requirements of enslavement. We find that the control of a person’s sexuality itself indicates a power attaching to the right of ownership, which is the defining aspect of the *actus reus* of the crime of sexual slavery. This is so regardless of whether sexual coercion is, as here, the dominant aspect of enslavement, or whether the sexual coercion occurs as incidental to or alongside other conditions that independently constitute enslavement.

(iv) Sexual Slavery v. Forced Prostitution: Correcting the Legal
(Mis)Characterisation

634. The identification of sexual slavery as an international crime in our Charter and as a matter of international law today is, in our opinion, a long overdue renaming of the crime of (en)forced prostitution. As such, it responds to a very important concern expressed by the survivors of the “comfort system,” which is that the term “forced prostitution” obscures the terrible gravity of the crime, suggests a level of voluntariness, and stigmatises its victims as immoral or “used goods.” For the reasons set forth below, the Judges conclude that the crime historically denominated as “(en)forced prostitution” is more appropriately named “sexual slavery.” We note initially, however, that the effect to obscure the offence of sexual slavery by calling it prostitution did not end with the end of the war. Japan’s sympathizers who deny its responsibility for the systematic atrocities perpetrated against the “comfort women” and girls continue to characterise them as “prostitutes” and “camp followers” to assert both the voluntariness and immorality of the “comfort women,” and thus Japan’s own innocence.⁴⁶⁸

clause is unnecessary. Not only is the emphasis on commercial exchange or similar deprivation of liberty antiquated, it is contrary to the lived experience of women and men coerced or deceived into enslavement situations and sexual slavery. We note, for example, the absence of such essential and non-commercial means of enslavement such as “using” another person as one’s property.

⁴⁶⁵ Article 1(2) of the Slavery Convention.

⁴⁶⁶ The second element in the ICC definition, that “the accused caused such person or persons to engage in one or more acts of a sexual nature,” is sufficiently broad to encompass situations of sexual slavery. The flaw here is in the failure to recognize that that exaction of sexual submission or services is itself a power attaching to the right of ownership.

⁴⁶⁷ ICC Statute, Article 9(1).

⁴⁶⁸ The Japanese government and military made efforts to create a subterfuge in order to make the “comfort system” appear as it were a form of voluntary prostitution. The very fact they were denominated “comfort women” suggests voluntary engagement in benevolent activity. Terminology such as “comfort stations,” “houses of relaxation” and “brothels” to refer to the sexual slavery facilities, and “prostitutes,” “camp followers,” “hostesses,” or “volunteers” to refer to the enslaved women, served to suggest that the “comfort stations” were houses of prostitution tantamount to the system of licensed

635. The problematic character of the term “forced prostitution” is illustrated by the fact that the Trafficking Convention of 1933 uses the term “immoral purposes” to refer to both voluntary and coerced prostitution.⁴⁶⁹ The definition of the word “prostitute,” historically associated primarily with women, is often referred to in terms such as “base behaviour,” “promiscuous lewdness,” and “purposeful evil.”⁴⁷⁰ In many countries, prostitution, the exchange of sex for money or other value, is a crime. Moreover, the epithet “prostitute” refers both to those who sell sex and to women who violate social rules against sex outside of marriage or who otherwise break the rules of proper female sexual conduct.⁴⁷¹ The Judges do not accept the negative connotations associated with the term “prostitute,” but recognise that the epithet “prostitute” reflects profoundly discriminatory attitudes toward women.
636. Notwithstanding that forced prostitution involves essentially the same conduct as sexual slavery, it does not communicate the same level of egregiousness. The term “forced prostitution” tends to reflect the male view: that of the organizers, procurers, and those who take advantage of the system by raping the women. The term sexual slavery reflects the victims view: its focus is on the enslavement and the rape, and the term more accurately captures the enormity of subordination and suffering.
637. In defence against the charges of rape and sexual slavery in the “comfort women” system, it has been asserted elsewhere that the women participated voluntarily as prostitutes. We find the persistence of this assertion mind-boggling in light of the enormous amount of testimonial, documentary, and circumstantial evidence to the contrary. The Tribunal categorically and forcefully rejects the proposition that the women subjected to sexual slavery were voluntary prostitutes.
638. The testimony before this Tribunal demonstrates that, even after the ordeal some women survived, their suffering has been cruelly exacerbated as a result of their having been stigmatised as prostitutes. Instead of being welcomed back to their communities as victims of a terrible wrong, many survivors experienced indescribable shame and isolation. Naming the crime as sexual slavery is intended to contribute to lessening the misplaced stigma for these survivors as well as for future victims of such crimes.
639. Accordingly, the Judges find that the situation of the former “comfort women” and girls is more accurately termed “sexual slavery” rather than “forced prostitution.”

prostitution in Japan, and that the women worked there by choice. By thus attempting to sustain the myth that the “comfort women” system was a form of prostitution, the Japanese government and military sought to obscure its exploitative and coercive character as a system of sexual slavery.

⁴⁶⁹ See e.g. International Convention for the Suppression of the Traffic in Women of Full Age, 53 UNTS 49, 1933, Article 1. See also International Convention for the Suppression of White Slave Traffic, 1910, Articles 1 & 2; Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 96 UNTS 271, GA Res. 317 (IV) of 2 Dec. 1949. For an analysis, see Yavori Matsui, *Women in the New Asia* (1996), pp. 13-30; Lois Chiang, *Trafficking in Women*, in *Women and International Human Rights Law* (Kelly Askin & Dorean Koenig eds., vol I, 1999), pp. 321-364; Ann Lucas, *Women and Prostitution*, in *Women and International Human Rights Law*, *Ibid.* pp. 683-726.

⁴⁷⁰ The word is associated with reference to its common definition across different cultures. Webster’s dictionary defines the verb “to prostitute” in wholly negative or derogatory terms: to surrender oneself or one’s powers; to expose publicly or shamefully; to offer, as a woman, to a lewd use; to give up to promiscuous lewdness; to devote to based or unworthy purposes; to seduce. As an adjective, prostitute is associated with base purpose or ends, infamous, venal, corrupt, licentious, debased or subjected to evil.

⁴⁷¹ See Anne Gallagher, *Contemporary Forms of Female Slavery*, in *Women and International Human Rights Law* (Kelly Askin & Dorean Koenig eds., vol. II, 2000), pp. 487-523; Ann Jordan, *Commercial Sex Workers in Asia*, in *Women and International Human Rights Law*, *Ibid.*, pp. 525-586.

(e) *Indicia of Sexual Slavery and Their Application to the “Comfort System”*

(i) Introduction

640. The situations of slavery discussed in the IMT and IMTFE cases demonstrate some common or recurring characteristics of slavery. The *Kunarac* Judgement also contains a useful summary of many of the various and variable characteristics or indicia that constitute enslavement and sexual slavery. The indicia are not “elements” that must exist in all cases, but rather are a guide to determining when the status or condition of being enslaved exists. The presence or absence of any one indicium is not dispositive of whether a person has been enslaved. Thus, in discussing the pertinent indicia of sexual slavery here, we also address, where relevant, the significance of either their presence or absence to the determination that the “comfort system” was a system of sexual slavery.

(ii) Involuntary Procurement

641. The acquisition of slaves through a slave trade is a common but not essential indicium of slavery. A review of the case law reveals that a person may be acquired for enslavement in many ways, including abduction, force, coercion, purchase, exchange, deception, or false promises designed to induce a person to submit without resort to force. As discussed above, the IMTFE considered those recruited by either false promises or force to be slave labourers. The IMT also included as slave labourers persons recruited by propaganda and economic coercion, as well as by force and threats of reprisals against family members.
642. Initial consent does not preclude the possibility that consent may be withdrawn at any time. Thus, even if some women initially agreed to provide sexual services, once they were forced to provide the services, enslavement existed and they became part of the “comfort system”.
643. The facts before us demonstrate beyond a reasonable doubt that most women were lured into the sexual slavery system through false promises of decent work, good wages and a better life. Some of the women and girls were purchased from families or traded themselves for money for themselves or their families and thereby became the “property” of the proprietor or the military. Others were dragged into the system involuntarily – abducted, conscripted, beaten, or otherwise terrified into submission.
644. With regard to the Japanese women who had worked as licensed prostitutes, the Judges note that some were conscripted, including when the authorities refused to allow them to turn in their licenses and avoid being taken. The facts also support a conclusion that those who initially agreed to provide sexual services to the soldiers became “comfort women” subjected to sexual slavery once they were required to provide services against their will. Because they did not consent to the conditions of enslavement and the utter lack of control over their sexual integrity that the “comfort system” required, their initial consent did not make the ensuing enslavement lawful. To the extent that some may have given knowing consent, their consent was subsequently vitiated by the conditions amounting to enslavement to which they were subjected and to which they objected. Once the women were not free to leave, free to dictate the nature and terms of their services, or free to refuse services, they were enslaved.

(iii) Treatment as Disposable Property

645. Perhaps the most common form of slavery emerging from the jurisprudence is the treatment of people as having value only as objects or things to be used, even to the extent of having their energy, health, or life depleted, for another's purposes or at another person's whim. This usually involves forcing people to work, thereby exploiting them; typically the slave is provided food and medical care only to the extent necessary to maintain their suitability to work. It may also involve working people to death or killing them or allowing them to die as a result of starvation or abuse when they are deemed to have outlived their usefulness. Treating a person as one's own property to use, keep, sell, lend, trade, discard or dispose of at will demonstrates one of the most characteristic forms of exercising powers of ownership.
646. Treating a person as one's sexual property is the epitome of objectification and possession, depriving the sexually enslaved person of even remnants of intimate space and personal integrity. It is a form of objectification disproportionately visited upon women and rooted in the fundamental failure to treat women as full persons. The testimonies and other evidence before us demonstrated that "comfort women" were sexually used to and well beyond the limits of their endurance, provided health care only to the extent it benefitted soldiers and often with lasting harm to the women, and were killed or abandoned when their usefulness had passed.

(iv) Restriction of Fundamental Rights and Basic Liberties

647. Another common feature of slavery is the restriction of fundamental rights and liberties, including freedom of movement and the exercise of free will. Describing the conditions for those enslaved by the Nazi forced labour program, the *Milch* Judgement gave the following list of basic freedoms, the denial of which, taken together or in extreme cases alone, may indicate slavery:

[T]he deportees were deprived of the right to move freely or to choose their place of residence; to live in a household with their families, to rear and educate their children; to marry; to visit public places of their own choosing; to negotiate, either individually or through representatives of their own choice, the conditions of their own employment; to organize in trade unions; to exercise free speech or other free expression of opinion or to gather in peaceful assembly. They were frequently deprived of the right to worship according to their own conscience.⁴⁷²

648. While detention, confinement, or other deprivation of liberty of movement is a common characteristic of enslavement, the inability to leave need not be absolute nor physically enforced. Enslavement does not require armed guards, barbed wire, or physical restraints; rather it involves control – physical, mental, psychological, financial, etc. – exercised over people's lives. For example, in the *Kunarac* case, women and girls were unable to escape the houses in which they were kept as sexual slaves because the territory was surrounded by the opposition. In one instance, the perpetrators gave the women keys to the house in order to keep unauthorised outsiders from entering. In another situation, the door to the apartment where the women were held was left ajar when the men were

⁴⁷² Trial of Erhard Milch, United States Military Tribunal, Nuremberg, 20th December -17th April 1947, UNWCC, Vol. VIII, pp. 29-30 (*Milch* case); also excerpts in Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law, Vol II, 1947, p. 773.

present. The Chamber in that case addressed the question of whether the possibility of escape negated detention or deprivation of liberty of movement. The Trial Chamber rejected the claim, stating:

The Trial Chamber is satisfied that the girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were recaptured.⁴⁷³

649. Thus an enslaved person can have freedom of movement and yet be unable to exercise it fully because of danger, fear, or circumstances. While in many cases the perpetrator may create the danger through force, threat, coercion, psychological oppression or abuse of authority, in other situations, such as periods of armed conflict, mass violence, or the breakdown of law and order, the perpetrator may simply take advantage of the conditions existing which render a victim unable, either physically or psychologically, to leave or, in the case of sexual slavery, to refuse sex.
650. The facts before this Tribunal demonstrate beyond doubt that in many cases the “comfort women” and girls were physically and unlawfully detained or confined. Barbed wire and armed guards were common throughout the different regions. The survivors’ testimony establishes that those who attempted to escape and failed were subjected to exceedingly cruel torture and public humiliation upon recapture designed to punish them and deter others from attempting to escape.
651. The survivors’ testimony also indicates that in some cases, other physical, psychological, or logistical barriers operated to restrict movement, even when the women were not physically restrained or obstructed from leaving. Some women remained in their homes but had to leave it at night to provide sexual services to soldiers or officers who threatened them or their families if they refused. In many cases, the “comfort women” and girls were transported far from their homes. Even those “recruited” or abducted locally were typically removed from their communities and everything familiar and did not have the means to return. The “comfort stations” were often in or near war zones; the women, particularly if they were of a different ethnicity or nationality, were easily identifiable, did not speak the local language, or had no resources which would enable them to get to safety. Some were very young. The testimony of Witness Song Shin Do of Korea sums up the most common situation:

Since I didn’t know where I was, I didn’t speak the language, I had no money and no idea how to take the train, and the area was surrounded with soldiers, escape was impossible. Even so, when the soldiers came into my room, horrifying and terrifying me, I cried and tried to run away. The manager slapped my cheek until my nose bled, withheld my food and shut me up in a narrow room. However, complete escape was impossible, and while crying, I became a tool for the sexual appetites of the soldiers.

652. The Judges agree with the analysis of the Trial Chamber in the *Kunarac* case that slavery does not depend on the use of physical restraint or the presence of formal signs of the slave status. Nor is it necessary to show that slaves are ill-treated,⁴⁷⁴ although gross ill-

⁴⁷³ *Kunarac* Trial Chamber Judgement, para. 750.

⁴⁷⁴ *Pohl* case, p. 970 (“involuntary servitude, even if tempered by humane treatment, is still slavery”).

treatment is almost always present. Rather, the key is whether circumstances exist which deprive a person unlawfully of the ability to exercise free will.

(v) Absence of Consent or of Conditions Under Which Consent Is Possible.

653. Consent is not a defence to conditions of enslavement. Apparent acquiescence or the lack of resistance is also irrelevant to a finding of sexual violence, rape or enslavement. The testimony powerfully demonstrates that women were forced to be the objects on which men enacted or extracted their sexual release. While some of the survivor-witnesses before this Tribunal indicated resistance at some point, we unequivocally reject the notion that lack of resistance is a sign of consent. In fact, passive compliance is often the best or only means of both physical and mental survival. In armed conflict situations especially, saying “no” is likely to be a futile gesture that places the victim in greater peril. The evidence before this Tribunal demonstrates that, where women resisted, it aggravated the brutality and their suffering. Thus, the Judges emphasise that passivity in no way precludes a charge of rape or sexual slavery when the elements of the crime are satisfied.
654. Indeed, in some cases, the victim may even initiate the sexual activity out of threat or fear. Although no testimony is before us in the present case to this effect, we have no doubt that this must have occurred on occasion in the “comfort system.” We note that our views as to the irrelevance of active participation find support in the *Kunarac* Judgement, which found that a woman who initiated sex with an accused out of fear did not consent to the sex:

The Trial Chamber is satisfied that it has been proved beyond a reasonable doubt that D.B. subsequently also had sexual intercourse with Dragoljub Kunarac in which she took an active part by taking off[f] the trousers of the accused and kissing him all over the body before having vaginal intercourse with him.

The Trial Chamber accepts the testimony of D.B. who testified that, prior to the intercourse, she had been threatened by “Gaga” that he would kill her if she did not satisfy the desires of his commander, the accused Dragoljub Kunarac. The Trial Chamber accepts D.B.’s evidence that she only initiated sexual intercourse with Kunarac because she was afraid of being killed by “Gaga” if she did not do so.⁴⁷⁵

655. The Judges agree with the wisdom of the Judges in *Kunarac* that active participation does not under these circumstances carry an inference of consent. Accordingly, the Judges emphasise that there is no shame in submission or compliance, as it is rather an entirely reasonable, and often inevitable, response to sexual aggression.

(vi) Forced Labour

656. Forced labour is also a frequent indicum of slavery. Common characteristics include work without pay or other remuneration, the existence of fictitious labour contracts, token compensation, or other attempts to make the system or recruitment appear voluntary or legitimate. The validity of any asserted agreements must be strictly scrutinised in light of the conditions imposed. In the *Milch* case, the Tribunal stated,

⁴⁷⁵ *Kunarac* Trial Chamber Judgement, para. 750.

It was sought to disguise the harsh realities of the German foreign labor policy by the use of specious legal and economic terms, and to make such policy appear as the exercise of conventional labor relations and labor law. The fiction of a "labor contract" was frequently resorted to...which implied that foreign workers were given a free choice to work or not to work for Germany's military industry. This, of course, was purely fictitious, as is shown by the fact that thousands of these "contract workers" jumped from the trains transporting them to Germany and fled into the woods.⁴⁷⁶

657. The presence of payment does not convert forced into voluntary labour. While lack of payment, or lack of adequate payment, is another common indicum of slavery, providing some form of compensation for the labour provided does not of itself negate the existence of slavery. The Nuremberg Tribunal stated that, even though "theoretically the workers were paid, housed and fed...and even permitted to transfer some of their savings back to their native country," the circumstances in which they were held and treated compelled a conclusion that they were enslaved.⁴⁷⁷ In particular, in that case, the evidence showed that:

restrictive regulations took a proportion of their pay; the camps in which they were held were unsanitary; and the food was often less than that necessary to give the workers strength to do their jobs. [In certain cases] the employers were given authority to inflict corporal punishment and were ordered, if possible, to house them in stables, not in their own homes. They were subject to constant supervision by the Gestapo and the SS, and if they attempted to leave their jobs they were sent to correction camps or concentration camps.⁴⁷⁸

658. Thus, inability to refuse work, inappropriate labour conditions, and restrictions on freedom demonstrated slavery, notwithstanding the presence of compensation.
659. The fact that payment does not negate a finding of slavery is underscored in the case of sexual slavery, since rape itself violates the fundamental human right to personal bodily integrity, and rape is the primary way that powers of ownership over a person are exercised in sexual slavery. The existence or non-existence of payment is irrelevant to this determination. Furthermore, as payment is no more than a "specious legal and economic term" used to disguise the reality of slavery, giving victims compensation often causes them additional harm by attempting to obscure the wrong done to them.
660. Thus, that some "comfort women" were given payments by the Japanese military in no way precludes a finding that they were enslaved. In some cases, the payments were a façade since the owners of the houses extorted all or most of it back from the women for so-called expenses. However, even if some women retained a portion of the money, it is the absence of free will to refuse to provide sex that is central to our conclusion that their condition was one of sexual slavery. Payment, even of prevailing wages, does not and cannot negate the crime of rape or slavery.

⁴⁷⁶ *Milch case*, p. 38.

⁴⁷⁷ IMT Judgement, p. 59.

⁴⁷⁸ IMT Judgement, p. 59.

(vii) Discriminatory Treatment

661. Slavery is typically a product of persecution and discrimination against a targeted group. The experiences of people under the chattel slavery system in the Western Hemisphere are instructive. Under that system, African people were slaves and, thereby, devalued and treated as property, subjected to reproductive and intergenerational bondage, usually denied the right to maintain family and community relationships, denied legal personality, and generally subjected to inhumane treatment and abusive conditions.⁴⁷⁹ It was a system that restricted virtually every aspect of liberty. It also involved both forced labour for enslaved women and men, and sexual and reproductive servitude for many of the women. Women were bought and sold through advertising as to their sexual and reproductive characteristics.⁴⁸⁰ As a parallel to the “comfort women” system under consideration here, enslaved African women were used as objects of sexual pleasure and release for the “owners” and overseers and were regarded as sexual objects rather than individuals possessing human rights and inherent dignity.

5. Findings as to Rape and Sexual Slavery in the Context of the “Comfort System” (Counts 1-2)

662. The above represent some of the most common, but by no means the only, indicia exhibiting the essential qualities of slavery, namely, the exercise of any or all of the powers of ownership over a person. The horrendous circumstances to which the women were subjected reflected many indicia of slavery. The women were treated as objects and used as property, deprived of their free will and liberty, and forced to provide sexual services to the Japanese military. The survivor-witnesses before this Tribunal testified consistently to being enslaved by force, deception or other involuntary and coercive means, either directly by soldiers or government officials or with their connivance and participation. They all endured a series of rapes over months and years, were not free to leave or refuse to provide the services, and suffered abusive and inhumane conditions of detention.
663. Moreover, kidnapping or “recruiting” and transporting the women and girls, which was condoned, authorised, and often supervised by Japanese military personnel, was in itself a form of slave trade, and in violation of customary international law prohibiting the slave trade and trafficking in women and children. The Judges also note that a large number of the victims of the military sexual slavery system were in fact girls.⁴⁸¹
664. The evidence establishes conclusively that the Japanese government and military exercised the powers attaching to the right of ownership over the girls and women in the “comfort system.” The Japanese military and their civilian agents asserted ownership over the women by procuring them, by confining them, by demanding their obedience and subservience, by subjecting them to repeated rapes and other forms of sexual violence, by otherwise torturing, mutilating and punishing them for disobeying them, by subjecting them to invasive and inhumane medical examinations, by exposing them to sexually transmitted diseases and subjecting them to harmful medical treatments, by

⁴⁷⁹ A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 Va. Journal of Int'l Law (1999), p. 303.

⁴⁸⁰ Deborah Gray White, *Ar'n't I a Woman?* (1985).

⁴⁸¹ The 1924 Declaration of the Rights of the Child, adopted unanimously by the League of Nations, recognises that “mankind owes to the child the best it has to give” and in particular the child “must be protected against every form of exploitation.” Article 46 of the 1907 Hague Regulations also includes the right not to have children forcibly taken away.

subjecting them to unwanted pregnancies, by forcing them to have abortions or give up their children, and by killing them or abandoning them when their services were no longer of use. Each of these acts and all of these acts were violations of international legal standards. The crimes most assuredly amount to rape and sexual slavery.

665. The Japanese military and government officials and their agents committed the crimes of rape and sexual slavery against girls and women as a part of, and in the course of, their aggressive war waged in the Asia-Pacific. These crimes were widespread – occurring on a vast scale and over a huge geographic area – and systematic – being highly organised, heavily regulated, and sharing common characteristics. They were committed against women and girls who were civilians.
666. In sum, the Tribunal finds that the Japanese military and civilian authorities committed rape and sexual slavery as a crime against humanity against tens of thousands of women and girls forced into sexual servitude to the Japanese military as part of the “comfort system” during World War II.
667. Whether the individuals accused incur individual or superior responsibility for these crimes will be addressed *infra*.

6. Findings as to Rape in the Context of Mapanique (Count 3)

668. The evidence establishes that on November 23, 1944 the Japanese army attacked Mapanique and systematically raped an estimated 100 women as part of the wholesale destruction of the barrio, during which the community was shelled, houses were looted and burned, and men were publicly tortured and slaughtered. According to the evidence, the Japanese military planned and conducted a punitive and subjugation raid on Mapanique. During this raid, the soldiers raped all of the young women and teenage girls of the barrio whom they could find. Many older women were raped as well.
669. The rapes to which the witnesses testified followed a consistent pattern which included separating the males from the females, torturing and killing the males, forcing some 100 girls and women to go to the Red House, and then raping them. Many victims were also raped in their homes or enroute to the Red House. Most were gang raped or raped by a series of perpetrators, often in front of others. The pattern reveals that the rapes were committed during the course of the subjugation effort, whether predetermined or emerging in the course of the attack.
670. The rapes were both widespread and systematic, and were committed as part of an attack on civilians during an armed conflict. The acts charged in Count 3 of the Indictment satisfy the legal requirements for the crime against humanity of rape. Thus the Tribunal finds that the rapes at Mapanique constituted crimes against humanity.
671. Finally, in considering the relevant facts and law in this case, the Judges opine that, although it was not charged as such in the Common Indictment, confining women at the *Bahay na pula* for the purpose of repeatedly raping them may in some cases also constitute sexual slavery. The soldiers held women against their will. They raped many women multiple times and the women could not know if or when they would be raped again or free again. The testimony given to this Tribunal on the count of sexual slavery shows that the sexual slavery facilities in the Philippines were most often military garrisons, and the soldiers frequently abducted women and girls for rape during the course of military raids. These facts suggest that rape and sexual slavery outside the

formal establishment of the “comfort system” was a known part of Japanese military operations. Indeed, the formal system of rape and sexual slavery instituted by the Japanese government and military would provide tacit approval of rape and sexual slavery committed outside the formalised system.

672. We now turn to an examination of the law to determine whether the accused incur individual or superior responsibility for the crimes alleged against them in the Common Indictment.

PART IV - INDIVIDUAL CRIMINAL RESPONSIBILITY

A. INTRODUCTION: RELEVANT PROVISIONS

673. Under Article 3 of the Charter, an accused can be found criminally responsible if he or she:
- individually “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime” within the jurisdiction of the Tribunal; or
 - as a superior or military leader, “knew, or had reason to know, that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent or repress their commission or submit the matter to the competent authorities for investigation and prosecution.”
674. Thus, consistent with domestic and international application of the law, an accused can be found criminally liable for a crime, in this case rape and sexual slavery, even if he or she did not physically commit the crime. Indeed, in the present case, none of the accused is alleged to have physically perpetrated the crimes charged in the Common Indictment. Article 3(1) of the Charter establishes individual criminal liability for one’s own acts or omissions that contribute to or participant in the criminal conduct, whereas Article 3(2) establishes a superior’s criminal liability for failing to prevent or punish crimes committed by subordinates.⁴⁸² The principle of superior responsibility enshrined in Article 3(2) is also known in contemporary terms as “command responsibility” or “superior authority.” While the doctrine of “superior responsibility” is a more recent articulation designed to cover both civil and military leaders, similar terms were used during the post-World War II Trials, including the IMTFE, as discussed below.
675. In keeping with the duty of this Tribunal to apply the law as it existed at the time the acts were committed, we have had to determine whether the elements of contemporary formulations of criminal responsibility were part of international law during the time the crimes were committed. Below, we examine the development of the law applicable to holding individuals and superiors criminally responsible for international crimes, particularly war crimes and crimes against humanity. We ultimately conclude that the two strands of responsibility identified in Article 3(1) and (2) of the Charter reflect, albeit in somewhat different terminology, the bases of criminal responsibility recognised and applied by the IMTFE, and that these formed part of international law as it existed at the time of the commission of the offences.
676. Just as the IMTFE brought charges only against high level government or military leaders, here too each of the accused is a person holding a high level position. Because all accused held positions of significant authority within the Japanese military or government hierarchy, we have decided to consider superior responsibility under Article 3(2) before considering individual responsibility under Article 3(1).

⁴⁸² These terms are also found in Article 6 of the ICTR Statute, Article 7 of the ICTY Statute, and Article 25 of the ICC Statute. See also Articles 5-6 of the IMTFE Charter, Articles 6-7 of the IMT Charter, and Article II of CCL10.

B. ARTICLE 3(2) – RESPONSIBILITY OF A COMMANDER OR OTHER SUPERIOR

677. Article 3(2) of this Tribunal's Charter recognises that in certain circumstances superiors can be held liable for failing to prevent or punish acts committed by subordinates. Superior responsibility is based on recognising the utility of requiring commanders to enforce the rules of war and the reality that war crimes are often committed by soldiers acting under the authority or with the support or acquiescence, explicit or implicit, of their commanders. Not only would it be unjust in such circumstances for the commander to evade responsibility for actions he or she authorised or permitted, it would also undermine the goal of deterrence to immunise commanders from criminal liability for the acts of persons subject to their authority and control. It further imposes greater incentive on superiors to properly train their troops and to educate them about the laws and customs of war.
678. The historical origins of command or superior responsibility pre-date the Second World War.⁴⁸³ The Lieber Code, promulgated by the Union government during the United States' Civil War and recognised as a source of humanitarian rules later adopted by international agreement and custom, required commanders to suppress illegal acts committed by their subordinates and to punish the offenders.⁴⁸⁴ In the 1907 Hague Convention IV, Article 43 of the Regulations requires the appropriate military authority to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."⁴⁸⁵ The 1919 post-WWI War Crimes Commission Report further confirmed the principle of command or superior responsibility by recommending the establishment of a tribunal to prosecute alleged Axis war criminals who "ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war."⁴⁸⁶
679. Hence, the laws and customs of war increasingly acknowledged that commanders and other superiors had a duty to exercise adequate control over their subordinates, and recognised that under certain circumstances, the superior should be held criminally responsible for failing to prevent or halt crimes committed by subordinates or failing to punish the perpetrators thereof.
680. Distinct standards of responsibility were applied by and reflected in the jurisprudence of post-World War II Tribunals. Article 5 of the IMTFE Charter empowered the Tribunal to hold responsible "leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy" to commit crimes against humanity or other crimes within the jurisdiction of the Tribunal. Such persons were liable "for all acts performed by any person in execution of such plan." Pursuant to Article 5, the IMTFE considered the responsibility of the accused under various counts of the Indictment, and it found some of the accused guilty of crimes charged under Count 54 of the Indictment for "ordering, authorizing, and permitting the commission of" crimes.

⁴⁸³ For a detailed discussion of the evolution of this doctrine, see Major W.H. Parks, *Command Responsibility for War Crimes*, 62 *Military Law Review* (1973), p. 1-11; Leslie C. Green, *Superior Orders and Command Responsibility*, 27 *Can. Y.B. Int'l L.* (1989), p. 167.

⁴⁸⁴ General Order No. 100 was issued in 1863. It is commonly called the Lieber Code. See Article 71. Article 71 does not explicitly provide for criminal liability for failing to prevent these crimes.

⁴⁸⁵ Convention Respecting the Laws and Customs of War on Land, The Hague, 18 Oct. 1907 [Hague Convention IV]. See also Article 3 of the Hague Convention IV.

⁴⁸⁶ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties – Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, reprinted in 14 *American Journal Int'l Law* (1920), pp. 95, 121.

It also convicted some of the accused under Count 55 of the Indictment for failing “to take adequate steps to secure the observance and prevent breaches of conventions and law of war in respect of prisoners of war and civilian internees.” Thus, without expressly articulating the distinctions, Count 54 imports individual responsibility, and Count 55 imports superior responsibility.

681. The IMTFE did not always delineate its reasons for assigning guilt based on one count as opposed to the other, nor did it consistently differentiate between these two distinct theories of responsibility. Nevertheless, the IMTFE Judgement did demonstrate that two standards of responsibility were applied: one for crimes involving individual responsibility (i.e., Count 54 of the IMTFE Indictment), akin to Article 3(1) of this Tribunal’s Charter, and the other for crimes involving superior responsibility (i.e. Count 55 of the IMTFE Indictment), akin to Article 3(2) of the present Charter.
682. The theories of criminal responsibility developed by and applied in the post-World War II trials were reinforced through subsequent conventions, protocols, and draft codes which extracted the primary principles from the Tribunals’ decisions. More recently, the ICTR and ICTY have analysed and applied them vis-à-vis their own Statutes. The contemporary jurisprudence and formulations will be referred to insofar as it clarifies and is consistent with the law as it existed at the time of the Nuremberg and Tokyo Trials.

1. General Standard

683. Although the concept of superior responsibility existed as far back as 500 B.C., the extent and nature of that responsibility was not clearly delineated.⁴⁸⁷ One of the major accomplishments of the Nuremberg and IMTFE trials and related procedures was that they provided more precision concerning the scope of the duty that superiors had over subordinates, and when and to what extent a superior incurred criminal responsibility for crimes committed by persons under their authority or control.⁴⁸⁸ The *Yamashita*, *High Command*, and *Hostages* Judgements in particular are considered leading authorities on command responsibility. The Judges note, however, that these Tribunals did not apply the standards with complete consistency.⁴⁸⁹
684. In examining the laws and customs of war prior to World War II, as well as the case law of the Nuremberg and Tokyo Trials, we conclude that the basic elements to be proved before it is possible to find a commander or other superior criminally responsible for crimes committed by a subordinate consist of the following elements:
- a. A superior-subordinate relationship existed such that the superior had a duty, whether formal or informal, to exercise authority or control over his or her subordinates;

⁴⁸⁷ See especially William Parks, *Command Responsibility for War Crimes*, 62 *Military L. Review* (1973), p. 45 (examining the concept of superior and command responsibility from Tzu through the post-World War II trials.) See also Stephen Heder with Brian D. Tittmore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, War Crimes Research Office and Coalition for International Justice, July 2001, at Appendix – Individual Criminal Responsibility, pp. 110-125.

⁴⁸⁸ See, e.g., William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*, 37 *Columbia Journal Transnational Law*, 1999, p. 767.

⁴⁸⁹ While the *High Command* and *Hostage* cases were Control Council Law No. 10 cases held in Nuremberg under Ordinance No. 7 within the American Zone of Occupation, *Yamashita* was a post-WWII trial held by the United States Military Commission in the Asia-Pacific.

- b. The superior knew or had reason to know that crimes were being, were about to be, or had been committed by subordinates; and
- c. The superior failed to take appropriate measures within his or her power to prevent or suppress the crimes or to punish the offender(s) thereof.

2. *Superior-Subordinate Relationship*

685. To be held criminally responsible for the acts or omissions of one's subordinates, the commander or other superior⁴⁹⁰ must have been in a formal or informal position of authority or control over the offender, had the duty to prevent or halt their commission of crimes or to punish the offenders, and subsequently failed in this duty.
686. The mandate to ensure proper control and treatment in a systematic way applies to all commanders and other superiors. Both civilian and military leaders have the duty to prevent crimes, halt their commission, and punish the perpetrators, so long as they possess sufficient authority or power. Indeed the IMTFE convicted not only military commanders and officers, such as generals and chiefs of staff, for superior or command responsibility, but it also convicted civilian government officials, such as prime ministers and foreign ministers, for failing to take reasonable measures to maintain order and safety, as their superior position of authority required.⁴⁹¹
687. The duty is contingent on the commander or superior having sufficient power or authority to exercise adequate control over the perpetrators of the crime. Such power can be either informal or formal, *de facto* as well as *de jure*.⁴⁹² Because the authority need not be formally prescribed, a commander may be held responsible for crimes committed by troops who are not under his or her immediate command, but who act under his or her authority.⁴⁹³ In the *Hostages* case, for example, the Court stated that the responsibility of a "commanding general of occupied territory" is co-extensive with his area of command, which prevents him or her from "say[ing] that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility."⁴⁹⁴ It explained the scope of the duty of commanders in occupied territory as thus:

[I]n his capacity as commanding general of occupied territory, [the accused] was charged with the duty and responsibility of maintaining order and safety, the protection of the lives and property of the population, and the punishment of crime. This not only implies a control of the inhabitants

⁴⁹⁰ The *Celebici* Appeals Chamber defines a superior as "one who possesses the power or authority in either a *de jure* or *de facto* form to prevent a subordinate's crime and to punish the perpetrators of the crime after the crime is committed." *Celebici* Appeals Chamber Judgement, para. 192.

⁴⁹¹ IMTFE Judgement, defendants HATA, p. 446, Kimura, p. 452, Muto, p. 455, Koiso, p. 453, Hirota, pp. 447-48, Shigemitsu, p. 458. A ICTY decision asserts that civilian superiors can be held responsible under the doctrine only to the extent that their degree of authority over their subordinates is akin to that of military commanders. *Celebici* Appeals Chamber Judgement, para. 378.

⁴⁹² See, e.g., *Celebici* Trial Chamber Judgement, para. 354.

⁴⁹³ See, e.g., *Celebici* Appeals Chamber Judgement, para. 198; *Kordic* Trial Chamber Judgement, para. 406.

⁴⁹⁴ Trial of Wilhelm List and Others, United States Military Tribunal, Nuremberg, 8th July 1947-19th February 1948, UNWCC, Vol VIII, p. 69 ("*Hostages* case") (p. 1254-1259 in Aristarchus version).

in the accomplishment of these purposes, but the control and regulation of all other lawless persons or groups.⁴⁹⁵

688. The IMTFE also found that, whether military or civilian, those who have a duty to prevent ill-treatment of those in their custody must establish and secure a “continuous and efficient” system appropriate for such purposes. Such persons become responsible for ill-treatment of prisoners and breach their duty if they fail to establish an appropriate system, or if, having established such a system, they do not ensure it is effectively implemented. Superiors must continue to take steps within their power to prevent crimes.⁴⁹⁶ The IMTFE Judgement held that a civilian or military leader has “a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application.”⁴⁹⁷
689. The *High Command* case compared the duty of preventing and punishing a crime in an occupied territory to the duty with regard to treatment of prisoners of war, emphasising the positive and preventative nature of this duty. The Judgement stated that “[t]he situation is somewhat analogous to the accepted principle of international law that the army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment.”⁴⁹⁸
690. In the *Yamashita* case, the U.S. Military Commission held that as the Japanese commander of the Philippines during the invasion of Manila, YAMASHITA failed in his duty to exercise adequate control over his troops, who had committed widespread rape, murder, and pillage in Manila. He failed in this duty by not halting the crimes. The Court held:

[A]ssignment to command military troops is accompanied by broad authority and heavy responsibility. . . . It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.⁴⁹⁹

691. Where the system of authority is rigidly hierarchical, an accused will not generally be held responsible as a superior if he or she does not have the ability to countermand superiors. At the same time, the superior’s title does not necessarily determine responsibility: more indicative is the nature and scope of his or her power. Hence, chiefs of staff on occasion have been found to have sufficient authority to be held liable for the actions of soldiers, while other chiefs of staff have not, depending on their functions or place within the chain of command.⁵⁰⁰ For instance, the IMTFE declined to convict defendant Muto of certain charges when he was a staff officer subordinate to General

⁴⁹⁵ *Hostages case*, p. 1255.

⁴⁹⁶ IMTFE Judgement (Roling), p. 30.

⁴⁹⁷ IMTFE Judgement (Roling), pp. 29-32.

⁴⁹⁸ See *High Command case*, pp. 542-547 (Aristarchus version).

⁴⁹⁹ *Yamashita case*, p. 486.

⁵⁰⁰ *Hostages case*, pp. 1974-1978.

MATSUI, on the basis that he did not exercise sufficient authority to have countermanded the General's course of conduct. By contrast, it did convict Muto in his position as chief of staff to General YAMASHITA, after finding that position allowed him the ability to "influence policy."⁵⁰¹ It held that Muto "shared responsibility" for the "campaign of massacre, torture and other atrocities" which occurred during his tenure as chief of staff.⁵⁰² In referring to the conviction of Muto, and emphasising that the "influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure", the Rwanda Tribunal noted that the "Tokyo Tribunal reasoned that influential power, which is not power of formal command, was [a] sufficient basis for charging one with superior responsibility."⁵⁰³

692. The *High Command* case, on the other hand, rejected the application of command responsibility to chief of staff Foertsch because he lacked "authority in the field", and to chief of staff von Geitner because of his "want of authority...to prevent the execution of unlawful acts."⁵⁰⁴ The War Crimes Commission, in its *Law Reports of Trials of War Criminals*, stated that "[a]n examination of the relevant facts...shows that the chiefs of staff who were held guilty took a closer and more willing and active part in the offences charged" than did Foertsch and von Geitner.⁵⁰⁵ Thus, the different findings of responsibility as to the chiefs of staff affirm that it is a person's power of control or authority, whether *de jure* or *de facto*, and not the leader's title, that determines responsibility.⁵⁰⁶
693. The scope of a superior's duty depends also on the nature of his responsibilities.⁵⁰⁷ For example, in the *Milch* case, the Tribunal found that the Under State Secretary of Reich

⁵⁰¹ IMTFE Judgement (Roling), p. 455.

⁵⁰² The Tribunal found that as Chief of Staff to YAMASHITA, Muto was in a position to influence policy and rejected his defence that he knew nothing of the atrocities, finding such an assertion "wholly incredible." IMTFE Judgement (Roling), p. 455.

⁵⁰³ Prosecutor v. Alfred Musema, Judgement and Sentence, ICTR-96-13-T, 27 January 2000, TCI, paras. 139-140 (*Musema* Trial Chamber Judgement).

⁵⁰⁴ *High Command* case, (Aristarchus version). Von Geitner was acquitted even though he signed or initialed his commander's orders as an indication of their correctness as to form because this was deemed insufficient to establish criminal liability. Among the reasons command responsibility was not applied to Foertsch was his attempt to "procure rescission of certain unlawful orders and the mitigation of others."

⁵⁰⁵ Law Reports, Vol. VIII, p. 90.

⁵⁰⁶ The *High Command* case, p. 82, emphasised, particularly in relation to chiefs-of-staff:

The rank and care with which staff officers were selected show in itself the wide scope of their responsibilities which could, and in, many instances undoubtedly did, result in the chief of staff assuming many command and executive responsibilities which he exercised in the name of his commander.

One of his main duties was to relieve his commander of certain responsibilities so that such commander could confine himself to those matters considered by him of major importance. It was of course the duty of a chief of staff to keep such commander informed of the activities which took place within the field of his command insofar at least as they were considered of sufficient importance by such commander. Another well accepted function of chiefs of staff and of all staff officers is, within the field of their activities, to prepare orders and directives which they consider necessary and appropriate in that field and which are submitted to their superiors for approval.

As stated heretofore, the responsibility allowed a chief of staff to issue orders and directives in the name of his commander varied widely and his independent powers for exercising initiative therefore also varied widely in practice. The field for personal initiative as to other staff officers also varied widely. That such a field did exist, however, is apparent from the testimony of the various defendants who held staff positions and in their testimony have pointed out various cases in which they modified the specific desires of their superiors in the interests of legality and humanity. If they were able to do this, the same power could be exercised for other ends and purposes and they were not mere transcribers of orders.

⁵⁰⁷ Invoking this principle as to commanders, the 1977 Additional Protocol I to the 1949 Geneva Conventions finally codified the duty of superiors to take measures in exercising authority over subordinates. Article 87, "Duty of Commanders", stipulates:

Air Ministry, who dealt primarily with aircraft production, could not be expected to concern himself with matters relating to medical experimentation.⁵⁰⁸ Yet, in the *Medical* case, Karl Brandt, a leading physician, could be held culpable because “[o]ccupying the position he did and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps.”⁵⁰⁹

694. The ICTY *Celebici* case stresses that power, even when not accompanied by a formal position of command, can be a sufficient basis for imposing command responsibility. The Tribunal states that “the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person’s *de facto*, as well as *de jure*, position as a commander.”⁵¹⁰ The *Celebici* formulation is to assign superior responsibility when it has been shown that the accused had “effective control” over subordinates.⁵¹¹ Such control has been defined as “a material ability to prevent or punish criminal conduct, however that control is exercised.”⁵¹² We find this consistent with the post-World War Tribunal’s approach.

3. *The Accused “Knew or Had Reason to Know” that Crimes Were Being Committed*

695. After determining that an accused had a duty to control or punish subordinates and possessed power or authority to do so, it must be assessed whether the accused possessed the requisite *mens rea* to be held criminally responsible for acts committed by subordinates.
696. Consistent with international law, Article 3(2) of the Charter requires that the accused knew or had reason to know of crimes committed by subordinates before criminal liability can attach. In the case before the Tribunal, it would need to be proven that the accused knew or had reason to know that crimes of sexual slavery and rape were being committed and that these crimes formed part of a widespread or systematic attack directed against a civilian population.

The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations . . .

The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach . . . to initiate such steps as are necessary to prevent such violations . . . and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Additional Protocol I, art. 87.

⁵⁰⁸ *Milch* case, pp. 1781-1785.

⁵⁰⁹ *Medical* case, Vol. VII, p. 63.

⁵¹⁰ *Celebici* Appeals Chamber Judgement, para. 370.

⁵¹¹ See, e.g., *Celebici* Appeals Chamber Judgement, para. 196; *Blaskic* Trial Chamber Judgement, para. 302.

⁵¹² *Celebici* Appeals Chamber Judgement, para. 256.

697. The IMTFE convicted superiors for crimes committed by their subordinates if the evidence confirmed that the accused knew or should have known the crimes were being committed or were about to be committed and the superior did not take necessary and reasonable steps to suppress the crimes.⁵¹³
698. We note that different standards as to the *mens rea* are discernible in the case law following World War II. For example, in the *Yamashita* case, a U.S. Military Tribunal found that the commander's failure to prevent or punish the crimes was a violation of the laws or customs of war, despite the fact that the accused was relatively far from the theatre of action and out of direct communication with his troops. Some scholars and jurists have interpreted this as applying strict liability, while others consider that the facts of the case satisfy a "knew or should have known" standard.⁵¹⁴ In contrast, although Admiral Toyoda was charged with violations of the laws or customs of war for tolerating crimes, including rape crimes, committed by his troops, the U.S. Military Commission held that because it was not established conclusively that Toyoda knew the crimes were being committed, he could not be convicted of command responsibility.⁵¹⁵ In the Nuremberg Tribunal, the *High Command* case found criminal responsibility where the commander had knowledge of the offences and acquiesced or "criminally neglected" to interfere with the commission of crimes.
699. In *Krstic*, the ICTY emphasised that "the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he knew or had reason to know of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability."⁵¹⁶
700. Negligence in failing to acquire information is another way the Tribunals have expressed the "knew or had reason to know" standard. Although the defendant in *Toyoda* was acquitted of superior responsibility charges, the Commission articulated the standard quoted recently by the ICTY in the *Tadic* case:

In the simplest language it may be said that this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to

⁵¹³ IMTFE Judgement (Roling), defendants HATA, p. 446, Hirota, pp. 447-448, Kimura, p. 452, MATSUI, p. 454, transcript p. 49815; Muto, p. 455, transcript p. 49820; and Shigemitsu, p. 458.

⁵¹⁴ See, e.g., Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. (2000), pp. 155, 181 (stating that the evidence indicates that Yamashita was not held to a strict liability standard.); Andrew D. Mitchell, *Failure to Halt, Prevent, or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 Sydney L. Rev. (2000), pp. 381, 390 (stating the standard applied in Yamashita was unclear); William H. Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. (1973), pp. 1, 37 (stating that strict liability was not imposed); Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (1982), p. 123 (concluding that Yamashita was held to a strict liability standard.) According to the US Supreme Court: "While this standard does not impose a threshold requirement of knowledge or reasonable anticipation of atrocities prior to the existence of a duty, some limitation on liability is found in the duty 'to take such measures as were within his power and appropriate under the circumstances.'" *In re Yamashita*, 327 U.S. 1, 16 (1946).

⁵¹⁵ *Toyoda* case, p. 5006.

⁵¹⁶ *Krstic* Trial Chamber Judgement, para. 369.

continue, he has failed in his performance of his duty as a commander and must be punished.

The Tribunal found that a superior is criminally responsible for breaching the “power of command” if he “fails to take such appropriate measures as are within his power...to prevent acts which are violations to the laws of war”.⁵¹⁷

701. In the *High Command* case, the Court explicitly found that failure to properly exercise “command authority” to prevent atrocities constituted a violation of the commander’s duty under the laws of war.⁵¹⁸ Further, in the *Hostages* case, the Court found that “under basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law.”⁵¹⁹
702. In the majority of cases, the post World War II tribunals found the accused liable for crimes committed by their subordinates if, based on their position, their power, and the circumstances existing at the time, they knew of or were put on notice about the actual or potential commission of the crimes but they nevertheless failed to take action to determine if crimes were about to be committed or were being committed, and if so, to take measures to halt the crimes.

(a) *Actual Knowledge*

703. If the Tribunal finds the accused to possess actual knowledge of the crimes, then the *mens rea* requirement is fulfilled. Proof of actual knowledge can be direct or imputed after being inferred from the circumstances.
704. The World War II trials found a superior had actual knowledge of the crimes if he witnessed their commission, received superior orders relating to them, or was present at meetings in which the crimes were discussed.⁵²⁰ With regard to the latter, the IMTFE found that TOJO Hideki had knowledge of atrocities, in part because he presided at meetings where “protests against the behavior of Japan’s troops” and “[s]tatistics relative to the high death rate” were discussed.⁵²¹ Koiso, as Prime Minister, was also found by the IMTFE to have actual knowledge, and part of the evidence against him was his presence at meetings in which war crimes were discussed.⁵²² Likewise, in the *Pohl* case, the Tribunal found a defendant to have knowledge of the commission of crimes based, in part, on his presence at a meeting discussing the logistics of a concentration camp routine.
705. In addition, actual knowledge can be inferred from the circumstances. Factors that can indicate whether the accused had knowledge include, but are not limited to: the notoriety of the crimes; their widespread, massive, systematic, or prolonged occurrence; the

⁵¹⁷ *Toyoda* case, pp. 5005-5006.

⁵¹⁸ *High Command* case, p. 1261.

⁵¹⁹ *Hostages* case, pp. 507-515 Aristarchus version.

⁵²⁰ The *High Command* case identified superior orders as a source of actual knowledge. pp. 1259-1264, Aristarchus version. The *Toyoda* case identified witnessing the commission and being informed thereof as sources of actual knowledge.

⁵²¹ IMTFE Judgement (Roling), pp. 457-463. The defendant Sato was also found to have actual knowledge of the atrocities because he was present at meetings of Bureau Chiefs in the War Ministry. But he was not held criminally responsible because he did not have the power to take action to stop the crimes: “he could not initiate preventive action against the chief.” P. 457.

⁵²² IMTFE Judgement (Roling), p. 453.

proximity of the accused to the crime scene; the military's hierarchical structure; and the functioning of the military, including its training, methods of communication, reporting, and information gathering methods.

706. Depending on the facts of each case, many of the factors that support an inference of actual knowledge may also support a finding that the accused should have known or had reason to know of the crimes, and vice versa.
707. The notorious, widespread, massive, systematic, and prolonged occurrence of crimes is particularly indicative in inferring the accused's knowledge.⁵²³ For example, in considering the culpability of HATA, the IMTFE found that the fact "[t]hat crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge."⁵²⁴ Additionally, it convicted defendant Koiso under Count 55 by inferring he had actual knowledge of the crimes:

When Koiso became Prime Minister in 1944 atrocities and other war crimes being committed by the Japanese troops in every theatre of war had become so notorious that it is improbable that a man in Koiso's position would not have been well informed either by reason of their notoriety or from interdepartmental communications.⁵²⁵

708. The U.S. Military Tribunal, in the *Toyoda* case, explicitly included the great number of offences as a factor in inferring knowledge. It defined "constructive knowledge" as consisting of:

the commission of such a great number of offences within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offences or of the existence of an understood and acknowledged routine for their commission.⁵²⁶

709. Thus, the magnitude of the crimes has lead courts to conclude that an accused must have known they were occurring, and, therefore, to infer actual knowledge. Indeed, in *Yamashita*, the Military Commission emphasised that "the crimes were so extensive and wide-spread, both as to time and area, that they must have been wilfully permitted by the Accused, or secretly ordered by the Accused."⁵²⁷
710. In the *Hostages* case, the Tribunal noted that a commander's job is to be informed of events occurring under his authority, and stated:

It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such

⁵²³ We note that the ICTR Trial Chamber in *Akayesu* found that both knowledge and intent could be inferred from the massive and/or systematic nature of the genocide.

⁵²⁴ IMTFE Judgement (Roling), p. 30.

⁵²⁵ IMTFE Judgement (Roling), p. 453.

⁵²⁶ Because it is arguable that the language "must have known" is a stricter standard than "had reason to know," we use this definition as demonstrative of the acceptance of inference of knowledge based on the widespread occurrence factor and not as the actual standard we will apply.

⁵²⁷ The UN War Crimes Commission, Vol IV, pp. 34-35, quoting the Yamashita Commission.

occurrences result occasionally because of unexpected contingencies, but they are unusual.⁵²⁸

711. In the same case, the Tribunal concluded that the defendant Dehner had actual knowledge of the unlawful shootings of hostages and prisoners because his headquarters called attention to the fact that an order authorizing such shootings was still in force.⁵²⁹
712. The Tribunals also took into consideration proximity to the crimes or circumstances that logically put an accused on notice of the crimes. For instance, in the *Pohl* case, the Tribunal found an accused to have knowledge of the crimes committed in a labour camp under his jurisdiction because inmate workers, whose poor physical state was obvious, daily passed by the building in which he had his office.⁵³⁰
713. The nature of the military hierarchy and the accused's position therein can evince actual knowledge. As noted above, the high ranking positions of the defendant Koiso in the IMTFE and the defendants in the *Hostages* case were significant factors in making an inference of knowledge when the crimes were widespread and notorious.
714. An accused's *de jure* or *de facto* position and his or her corresponding responsibilities can provide the basis for inferring knowledge. The Tribunal in the *High Command* case, after considering the nature of the relationship between a commander and his chief of staff, concluded that orders signed for the commanding officer by a chief of staff "are presumed to express the wishes of the commanding officer."⁵³¹ In addition, in the *Batavia* Judgement, because Defendant III's position put him in charge of all "brothels," it was determined that everything that happened there would have been reported to him.⁵³²
715. The Tribunals also took into consideration the military's effectiveness, capacity and breadth of communication, and intelligence-gathering in deciding whether to infer actual knowledge. For example, in the *Hostages* case, the Tribunal noted the efficiency of the Nazi army's communications and intelligence-gathering systems in their conclusion that high-ranking officers received information promptly.⁵³³
716. We also note that the standard applied in the post-war Tribunals has been adopted by the ICTY, which has emphasised that "the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he 'knew or had reason to know' of the offences and failed to act to prevent or punish their occurrence."⁵³⁴

(b) "Had Reason to Know"

717. Pursuant to Article 3(2) of this Tribunal's Charter, even if it is not adequately established that the accused actually knew of the rape and the sexual slavery of the "comfort women" or, as to the Emperor HIROHITO and YAMASHITA, of the rapes in Mapanique, we

⁵²⁸ *Hostages* case p. 1259-1264, Aristarchus version. See also the Tokyo Tribunal's treatment of Muto, IMTFE Judgement (Roling), p. 455.

⁵²⁹ *Hostages* case, pp. 1985-1987.

⁵³⁰ *Pohl* case, p. 2439.

⁵³¹ *High Command* case.

⁵³² *Batavia* case.

⁵³³ *Hostages* case, p. 644.

⁵³⁴ *Kordic* Trial Chamber Judgement, para. 369.

must consider the alternative principle, established under international law, that a superior “had reason to know” of these crimes.

718. Post-war jurisprudence applied the principle that a superior should have known of the crimes if something should have put him on notice to inquire further about possible crimes. In addition, the circumstances themselves may give rise to the duty to know.
719. With respect to the concept of inquiry notice, the information that puts the accused “on notice” need not prove by itself that crimes exist. It is enough that the information indicates the need to inquire further in order to ascertain whether subordinates are or were involved in criminal activity.
720. The IMTFE found Foreign Minister Mamoru Shigemitsu criminally responsible for his failure to prevent crimes or punish the perpetrators because, having received reports of atrocities, “the circumstances, as he knew them, made him suspicious that the treatment of the prisoners was not as it should have been.”⁵³⁵ Although he “bore overhead responsibility for the welfare of the prisoners,” he failed to adequately investigate whether crimes were being committed, and indeed they were.⁵³⁶
721. In the *Hostages* decision, the Tribunal found the defendant List liable for executions carried out by units under his authority but not tactically subordinate to him because reports of the executions were given to him, and this provided him with sufficient notice of the crimes.⁵³⁷ Significantly, it held that a commander could not claim ignorance of such reports sent to headquarters: failure to appraise oneself of the substance of reports or to require additional reports if necessary constituted a dereliction of duty.⁵³⁸ Further, the defendant Rendulic was held criminally responsible for failing to investigate after receiving reports lacking sufficient information about the treatment of hostages. The Tribunal held he should have made inquiries in order to ensure that the “hostage and reprisal practices [were] in conformity with the usages and practices of war.”⁵³⁹ It thus found Rendulic guilty of acquiescing in the crimes because he failed in his duty to investigate as required under international law.⁵⁴⁰ Sometimes the duty to investigate regardless of notice overlaps with inquiry notice. It appears in this case that the Tribunal was holding that, because of the situation at hand, the superior had a duty to remain informed of the treatment of hostages, and that this duty was breached further when he still failed to make inquiries after receiving insufficient information as to their treatment.
722. The large-scale or systematic commission of crimes can be considered sufficient “notice” to find that an accused “should have known” or should have taken steps to learn about the crimes. The IMTFE found the defendant HATA guilty of superior responsibility under Count 55 stating:

⁵³⁵ IMTFE Judgement (Roling), p. 458.

⁵³⁶ IMTFE Judgement (Roling), p. 458.

⁵³⁷ *Hostages* case, pp. 1961-1969. In the same case with regard to the defendant Kuntze, the Tribunal found that documentary evidence showed that he had notice of reports of shootings of Jews and Roma/gypsies by his subordinates. Because there was no evidence that the defendant acted to stop such unlawful practices, the Tribunal found that he had acquiesced in them. *Hostages* case, pp. 1969-1974.

⁵³⁸ *Hostages* case, pp. 1271-1276 (in Judgement against defendant List) [Aristarchus version].

⁵³⁹ *Hostages* case, pp. 1978-1985.

⁵⁴⁰ *Hostages* case, pp. 1969-1974; defendant Rendulic, *Hostages* case, pp. 1978-1985.

HATA [was] in command of expeditionary forces in China [and] atrocities were committed on a large scale by the troops under his command and were spread over a long period of time. Either HATA knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provisions for learning whether [his] orders for the humane treatment of prisoners and civilians were being obeyed.⁵⁴¹

By contrast, the IMTFE did not convict the accused Togo Shigenori under Count 55 because, “[a]t the time of his resignation atrocities committed by the Japanese troops had not become so notorious as to permit knowledge to be imputed to him.”⁵⁴²

723. In the *Hostages* case, the Court stated that the commanding General of an occupied territory, in order to fulfil his duty of “maintain[ing] peace and order” and “protect[ing] lives and property,” may need:

adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defence.⁵⁴³

724. In the *Pohl* case, the Tribunal described one defendant’s assertions that he lacked knowledge of crimes committed in labour camps under his jurisdiction as “assumed or criminal naivete” because “it was his duty to know.”⁵⁴⁴ Another defendant was acquitted because the crimes committed by subordinates were not of sufficient magnitude or duration to put him on notice.⁵⁴⁵
725. The post-World War II Tribunals found that a defendant had reason to know of criminal activity committed by subordinates where his command position gave him the duty to know or find out what was happening in his area of command. Thus, asserting lack of knowledge will not have success when the superior has a duty to know and fails in his duty to adequately supervise subordinates.
726. Criminal negligence was also applied by the Tribunals to defendants who failed in their duties to know about crimes committed by subordinates. As stated in the *Roechling* case, a CCL10 trial in the French Zone of Occupation of industrialists who had *de facto* power and influence to prevent the mistreatment of forced labourers by the Gestapo, “[n]o superior may prefer this defence indefinitely; for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence.”⁵⁴⁶ The criminal negligence standard was also applied in the *High Command*

⁵⁴¹ IMTFE Judgement (Roling), p. 446 (emphasis added). The IMTFE noted in its separate verdict for defendant Muto, that “widespread” atrocities were committed by the troops under his command “for which MUTO shares responsibility.” p. 455.

⁵⁴² IMTFE Judgement (Roling), p. 461.

⁵⁴³ *Hostages* case, p. 1271.

⁵⁴⁴ *Pohl* case, p. 64.

⁵⁴⁵ *Pohl* case, defendant Tschentscher, p. 63.

⁵⁴⁶ The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v Herman Roechling and Others, XIV Law Reports, Appendix B, p. 1075, para. 1092 (*Roechling* case).

case, in which the Tribunal held that for a superior to be held criminally responsible for acts of subordinates, there must be a “personal dereliction”,

[t]hat can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence.⁵⁴⁷

727. We understand the ‘wanton, immoral disregard’ language to indicate that guilt can be established where acquiescence results not only from knowing failure but also from a ‘willful blindness’ on the part of the commander.⁵⁴⁸

4. *Failure to Take Necessary and Reasonable Measures*

728. In sum, a commander or superior with the requisite power of control over subordinates who knew or had reason to know of the commission of crimes is criminally responsible for crimes under the doctrine of superior responsibility if – in the language of this Tribunal’s Charter – he or she then “failed to take the necessary and reasonable measures to prevent or repress their commission or submit the matter to the competent authorities for investigation and prosecution.” Thus, to be found culpable, each accused here must have failed to take necessary and reasonable measures available to prevent or repress rape and sexual slavery, or punish perpetrators thereof.
729. While it is not required that the superior be successful in the prevention of crimes or the repression of their commission, the duty is discharged only if he or she has made adequate efforts under the circumstances of each situation. Token, limited, or insincere efforts will generally not suffice. For instance, a commander cannot hide behind assurances that crimes are not being committed or have ceased when other circumstances should have alerted the commander to the fact that those assurances are false or questionable. The IMTFE found Japanese Foreign Minister Hirota guilty of having “disregarded his legal duty to take adequate steps to secure the observance and prevent breaches of the laws of war.”⁵⁴⁹ After receiving reports of atrocities in Nanking, he contacted the War Ministry, which assured him the atrocities would cease. However, because reports of atrocities continued to come in for at least a month, the Tribunal found that Hirota was “derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end” to the crimes.⁵⁵⁰
730. A commander also fails to fulfil his or her duty to secure performance of the laws of war when punitive or disciplinary measures are not sufficiently severe or effective in relation to the seriousness of the crimes committed. In the *Hostages* case, the Tribunal found that certain measures taken by the defendant Felmy against subordinates who had committed crimes were inadequate. For example, he recommended that the officer in charge of a regiment which had massacred two villages be subjected to “disciplinary action (the

⁵⁴⁷ *High Command* case, pp. 73-74. Considering the duties of a commander in overseeing occupied territory, the Tribunal further stated to be held criminally responsible, the “occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal.” pp 76-77.

⁵⁴⁸ Major Michael L. Smidt, Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations, 164 *Military Law Rev.* (2000), pp. 155, 182-83.

⁵⁴⁹ IMTFE Judgement (Roling), p. 448.

⁵⁵⁰ IMTFE Judgement (Roling), p. 448.

method of trying minor offences)” and never followed up to see what action had been taken.⁵⁵¹

731. When the potential or actual gravity of the harm is high, the level of effort required to discharge this duty is correspondingly high. In the *Hostages* case, the Court dismissed defendant Lanz’s excuses that “as tactical commander he was too busy to give attention to the matter” and convicted him for failing to take any action on the illegal shooting of hostages and reprisals against prisoners.⁵⁵² The Judgement noted that “the unlawful killing of innocent people is a matter that demands prompt and efficient handling by the highest officer of any army.”⁵⁵³
732. Moreover, preventing and punishing crimes under the direct command of others is the duty of the highest level government and military officials. For example, the IMTFE found that Prime Minister TOJO “knowingly and willingly refused to perform his duty to enforce performance of the laws of war” despite his attempted explanation that “a commander in the field is not subject to specific orders from Tokyo.” That Tribunal rejected his attempt to disconnect himself from any duty to stop the crimes.⁵⁵⁴
733. The Judges are mindful that international law does not oblige a commander or superior to perform the impossible: he or she may only be held criminally responsible for failing to take such measures as are within his or her power or authority. At the same time, in some circumstances it may be necessary to take certain steps to prevent incurring criminal liability for acts of others, including superiors. For example, the IMTFE concluded that Foreign Minister Shigemitsu should have resigned rather than allow certain crimes to be committed in the territory under his command.⁵⁵⁵ Only by resigning could he “quit himself of responsibility which he suspected was not being discharged.”⁵⁵⁶
734. The level of effort required to discharge one’s duty to prevent, repress, or punish crimes also depends on the nature of a superior’s responsibilities. As noted above, if a commander is responsible for the well-being of civilians, for example, in a prison camp, then the duty to prevent crimes against such civilians is heightened.
735. It is clear that commanders and other superiors have a duty to administer a system that prevents and punishes the commission of crimes against civilians, including in detention camps and in occupied or annexed territories that are under their command. There is an indisputable duty on military and civilian leaders to take necessary and reasonable measures to prevent crimes, including slavery and rape, committed by subordinates. This duty is even greater in situations where the leaders have created the situation that poses extraordinary risks upon persons entrusted to their care, such as persons in the “comfort stations.” This duty also requires that commanders and other superiors take all necessary measures to prevent the abduction or deceptive recruitment of girls and women into the “comfort stations” and their mistreatment, including rape and sexual slavery, while confined as prisoners therein.

⁵⁵¹ *Hostages* case, pp. 1990-1993.

⁵⁵² *Hostages* case, defendant Lanz, pp. 1993-1996.

⁵⁵³ *Hostages* case, defendant Lanz, pp. 1993-1996.

⁵⁵⁴ IMTFE Judgement (Roling), p. 458.

⁵⁵⁵ IMTFE Judgement (Roling), p. 458.

⁵⁵⁶ IMTFE Judgement (Roling), p. 458.

736. In concluding this discussion of command and other superior responsibility under Article 3(2) of this Tribunal's Charter, it is important to distinguish superior responsibility for omissions from the criminal responsibility of commanders and superiors as individuals. The ICTY clarifies that the liability of superiors attaches because of omission, not positive acts of the accused. At the same time, it makes clear that positive acts and certain omissions of the accused may also permit a finding of individual criminal culpability under Article 3(1) of the Charter, rather than or in addition to superior responsibility under Article 3(2) of the Charter.⁵⁵⁷
737. The *Kordic* Trial Chamber distinguished the situations in which superiors should be charged with individual instead of superior responsibility, stating:

The Trial Chamber is of the view that in cases where the evidence presented demonstrates that a superior ...[]exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by Article 7(1) [individual responsibility]. Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).⁵⁵⁸

738. Thus, it is only when a superior fails to prevent, suppress, or punish acts committed by subordinates that liability incurs under Article 3(2). For his or her own acts or omissions, the most appropriate charge is for individual responsibility under Article 3(1). The legal standards of individual responsibility will be examined below.

C. ARTICLE 3(1): INDIVIDUAL RESPONSIBILITY FOR PLANNING, INSTIGATING, ORDERING, AIDING OR ABETTING CRIMES

739. The accused in the present case have also been charged with planning, instigating, ordering, or aiding and abetting the rapes and sexual slavery, pursuant to Article 3(1) of the Charter. These are all recognised as forms of "participation" in the crimes. In addition to physical perpetrators, individuals can be held responsible for crimes which they did not commit physically, but to which they contributed directly (such as by ordering) or indirectly (such as by abetting).⁵⁵⁹

⁵⁵⁷ See, e.g., *Kordic* Trial Chamber Judgement, para. 369.

⁵⁵⁸ *Kordic* Trial Chamber Judgement, para. 371.

⁵⁵⁹ The ICTY in the *Krstic* Trial Chamber Judgement defined various forms of individual criminal responsibility, as covered in Article 7(1) for individual responsibility of its Statute:

- "Planning" means that one or more persons design the commission of a crime at both the preparatory and execution phases;
- "Instigating" means prompting another to commit an offence;
- "Ordering" entails a person in a position of authority using that position to convince another to commit an offence;
- "Committing" covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law;
- "Aiding and abetting" means rendering a substantial contribution to the commission of a crime; and
- "Joint criminal enterprise" liability is a form of criminal responsibility which the Appeals Chamber found to be implicitly included in [the Statute]. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.

Krstic Trial Chamber Judgement, para. 601 [citations omitted].

740. Article 5(c) of the IMTFE Charter, granting the Tribunal jurisdiction over crimes against humanity, imposed responsibility upon persons in the position of the accused as follows: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." Pursuant to Articles 5(b) and 5(c) of the IMTFE Charter, the Indictment charged many of the accused under Count 54 with "ordering, authorising and permitting" war crimes and crimes against humanity.
741. Article II of CCL10 also contains a provision for assessing individual responsibility, stipulating that a person "is deemed to have committed a crime" if that person "(b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission."
742. The legal authority for and criteria of the various forms of participation required to incur individual responsibility under the terms of the Charter will be discussed below.

1. Ordering, Planning, and Instigating

743. A superior is individually liable for crimes committed pursuant to his or her own orders. This is derived from basic principles of complicity, and makes particular sense in the context of a military hierarchy, which carries out its operations by means of command and discipline. A superior who issues orders that a crime be carried out is utilising the available structure of command to mobilise potentially huge numbers of subordinates, depending on the commander's own position within the hierarchy, to participate in the commission of the crime.
744. Liability for issuing orders to commit crimes against humanity can be found in the Turkish court-martial trials of the Turkish leaders deemed responsible for the Armenian genocide. Established at British insistence, the Turkish Court tried the lieutenant governor and police commander of a district from which Armenians had been deported *en masse*. In finding them guilty, the Court found that the two accused had:

issued awesome orders to their subalterns at the time of the deportations of the Armenians. Acting under these orders, their underlings...without regard to ill-health, treating men, women and children alike, organised them into deportation caravans.

[I]llegal orders were handed down for the murder of the males...[T]hey were premeditatedly, with intent, murdered, after the men had had their hands tied behind their backs.... The officials then practiced all methods of murder...Nor did they make any attempt to prevent further killings...

All these facts are against humanity and civilization. They are never compatible in any manner to human considerations.⁵⁶⁰

745. Both the Nuremberg and Tokyo Tribunals, as well as the subsequent proceedings against alleged German and Japanese war criminals, held certain defendants criminally liable for having ordered crimes. Most defendants in those cases, as in the present one, were high

⁵⁶⁰ Quoted in Bass, *Stay the Hand of Vengeance*, p. 125.

level civilian and military officials, rather than the soldiers who actually committed the atrocities by their own hands.

746. A superior may also be responsible for orders issued under his authority, including those prepared by a staff officer. The *High Command* case states,

While the commanding officer may not and frequently does not see these orders, in the normal process of command he is informed of them and they are presumed to represent his will unless repudiated by him.⁵⁶¹

747. A chief of staff is also liable for orders which he issues under the commander's authority if he drafts the order (directly or through subordinates) or takes personal action to see that it is executed, i.e. if he is "more than a mere transcriber" of the order.
748. Moreover, a commander is also liable for "ordering" a crime if the order is directed to him and he passes it down the chain of command, knowing its criminal nature. Then he or she is considered to have committed a morally culpable act which carries legal sanction. However, if the order is directed to a commander's subordinates, and is merely passed through the commander's headquarters, the commander may not be individually liable for "ordering" the crimes, although he or she may still be liable under a theory of "command responsibility" if he knew or should have known of the crimes and failed to take steps to prevent them.⁵⁶²
749. The ICTY Chambers have addressed some of the issues related to proof. The *Blaskic* Trial Chamber found that the existence of an order may be proved through circumstantial evidence; there is no requirement that an order be in writing.⁵⁶³ The *Kordic* Trial Chamber made clear that, for individual responsibility to attach, no superior-subordinate relationship needs to be established; it is sufficient if the accused possessed the authority to order and gave a criminal order.⁵⁶⁴
750. In the present case, the accused commanders and other superiors can be held individually liable for ordering a crime charged to the extent that they had the authority, *de jure* or *de facto*, to issue an order, that circumstantial evidence proves the existence of an order, or that staff officers subject to their authority issued an order that established or maintained the "comfort system" or otherwise resulted in the rape or sexual enslavement of "comfort women" or, for two of the accused, rapes at Mapanique.

2. *Aiding and Abetting*

751. The factual findings may also give rise to a conclusion that the accused aided or abetted the rapes and sexual slavery. When examining the case law of the Tribunals after the Second World War, the Judges are somewhat hampered by the imprecise and sometimes inconsistent use of terminology. The phrases "concerned in the killing" and "permitted the commission of Conventional War Crimes"⁵⁶⁵ have been used by the Tribunals to indicate aiding and abetting, although on occasion the terms are used to reflect co-perpetration. While the concepts of "aiding and abetting" are often fused, the discussion

⁵⁶¹ *High Command* case, p. 1261.

⁵⁶² *High Command* case, section: XI: Judgement: Orders, Part 1.

⁵⁶³ *Blaskic* Trial Chamber Judgement, para. 281.

⁵⁶⁴ *Kordic* Trial Chamber Judgement, para 388.

⁵⁶⁵ IMTFE Indictment, Count 54.

below distinguishes them for the purpose of more clearly identifying what constitutes a finding of responsibility under these categories. Following the useful discussion of these terms by the ICTR Trial Chamber in the *Akayesu* case, we concur that “aiding” means giving assistance to someone, while “abetting” involves facilitating the commission of an act by being sympathetic thereto.⁵⁶⁶

(a) *Aiding: Actus Reus*

752. The post World War II Tribunals found criminal responsibility for aiding on the basis of the following actions: participating in the running of a prison camp that constituted a system of ill-treatment of prisoners; procuring Zyklon B gas, constructing gas ovens, arranging for trucks to transport inmates to the gas chambers, and alerting the camp bureaucracy as to the imminent arrival of transports at the Auschwitz concentration camp; standing by, as members of the German guard, while civilians injured and killed American pilots and paraded them through the streets; denouncing French citizens involved in the resistance movement and later arrested and tortured or deported; driving the lorry which carried victims to the woods for execution; digging the grave for the victims; accompanying superior officer to look for suitable sites for shooting; and lighting the oven of a concentration camp crematorium.
753. In each case, the actions of the accused had a material effect on the perpetration of the crime. Thus, in order for a person to be found to aid a crime, some level of assistance is necessary. This principle was confirmed by an ICTY Trial Chamber in the *Tadic* case, which concluded that the post-war Tribunals found criminal responsibility based on these actions because they had a material effect on those of the principals.⁵⁶⁷ Significantly, the acts did not have to be a necessary condition of the crime without which the crime would not have occurred. In other words, the act of the aider does not have to be a *conditio sine qua non* of the crime, but it does need to have contributed in some significant way to its commission.
754. In the *Dachau Concentration Camp* case, a U.S. Military Tribunal found that once the existence of a criminal system has been established, a person can be criminally liable for participating in this system.⁵⁶⁸ Participation was generally found if the accused held a high level position or if he physically committed crimes, such as beatings, torture, or execution.
755. While aiding crimes, which are not part of a “criminal system,” must have a material effect on the commission of the crime, any participation in a criminal enterprise is sufficient for a finding of guilt.⁵⁶⁹ This seems to indicate that any participation in a criminal enterprise may, depending on the circumstances, be sufficient to have a material effect on a crime, although more current jurisprudence indicates the participation would need to have a “direct and substantial effect.”

⁵⁶⁶ *Akayesu* Trial Chamber Judgement, para. 484.

⁵⁶⁷ The ICTY states that the defendant’s actions must “make a significant difference to the commission of the criminal act by the principal.” *Tadic* Trial Chamber Judgement, para. 233. See also *Kunarac* Trial Chamber Judgement, para. 391, which required a “substantial effect.”

⁵⁶⁸ *Dachau Concentration Camp* case, pp. 1312-1314. See also *Kvocka* Trial Chamber Judgement, which held that Omarska prison camp was a joint criminal enterprise, and anyone who knowingly participates in the enterprise is liable if the participation is significant.

⁵⁶⁹ We note that this conclusion was also reached by the *Furundzija* Trial Chamber Judgement, para. 213.

756. In *Tadic*, the accused, a low level actor who nonetheless wielded power through his bullying and violence, was found guilty of cruel treatment for aiding and abetting a crime when his presence at the scene was deemed to have had a “direct and substantial effect” on the commission of the crime, namely forcing a detainee to bite the testicles of another detainee.⁵⁷⁰ Also, in another ICTY case, the *Furundzija* Trial Chamber held that an accused who verbally interrogated a victim while another raped her aided and abetted the rape through his presence, acts, words, and omissions.⁵⁷¹ The Rwanda Tribunal has made similar findings, for instance, by holding the accused Akayesu responsible for rape as a crime against humanity for aiding and abetting the crimes when his presence and words were found to have facilitated the rapes.⁵⁷² In each case, the person was convicted of more than mere presence – his acts or omissions were found to have had a substantial effect on the crime’s commission.

(b) *Abetting: Actus Reus*

757. As noted above, the *actus reus* of abetting involves facilitating the commission of a crime being sympathetic thereto. This can take the form of either an act or an omission. If the accused fails to take action to prevent a crime, he or she may be found criminally liable for facilitating that crime. For example, in the *Wagner* case, a conviction was rendered against a defendant found to have failed to grant the “privilege of mercy” to persons unlawfully condemned to death by the Nazi Special Courts despite the fact that he had the power to do so.⁵⁷³ While some cases rest almost entirely on the failure of the defendant to take action, in other cases, the defendant’s lack of action, combined with affirmative acts of assistance, forms the basis for a finding of guilt.⁵⁷⁴
758. Where the post-World War II Tribunal decisions based a finding of guilt solely on failing to act, thus on omissions, the Courts tended to look at whether the accused was in a position to influence the crime or the outcome. The inaction of a person in an influential position may have the effect of facilitating the crime, particularly if he or she has the ability to prevent it. In some cases, the omission may be intended to give “silent approval” to the crime.⁵⁷⁵ For example, the IMTFE found Muto guilty under Count 54 for giving silent encouragement when he permitted atrocities to occur when he was in “a position to influence policy” as Yamashita’s chief of staff.⁵⁷⁶ In addition, that Tribunal found that Tojo Hideki “knew and did not disapprove of the attitude” that soldiers could ignore the rules of warfare and could mistreat prisoners of war.⁵⁷⁷
759. Likewise, in the *Einsatzgruppen* case, the Tribunal found the defendant Fendler guilty based on inaction: although Fendler surmised that the procedure of condemning the Communist party functionaries to death was “too summary,” he did nothing about it, even though his objection would have been influential.⁵⁷⁸ Being present at a crime scene,

⁵⁷⁰ *Tadic* Trial Chamber Judgement, paras. 689, 726.

⁵⁷¹ *Furundzija* Trial Chamber Judgement, para. 166.

⁵⁷² *Akayesu* Trial Chamber Judgement, at paras. 461.

⁵⁷³ Trial of Robert Wagner and Six Others, Law Reports of Trials of War Criminals, Vol. III, p. 25 (*Wagner* case).

⁵⁷⁴ *Rohde* case, defendant Wochner, p. 54; IMT trial, defendant Frick.

⁵⁷⁵ *Einsatzgruppen* case, the defendant Fendler, p. 209, defendant Walter Haensch, p. 184.

⁵⁷⁶ IMTFE Judgement (Roling), p. 455. While we have noted above that this verdict reflects an application of superior responsibility, we also understand it as an example of abetting as a matter of individual responsibility.

⁵⁷⁷ IMTFE Judgement (Roling), p. 463.

⁵⁷⁸ *Einsatzgruppen* case, the defendant Fendler, p. 209; see also Defendant Walter Haensch, p. 184.

though not required for criminal responsibility to attach,⁵⁷⁹ can be sufficient to constitute abetting if the accused is in a position of influence and respect. In this situation, the approving spectator gives encouragement and moral support – which constitutes the *actus reus* of the crime – if his or her omissions have a significant effect on the commission of the crime.⁵⁸⁰

760. Whether as an approving spectator or supporter from afar, the accused's position of influence and corresponding power is pertinent to the determination of whether abetting occurred. In contrast to the above examples, certain defendants were acquitted of individual responsibility because they were not in a position to "control, prevent, or modify" criminal activities of which they had knowledge.⁵⁸¹ In the *Einsatzgruppen* case, for example, some of the defendants were acquitted of individual responsibility if his low rank failed "to place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation."⁵⁸² As noted previously, the IMTFE acquitted Muto for his failure to stop the atrocities at Nanking because, as staff officer to General MATSUI, he was not in a position of sufficient influence to alter the outcome.
761. It follows then that abetting the commission of a crime does not require tangible or active assistance or facilitation, nor does it require active contribution or participation. Rather, encouragement and moral support alone, whether active or passive, through either action or inaction, can constitute the *actus reus* of abetting where the person occupies a position of trust or influence.

(c) *Aiding and Abetting: Mens Rea*

762. It is also necessary to ascertain the level of knowledge or intent that is required for a person to be found guilty of aiding and abetting a crime against humanity.
763. The jurisprudence of the post World War II Tribunals demonstrates that, in order to be found guilty of aiding or abetting a crime, it is not necessary to share the intent of the direct perpetrator or principal. The *Furundzija* Trial Chamber considered whether it was necessary for the accomplice to share the *mens rea* of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime was sufficient to constitute *mens rea* for aiding and abetting the crime. After surveying post World War II caselaw, the Chamber concluded:

[I]t is not necessary for an aider and abettor to meet all the requirements of *mens rea* for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in

⁵⁷⁹ See Trial of Karl Adam Golkel and 13 Others, British Military Court Wuppertal, Germany, 15-21 May 1946; *Rohde* case, p. 54.

⁵⁸⁰ See *Auschwitz Concentration Camp* case, defendant Mulka. The ICTY discussed this in the *Furundzija* Trial Chamber Judgement, para. 215.

⁵⁸¹ *Einsatzgruppen* case, defendants Ruehl and Graf, p. 243; see also defendant Foertsch and defendant von Geitner, Trial of Wilhelm List and Others ("Hostages case"), in Substantive and Procedural Aspects of International Criminal Law, Volume II Part 2, Documents and Cases (2000, Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds.) p. 1977; United States v. Kurt Goebell et al. (the *Borkum Island* case).

⁵⁸² *Einsatzgruppen* case, defendants Ruehl and Graf, p. 243. Note however that the defendants were not acquitted of all crimes alleged against them.

itself be perfectly lawful; it becomes criminal only when combined with the principal's unlawful conduct.⁵⁸³

764. In short, the aider or abettor need not share the *mens rea* of the principal. However, he or she must know that his or her actions or omissions would assist the principal in the commission of the crime. For instance, in the *Einsatzgruppen* case, the accused Klinghoefer was found to have known that his locating, examining, and handing over of the lists of Communist functionaries to his Einsatz unit would assist them in executing those on the list of persons to be exterminated.⁵⁸⁴
765. The post-war jurisprudence supports a finding that, in certain circumstances, knowledge of the intended criminal conduct can be presumed, and thus, it can be inferred. We note that the ICTY interpreted the *Justice* case in this way. The *Tadic* Trial Chamber observed that, in the post-World War II trial, the Court had concluded that either actual or presumed knowledge must be shown:

[I]f an accused took part with another man with the knowledge that the other man was going to kill, then he was as guilty as the one doing the actual killing. Again, in the Trial of Joseph Altstötter and Others ("Justice case"), the fact that the accused had specific knowledge was treated as essential. The judgement repeatedly confirmed this, stating that the various people charged *knew or had knowledge, or must be assumed to have had knowledge*, of the Nacht und Nebel plan, of Hitler and his associates' use of the German legal system, and of the plans or schemes for racial persecution. In several places, the judgement presumed knowledge on the part of an accused.⁵⁸⁵

766. Thus, in applying the law to the facts of this case, it is necessary to examine whether the accused had direct or inferable knowledge that the "comfort women" were forced, sold, or deceived into slavery, forced to have sex against their free will, and/or that they were held and maintained under conditions constituting enslavement.
767. The Judges will next determine whether there is evidence before this Tribunal to hold the accused criminally responsible as individuals or as superiors for rape and sexual slavery, as charged in the Common Indictment.

⁵⁸³ *Furundzija* Trial Chamber Judgement, para. 243.

⁵⁸⁴ *Einsatzgruppen* case, pp. 204-205; also see the *Rohde* case, *Schonfeld* case, and *Zyklon B* case.

⁵⁸⁵ *Tadic* Trial Chamber Judgement, para. 675 (emphasis added).

PART V – LEGAL FINDINGS AND VERDICTS

A. INTRODUCTION: SUMMARY OF THE CHARGES AND EVIDENCE RECEIVED

768. Counts 1 and 2 of the Common Indictment charge nine accused – Emperor HIROHITO, ANDO Rikichi, HATA Shunroku, ITAGAKI Seishiro, KOBAYASHI Seizo, MATSUI Iwane, TERAUCHI Hisaichi, TOJO Hideki, and UMEZU Yoshijiro – with criminal responsibility under international law for the crimes of sexual slavery and rape as crimes against humanity in accordance with Article 3 of the Charter of this Tribunal.
769. Count 3 charges Emperor HIROHITO and YAMASHITA Tomoyuki with criminal responsibility for the rape of women at Mananque as a crime against humanity.
770. As to all Counts, the Common Indictment alleges that rape was committed by persons acting pursuant to an order, plan, or policy of the accused, or with their assistance, instigation, encouragement, or acquiescence. To find such participation would establish the accused's individual responsibility under Article 3(1) of this Tribunal's Charter.
771. In addition, under Article 3(2) of the Charter, a military commander or other superior may be held criminally responsible for the crimes of sexual slavery and rape committed by persons over whom they exercised *de jure* or *de facto* control by virtue of their position or authority.
772. The two different bases of individual criminal responsibility enunciated by Articles 3(1) and 3(2) of the Charter each impose different legal requirements, as recognised and applied by the post-war Tribunals and as summarised below.
773. To incur Article 3(1) individual responsibility, the accused must have participated through ordering, planning, committing, instigating, aiding, or abetting crimes. In addition, the Prosecutor must show that the accused had knowledge of the crime. With regard to proving Article 3(1) responsibility for rape and sexual slavery in the "comfort system," the evidence must show that the accused not only knew about the existence of the "comfort stations," but also knew that the "comfort system" involved criminal activity. This standard could be met if, for example, it could be shown that the accused knew that recruitment for the stations was deceptive or coercive or that the women were not providing sexual services willingly.
774. If it is demonstrated that the accused had the requisite *mens rea*, then, for Article 3(1) individual responsibility to attach, the Tribunal must determine whether the accused planned, instigated, ordered, aided, or abetted the "comfort system" by their acts or omissions. These are all commonly recognised as forms of "participation." Thus, the Article 3(1) individual responsibility *actus reus* here would require that the accused participated, through any of the aforementioned acts or omissions, in the "comfort system" or in the rapes at Mananque.
775. By contrast, to incur Article 3(2) command or superior responsibility, the evidence must show that the accused knew or had reason to know that subordinates may be involved in criminal activity, and the superior failed to take necessary and reasonable measures to prevent or suppress the crimes and punish the perpetrators.
776. For Article 3(2) superior responsibility to attach once the mental element is satisfied, it is left to the Trial Chamber to determine whether the accused was a superior who failed in

his duty to prevent or punish the crimes committed by subordinates. Because there is no evidence which suggests that any meaningful attempts were made by the accused to prevent or punish crimes related to the “comfort system” or the rapes in Mapanique, the sole remaining issue for Article 3(2) liability is to determine whether the accused had a duty to prevent the commission of the crimes by subordinates.

777. We have previously found the powerful and frank testimonies of the survivors of rape and sexual slavery to be credible and accept their testimony concerning the crimes committed both inside and outside of the “comfort system” as trustworthy. The evidence demonstrates the frequent occurrence of rape accompanying the Japanese military aggression, including in Mapanique, as well as the existence of “comfort stations” or facilities for rape and sexual slavery in virtually all regions.
778. In addition to the testimonies of the survivors, the Tribunal heard the testimony of two perpetrators, former Japanese soldiers who confessed to participating in or otherwise encouraging and facilitating the rape of women inside and outside the “comfort station” system. Their testimony confirmed that the military encouraged a culture of sexual violence toward “comfort women” and local women. The perpetrator-witnesses authenticated the accusation that sexual violence inside and outside the “comfort system” was committed on a selective and racist basis, targeted against women whose rape or abduction would not, in the Japanese’s view, generate objection, outrage, or revenge. We found this testimony, consisting of admissions of their own criminal conduct, to be credible.
779. The Tribunal also heard and accepted the testimony of a number of experts addressing the question of the roles and responsibility of the Japanese military and civilian officials for the system of military sexual slavery known as “comfort women” and its integral relation to the Japanese military aggression, as well as its sources in the prevailing misogynist and racist imperial culture. The experts assisted us by providing and interpreting a small but significant number of official Japanese documents that they and others had been able to rescue, notwithstanding the massive destruction of documents before surrender and the continued concealment of documents by the Japanese and certain Allied governments. Their testimony and the documents both confirm the testimony of the survivors with respect to the character of the sexual slavery system and shed further light upon the involvement of high-level political and military officials in its design, execution, and maintenance. Experts in international law also provided useful information on appropriate legal standards in effect during the war. The Judges were further assisted in their understanding of the profound and lasting nature of the trauma inflicted upon the “comfort” women by the testimony of psychological experts and sociologists.
780. In this section, we will first summarise the findings relevant to the assessment of criminal responsibility for the system of military sexual slavery charged in Counts 1 and 2 of the Common Indictment. We will then apply the criteria of Article 3(2) and Article 3(1) criminal responsibility to the nine accused herein of those charges. Secondly, we will summarise the evidence and findings relevant to the assessment of the criminal responsibility of the accused Emperor HIROHITO and YAMASHITA with respect to the rape of women at Mapanique charged in Count 3 of the Common Indictment.

B. COUNTS 1 AND 2 OF THE COMMON INDICTMENT

1. *Rape and Sexual Slavery in the "Comfort System" as Crimes Against Humanity*

(a) *Summary of Findings Relevant to the Assessment of Criminal Responsibility of the Accused*

781. There is abundant evidence, most notably from victim-survivor testimony, that the Japanese government and military were involved in all aspects of the sexual slavery system. In addition, the evidence provided by experts confirms that Japanese officials at the highest levels participated knowingly in the system of sexual slavery.
782. The Tribunal has considered the findings of the IMTFE and the evidence before this Tribunal regarding the context in which the crimes charged occurred. The totality of the evidence compels a conclusion that there was a consistent pattern of gross abuses committed against civilians by the Japanese military in the territories under Japanese control or attack. The documented atrocities committed by the soldiers provide incontrovertible evidence that the Japanese military cultivated a culture of oppression and violence, including sexual violence, against both women and men. The evidence before us demonstrates that the "comfort system" was a cruel reflection and systematic extension of this culture, visited principally upon women who were treated as inferior and expendable by virtue of their gender, ethnicity, poverty, and subordinated status.
783. The evidence is irrefutable that Japanese military and political leaders were, at the very least, aware of the propensity of soldiers to rape and otherwise sexually assault civilians. This predisposition was inveterate both before and after the establishment of the "comfort system." After the assault on Nanking, consisting of mass murder, rape, and pillage, which became known internationally as the "Rape of Nanking," the rape crimes drew intense international condemnation. These crimes became infamous, cast the Japanese military in disrepute in many parts of the world, and created a major diplomatic issue for the top political and military leadership. In addition, the widespread rape of local Chinese women before, during, and after the conquest of Nanking generated local outrage and resistance which threatened to impede Japan's conquest of China. Accordingly, largely as a result of the mass rapes committed in and around Nanking, in late 1937 Japanese military and civilian authorities approved a massive expansion of the "comfort system," which had begun on a relatively small scale in 1932.
784. Thus, among the urgent goals of the expansion of this system was to reduce the indiscriminate rape of civilian populations and thereby minimize international outrage and local resistance and protect the public image of the Japanese military and state. The evidence demonstrates that the Japanese leaders expanded the "comfort system" for other reasons as well: to prevent the soldiers from being infected with sexually transmitted diseases; to provide a means of "recreation" for soldiers, including to stoke them for battle and relieve their tensions afterward; and to avoid the leakage of strategic information from soldiers visiting brothels outside the control of the Japanese. There is no doubt that the "comfort women" system of sexual servitude was perceived as essential to the success of the Japanese military and its war of aggression.
785. Several key documents reveal the criminal nature of the recruitment process and the sexual servitude imposed upon "comfort women." For example, the Recruitment Memo of March 1938 reported that recruiters used by the expeditionary forces were rounding up

or recruiting women by methods tantamount to abduction, with the effect of creating hostility toward the Japanese military. Consequently, the Recruitment Memo, which was sent by the War Ministry to the North China Area Army and Central China Expeditionary Forces, demands that greater attention be directed toward selecting more discrete recruiters (i.e., recruiters who would not abduct women off the street in broad daylight). A series of Japanese reports and secret telegrams concerning Taiwan demonstrate high-level Ministry and military involvement in minute details involving the trafficking of women and girls and the establishment and maintenance of the sexual slavery system. Even information regarding something as basic as the travel arrangements of individual "comfort women" was reviewed at the highest levels. Two reports by the Allied powers after the defeat of Japan further substantiate the claim that the Japanese Imperial Army was involved both directly and indirectly in illicit procurement and operation of the system of sexual slavery. These reports also verify that the Allies had evidence of the coercive nature of the "comfort system" and, hence, that their failure to charge IMTFE defendants for crimes associated with the "comfort women" system was a conscious one.

786. Incontrovertible evidence verifies that the Japanese government and military used military personnel, local agents (such as police officers), village headmen, and private traffickers in the procurement process. The evidence indicates that they increasingly encountered problems filling their quotas of "comfort women" necessary to satisfy sexual demands of a Japanese military comprised of some two million soldiers. The accepted ratio of "comfort women" to soldiers and the cruel and inhumane conditions alone would have alerted political and military leaders, policy-makers, and those who implemented the scheme that the "comfort system" was coercive and women were subjected to abusive treatment and conditions.
787. It is highly significant that the documents which provide evidence of recruitment and regulations applicable to the "comfort women" do not also contain the necessary protective policies and procedures that would normally characterise a voluntary system. For example, there were no instructions directing the stations to implement measures ensuring that the girls and women were making voluntary decisions to join, were paid prevailing wages, or were able to leave and able to dictate or at least negotiate the terms of services. These omissions are conspicuous. Instead, the regulations were directed toward protecting the health of the Japanese soldiers and the reputation of the military.
788. It is impossible to give credence to the claim that officials believed that the "comfort" girls and women from conquered, colonized, and annexed territories were providing their services willingly to assist the Japanese army, or that the women and girls would have agreed to provide or continue to provide sexual services once the brutal and slave-like conditions in the "comfort stations" became known. The large numbers of women impressed into the sexual slavery system and the fact that the overwhelming majority was young, from poor, rural backgrounds, and from areas exploited and oppressed by Japan renders spurious subsequent claims that the women were not coercively or deceptively recruited.
789. Further, the urgency of the recruitment process and the diverse, dangerous, and extensive number of places to which the "comfort" girls and women were transported also signalled the coercive nature of the system. Experts before this Tribunal estimate that approximately 200,000 girls and women were sexually enslaved, transported, and kept in a variety of facilities, be it formal stations, makeshift shacks, or opportune caves. The documents, the testimony of survivors, and the admissions by the state of Japan make

clear that these stations existed everywhere that Japanese troops were present, including on the frontlines, and that the women had no capacity to refuse services to any demanding them. The logistics alone would have been impossible to implement without approval from the top authorities. Both army and navy support and coordination were required simply for the transportation of the women across countries and through war zones. This extensive system had to be supplied with food and necessities, however minimal; the military also provided to the “comfort stations” condoms, medical personnel, and often dangerous “treatments” for sexually transmitted diseases and pregnancy. Although we do not have amounts, the costs involved in procuring, transporting, and maintaining the system had to have been substantial and required a significant allocation of resources.

790. The ubiquity of the “comfort stations” and the inhumane conditions in which the “comfort women” and girls were detained would have been obvious to soldiers and officers, including the visiting commanders and staff, as would the abuses committed in the stations. It would have had to be apparent that many of the victims were very young, and most were in a perpetual state of exhaustion, pain, malnutrition, and deteriorating health due to the extreme physical, mental, and sexual violence to which they were subjected. In addition to the rapes, tortures, and beatings, they were generally forced to endure horrendous conditions of detention, such as cramped spaces, inadequate food, water, hygiene, and ventilation, selective and invasive medical treatment, repressive, degrading, and exploitative treatment, and reproductive violence, including pregnancy and/or maternity resulting from rapes, forced abortion, forced sterilization, or illness from pregnancy-prevention drugs.
791. The involuntary nature of the “comfort stations” would also have been clear from the fact that they were commonly surrounded by barbed wire and had armed guards and locked doors, indicating that the women were held against their will. The presence of stations was known throughout the military. It was a matter of great importance to the officers that the soldiers be serviced at the same time as the officers enjoyed privileged access.
792. Two former soldiers and perpetrators testified that they knew the women were not participating voluntarily and that use of the “comfort stations,” as part of a culture of sexual violence against women, was encouraged by their superiors. Further, their testimony undermines the claim that rape was discouraged even against local women. The mistreatment of women inside and outside the “comfort” stations was so common that the perpetrator-witnesses committed rape or encouraged their own subordinates to rape and then kill local women. One perpetrator-witness recalled how they were taught to kill women of the opposing side because they could reproduce and bear children. The other perpetrator-witness confessed that when he was a superior officer and he told his subordinates they could do whatever they wanted to do to the women of a village, the soldiers went into homes and raped the women. The perpetrator-witness explicitly stated that the Japanese soldiers were allowed to rape local women as long as they were not the type of women who could register complaints or have their complaints seriously considered, and thus generate negative attention for the military. Their testimonies corroborate those of survivors.
793. There is evidence that innocuous terms such as “hostess”, “comfort women”, “comfort station”, and “houses of relaxation” were employed by the Japanese government and military to refer to the victims and the facilities, and there are several indications that these terms were designed to disguise the fact that the system in fact operated as a criminal enterprise. The destruction of documents regarding the “comfort system” at the

close of the war further attests to the high-level awareness of the illegality of the system. Thus, the evidence has had to be examined in light of the systemic nature of the deception and violence involved.

794. In sum, the Judges find that the “comfort system” was designed and maintained to facilitate the rape and sexual slavery of tens of thousands of young girls and women from occupied or conquered territories in the Asia-Pacific region. The scale of the “comfort system” was so enormous, the conditions so inhumane, and the operations so consistent, that no other conclusion can be reached but that the highest level political and military officials must have known of the criminal nature of the system which they set in motion and sustained. Indeed, a system so vast required the planning and knowing participation of a large number of actors at all levels of the hierarchy. Military and government leaders responsible for organising and supervising the movement and activities of troops had to have approved the establishment of “comfort stations” or other facilities for rape and sexual slavery and/or known of the criminal nature of the system. Indeed, from the lowest level soldier visiting the stations, to the top military and government officials who devised and oversaw the regulation of the system, to midlevel actors who procured women and girls for the stations and supplied the necessities, officials at all levels participated in facilitating and maintaining the system of rape and sexual slavery. In light of the fact that there were regulations distinguishing between visits to the “comfort stations” by officers and soldiers, it is the view of the Judges that many superiors also used the “comfort stations,” which would also serve to condone and encourage the system.
795. The Judges emphasise that it is axiomatic that when the state or military designs and creates a system with potential for abuse, it has a concomitant duty to implement and monitor protective measures designed to prevent abuses. Hence, where a system was established in which large numbers of women in occupied, annexed, or conquered territories were to provide sexual services to huge numbers of men, particularly in the context of war (where, for example, men were far from families or social life for extensive periods of time, and engaged in dangerous, violent, stressful, and sometimes monotonous situations), there is a very high risk that such a system would inherently facilitate rape, sexual enslavement, and other mistreatment of persons procured to provide the sex. The need, in such a case, for consistent supervision to protect the women and their choices would be critical. Hence, establishing such a system imposes a duty upon its architects and purveyors to monitor the system to ensure that protective measures are enforced, and to punish those who ignore protective measures and commit crimes. The evidence indicates that no meaningful protective measures were ordered or implemented.⁵⁸⁶ When people are kept in any form of detention, it is incumbent on the authorities to ensure there are no abuses.
796. By contrast, the Judges find that any protective measures provided by the regulations were limited to preventing conflict among soldiers and officers with regard to their use of the “comfort stations,” protecting male soldiers from sexually transmitted diseases, and, at times, restraining soldiers from raping local women because of its negative repercussions for Japan, particularly if committed against women of privilege. Measures regulating women’s health were invasive or injurious. For example, medical personnel

⁵⁸⁶ In this regard, the Tribunal notes with agreement the findings of the *Kvocka* Trial Chamber which concluded that “if a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes.” *Kvocka* Trial Chamber Judgement, para. 318.

monitored sexually transmitted disease but not the mutilating impact of constant rape on women's health and medical procedures often inflicted additional harms on women's reproductive health. Regulations barring soldiers from using physical violence or alcohol were sporadically enforced. And none of these purported protections were designed for the benefit of the women. These measures were designed toward protecting the "comfort women" and girls as commodities. They were fed, sustained, and medically examined only to maximize their potential to provide unabated sexual services to the soldiers. The "comfort women" and girls often suffered harm, including pain and permanent reproductive damage, as a result of rape and the sanctioned medical interventions inflicted upon them. These injuries were ignored.

797. The Judges also find that the Japanese military and government established a sophisticated, heavily regulated, and unimaginably cruel system in which women and young girls were held for sexual access by Japanese soldiers. Even if we were to accept the dubious premise that the "comfort stations" were intended to be filled with voluntary sex workers, it is clear that from the onset of its expansion in late 1937 the system rapidly became involuntary. The evidence establishes that only a small minority of the women procured had previously been prostitutes, and that even those who may have initially volunteered were eventually impressed into sexual slavery – required to service many men and enslaved in the facilities without freedom to leave.
798. The "comfort system" was, in essence, state-sanctioned rape and enslavement. The practice of deception, coercion, purchase, and force used to secure women for the "comfort system" was so widespread, the numbers of women acquired so enormous, and the pressure to expand the system so strong that the crimes involved had to have been known to high-level participants of the system as well as to those who oversaw the maintenance of the system and the continued supply of women.
799. In total, the "comfort women" system lasted over 13 years and there were literally thousands of facilities in which women were held for sexual slavery throughout some dozen countries in the Asia-Pacific region. The system depended upon massive transnational trafficking of women and young girls to and between these stations, often by military escorts or on military vehicles or vessels. Nonetheless, the persons in positions of authority or influence did nothing meaningful or effective to prevent or stop the crimes from being committed on a daily and indeed hourly basis.
800. In sum, based on the above findings and on other findings made previously in this Judgement, the Tribunal has already determined that the following has been proved beyond a reasonable doubt:
 - that tens of thousands of women and girls were deceived, forced, coerced, conscripted, sold, or otherwise unlawfully procured into the so-called "comfort women" system;
 - that the "comfort system" was conceived, established, regulated, maintained, and facilitated by the Japanese government and military, often utilizing, or with the complicity of, local authorities or agents;
 - that the "comfort system" was established throughout the Asia-Pacific, including on the frontlines, by the Japanese government and military to provide relatively safe and convenient sexual services to members of the Japanese military;

- that in 1937, after the international and local outrage generated by rape as part of the assault on Nanking (“Rape of Nanking”), the “comfort system” was expanded on an urgent basis to attempt to stop the indiscriminate rape of local women and soon thereafter became firmly entrenched as an intrinsic part of the Japanese military strategy;
- that the “comfort system” was criminal in nature on multiple levels, most particularly as a result of the illicit methods of procurement; the crimes of rape, sexual slavery, and other forms of mental, physical, sexual, and reproductive violence committed against the victims enslaved in the system; and the inhumane conditions of detention;
- that the system was so extensive, the regulation of it so complex, and the crimes committed therein so routine that the criminal nature of the system had to have been known to most members of the Japanese military and to the those holding high-level positions concerned with the war effort. The system was indeed a “system”, and all the elements that make it a system demonstrate official involvement of the required levels;
- that the regulations pertaining to “comfort stations” did not ensure that the women’s participation was willful or knowing, that women were protected against rape and other forms of violence, and that the women were able to refuse services and to leave the facilities. Instead, the regulations were designed solely to protect Japanese interests; and
- that rape and sexual slavery as crimes against humanity contained in this Tribunal’s Charter and prohibited by the laws and customs of war in effect at the time, and charged in Counts 1 and 2 of the Common Indictment, were committed against the former “comfort women.”

In the next section, the Judges determine the criminal responsibility of the accused in light of the foregoing findings.

(b) *Assessment of Criminal Responsibility of the Accused*

(i) *Bases for Determining Criminal Responsibility of the Accused*

801. Based on the foregoing findings of fact and applicable law, the Tribunal finds that persons holding a high position of authority in the Japanese government or military with connections to the war effort in general or the “comfort system” in particular would have had to have known of the criminal nature of this system unless unexpected contingencies or exceptional circumstances existed that would cast doubt as to whether the particular person knew or had reason to know that crimes were being committed.
802. The Tribunal echoes the words of post World War II *Hostages* case: “It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such occurrences result occasionally because of unexpected contingencies, but they are unusual.”⁵⁸⁷ The Judges distinguish between “exceptional circumstances” and “unexpected contingencies,” the latter of which we consider would

⁵⁸⁷ *Hostages* case p. 1259-1264 [Aristarchus version]. See also the Tokyo Tribunal’s treatment of Muto. IMTFE Judgement (Röling), p. 455.

cover such things as illness or having lines of communication cut in the midst of battle, and thus encompasses events which would prevent a superior from maintaining constant control over his subordinates.

803. Given the dimension, duration, and perceived significance of the “comfort system” to Japan’s war effort, it is impossible to imagine any “unexpected contingencies” that could have prevented an accused from learning that crimes were committed in the “comfort stations.” This is particularly true when considering that the “comfort system” existed for the entire eight years covered by the Common Indictment, and that by late 1937 the women and girls procured into the system were held as sex slaves and forced to submit to rape and other forms of sexual and reproductive violence by members of the Japanese military.
804. By “exceptional circumstances” we mean such circumstances as would warrant distinguishing that person as to their knowledge of or participation in the criminal activity. Such circumstances might include whether they held a position at an insignificant time, whether they were incapable of exercising the leadership powers conferred, or whether there was a deliberate and successful effort to prevent them from acquiring knowledge of criminal activity despite their efforts to remain informed.
805. Exceptional circumstances, as used in this case, would distinguish the circumstances of an accused such that it would be reasonable to question his particular or personal knowledge of or participation in the joint criminal endeavour of the “comfort system.”
806. Therefore, after reviewing the positions of the accused, we will determine whether exceptional circumstances exist for any of the accused which precludes a finding of guilt on the basis of the more general and circumstantial evidence. If exceptional circumstances as to any accused are found, additional evidence is required before it can be established that the accused had the requisite knowledge or involvement to justify a finding of criminal responsibility under Articles 3(1) and 3(2) of the Charter. If exceptional circumstances are not found, and the accused holds the necessary positions and played the roles which would allow liability to attach, then the evidence is sufficient to establish individual and superior responsibility for the criminal activity committed in relation to the “comfort women” system.
807. In addition, the Tribunal notes that, as to several of the accused, the documentary evidence in particular links the accused directly to the “comfort system” and provides proof of actual knowledge on their part. Nonetheless, unless exceptional circumstances exist, the *mens rea* of the accused has already been established by inferring knowledge based on their position of authority within the Japanese hierarchy and their role in the expansion, institutionalisation, and facilitation of the “comfort system.” Thus, it is not necessary, and indeed would be superfluous, to rely on more specific evidence to prove actual knowledge, except where exceptional circumstances indicate the need to consider additional evidence.

(ii) The Positions Held by the Accused

808. The most relevant positions held by the accused during the time period covered in the Common Indictment are summarised below:
 - Emperor HIROHITO was the *de jure* Head of State for the duration of the war and, as such, he also held the title of Supreme Commander of the Armed Forces;

- ANDO Rikichi was Commander of the 21st Army (southern China) from November 1938-February 1940, Commander of the South China Area Army from October 1940, and Commander of the Taiwan Army from November 1941-February 1945. He was concurrently the Governor-General of Taiwan from December 1944 until the end of the war;
- HATA Shunroku was Commander of the Taiwan Army from August 1936-August 1937, Commander of the Central China Expeditionary Army from February 1938 - December 1938, the Minister of War from August 1939-July 1940, and Commander of the China Expeditionary Army from March 1941-November 1944;
- ITAGAKI Seishiro was the Minister of War from June 1938-August 1939, Chief of Staff to the China Expeditionary Army from August 1939-July 1941, and Commander of the Korea Army from July 1941-April 1945, when he became Commander of the 7th Area Army in Southeast Asia;
- KOBAYASHI Seizo was the Governor-General of Taiwan from June 1936-November 1940, and a cabinet minister from December 1944-March 1945;
- MATSUI Iwane was Commander of the Shanghai Expeditionary Army from August to December of 1937. In October 1937 he also took the position of Commander of the Central China Area Army, a position he held until February 1938;
- TERAUCHI Hisaichi was Minister of War from March 1936-February 1937, when he became Inspector-General of Military Education until August 1937. He was Commander of the North China Area Army from August 1937-December 1938 and Commander of the Southern Army (covering the Philippines, Indonesia, Malaysia, Timor, and Burma) from 1941-1945;
- TOJO Hideki was appointed Vice Minister of War in May 1938. From 1941-July 1944 he was Prime Minister and Minister of War; he also held the position of Home Minister for some time during this period. He was also Chief of General Staff of the Army from February 1944-July 1944; and
- UMEZU Yoshijiro was Vice Minister of War from March 1936-May 1938, Commander of the 1st Army in May 1938, and Commander of the Kwantung (Guandong) Army from September 1939-July 1944, when he became Chief of General Staff to the Army, a post he held until October 1945.

809. During the Second World War, the Emperor was the highest authority in Japan, a position carrying the ultimate power and influence; a Governor-General was charged with administrative functions and enforcement of laws over their appointed country. Governors-General were the highest authority in the annexed territories of Korea and Taiwan and reported directly to the Emperor; a Commander was the head of the armed forces within his territory, and those holding the highest area positions reported to the Emperor; a Chief of Staff was the most senior administrator to the Commander of a territory who reported to and acted on behalf of the Commander; and the Minister of War was the government cabinet post responsible for all the armed forces.
810. The Judges note that each of the accused held either the highest or one of the highest level positions concerned with the war effort within the Japanese government or military from

at least 1937 to 1945, during which time the “comfort station” system was continually expanded and maintained under the authority and for the use of the Japanese military and this system was considered a critical component to the success of Japan’s war effort. With the sole exception of MATSUI, all of the accused held their positions of authority or influence for at least four years, some for considerably longer, and all held their positions during the time that rape and sexual slavery was institutionalized in the “comfort women” system.

811. Barring a consideration that exceptional circumstances exist, the above findings are more than sufficient to establish the guilt of the accused under Articles 3(2) and 3(1) of this Tribunal’s Charter for having knowingly participated in the “comfort system” despite being aware that criminal activity was endemic throughout the system and for failing to prevent crimes committed by subordinates.
812. In considering the roles and positions of the accused, the Tribunal finds that exceptional circumstances exist for two of the accused – Emperor HIROHITO and MATSUI – such that additional evidence is required before guilt can be established beyond a reasonable doubt. More precisely, we consider that the brevity and time period of MATSUI’s participation in the war effort, lasting some 7 months during the initial stages of the “comfort women” campaign, warrants requiring additional information as to his knowledge of and participation in the “comfort system” as a criminal endeavor. We also consider that the persistent claim that Emperor HIROHITO was merely a ceremonial figurehead who did not have power to effect the war effort and who was shielded from information as to criminal activity warrants additional information establishing that he knew that crimes were afoot in regards to the “comfort system.” Although his criminal responsibility has already been found by the Tribunal, as announced in the Summary of Findings of December 9, 2000, the reasoning for rendering such a finding will be examined in more detail below.
813. For the other accused for whom exceptional circumstances do not exist, namely ANDO Rikichi, HATA Shunroku, ITAGAKI Seishiro, KOBAYASHI Seizo, TERAUCHI Hisaichi, TOJO Hideki, and UMEZU Yoshijiro, based on the foregoing evidence which firmly establishes their *mens rea* and *actus reus*, the Tribunal finds them **GUILTY** under Counts 1 and 2 of the Common Indictment as incurring both individual and superior responsibility, pursuant to Articles 3(1) and 3(2) of the Charter, for their knowing participation in a criminal system which cultivated and sustained a system of rape and sexual slavery.
814. Below, we will assess the evidence as to the criminal responsibility of Emperor HIROHITO and General MATSUI.

(c) *Consideration of Exceptional Circumstances and Additional Evidence as to Emperor HIROHITO and General MATSUI*

815. The Judges now examine with more specificity the evidence relating to Emperor HIROHITO and MATSUI Iwane. We do this because we deem it necessary to address the issues that Emperor HIROHITO was a mere figurehead and that MATSUI held office for such a brief time and at the very outset of the expansion of the “comfort system,” and, accordingly, that they each did not have the requisite knowledge of or participation in the crimes committed within the “comfort system” so as to justify a finding of guilt under Article 3(1) or 3(2) of the Charter.

(i) Findings with Regard to Emperor HIROHITO's Superior and Individual Responsibility for Rape and Sexual Slavery Committed as a Consequence of the "Comfort Women System"

816. If the assertion were true that Emperor HIROHITO was not more than a figurehead or puppet and was, therefore, kept ignorant of the military situation and the problems it engendered and had no power to take corrective action even if he knew of the crimes, this would preclude a finding of guilt. Accordingly, we consider this claim to determine whether additional evidence specific to his knowledge and power establishes his individual or superior responsibility for the rape and sexual slavery committed as part of the "comfort system."
817. In our Summary of Findings delivered in Tokyo on December 12, 2000, we found the Emperor HIROHITO guilty on Counts 1 and 2 of the Indictment, concluding that the Emperor exercised both *de jure* and *de facto* power as Head of State and as commander of the armed forces. We explicitly rejected the contention that the Emperor was merely a ceremonial figurehead who did not have the requisite knowledge or exercise sufficient decision-making authority.⁵⁸⁸ In this Judgment we elaborate the bases of our earlier findings.
818. As Head of State and Supreme Commander of the army and navy, Emperor HIROHITO held a position of supreme authority over the state and the military. In this position, he had authority over all military personnel and directed through close intermediaries the course of the Area Armies and Expeditionary Forces. He was also the direct superior of the Governors-General of Taiwan and Korea.
819. The evidence demonstrates that HIROHITO had enormous power, going even beyond the powers granted him by the Constitution. The expert witness, Professor Yamada, testified that a formal decree issued in 1882 to the soldiers explicitly declared that ultimate decision-making power resides only in the Emperor. Professor Yamada explained that from the time of its issuance in 1882 until the end of World War II, the decree was the ultimate moral order of the Japanese military and something that all officers were expected to learn by heart. As Professor Yamada further explained, the Constitution of the Empire of Japan issued in 1889 – the Meiji Constitution – clearly states in Article 11 that the Emperor is the Supreme Commander of the army and the navy.⁵⁸⁹ In addition, Article 13 of the Constitution provides that the Emperor declares war, makes peace, and concludes treaties.⁵⁹⁰
820. Professor Yamada indicated that, at the time of the promulgation of the Meiji Constitution until the early 20th century, Japanese society understood the Emperor's powers to be set out and limited by the Constitution – what is referred to as the "Emperor-as-organ" theory of government. Indeed, upon examination of the Meiji Constitution, we note that Article 4 provides that the Emperor exercises the rights of sovereignty according to the constitutional provisions.⁵⁹¹ However, in a document issued by the Ministry of Education on May 31, 1937, entitled "The Fundamentals of Our National Polity," the Japanese government explicitly rejected the Emperor-as-organ theory. Instead, it asserted:

⁵⁸⁸ Summary of Findings, para. 24.

⁵⁸⁹ Registry No. 199.

⁵⁹⁰ Registry No. 199.

⁵⁹¹ Registry No. 199.

The basic principle of government . . . is not rule by mandate, or the English 'monarch who reigns but doesn't rule'; it is not joint government by the monarch and its subjects either, nor is it the separation of the three powers or constitutional government. It is the direct rule of the Emperor instead.⁵⁹²

The document emphasises the "divine present Emperor" expressed in Article 3 of the Meiji Constitution, which states: "The Emperor is sacred and inviolable."

821. Moreover, according to Professor Yamada's testimony, the Emperor's power increased in 1936 when he successfully ordered the suppression of an attempted coup. This occurred just a year before the formal rejection of the Emperor-as-organ theory which centralized power in the Emperor. Professor Yamada describes this increasing centralization of power as part of a project to restructure the government for the anticipated war against the United States, the United Kingdom, and Russia.
822. The Tribunal finds that the Emperor had real power and authority over the Japanese government and military. We firmly reject the contention that the Emperor was a mere figurehead.
823. In our Preliminary Findings, we concluded that the Emperor was clearly aware of crimes committed by Japanese soldiers. More specifically, it would have been virtually impossible for him to have been ignorant of the fact that Japanese soldiers committed a range of atrocities, including rape and sexual violence, during events so notorious they were known as the "Rape of Nanking" and the "Rape of Manila." The massacres and rapes were widely reported both in Japan and internationally. The prosecution submitted into evidence international news articles reporting the "Rape of Nanking," as well as a military journal entry in January of 1938 referring to a report written by a group of foreign nationals living in Nanking which described rape and other acts of violence.⁵⁹³ We accept Professor Yamada's testimony that HIROHITO was very concerned about what the foreign media reported about Japan and, therefore, that the core members of the Foreign Ministry must have given him informal reports. Among those core members was Ishii Itaro, the Chief of the East Asia section of the Ministry of Foreign Affairs, who held the third highest position in the Ministry of Foreign Affairs. In a January 1938 journal entry, Ishii Itaro recorded: "At meetings of the secretariat of the three ministries (Foreign Affairs, Navy and War Ministries), I have frequently given warnings to the Army. Minister of Foreign Affairs Hirota also demanded Minister of War Sugiyama to enforce the military discipline."⁵⁹⁴
824. More recently, further evidence has come to light that Emperor HIROHITO was aware of the cruel treatment by the Japanese military of civilians. Prince Mikasa, HIROHITO's youngest brother, stated that he told his brother about the atrocities committed in China. On June 15, 2000, addressing a party honoring the Japanese artist Hirayama Ikuo's contributions to cultural exchanges between Japan and China, Prince Mikasa said: "I shrank in fear at the sight of the Japanese military's cruel behavior in China during the war and I told Showa Emperor about this."⁵⁹⁵

⁵⁹² Registry No. 200.

⁵⁹³ Registry No. 204.

⁵⁹⁴ Registry No. 204.

⁵⁹⁵ Registry No. 206.

825. The expert testimony, as well as the documentary evidence assessed with regard to the other accused, all of whom were HIROHITO's subordinates, establishes that it was well known that Japanese troops committed rape with abandon even after the expansion of the "comfort system." There was no prohibition on rape in the Japanese military code, unless it occurred within the context of looting, until 1942. On January 8, 1941, the Ministry of War issued a Field Service Code which contained the first of a series of instructions to the soldiers in the field, in an attempt to counter their acts of rape, murder, arson, and looting.⁵⁹⁶ Professor Yamada testified that TOJO, Minister of War at the time, discussed the draft of the Field Service Code with HIROHITO, who then granted his permission for its issuance and distribution.
826. The prosecution has also submitted documentary evidence with regard to the amendment to the Army Criminal Code in March of 1942. The amendment defined rape as a crime, abolished the *Shinkokuzai* system, which allowed prosecution of rape only upon complaint, and broadened the sentencing for rape.⁵⁹⁷ Professor Yamada testified that the Emperor knew of these changes to the Army Criminal Code.
827. With regard to the communication between HIROHITO and his advisors, the fact that HIROHITO received reports from the Foreign Minister and the Governors-General, that he sanctioned the Field Services Code, and that he knew of the Army Criminal Code amendment show that HIROHITO was not isolated from war events and strategies or from the specific, ongoing problem of rape of local women.
828. In addition, we note that the Ministers of the Japanese government had the constitutional duty, under Article 55, to give advice to the Emperor and to be responsible for it. The expert witnesses also testified that HIROHITO had a close circle of advisers with whom he consulted regularly regarding the war. Consequently, Emperor HIROHITO was kept informed of the military activities, and of crimes such as rape, which generated international outrage when complaints were made. Having been deeply concerned over Japan's international reputation, he surely would have read or been informed of the media reports of rape crimes.
829. The foregoing evidence overwhelmingly supports our findings that Emperor HIROHITO was not a mere figurehead and that he was kept abreast of matters of significance to the success of the war effort and the reputation of the army. That he had knowledge of the rape of Chinese women in the Nanking campaign and of the continuing problem of the rape of local women is indubitable. He had the duty to prevent, monitor, and punish rape crimes committed by his subordinates. Nonetheless, HIROHITO knew that rape was not even an independent crime until mid-way in the war and that it continued to be a serious problem. Instead of instituting and monitoring effective measures against rape, the military and civilian leadership sought to reduce the rape of local populations by channelling it into "comfort stations," not because it cared that women were raped, but because it wanted to protect the reputation of Japan, avoid negative international visibility, and curtail resistance of local populations.
830. With respect to the expansion of the "comfort stations" beginning in 1937 as a system of military sexual slavery, it is impossible to believe, given our findings regarding the urgency, extensiveness, logistical complexity and expense, and involvement of the

⁵⁹⁶ Registry No. 203.

⁵⁹⁷ No Registry #. See the photocopy of the slide when Yamada was testifying.

highest level ministry and military officials in various aspects of the process, that HIROHITO was ignorant of the existence of the “comfort system” or was impotent to protest its activities. Indeed, we find that he gave his approval to the system, whether tacitly or explicitly. We note that the original orders to expand the system in China were issued by or on behalf of MATSUI. Given the significance of the problem of rape as a national one, the logistical support needed, and the fact that women were not only being rounded up in China but also “recruited” from Japan and Korea, it is inconceivable that the War Ministry and others were not involved in deciding, approving and facilitating the expansion of the “comfort system.” Further, in light of the responsibility to report such matters to the Emperor and the pervasiveness of the problem, we find that Emperor HIROHITO had to have known that the expansion of the comfort system would entail the illicit procurement and trafficking of women for rape and sexual slavery.

831. Accordingly, as supreme head of state and military commander exercising both *de jure* and *de facto* power, we confirm our previous finding as to Emperor HIROHITO’s guilt under Article 3(2) for his failure to exercise superior responsibility to prevent these atrocities. Clearly, by virtue of the outcry about rape, he had reason to know of the propensity of his soldiers to commit widespread rape against local women and he had a duty to take necessary and reasonable measures to prevent, halt and punish such violations. He had a duty to institute measures and monitor efforts to prevent the crimes, including in the “comfort stations” set up to provide sexual services to the Japanese military. Emperor HIROHITO failed utterly to fulfill his responsibility. Accordingly, we find Emperor HIROHITO **GUILTY** of criminal negligence under Article 3(2) of the Charter for the crimes of rape and sexual slavery committed as part of the system of military sexual slavery.
832. In addition, the Tribunal finds that Emperor HIROHITO had to have known that the “comfort system” was being rapidly expanded as a purported alternative to the more visible and problematic rape of local women and that rape and sexual slavery were being committed in the “comfort system.” Further, we find, based on his position and continuing participation in the war effort and the significance of the “comfort system” to the war effort, that, at the very least, he participated by tacitly or actively approving the existence and expansion of the “comfort system.” Accordingly, we reaffirm our previous holding and find Emperor HIROHITO **GUILTY** of rape and sexual slavery as crimes against humanity under individual responsibility pursuant to Article 3(1) of our Charter.

(ii) Findings with Regard to MATSUI’s Command and Individual Responsibility for Rape and Sexual Slavery Committed as a Consequence of the “Comfort Women System”

833. MATSUI held a high level position of military authority for seven months during the period of the Common Indictment. Of greater significance is the fact that he held his position only until mid-February 1938, thus arguably prior to the time that the “comfort system” was institutionalized and perhaps when its character as a coercive system was not yet as pervasive. This suggests that, in MATSUI’s case, exceptional circumstances could conceivably be present, which precludes an inference of knowledge as to the system’s criminal nature based principally on his position in conjunction with the extensiveness and transparency of the criminal nature of the system.
834. What must be considered, then, is whether, at the early point in the expansion and institutionalisation of the “comfort system,” there is additional and sufficient evidence

before this Tribunal on which to base a conclusion that MATSUI knew or had reason to know of the criminal nature of the system.

835. As Commander of the Shanghai Expeditionary Force from August to December 1937, MATSUI led the last phase of the assault on Shanghai and, as Commander of the Central China Area Army from October 1937 to at least mid-February 1938, he led the march toward and conquest of Nanking.
836. As Commander, MATSUI was directly responsible for the rampage of rape, murder and looting which began with the conquest and occupation of Shanghai and the crimes reached an abominable level with the Rape of Nanking. The atrocities committed by troops under MATSUI's command generated tremendous international criticism and threatened the reputation of the Japanese military and imperial state. In addition, the mass rape of Chinese women by the troops, even as they were marching toward Nanking, immediately became a critical military problem as it heightened resistance among the local population. Instead of attempting to prevent rape altogether, the decision was taken to attempt to provide an alternative to mass rape of local women through the urgent expansion of the "comfort stations." Based on the evidence before us, MATSUI was significantly involved in that decision.
837. We note that the IMTFE convicted MATSUI of rape charges relating to the conquest of Nanking, finding that he had knowledge of, and criminally failed to take appropriate measures to stop, rape and other atrocities against the civilian population. As an extension of the prior proceedings, this Tribunal accepts and incorporates the evidence before and the determination of the IMTFE with respect to MATSUI. At the same time, consistent with the principle against double jeopardy, we consider the prior determination only in so far as it is relevant to the charges against MATSUI in the Common Indictment. The charges here do not include those tried before the IMTFE; rather, they are strictly limited to the crimes of sexual slavery and rape in relation to the "comfort station" system for which he was neither charged, tried, nor convicted before the IMTFE or elsewhere previously.
838. The problems created for the military and the state by the widespread and uncontrolled rape of local women clearly drew the attention of MATSUI and the highest level military officers. Although MATSUI exercised command for only a relatively brief period of seven months in late 1937 to early 1938, the evidence demonstrates that this was a critical period in the development of the "comfort stations" as a system of sexual slavery, that this evolution occurred under MATSUI's command, and that MATSUI was knowingly and directly involved.
839. The evidence before this Tribunal demonstrates that in December of 1937, in the midst of the Japanese march toward Nanking, the Central China Area Army, under MATSUI's command, ordered the establishment of "comfort stations." The Diary of Iinuma Mamoru, the Chief of Staff to the Shanghai Expeditionary Army, includes an entry dated December 11, 1937. It records that "On the matter of the establishment of military comfort stations, documents from the [Central China] Area Army arrived, and [I will] oversee the execution" of the orders contained therein. Iinumu Mamoru recorded this entry just before the invasion of Nanking.⁵⁹⁸ From this we infer that MATSUI as

⁵⁹⁸ Reg. No. 222. See Yoshimi's written testimony, Reg. No. 225; Yoshimi, *Comfort Women*, pp. 49-50.

Commander of the Central China Area Army had to have given or approved the orders and overseen the establishment of “comfort stations” under his command.

840. The Judges must next determine whether MATSUI’s participation in planning, ordering, instigating, facilitating, or otherwise aiding and abetting the expansion of the “comfort stations” under his command was with knowledge of the criminal nature of the system.
841. The evidence makes clear that the establishment of the “comfort stations” was a matter of extreme urgency. The evidence presented by Professor Yoshimi indicates that, during MATSUI’s tenure, immediate efforts to establish comfort stations were undertaken by the General Staff of the Shanghai Expeditionary Army and the 10th Army, both under the command of the Central China Army.⁵⁹⁹ He writes that “[e]arly in 1938, military “comfort stations” were being set up in rapid succession.”⁶⁰⁰ Some stations were already operating by early January 1938.⁶⁰¹
842. In addition, the evidence shows that it was increasingly difficult to procure women and girls for the “comfort stations”, and they were acquired under extremely coercive circumstances, whereupon they were subjected to inhumane and terrifying conditions. For example, even in this early period, the evidence supports the finding that Chinese and Korean women were being rounded up hurriedly by the Japanese military. The diary of Major Yamazaki Masao, a 10th Army staff officer, records:

Lt. Colonel Terada was sent ahead to take command of the military police and establish entertainment facilities in Huzhou. At first, there were four women, and from now on there will be seven. Because the women are still terrified, it was difficult to gather seven women. I heard that they didn’t “perform” their “tasks” very well. If we consistently assure them that their lives will not be in danger, that they will always be paid, and that they will not be treated cruelly, then more women who want to join up will come forward. The military police revealed that they are supposed to round up one hundred women Soldiers must be warned about their tendency to lapse into abuse.⁶⁰² Another report from Sugino Shiguero, a member of the military group in charge of establishing a “comfort station” in Yangzhou, indicates that, during the period of MATSUI’s tenure, Sugino and other members of the military group, together with the Chinese local government association established to maintain order, gathered forty-seven (47) Chinese women.⁶⁰³

843. There is also evidence that by the beginning of 1938, Korean women had begun arriving in considerable numbers to the area under MATSUI’s command. For example, Aso Testuo, a military physician with the Shanghai Expeditionary Force noted that the military had set up and directly managed a “comfort station” in Tanjiazhai in Shanghai and that he examined there about 100 women, of which 80 percent were Korean and 20 percent, were Japanese.⁶⁰⁴

⁵⁹⁹ Yoshimi, *Comfort Women*, p. 50.

⁶⁰⁰ Yoshimi, *Comfort Women*, p. 51.

⁶⁰¹ Yoshimi, *Comfort Women*, pp. 51-53.

⁶⁰² Yoshimi, *Comfort Women*, p. 50.

⁶⁰³ Yoshimi, *Comfort Women*, p. 51.

⁶⁰⁴ Yoshimi, *Comfort Women*, p. 53.

844. With respect to whether MATSUI knew the system was involuntary, we find the direct involvement of the military under his command in obtaining women and setting up the stations to be profoundly incriminating. The Recruitment Memo, dated March 4, 1938, which was sent from the War Ministry to the Chief of Staff of the Central China Area Army removes all reasonable doubt about the coercive nature of the early recruitment process carried out under MATSUI's immediate command.⁶⁰⁵ According to this Memo, recruiters used by the expeditionary forces, such as the Shanghai Forces and the Central China Area Army, were openly abducting local Chinese women for the "comfort stations," and this method of securing women was creating hostility toward the Japanese army.
845. MATSUI left his position as Commander of the Central China Area Army in February 1938, shortly before the War Ministry issued the above memorandum. While MATSUI may not have received this memorandum, the timing and content of the Memo make clear that it is responding to the use of coercion and force against Chinese women being procured for the "comfort stations" by military recruiters and their agents operating under MATSUI's command. Accordingly, we find, both because the abductions occurred directly under his command and the high-level concern they generated, that MATSUI was well aware that the system was not voluntary.
846. In addition, we note that many of the records of this period reflect that the coercive and inhumane conditions that we have found to characterize the "comfort system" also existed during the period of MATSUI's tenure and that he would have been aware of them. Major Yamazaki Masao's record of Lt. Colonel Tanaka's report that the women were "still terrified" and didn't "perform their 'tasks' very well" and that the soldiers had to be "warned about their tendency to lapse into abuse" makes clear that these conditions, which presented obstacles to meeting the demand for "comfort women" and satisfying the soldiers, were known to the higher echelons.⁶⁰⁶
847. The urgency and difficulty of recruitment, and the coercion required, also would have indicated to the leadership that the number of "comfort women" necessary to provide sexual services to the soldiers was inadequate to the demand and would remain so unless drastic measures were taken to secure additional women. The "Situation Report" of the military-run station under the Shanghai Expeditionary Force's control in January 1938 indicates that the commanding officer had to give the unit permission and that the unit had to be accommodated within one hour.⁶⁰⁷ Another report of the opening of a "comfort station" in Shanghai describes the "comfort women" as "besieged."⁶⁰⁸
848. In sum, during MATSUI's tenure as Commander of the Central China Area Army, local Chinese women were forcibly procured by his employees and agents and "comfort stations" were established in rapid succession from Shanghai to Nanking.
849. The evidence supporting our finding that MATSUI knew, beyond a reasonable doubt, of the criminal character of the "comfort stations" being established under his command likewise supports the findings, necessary for determination of command responsibility under Article 3(2) of the Charter, that he "had reason to know" of the criminal character

⁶⁰⁵ Reg. No. 222-C. Referred to in Yoshimi's written testimony. Reg. No. 225.

⁶⁰⁶ Yoshimi, *Comfort Women*, p. 50.

⁶⁰⁷ Yoshimi, *Comfort Women*, p. 51.

⁶⁰⁸ Yoshimi, *Comfort Women*, p. 53.

of the procurement and treatment of the “comfort women.” His actual knowledge of the troops committing extensive rape crimes and the enormous pressure to rapidly establish more stations is sufficient for concluding that MATSUI had reason to know that there was a danger that the “comfort stations” were or would quickly become facilities for rape and sexual slavery. That danger triggered his duty to take necessary and reasonable measures to prevent these crimes. The evidence aptly proves that he took no meaningful measures to that end.

850. The Tribunal thus finds MATSUI Iwane **GUILTY** under Article 3(2) of the Charter for his failure to prevent, halt, or punish crimes of rape and sexual slavery committed by subordinates in the part of the “comfort system” under his command.
851. In addition to finding that MATSUI knew and had reason to know of the criminal character of the “comfort stations,” the Tribunal also finds that he ordered, instigated, facilitated, planned or otherwise aided and abetted the illicit procurement and enslavement of Chinese women and girls to function as sex slaves during his tenure as a military leader.
852. The Tribunal thus finds MATSUI Iwane **GUILTY** under Article 3(1) of the Charter for his knowing participation in the rape and sexual slavery committed as crimes against humanity.
853. The Tribunal next considers the allegations contained in Count 3 of the Common Indictment, charging Emperor HIROHITO and YAMASHITA with rape as a crime against humanity for the mass rape committed in Mapanique.

C. COUNT 3 OF THE COMMON INDICTMENT

1. Rapes in Mapanique

854. In Count 3 of the Common Indictment, the Prosecutors charge Emperor HIROHITO and General YAMASHITA with individual and superior responsibility for rape as a crime against humanity under Articles 3(1) and 3(2) of the Charter for the mass rape of women and girls in Mapanique.
855. With regard to the rape crimes and other forms of sexual violence committed against women and girls in Mapanique beginning on November 23, 1944, the evidence demonstrates the following:
 - That the women and girls in Mapanique were subjected to multiple, extreme forms of violence as part of a punitive or “subjugation” attack on the barrio in order to destroy anti-Japanese activity there.
 - The attack on the women in Mapanique was widespread. It was visited upon many of the women of Mapanique and included having to witness brutal deaths of loved ones and endure torture and grotesque humiliations.
 - That soldiers rounded up the women and girls and caused them to be detained at the *Bahay na Pula* or Red House, where they subjected them to mass rape, gang rape, or other forms of sexual violence.

- That, as found by the IMTFE and confirmed by the testimony in this case, Japanese soldiers routinely engaged in rape accompanied by other sadistic brutality in the Asia-Pacific wars.
- That the rape and other crimes at Mapanique were committed by forces under YAMASHITA's authority and control and as part of a campaign of subjugation or punishment ordered and approved by General YAMASHITA in October 1944 as part of his "Guiding Principles for Philippines Operations," and on November 22, 1944 by his subordinate.
- That rape as a crime against humanity under international law and pursuant to Article 2(1) of this Tribunal's Charter and was committed against women and girls in Mapanique as part of a widespread and systematic attack against the civilian population.

856. These findings as to the rape crimes committed in Mapanique do not reach a conclusion as to whether the accused charged herein incur responsibility for the crimes committed. Therefore, the Tribunal next considers the evidence concerning the accuseds' *mens rea* and *actus reus* to determine whether they are responsible as individuals and/or as superiors for the Mapanique rape crimes.
857. As noted above, Emperor HIROHITO was the Head of State, and held a position of supreme authority over the military. YAMASHITA was Commander of the 14th Area Army from September 1944-September 1945, during which time he was responsible for troops operating in the Philippines, including those attacking Mapanique on November 23, 1944.

(a) *Findings with Respect to Emperor HIROHITO's Superior and Individual Responsibility for the Rapes at Mapanique*

858. HIROHITO was not the direct superior to YAMASHITA, the commander of the troops who attacked Mapanique, although he was certainly his superior. Rather, YAMASHITA was two steps removed from HIROHITO in the military hierarchy. The expert witness Professor Hayashi testified that the 14th Area Army, which committed the rapes, formed part of the Southern Army, which headed the expansion into Southeast Asia. The Imperial General Headquarters, under the direct authority of HIROHITO, had command of the Southern Army. Nonetheless, given this distance between YAMASHITA and HIROHITO, and with no further evidence available pointing to their communication or any form of encouragement or assistance by the Emperor, we cannot infer that HIROHITO knew of or otherwise participated in the "Rape of Mapanique."
859. We note however that the expansion of the Japanese military into Southeast Asia was of critical importance to the war effort, of which HIROHITO had supreme command. Given HIROHITO's position of command and his communication with the top advisors, including those in the Imperial General Headquarters, it is likely that HIROHITO knew of the Filipino people's resistance to the Japanese military and of the Japanese military's brutal suppression of this resistance. HIROHITO thereby had notice of the possibility that crimes might be committed against civilians. An inquiry into the methods of quelling resistance would have further alerted HIROHITO to the violence, including rape and other sexual violence, being inflicted upon civilian women and girls in the course of punitive missions.

860. Most assuredly, by November 1944, which was seven years into the war in the Asia-Pacific, and three years into the assault on the Philippines, Emperor HIROHITO was well aware that serious crimes had been committed by Japanese troops in all theatres of war, including the Philippines. He was on notice that criminal activity was likely to continue to be committed by Japanese troops and he “had reason to know” that extra measures were needed in order to exercise adequate control over Japanese forces and to remain apprised of their activities.
861. Based on the totality of evidence, it is clear that HIROHITO was on notice that crimes were likely to be committed by Japanese forces under his command and control, and yet he did nothing to prevent the crimes. Accordingly, pursuant to Article 3(2), we find Emperor HIROHITO criminally responsible as a superior for the rape crimes committed against women and girls in Mapanique on November 23, 1944.
862. At the same time, we consider that Emperor HIROHITO cannot be individually liable every time his some two million soldiers committed atrocities. For Article 3(1) individual responsibility to attach, he must have knowledge of the crime and participate in some way – through planning, ordering, instigating, committing, aiding, or abetting – in the crime. While this was readily established in the case of the former “comfort women” with the criminal activity committed throughout the Asia-Pacific over several years, here, where the crimes were committed over a couple of days in a small village in the Philippines, without more evidence to establish the Emperor’s knowledge or participation, we find that there is an insufficient basis upon which to conclude beyond a reasonable doubt that HIROHITO had actual knowledge of the rapes or that he participated in any way in the crimes. As such, we decline to find that Emperor HIROHITO incurs individual responsibility under Article 3(1) under Count 3 of the Indictment.
863. In conclusion, pursuant to Article 3(2), the Tribunal finds Emperor HIROHITO **GUILTY** of the crime against humanity of rape under Count 3 of the Common Indictment insofar as it relates to superior responsibility under Article 3(2) of the Charter; it **DISMISSES** as to individual responsibility under Article 3(1) of the Charter after a finding that individual responsibility for the rapes at Mapanique has not been established beyond a reasonable doubt due to insufficient evidence.

(b) *Findings with Respect to YAMASHITA’s Superior and Individual Responsibility for the Rapes at Mapanique*

864. Count 3 of the Common Indictment charges General YAMASHITA with crimes not adjudicated in the previous war crimes trial held against him, namely the mass rape of women and girls at Mapanique in the Philippines. The charge of rape relating to the events in Manila was not and could not be charged here against YAMASHITA because the United States Military Commission already tried and convicted him for that crime.⁶⁰⁹ The charges against YAMASHITA here are limited to the rape crimes committed in Mapanique.
865. The evidence demonstrates that YAMASHITA was an experienced commander who held positions of high authority within the Japanese military. From July 1938 to September 1939, YAMASHITA served as Chief of Staff to the North China Area Army. In November 1941, he became Commander of the 25th Army in Malaya, a position he held

⁶⁰⁹ *Yamashita case*, Decision of the United States Military Commission at Manila, December 7, 1945.

until July 1942, when he became Commander of the 1st Army in North East China. In September 1944, he was appointed to serve as Commander of the 14th Area Army in the Philippines. In such high-ranking military posts, YAMASHITA exercised enormous power over his subordinates.

866. YAMASHITA took control of the 14th Area Army in the Philippines in September 1944. Significantly, on October 11, 1944, YAMASHITA promulgated his "Guiding Principles for Philippine Operations" in which he warned his troops of the danger of "schemes" and attacks by Philippine civilians and enemy paratroopers. The Principles ordered that armed Filipino bands "must be subjugated and pacified. These united activities must be destroyed."⁶¹⁰ On November 22, 1944, the 2nd Tank Divisional Commander, Iwanaka, a subordinate of YAMASHITA, issued an order to purge Mapanique of all "anti-Japanese Communist guerillas" through a punitive or subjugation mission.⁶¹¹ The next day, 14th Area Army troops entered Mapanique and went on a rampage of brutality against Filipino civilians, including the mass rape of some 100 women and girls.
867. Survivors of this mass rape testified before this Tribunal, and their testimony demonstrates that rape occurred according to a pattern.⁶¹² The evidence shows that soldiers attacked the barrio of Mapanique and rounded up the inhabitants, separating the men from the women and children. The soldiers then tortured, mutilated, and killed the men, and forced their families, including some of the survivors who testified before this Tribunal, to watch. Afterwards, the Japanese soldiers led the women and girls of the village to the *Bahay na Pula* (Red House) and repeatedly raped them. An estimated 100 girls and women were raped during this attack, which lasted over a day. The Tribunal has already found that the rapes at Mapanique were not only widespread but also systematic.
868. Because YAMASHITA participated as a high level commanding officer for several years throughout the war, the Judges consider that he was clearly apprised of past criminal activity, including rape crimes, committed by Japanese troops under his command. In addition, we find that YAMASHITA both knew and had reason to know that soldiers under his command might and in fact did commit rapes at Mapanique. As discussed above, the culture of violence created and perpetrated by his troops throughout the Philippines put him on notice that attacks on villages or cities were commonly accompanied by atrocities including rape and other forms of torture.
869. Accordingly, YAMASHITA had a duty to prevent future crimes and to institute measures to prevent, monitor, and punish these crimes and to ensure that his troops respected the laws and customs of war. Although YAMASHITA held a command position over the 14th Area Army soldiers, he failed to prevent the rapes at Mapanique. Despite evidence of a propensity of his soldiers to commit rape and other crimes, YAMASHITA did not fulfill his duty to take reasonable and necessary measures to ensure the safety of the women, men, and children of Mapanique, a region under his command, by instituting measures to prevent such unlawful attacks. In addition, he failed to punish the crimes after they occurred, which also incurs superior responsibility.
870. Based upon his status as commander and the aforesaid findings that he knew or had reason to know that troops under his command were likely to commit violence, including

⁶¹⁰ Exhibit JJ-2.

⁶¹¹ Exhibit KK.

⁶¹² Registry Nos. 99-128.

rape, and that he did not exercise his power to control his troops, the Tribunal finds YAMASHITA Tomoyuki **GUILTY** of the rapes at Mapanique in accordance with the principles of superior or command responsibility pursuant to Article 3(2) of the Charter.

871. In addition, as Commander of the 14th Area Army at the time of the “punitive missions” in the Philippines, the Tribunal finds that YAMASHITA either ordered, instigated, approved, assisted, and/or encouraged attacks such as the one against Mapanique through publication of the Principles Order. He did this despite knowing that crimes, including rape and sexual violence, were likely to be committed.
872. The evidence shows that, pursuant to this Principles Order, YAMASHITA had established the policy to “eliminate” the anti-Japanese guerillas. In pursuit of this policy, a 14th Area Army divisional commander subordinate to YAMASHITA ordered the “punitive mission” against Mapanique. It is reasonable to conclude that this plan was approved by YAMASHITA, the Commander.
873. Therefore, the Tribunal finds YAMASHITA Tomoyuki **GUILTY** of individual responsibility pursuant to Article 3(1) of the Charter for the mass rape of women and girls in Mapanique, as charged in Count 3 of the Indictment.

D. VERDICTS

874. In conclusion, as to Counts 1 and 2 of the Common Indictment charging nine accused with rape and sexual slavery as a crime against humanity, the Judges unanimously find Emperor HIROHITO, ANDO Rikichi, HATA Shunroku, ITAGAKI Seishiro, KOBAYASHI Seizo, MATSUI Iwane, TERAUCHI Hisaichi, TOJO Hideki, and UMEZU Yoshijiro, **GUILTY** of superior and individual responsibility for the crimes committed against the former “comfort women,” pursuant to Article 3(2) and 3(1) of the Charter.
875. As to Count 3 of the Common Indictment charging Emperor HIROHITO and YAMASHITA Tomoyuki with rape as a crime against humanity, the Judges unanimously find both Emperor HIROHITO and YAMASHITA Tomoyuki **GUILTY** of superior responsibility under Article 3(2) of the Charter for the crimes committed against the women and girls in Mapanique. The Judges unanimously find that there is insufficient evidence that Emperor HIROHITO knew of or participated in the plan to attack Mapanique on November 23, 1944 and therefore **DISMISS** the charge as to his culpability under Article 3(1) of the Charter. Finally, the Judges unanimously find that YAMASHITA Tomoyuki did know about and did participate in the attack on Mapanique, and consequently find him **GUILTY** of individual responsibility pursuant to Article 3(1).
876. The Tribunal will next consider the responsibility of the state of Japan as a result of the findings above and in relation to the Application for Restitution and Reparations submitted to and accepted by the Tribunal.

PART VI – STATE RESPONSIBILITY

INTRODUCTION

877. On behalf of the Peoples of the Asia-Pacific region, and particularly of the women victimised as a result of rape and sexual slavery as crimes against humanity committed by Japanese military and government officials, the Prosecutors have submitted an Application for Restitution and Reparations, asserting that the state of Japan has a duty to both prevent and repair these original crimes. The Application further asserts that Japan has failed to fulfil this duty and that this failure constitutes a continuing breach of its responsibility as a state, which has inflicted additional harm upon the victims, and for which it incurs additional liability.
878. In this Part of the Judgement, the Tribunal considers the responsibility of the state of Japan pursuant to Article 4 of our Charter, which authorises this Application and provides:

State responsibility arises from the following:

- (a) Commission of crimes or acts as referred to in Article 2 by military forces, government officials and those individuals acting in their official capacity.
- (b) Acts or omissions by States such as:
 - (i) concealment, denial or distortion of the facts or in any other manner its negligence or failure to meet its responsibility to find and disclose the truth concerning crimes referred to in Article 2;
 - (ii) failure to prosecute and punish those responsible for said crimes;
 - (iii) failure to provide reparations to those victimised;
 - (iv) failure to take measures to protect the integrity, well-being and dignity of the human person;
 - (v) discrimination based on such ground as gender, age, race, colour, national, ethnic or social origin or belief, health status, sexual orientation, political or other opinion, wealth, birth or any other status;
 - (vi) failure to take necessary measures to prevent recurrence.

879. In considering this Application for Restitution and Reparations, this Tribunal is not limited by the law of 1945 that governed the Common Indictment based on the principle of non-retroactive application of the criminal law. Rather, the obligation to prevent and repair wrongdoing, particularly wrongdoing of this horrific dimension, is a continuing one. Therefore, Japan continues to breach this obligation and its responsibility must be examined not only in light of the law applicable in 1945 but also of the current international norms respecting the duties of the violator state to prevent and repair.

880. We note that the authority of this Tribunal under Article 4 of our Charter to examine state responsibility, and the scope of reparations to victims and survivors, is fully consistent with the evolution of international law. In international practise, apart from restitution of stolen property or property acquired by criminal conduct, these issues have usually been the province of arbitral or claims commissions and, more recently, of human rights bodies, rather than international criminal tribunals.⁶¹³ We note, however, that Article 75 of the ICC Statute confers authority upon the International Criminal Court to establish principles for, and to order, reparations including “compensation, restitution and rehabilitation.” On the basis of the power conferred on this Tribunal through the Charter by the peoples of civil society, especially the people of the victimised countries and those from Japan, we find that this Peoples’ Tribunal may legitimately consider this Application for Restitution and Reparations. We note, in addition, that consideration of this Application is consistent with international law.
881. While this Tribunal does not possess formal legal authority to compel the state of Japan to satisfy its obligation to repair these wrongs and prevent future offences, it can nonetheless contribute to the substance of international law, articulate the harms endured by the “comfort women,” declare the state responsibility of Japan under international law therefor, and recommend, as opposed to order, measures necessary and appropriate to fulfil its responsibility.
882. Accordingly, in this Part, the Judges will determine the international legal responsibility of the state of Japan for the offences presented in the Common Indictment including breaches of continuing obligations in accordance with Article 4. In Part VII we consider Japan’s legal responsibility under international law to provide reparations and set forth our recommendations.

A. PRELIMINARY LEGAL ISSUES

1. The Standing of the Applicants

883. The Japanese government has argued that the individual victims of rape and sexual slavery do not have standing to bring an application for reparations under international law. The Tribunal considers, however, that all those persons falling within the class identified in the Application – victims of military sexual slavery – are entitled to bring claims for any form of reparations authorised by this Tribunal’s Charter consistent with international law.
884. The Third Report of the International Law Commission’s Special Rapporteur on State Responsibility addresses the situation where the primary victim is an individual or group. He recognises the importance of taking into account the wishes of the victims and that standing must be broader when individuals are the victims of internationally wrongful acts. His recommendation reaffirms the position which this Tribunal adopts:

As to the invocation of responsibility by a State in cases where the primary victim is a non-State, the Draft Articles [on State Responsibility] should provide that any State Party to the relevant collective obligation should

⁶¹³ See, e.g., Nuremberg Charter, Article 28; ICTY Statute, Article 24(3)(l) and ICTR Statute, Article 23(3).

have the right to invoke responsibility by seeking cessation, assurances and guarantees of non-repetition and, where appropriate, restitution.⁶¹⁴

885. In his Fourth Report on State Responsibility the Special Rapporteur asserts that failure by the institutions of international law “to act in a given case should not entail that a state in breach of an obligation to the community as a whole cannot be called to account.”⁶¹⁵ This Tribunal has been created by civil society to consider the claims of the “comfort women” for whom the formal state-based mechanisms of international law have proved inadequate. The presence before the Tribunal of many of the survivors indicates their consent to this Tribunal’s hearing the claims arising out of the wrongs perpetrated upon them. Accordingly the Judges consider that Article 4 of its Charter properly allows these claims to be heard.

2. *The Legal Significance of Delay in Bringing the Application*

886. The passage of time since the commission of the crimes charged is relevant to the work of the Tribunal in two ways: it must consider whether the Application is precluded by the passage of time and its recommendations must be consistent with the principle of inter-temporal law. With regard to inter-temporal law, the Judges adhere to the principle that the legality of actions must be assessed in accordance with the law applicable at the time of their commission.⁶¹⁶ The Judgement on the Common Indictment applied the related principle of *nullum crimen sine lege* to the determination of whether the charged conduct constituted crimes as of 1937-1945. In determining state responsibility, the application of inter-temporal law has been facilitated by the considerable consistency and continuity in the basic principles. In sum, where there are continuing wrongful acts, contemporary law can be applied.
887. In addressing Japan’s anticipated arguments on the operation of statutory limitation periods, the Tribunal notes that time limitations play a prominent role in all legal systems. The policy consideration behind allowing a statute of limitations is the principle of finality – that is, it is generally in the public interest that lawsuits be instituted within a specified period of time or the right to sue is lost. However, in the present context, the Judges consider that the nature of the original offences as crimes against humanity, the fact that the violations are continuing, and the recent emergence of circumstances enabling the Applicants to bring their claims preclude treating these claims as time-barred.
888. The Application herein seeks to hold the state of Japan responsible to provide reparations for both the original offences and certain breaches of continuing obligations that have exacerbated the original damage and caused additional harm to former “comfort women.” These include Japan’s concealment of crimes and denial of wrongdoing; its failure to discharge its responsibility to prosecute the perpetrators and repair the damage through apology and compensation; its assertions, and failure to refute assertions, that the “comfort women” were voluntary prostitutes; and its failure to ensure the teaching and transmission of the historical truth. In determining whether there is an applicable limitations period, we turn to international jurisprudence, in particular, the decision of the

⁶¹⁴ Third Report on State Responsibility, Addendum, submitted by James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/507/Add.4 (2000), para. 378.

⁶¹⁵ Fourth Report on State Responsibility, submitted by James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/517 (2000), para. 37.

⁶¹⁶ “A judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled.” Judge Huber in the *Island of Palmas Case* (1949) II UNRIAA 829.

International Court of Justice (ICJ) in the case of *Certain Phosphate Lands in Nauru*.⁶¹⁷ There, the ICJ noted that international law does not lay down any specific time limits and that it is for the Court to determine, in the circumstances of each case, whether the passage of time renders an application inadmissible. That case did not involve crimes against humanity, a factor which strengthens our determination not to treat these crimes as time-barred.

889. Given that the original offences underlying this Application constituted crimes against humanity when committed, we apply the international legal principle, formally adopted in relation to criminal proceedings, that there is no applicable period of limitations.⁶¹⁸ As expressed by Mr. Louis Joinet, the Special Rapporteur on Impunity of Perpetrators of Violations of Civil and Political Rights, “[p]rescription is without effect in the cases of serious crimes under international law . . . [and] cannot run in respect of any violation while no effective remedy is available.”⁶¹⁹ Moreover, the fact that the failure to repair the original violation constitutes a continuing violation negates any question of time limits in regard to the Application for Restitution and Reparations before us.
890. To apply a limitation period would be especially inappropriate here given that neither the Allies nor Japan has allowed prosecution of the crimes of military sexual slavery.⁶²⁰ Nor has Japan provided legal compensation or reparations within a reasonable time period. We note further that state practice indicates that the obligation to repair crimes against humanity is a continuing one. Despite time limits set on negotiated agreements to pay reparations for Nazi crimes committed during World War II, the recognised importance of making full compensation has led to repeated extensions of the deadlines.
891. Further, the Judges consider that the principle of finality can only become operable if the information necessary to filing suit is available to the victims. Given Japan’s acts of concealment and denial of these offences, such a process could only commence in the present context following the Japanese state’s acknowledgement that the offences, which form the subject matter of this claim, were committed. Explicit, albeit partial, acknowledgement of official participation and coercion in the “comfort system” was not provided by Japan until 1993. Finally, the state of Japan itself has accepted the validity of old claims, as shown by the fact that it recently concluded an official compensation agreement with a group of forced labourers.⁶²¹ Accordingly, the Judges find that this Application is not time-barred.

3. *Exhaustion of Domestic Remedies*

892. National remedies must usually be exhausted before there can be recourse to international justice mechanisms. This general principle of customary international law⁶²² has been

⁶¹⁷ *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections, 1992 ICJ Rep. 240, para. 4 (June 26).

⁶¹⁸ This Judgement, *supra*.

⁶¹⁹ Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) submitted by Mr. Joinet pursuant to Sub-Commission decision 1996/119, U.N. Doc E/CN.4/Sub.2/1997/20/Rev.1, para. 31 (hereinafter “Joinet Report”). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, annexed to the Final Report of Mr. M. Cherif Bassiouni, Special Rapporteur, 18 January 2000, U.N. Doc. E/CN.4/2000/62, Section IV, paras. 6, 7.

⁶²⁰ The exception is the Dutch prosecution of Japanese military personnel and civilian comfort station proprietors at Batavia for crimes against Dutch women living in Dutch Indonesia under Article 4 of the 1907 Hague Convention and Dutch war crimes laws. Batavia. No. 72/1947, Verdict 231 in the Name of the Queen.

⁶²¹ Following the Japanese Supreme Court’s dismissal on standing grounds, the Japanese Diet enacted a special compensation bill for all Taiwanese drafted by Japanese military. This Judgement, *infra*.

⁶²² See, e.g., *Interhandel* (Switzerland v. United States of America) 1959 ICJ Rep. 27 (24 October); *Case concerning Elettronica Sicula S.P.A. (ELSI)* (United States of America v. Italy) 1989 ICJ Rep. 50 (20 July).

incorporated into the rules of many international courts and tribunals, including human rights bodies.⁶²³ This Tribunal accepts the principle as applicable to itself. However, failure to exhaust local remedies is not a bar to international proceedings where “pending proceedings have been unreasonably prolonged.”⁶²⁴ The Tribunal notes the numerous unsuccessful efforts of the applicants to seek redress in the courts of Japan. The fate of these cases compels the conclusion that survivors have no reasonable expectation of achieving an effective resolution of this matter in a timely manner within the courts of Japan.

893. Recognising that none of the cases has been finally settled in the Supreme Court of Japan, the Judges nonetheless find that it would be inappropriate to stay this Application pending the final disposition of these cases. To deny the Application until final adjudication in domestic courts is likely to result in a denial of justice to many of the elderly women applicants who may not survive the delay inherent in further process in Japan. Moreover, we appreciate, from the agonized demand for justice expressed by the survivors before this Tribunal that, with over 55 years having elapsed since the end of the war, the need for adjudication of this Application is urgent and that Japan’s responsiveness thereto is a crucial factor to their being able to live out the rest of their lives in peace and to die in peace.
894. Notably, the decade-long effort to exhaust domestic remedies has thus far been futile. In light of the ongoing and time-sensitive nature of the harm caused by the already longstanding denial of redress, we find, consistent with international legal standards, that access to domestic remedies has been unreasonably prolonged and that the survivors are entitled to bring this Application under the Charter of the Tribunal.

4. *Standard of Responsibility*

895. The Judges next consider the standard of responsibility appropriate to this Application. There has been debate over whether the standard is subjective, fault-based or objective. Oppenheim asserts that state responsibility is based on fault.⁶²⁵ It must normally be demonstrated that the state failed to show due diligence in preventing the injury or punishing the offender. By contrast, Brownlie takes the position that liability rests upon violation of a particular legal duty based on treaty or custom under international law, and that the test of responsibility is an objective one. He states that “objective responsibility rests on the doctrine of the voluntary act: and, thus, provided that agency and causal connection are established, there is a breach of duty by result alone.”⁶²⁶ Brownlie argues that the public law analogy to the *ultra vires* act (or an act exceeding the scope of legitimate authority) is more realistic than attempting to identify subjective *culpa* (or guilt) in specific natural persons who may, or may not, “represent” the legal person (the state) in terms of wrongdoing. For Brownlie, opinions in favour of the principle of fault

⁶²³ See for example: Optional Protocol to the International Convention on Civil and Political Rights, G.A. Res. 2200A (XXI) (1976), art. 5(2)(b); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (Vol. 1) (2000) (entered into force Dec. 22, 2000), art. 4(1); International Convention on the Elimination of All Forms of Racial Discrimination, 60 U.N.T.S. 195, art. 11; Convention Against Torture, and Other Cruel, Inhumane or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 113, art. 21(1)(c); American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. 1, art. 46(1)(a), OEA/ser.L./V/II.23, doc. 21 rev. 6 (1979) (entered into force July 18, 1978); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 35(1); African Charter on Human and Peoples’ Rights, 21 ILM 58 (1982), art. 50.

⁶²⁴ Sir Robert Jennings and Sir Arthur Watts eds., *Oppenheim’s International Law*, 9th ed., vol. I, 1992, p. 526.

⁶²⁵ Sir Robert Jennings and Sir Arthur Watts eds., *Oppenheim’s International Law*, 9th ed., vol. I, 1992, p. 509.

⁶²⁶ Ian Brownlie, *System of the Law of Nations State Responsibility*, 1983, p. 439.

are unconvincing for the following reasons: (i) such opinions produce firm propositions divorced from the evidence of diplomatic practise; (ii) international jurisprudence does not support the principle (see below); and (iii) the use of the term *culpa* or *faute* is mistaken or vacuous simply to describe a breach of a legal duty as an unlawful act.⁶²⁷

896. International jurisprudence supports Brownlie's conclusions. For example, the General Claims Commission, established by a treaty between Mexico and the United States in 1923, employed objective tests of responsibility.⁶²⁸ In the *Caire* claim, Verzijl, President of the Franco-Mexican Claims Commission and a noted jurist, explained:

The doctrine of the objective responsibility of the State . . . is . . . a responsibility for those acts committed by its official or its organs, and which they are bound to perform, despite the absence of *faute* on their part The State also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official organ has acted within the limits of his competency or has exceeded those limits⁶²⁹

In this view, strict liability is essentially a *prima facie* responsibility with various defences or justifications available to preclude a finding of liability.⁶³⁰

897. The relevance of fault – or the relative “strictness” of the obligation – is determined by the content of the particular international duty or rule. Although *culpa* or fault is not a general condition of liability, it may play an important role in certain contexts. For example, where the loss results from acts of individuals not employed by the state, the responsibility of the state will depend on a failure of due diligence or a failure of control.
898. The Judges note, however, that the principle of objective responsibility dictates the irrelevance of intention to harm (*dolus*) as a condition of liability. Thus state responsibility cannot be avoided based on claims that there was no intent to harm the victims. This does not mean that *dolus* or intention to harm has no role to play: proof of intent to harm on the part of leading organs of the state will solve the problem of imputing the wrong to the state in any given case.

B. ELEMENTS OF STATE RESPONSIBILITY

1. The Applicable Principles of Law

899. Under general international law, a state is internationally responsible for any wrongful act that is attributable to the state and has damaged the legitimate interests of others. Such responsibility of a state is *additional* to and exists alongside the international criminal liability of the individuals who committed crimes in violation of international law. This rudimentary principle of international law has been reaffirmed by the expert testimony of Professor Frits Kalshoven before this Tribunal as well as by the ICJ in the cases brought by Bosnia and Croatia respecting responsibility of the Federal Republic of Yugoslavia for genocide.⁶³¹ A state bears responsibility for wrongful acts when a state, either through its

⁶²⁷ Brownlie, p. 440.

⁶²⁸ Neer (1926) R.I.A.A., iv, pp. 60, 61-62; Roberts (1926) R.I.A.A. iv, pp. 77, 80; *Caire* (1926) R.I.A.A. v, pp. 516, 529-31.

⁶²⁹ *Ibid.* See also Brownlie, p. 39.

⁶³⁰ Brownlie, p. 44.

⁶³¹ See Exhibit 230. See also Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*) (Judgement on preliminary objections), 1996 ICJ Rep. para. 33 (11

own conduct or through the conduct of its agents or organs, acts in violation of an international duty and thereby commits an international wrong. It is a fundamental principle of international law that the breach of an international duty incurs an obligation to make reparation in an adequate form.⁶³² The duty must generally have been incumbent upon the state at the time the act complained of was committed.

900. These fundamental tenets of international law have remained constant from at least 1930. The League of Nations Codification Conference, 13 March-12 April 1930 produced 10 Draft Articles on the Responsibility of States, although it failed to formally adopt them or promulgate a conference report.⁶³³ Article 7 of the Draft Articles provided that "International responsibility is incurred by a State if damage is sustained by a foreigner as a result of an act or omission on the part of the executive power incompatible with the international obligations of the State." In addition, Article 8 stated:

International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.⁶³⁴

901. These principles were reaffirmed in Article 15 of the 1961 Harvard Draft on the International Responsibility of States for Injuries to Aliens,⁶³⁵ which provides that direct state responsibility attaches both to official and authorised acts of agents and/or organs of the state and to acts committed by such persons in the ostensible exercise of their official functions, but without the state's command or authorisation or in excess of their competence according to the internal law of the state. Although neither set of Draft Articles was concluded in treaty form, their constant reiteration and application in state practice shows that they were widely accepted. These principles of state responsibility were applicable to the state of Japan at the time the military sexual slavery was committed.
902. The International Law Commission's 2001 Draft Articles on State Responsibility⁶³⁶ provides the most up-to-date articulation of state responsibility in international law. Article 1 provides that "Every internationally wrongful act of a State entails the international responsibility of that State." This enunciation of the basic concept remained uncontroversial throughout the drafting process, demonstrating its acceptance in international law.

July); Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia), Application made 2 July 1999.

⁶³² Chorzow Factory (Jurisdiction) (Germany v. Poland) 1927 PCIJ, Series No. 9, p. 21.

⁶³³ League of Nations Publication 1930, xvii at 234.

⁶³⁴ The International Commission's Draft Articles on State Responsibility, Part 1, Articles 1-35 (1930), compiled and edited by Shabtai Rosenne; "State Responsibility Minutes", Acts and Documents: Conference on the Codification of International Law, vol. 5, 1st, The Hague, 1930.

⁶³⁵ Louis B. Sohn and Richard Baxter, Draft Convention on the International Responsibility of States for Injuries to Aliens, Harvard Law School, 1961, Research in International Law, "Responsibility of States," 23 Am. J. Int'l L., Spec. Supp. (1929) (Harvard Draft), pp. 131-239.

⁶³⁶ U.N. Doc. A/CN.4/L.602/Rev.1, adopted by the Drafting Committee on second reading (26 July 2001) (hereinafter ILC Draft Articles 2001).

903. Thus the core constituents of state responsibility have remained largely unchanged from the early part of the 20th century. These are principles, then, that must be applied to the conduct of the state of Japan with respect to its responsibility for the “comfort system” and for violations before the Tribunal continuing to this day.
904. A state commits an internationally wrongful act when it acts in violation of international law. An act or omission that produces a result which is, on its face, a breach of a legal obligation gives rise to responsibility in international law, whether the obligation rests on treaty, custom or some other basis. An act in violation of a state’s international obligations but which is lawful under its internal law is not thereby rendered lawful in international law.⁶³⁷ Otherwise a state could evade its international obligations by domestic legislation.
905. The Judges have found above that, in the instigation, operation and continuation of the “comfort women” system, high-ranking Japanese military and government officials, and thus the state of Japan, have acted in violation of both its treaty obligations and its obligations under customary international law. Indeed, as the Judges have found, these violations were integral to Japan’s military strategy at the highest levels during the war in the Asia-Pacific region.

2. *Applicability to Colonial and Occupied Territories*

906. The question then arises whether the state responsibility attaching to such violations applies to women raped and enslaved from Taiwan, Korea and Japan, or only to women considered “foreigners” or “aliens” to Japan under international law.
907. Under international law, colonies and similar dependent territories possess no separate statehood or sovereignty. It is the colonial power alone that possesses the international personality of statehood and has capacity to exercise the international rights and duties appertaining to states. Accordingly peoples from colonized territories are deemed to have no separate nationality from that of the colonial power.
908. Japan colonised Taiwan in 1895 and Korea in 1910. Credible arguments suggest that had there been no Japanese colonial domination of Korea and Taiwan, such massive numbers of women would not have been taken from these jurisdictions as “comfort women.” It is undoubtedly true that the imperialist and racist assumptions of the inferiority of colonised peoples and the sexist and ethnocentric policies of the Japanese military and government contributed to the exploitation of women in these jurisdictions: the Japanese state machine regarded colonised women as at its disposal and considered it more acceptable to make colonised women “comfort women” than Japanese women.

(a) *The Status of Taiwan*

909. Following the Sino-Japanese War, in 1895 Japan extended its rule over Taiwan by the terms of Article II of the Shimonoseki Treaty. Japan appointed a Governor-General to administer Taiwan, and the Governor-General reported directly to Emperor HIROHITO. Taiwan remained a colony of Japan throughout the armed conflict between Japan and China in the 1930s and throughout World War II until the Japanese surrender in 1945.

⁶³⁷ This principle is found in the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, T.S. No. 58, 1155 U.N.T.S. 331, art. 27.

(b) *The Status of Korea*

910. The domination of Korea was one of Japan's major goals in the third quarter of the 19th century. Both the Sino-Japanese War (1894-1895) and the Russo-Japanese War (1904-1905) were fought and won by Japan in order to establish its power and authority over Korea. In 1905, Korea became a Protectorate of Japan. Japan completed its domination of Korea through the Treaty of Annexation on 29 August 1910, whereby the Korean Emperor ceded all sovereign power over Korea to the Japanese Emperor. Korea was therefore annexed to Japan during the relevant time period.

3. *The Position of the Japanese, Korean and Taiwanese Claims Under International Law*

911. Japan has sought to deny liability in relation to Japanese, Korean and Taiwanese women on the grounds that the traditional doctrine of state responsibility rests upon the commission of an internationally wrongful act against a non-national. As colonised peoples, Koreans and Taiwanese do not come within this protection.
912. However, as discussed in the Judgement on the Common Indictment, the concept of crimes against humanity extended this basic doctrine to harm caused to any population irrespective of whether the civilians are nationals or indeed colonised peoples. This principle of liability thus applies to crimes against humanity committed by a belligerent state against its own nationals. Japan is, therefore, not exempt from liability for such international wrongful acts whether committed against the peoples it colonised or against its own nationals.
913. In addition, slavery as an international crime was not based solely on the laws of war but constituted an internationally wrongful act independent of war at the time when the crimes charged were committed. We agree with the conclusion of the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, that Japan violated customary international law "regardless of the territorial status of the Korean [and Taiwanese] peninsula at the time that the offences were committed. As a result, these norms apply equally to Korean [and Taiwanese] women, whether or not they were civilians in an occupied territory."⁶³⁸ The point applies *mutatis mutandis* to the Japanese claimants.

C. **JAPAN'S INITIAL VIOLATIONS OF TREATY AND CUSTOMARY LAW**

906. As examined at length in the Judgement on the Common Indictment, we find that the state of Japan, through its officials and their agents (the named accused and numerous other personnel of the Japanese military, colonial and government machines), incurred criminal responsibility for – individually and through their failure as superiors to prevent, punish and protect – the internationally wrongful acts of rape and sexual slavery as crimes against humanity. We note that Japan's conduct also directly breached a number of its treaty obligations.

⁶³⁸ "An analysis of the legal liability of the Government of Japan for 'comfort women stations' established during the Second World War", Appendix to the Final Report on Systematic Rape, Sexual Slavery, and Slavery-like Practices during Armed Conflict, submitted by Gay J. McDougall, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1998/13.

1. The 1907 Hague Convention Respecting the Laws and Customs of War on Land

914. Having ratified the 1907 Hague Convention IV in 1911, Japan was bound by its provisions. In addition, by the time of the Second World War, the 1907 Hague Convention had become part of international customary law governing the conduct of war on land, including the rules relating to the occupation of enemy territory. This point was expressly stated in the Judgements of the International Military Tribunals of Nuremberg and Tokyo.
915. The 1907 Hague Convention governs military conduct during the period of open hostilities and details the proper treatment of the enemy, prisoners of war and spies. It provides that belligerents must obey the “laws, rights and duties” and that commanders are responsible for the conduct of their subordinates.⁶³⁹ The Judges accept the prosecution’s contention that “laws and customs of war” encompassed the recognised core prohibitions and accepted doctrines of armed conflict.
916. The Nuremberg Tribunal addressed the point in relation to defence arguments concerning the application of the general participation clause of Article 2. That Article provides that the Regulations of the Convention are only applicable if all the belligerents are parties to the Convention. But not all belligerents of the Second World War were parties to the Hague Convention. The Nuremberg Tribunal ruled that where the Hague Convention could not be directly applied, it served as good evidence of customary international law existing at the time of war: “[B]y 1939 these rules laid down in the Convention were recognised by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to [in the Charter of the Tribunal].”⁶⁴⁰
917. Similarly, the IMTFE found that the series of treaties concluded between 1907 and 1929 impose direct treaty obligations on states and delineated more precisely the customary law. According to Professor Kalshoven, in his expert submissions before this Tribunal, “[t]he legal opinion, expressed in either of these judgements, that at the time of the Second World War the Convention could be regarded as belonging to the body of customary international law has since been accepted generally, both in state practice and in legal literature, and it may be regarded as uncontested today.”⁶⁴¹
918. The Judges find that the limiting effect of the general participation clause was thus negated at the time of the violations herein charged. The 1907 Hague Convention applied to international armed conflicts, and thus was applicable to the Asia-Pacific wars. Japan and its opponents in war were “belligerent Powers.” “Both the [1907 Hague] convention and, in particular Article 3, were therefore applicable to Japan as a belligerent Power participating in the Second World War, as well as, obviously, to the conduct of its armed forces in the course of military operations and during situations of occupation.”⁶⁴²
919. The IMTFE found, and the evidence before this Tribunal confirms, that the state of Japan violated numerous provisions of the 1907 Hague Convention, in particular Article 1 of the Convention, and Articles 4, 5, 20 and 46 of the Regulations annexed to the Convention.

⁶³⁹ 1907 Hague Convention IV, Article 1(1) and 1(4).

⁶⁴⁰ IMT Judgement, pp. 220-221.

⁶⁴¹ See Exhibit 230, Expert Supplementary Opinion by Frits Kalshoven, Article 3 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, and the Right of Individual Persons to Claim Compensation for the Acts of Members of the Armed Forces, p. 4.

⁶⁴² Exhibit 230, Expert Supplementary Opinion by Frits Kalshoven.

920. Article 1 of the 1907 Hague Convention states that the Contracting Powers shall issue instructions to their armed forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention. Under the Convention, battlefield commanders, whether responsible for armies, militias or volunteers, as well as occupying authorities had to enforce the Regulations at all times and in all contexts.⁶⁴³ Thus, we find that Japan had an obligation under the Convention to educate and disseminate information to military personnel regarding the laws of war and to take other measures to prevent and punish violations of the laws.
921. Among the laws subject to this obligation, as we have already discussed in our Judgement on the Common Indictment, were the prohibitions of and obligations to prevent rape and forced labour, as incorporated in the Hague Convention and the laws or customs of war. Although the Convention, by its terms, does not apply to Japan and its annexed territories Korea and Taiwan, the obligations being a part of customary law and embodied in the concept of crimes against humanity were applicable to all the women and girls affected by both the “comfort system” and the rapes at Mananque.

2. *The 1921 International Convention for the Suppression of the Traffic in Women and Children*

922. Having ratified the 1921 Trafficking Convention in 1925, Japan was required under Articles 2 and 3, to take all steps necessary to discover and prosecute persons engaged in the traffic of women and children.⁶⁴⁴ Japan’s activity of forcibly recruiting, kidnapping, transporting and coercing women and girls into sexual slavery from each of its colonial and occupied territories, as demonstrated through the testimony of survivors and documentary evidence presented to the Tribunal, was in flagrant violation of the terms of the Convention.
923. We further consider that Japan’s declaration, purportedly pursuant to Article 14, that the Territory of Chosun (now Korea) was not included in the scope *ratione territorii* of its acceptance of the Convention, does not legitimise the military sexual slavery system operated by Japan. We have already indicated that we view Article 14 as permitting exceptions in order to protect local customs that were not clearly condemned at that time. We note further that reservations cannot be invoked to justify violations of other international obligations and that the obligation to prevent and punish trafficking in women and girls was already of customary status by the time of the China War.⁶⁴⁵

3. *1929 Geneva Convention*

924. Article 3 of the 1929 Geneva Convention stipulated that “Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex.” The “comfort women” were not technically prisoners of war in the terms of the Geneva Convention⁶⁴⁶ (although, in many ways, they were truly prisoners of the warfare in and for which they were used). However, the Convention, in conjunction with

⁶⁴³ 1907 Hague Convention IV, Article 1.

⁶⁴⁴ International Convention for the Suppression of the Traffic in Women and Children (1921), 92 UNTS 19, arts. 2 and 3.

⁶⁴⁵ We also note that many of the Korean women taken by the Japanese military were initially taken to Japan. Once they landed in Japan, the obligations of the Convention applied. This provides an additional reason why it is not necessary to examine the question of whether such a reservation is legally permissible in general.

⁶⁴⁶ Prisoners of war are defined in the Convention of July 27, 1929, Relative to the Treatment of Prisoners of War, Article 1 and the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land, of October 18, 1907, Articles 1, 2, and 3.

the other treaties, makes it clear that there was a general prohibition on abusing women. Accordingly, this provision provides additional support for the finding that Japan was not allowed to subject the “comfort women” to rape and sexual slavery, but rather was required to protect all women within its colonies and the territories it militarily occupied from sexual violence. The evidence before the Tribunal has demonstrated that the state of Japan brazenly violated its obligations under this Convention in its treatment of “comfort women” and girls.

4. *1930 International Labour Organization Convention Concerning Forced Labour*

925. As noted in the Judgement on the Common Indictment, Japan ratified the 1930 ILO Forced Labour Convention in 1932.⁶⁴⁷ Under Article 1, Japan undertook to suppress the use of forced labour in all its forms within the shortest possible period. Article 8 placed the responsibility for every decision to have recourse to forced labour on the highest civil authority in the territory concerned. As previously discussed, like the ILO Committee of Experts, this Tribunal finds that the evidence demonstrates that the state of Japan’s system of military sexual slavery could not be excused under any of the 1930 exceptions and thus constituted “forced labour” in violation of the Convention.

5. *Enslavement and Sexual Slavery*

926. Since Japan did not ratify the 1926 Slavery Convention, it cannot be held responsible for breaching specific obligations under the terms of the Convention. However, as discussed in the Judgement on the Common Indictment, the prohibition against slavery and the slave trade was accepted as customary international law by the beginning of the 20th century.
927. This Tribunal has found that once the women from the colonised and occupied territories were removed from their homes and villages, irrespective of the method of removal, and forced to provide sexual services to the Japanese military, the women were military sexual slaves for the Japanese military. Japan thus violated the customary international law prohibiting the slave trade and the practice of slavery and is liable under international law for this grave violation.

6. *Non-Discrimination Norms*

928. Norms of sexual equality were emerging at the beginning of the 20th century, first through notions of protection. This is demonstrated by the inclusion in Article 37 of the Lieber Code of protection for “the persons of the inhabitants, especially those of women” and, in Article 46 of the Regulations Annexed to the 1907 Hague Convention, of the provision protecting family honour. The Hague Convention also placed a firm emphasis on the respect of all peoples as equals. Further the various treaties already discussed show that there was a longstanding international norm relating to the protection of women. In addition, the Preamble to the ILO Constitution explicitly required equality based on sex, for example in recognition of the principle of equal remuneration for work of equal value. In 1935, the Permanent Court of International Justice enunciated the principles of substantive equality and understanding difference in the context of the treatment of

⁶⁴⁷ Convention Concerning Forced Labour (1930), 39 U.N.T.S. 55.

minorities.⁶⁴⁸ These emerging norms of race and sex equality, had fully crystallized by the time of, and were incorporated in, the UN Charter in 1945, where they are included in Articles 1(3) and 55.

929. The evidence demonstrates multiple violations of both the requirements for the protection of women as well as the prohibitions on race and sex discrimination. Most fundamentally the evidence shows that the Japanese military targeted women and girls primarily of subjugated populations viewed as inferior by Japanese Imperial culture, for the provision of forced sexual services because they were female and thus seen as disposable. As such, the “comfort system” denied women and girls their right to gender and racial equality and rights to respect for their physical, mental and sexual integrity and human dignity.⁶⁴⁹ The creation of the “comfort women” system reflects the intersection of discrimination based on both gender and race/ethnicity, as discussed above.

D. ATTRIBUTABILITY OF INTERNATIONALLY WRONGFUL ACTS TO THE STATE OF JAPAN

1. *State Responsibility for Acts of State Organs*

930. For the state of Japan to be responsible under international law for the internationally wrongful acts of rape and sexual slavery for which this Tribunal has convicted the accused charged in the Common Indictment, as well as for the subsequent breach of continuing obligations, their wrongful acts must be attributable to the state. For the reasons set forth below, the Judges find that the state of Japan is responsible for the rape and enslavement of women and girls as “comfort women” pursuant to the military sexual slavery system whether such enslavement was carried out by government agents, army personnel, or civilians acting on its behalf.
931. States act through the institutions and agencies of the state, its officials and employees. Such institutions are commonly referred to collectively as *organs of the state*. Since at least 1923, it has been well established that the conduct of an organ of the state will be considered as an act of that state under international law, whether that organ belongs to the constituent legislative, executive, judicial or other power; whether or not its functions are of an international character; and whether or not it holds a superior or a subordinate position in the organisation of the state.⁶⁵⁰ The key element is the role of the organ or official *as part of the administration of the state*. It does not matter that the application of policies is in the hands of subordinate officials. The forms of administration are secondary. The administration is for legal purposes to be seen as a *system* of government.
932. Armed forces are clearly state organs and part of the administration of the state. A state may be liable for a failure to control elements within the military structure when, under all the circumstances, it is reasonable to assume such a duty to exercise control. States may be responsible for *ultra vires* acts of their officials committed within their apparent authority or general scope of their authority. For example, the *Youmans* case stated:

⁶⁴⁸ See, for example, *Settlers of German Origin in Territory Ceded by Germany to Poland*, 1923 PCIJ (Series B) 24 (Nov. 6); *Minority Schools in Albania*, 1935 PCIJ (Series A/B) No. 64, p. 19 (6 April).

⁶⁴⁹ In the Judgement on the Common Indictment, the Judges have noted that the Japanese military inflicted sexual violence on both women and men. However, the institutionalized system of “comfort” stations or facilities for sexual slavery was directed at the forced sexual servitude of women.

⁶⁵⁰ This general approach is contained in the Draft Articles adopted by the Institute of International Law in 1927, which are in turn reflected in the ILC Draft Articles of 1973. This longstanding principle is affirmed by the ILC Draft Articles 2001, Article 4: “The conduct of any State Organ shall be considered an order of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.”

Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience to some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instruction must always be considered as personal acts.⁶⁵¹

933. What matters is the amount of control that ought to have been exercised rather than the amount actually exercised. During World War II, HIROHITO was the head of the state and Supreme Commander of the Imperial Japanese Military. The other defendants were leading members of the Japanese military or government. As heads and high-ranking leaders of the organs of the Japanese state, the findings of their individual, command or superior responsibility under international law are more than sufficient evidence of internationally wrongful acts attributable to Japan.
934. The fundamental issue “is whether in the given case the system of administration has produced a result which is compatible with the pertinent principle or standard of international law.”⁶⁵² As determined in the Judgement on the Common Indictment, the expert testimonies of Professors Yoshimi and Hayashi demonstrate that the structures of the Japanese military and political machines do indeed constitute such a system of administration which facilitated the egregious violations of international law. Based on the expert testimony of Professor Yoshimi and other evidence submitted to the Tribunal, the Judges find that the chains of command linked officers in the field supervising the provisioning and operation of military “comfort stations” to the highest echelons of the War and Foreign Ministries and to the Emperor himself, where the establishment of the “comfort station system” was sanctioned, organised and/or managed.
935. On many occasions, what constitutes an “organ of the state” is essentially a question of fact not related to the formal or regular tests provided by a constitution, or other pre-existing local law. Thus, the conduct of an organ of an entity, which is not part of the formal structure of the state but which is empowered to exercise elements of governmental authority, may be classified as acts of the state, providing the organ was acting in that capacity in the case in question.⁶⁵³ In the same way, the conduct of a non-official, private person or group of persons is also an act of the state under international law, provided such persons were acting on behalf of the state.⁶⁵⁴ The *Massey Claim*⁶⁵⁵ is on point and shows these principles to have been part of international law prior to 1945. This is important in the present context in relation to the potential assertion by the state of Japan that because private individuals recruited the “comfort women” on many occasions, the state of Japan cannot be held liable.
936. On the basis of the principle articulated, the state of Japan cannot evade responsibility on this ground. The evidence has established that private individuals recruiting “comfort women” were selected, monitored, assisted and, in a substantial number of cases, directly

⁶⁵¹ U.N. R.I.A.A. iv, pp. 110, 116; Annex 3 (1925-6), No. 162 (1926).

⁶⁵² This position is supported by the responses of states to a request for information addressed to Governments by the Preparatory Committee of The Hague Codification Conference of 1930.

⁶⁵³ ILC Draft Articles 2001, Article 5.

⁶⁵⁴ Article 8 of the Draft Articles by the ILC in 1973 on State Responsibility adopted on First Reading, 1980 YBILC II, part two, pp. 30, articulates this point.

⁶⁵⁵ (1927) UNRIIAA iv, p. 155. Commissioner Nielsen stated: “it is undoubtedly a sound general principle that whenever misconduct on the part of [persons in private service] whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, the nation must bear the responsibility for the wrongful acts of its servants.”

accompanied by the Japanese military; their offers and demands were backed by the intimidation of military involvement. As such, the civilian recruiters were acting on behalf of the Japanese military and clearly agents of the Japanese military and their acts were attributable to the state of Japan. Japan is therefore liable for their acts or omissions under the international principles of state responsibility.

937. In addition, a state is responsible if it adopts the actions of private individuals.⁶⁵⁶ Article 11 of the ILC Draft Articles 2001 reiterates this longstanding principle: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own."⁶⁵⁷ The Judges consider that, in addition to the illicit recruitment methods, the subsequent rape and sexual slavery imposed on the women and girls supplied to them, and regulated in minute detail by the military, constitute acknowledgement and adoption. Finally, as previously noted in the Judgement on the Common Indictment, in 1993 the state of Japan explicitly acknowledged in its August 4, 1993 report that the military was involved in coercive recruitment of "comfort women" and girls either directly or through "private recruiters who acted in response to requests of the military . . . [and that the] women lived in misery at the comfort stations under a coercive atmosphere."⁶⁵⁸
938. Accordingly, the Tribunal finds that Japan is liable under the international principles of state responsibility for the acts and omissions of its officials involved in the military sexual slavery system at every level as well as that of the private recruiters and proprietors and others who assisted the implementation of that system and the sexual abuse and enslavement of women. It is important to note that the responsibility of Japan under international law applies not only to the institutionalisation of the system itself, but also to subsequent actions of its organs and private agents who have obstructed and failed to make full reparations for these horrific crimes and, in doing so, have perpetuated new and continuing violations against the victims and survivors.

2. *Extra-Territorial Theory of Responsibility*

939. Responsibility attaches to a state not only for wrongful acts and omissions within its territory but also for the wrongful acts and omissions of its organs, agencies, officials, and employees acting outside the territory of that state.⁶⁵⁹ Thus, Japan is responsible for all violations of its international obligations perpetrated by its organs and agents throughout the Asia-Pacific region.

E. CONTINUING OBLIGATIONS AND VIOLATIONS OF STATE RESPONSIBILITY

940. In the Judgement on the Common Indictment, we found that individuals who were high-ranking officials of Japan were criminally responsible for rape and sexual slavery of the "comfort women" and rape of the women of Mananike. Given the official positions of the accused as high-level officials of the Japanese government or military, the state of Japan is responsible for these violations and has the responsibility to make reparations, which is a broad concept examined at greater length in the next part of this Judgement.

⁶⁵⁶ US Diplomats in Iran Case (U.S. v. Iran), 1980 I.C.J. 3; ILC Draft Articles 2001, Article 11.

⁶⁵⁷ ILC Draft Articles 2001, Article 11.

⁶⁵⁸ Exhibit 231.

⁶⁵⁹ Namibia (South West Africa) Legal Consequences Case, 1971 I.C.J. 54. See also, Harvard Draft, *supra*.

941. Article 4 of the Charter of this Tribunal gives this Tribunal jurisdiction to consider acts and omissions of the state of Japan that constitute continuing violations and obligations flowing from the original wrongful acts. For the reasons stated above, the state of Japan has additional responsibility for these continuing violations and obligations, both active and passive, which have caused significant additional physical and mental suffering to the survivors. As previously discussed, to the extent that these violations or obligations continue until today, the Judges find it appropriate to utilise not only the law existing from 1937–1945, but also the law as it has developed to this time.

1. Denial, Concealment, and Distortion

942. A related continuing obligation of the state is to acknowledge and disclose the truth of crimes against humanity and war crimes. While trials and prosecutions may serve this goal in part, it must also be achieved in other ways. States have an obligation to declassify information concerning past wrongs and provide means for its preservation, analysis and accessibility to the public, both lay and scholarly. The right to know the truth is a derivative of the right to ensure human rights; it is a precondition to the effective use of remedies for violations and a deterrent against future wrongdoing.⁶⁶⁰ The Judges note the increasing use of national and international truth commissions and public inquiries to uncover past crimes.
943. Based on the evidence delineated below, the Judges find that the state of Japan has not only failed to fulfil this obligation, but that it has in fact repeatedly acted to obstruct the disclosure of the truth of the “comfort station” system, including up to the present day. We have already made reference to the actions of the state of Japan after World War II to destroy evidence of the “comfort station” system. In addition, Japan has failed to conduct and publicise a full investigation into the system.

(a) Destruction and Concealment of Documents in the Immediate Aftermath of the War

944. At the time that the Japanese government accepted unconditional surrender around 15 August 1945, it tried to destroy evidence of its war crimes and crimes against humanity. The evidence indicates that the General Staff and the Army Ministry instructed all Army units to burn confidential documents. Documentary evidence demonstrates that the Navy issued a similar order to all naval units.
945. Professor Yamada testified that at the end of the war, the Japanese government ordered the destruction of evidence by burning and concealment of documents in order to exempt the Emperor from responsibility and protect state officials from incrimination for war crimes and crimes against humanity. In an affidavit prepared for the Tribunal, another expert, Professor Yoshida Yutaka, referred to the 1978 statements of Hirose Toyosaku, the Finance Minister at the time of surrender, in which he declared: “Immediately after the end of the war, I also burned documents according to the government policy. This is

⁶⁶⁰ UN Special Rapporteur Cherif Bassiouni states that one form of reparation victims are entitled to is “verification of the facts and full and public disclosure of the truth.” United Nations Commission on Human Rights, The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report submitted by Mr. M. Cherif Bassiouni, Special Rapporteur, Annex, UN Doc. E/CN.4/2000/62, 18 January 2000, para. 25(b). The Annual Report for 1985-86 of the Inter-American Commission on Human Rights also states, “Every society has the inalienable right to know the truth about past events, as well as the motive and circumstances in which aberrant crimes came to be committed in order to prevent a repetition of such acts in the future.” Quoted in Mendoza et al. v. Uruguay, cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Report No. 29/92, Inter-Am. C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993), paras. 37-38.

what we decided at a Cabinet meeting.”⁶⁶¹ According to Professor Yoshida, Oyama Fumio, former Army Lieutenant-General in charge of Legal Affairs, confirmed in response to the Justice Ministry’s postwar survey that documents were destroyed under a government order. Professor Yoshida’s affidavit also includes a 5 December 1960 public statement by Okuno Seisuke, a Home Ministry employee during the war. Participating in a Jichi University radio program entitled “The Talk of the Days of Home Minister Yamazaki,” Okuno Seisuke said that he had been ordered to destroy official documents related to the war at the end of World War II.⁶⁶² Professor Yoshida drew the conclusion from the available materials that the Cabinet ordered the burning of official documents and concealment of other confidential materials, and that the government orally instructed recipients to destroy evidence of the order itself. Another expert, Professor Arai Shinichi, documented that, just after the declaration of surrender, the General Staff Office, the Army Military, and the Navy gave notice to all units to have confidential documents burned, and that the Ministry of Home Affairs burnt public documents.⁶⁶³

946. Based on the expert opinion, and the declarations against interest by government officials, the Tribunal finds that the government of Japan adopted and carried out a deliberate policy of incineration as well as concealment of documents relating to their crimes. These acts represent recognition by Japan itself of its wrongful acts and the Judges accept Professor Arai’s opinion that “such actions taken right after the defeat were clearly carried out in order to obliterate evidence that could have been used by war crime tribunals.”⁶⁶⁴
947. Evidence submitted by the Netherlands Prosecution indicates that the Japanese government was also specifically concerned to conceal the existence of the “comfort station” system even before the end of the war. Survivor-witness Jan Ruff-O’Herne testified that when the Japanese military returned the Dutch “comfort women” to civilian prisoner of war camps towards the end of the war, the military not only segregated them but also threatened their lives and the lives of their families in the event that they broke their silence and spoke of the crimes committed against them in the “comfort stations.”
948. The Tribunal finds that not only were measures taken to disguise the existence of the “comfort stations” but also documents concerning the establishment and operations of the “comfort women” system were systematically destroyed in the final days of the war. We base this finding on the evidence just discussed as well as on the fact that the surviving documentation makes clear that the “comfort system” was the subject of extensive, documented communications. The evidence, reviewed in the Judgement on the Common Indictment, of instructions regarding the regulation of the “comfort stations” and authorisations for even individual travel permits illustrates this point. We agree with the U.N. Special Rapporteur that the incriminating documents available “not only . . . reveal beyond doubt the extent to which the Japanese forces took direct responsibility for the comfort stations and were intimately connected with all aspects of their organization, but they also clearly indicate how legitimised and established an institution the stations had become.”⁶⁶⁵ That some incriminating documents survived the systematic destruction of

⁶⁶¹ Exhibit 213-E, Destruction and Concealment of Official Documents and Exemption from the Emperor’s Responsibility, Expert opinion submitted to the Tribunal by Professor Yoshida Yutaka.

⁶⁶² Exhibit 220-S-2, Documentary Evidence submitted by Professor Yoshida Yukata.

⁶⁶³ Exhibit 217, Expert Opinion of Professor Arai Shirichi.

⁶⁶⁴ Exhibit 217.

⁶⁶⁵ Report on the mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, Addendum to the Report of the Special Rapporteur on violence against women, its

evidence by the Japanese at the end of the war indicates that many more must have been destroyed.

949. Accordingly, the Judges find that the state of Japan systematically destroyed documentation concerning the “comfort system” and undertook, thereby, to obstruct both the possibility of prosecution and the disclosure of truth. As such, the program of destruction constituted a continuing violation of state responsibility to investigate and publish the truth and bring the perpetrators to justice.

(b) Continuing Concealment of Documents

950. The scarcity of official documentation on the “comfort women” system has been exacerbated by the continuing resistance of the Japanese government to revealing even those documents that survived the pre-surrender destruction. According to Professor Yoshimi, a group of documents written prior to 1942 did survive, however, and were later brought to the United States because the arrival of the Allied forces interrupted their scheduled incineration in the final days of the war.⁶⁶⁶ His historic disclosure of “comfort women” documents was made possible because “[n]o one knew that this collection contained documents relating to the comfort women.”⁶⁶⁷
951. The Judges note that the Japanese government has recently rejected the principle that the state has a duty to disclose fully documents concerning human rights violations, war crimes and crimes against humanity. In the final report submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Special Rapporteur Theo van Boven, proposed that every state must make readily available all evidence in its possession concerning human rights violations.⁶⁶⁸ In response, Japan stated: “It would not be practical to expect every state to make readily available to the public all evidence in its possession concerning human rights violations without exception. For instance, it is impossible for any State to disclose fully information which concerns national security or individual’s privacy Thus, it is not necessarily appropriate only to demand that States make available all evidence in their possession.”⁶⁶⁹
952. According to Professor Yoshimi, many documents remain secret, namely, “police records, documents of the Department of Overseas Affairs and Home Ministry relating to the colonies, the huge collection of diaries of officials and personnel accompanying the military held by the Defence Agency, materials relating to the war crimes trials held by the Justice Ministry and the Foreign Ministry, and Welfare Ministry documents relating to demobilization and support.”⁶⁷⁰ The Tribunal does not have the withheld documents before us to examine nor do we have Japan’s particularised objections to disclosure. The fact, however, that the violations at issue in this proceeding occurred over 56 years ago and related to a system of sexual slavery precludes any claim of national security. Moreover, respect for the privacy of individual victims can be consistent with disclosure of wrongdoing.

causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/1995, UN Doc. E/CN.4/1996/53, Add.1, 4 January 1996, paras. 20-21.

⁶⁶⁶ Yoshimi, *Comfort Women*, p. 35.

⁶⁶⁷ Yoshimi, *Comfort Women*, p. 63.

⁶⁶⁸ Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedom, Final report submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, para. 137.

⁶⁶⁹ Information submitted by Japan included in Report of the Secretary-General prepared pursuant to Sub-Commission resolution 1993/29, Addendum, UN Doc. E/CN.4/Sub.2/1994/7/Add.1, 22 July 1994, paras. 28-29.

⁶⁷⁰ Yoshimi, *Comfort Women*, p. 39.

953. The Judges find that the Japanese government has continued to the present to withhold documentation of the responsibility of Japanese officials (or anyone else) and, by attribution, the state of Japan for the “comfort system.” As discussed below, the fact that the government’s limited revelations have come only after independent researchers discovered incriminating documents subjecting Japan to political and diplomatic pressures, supports our finding that Japan has violated its international obligations through continuing concealment of documents.

(c) Continuing Denial and Failure to Fully Disclose the Truth

954. The Japanese government’s statements related to the “comfort women” issue follow a pattern of revealing information only under domestic or international pressure and/or in response to the publication of new documents. Until 1992, the Japanese government officially denied involvement of the military or the state in the “comfort system”, as well as coercion of women and girls, claiming there were no documents revealing who was responsible. Only when the victims began to speak out and Japanese and other scholars came forward with government documents to prove that the Japanese military drafted and held women against their will for sexual slavery, did the Japanese government begin reluctantly and partially to admit government involvement.⁶⁷¹
955. In April 1990, Kim Hak-Sun, now deceased, was the first survivor to break the silence and come forward to testify to her ordeal as a “comfort woman.” In connection with the visit to Japan of Korean President Roh Tae Woo in May, 1990, Korean women’s groups issued a joint public statement demanding an apology and compensation from the Japanese government. This generated domestic and international pressure upon Japan to conduct an investigation and to issue an apology regarding the “comfort system.”⁶⁷²
956. The Japanese government initially denied that the “comfort stations” were run by the military or state, and claimed that there was no documentation revealing who was responsible. It soon became apparent, however, that there was substantial documentation of official involvement. Evidence was found and disclosed by scholars, the South Korean government, and individuals who had come into contact with the system.
957. The first denial of the state responsibility took place on 6 June 1990 at the Budget Committee meeting at the House of Councillors, where Motooka Shoji, a member of the Socialist Party and the Upper House of the Diet, demanded that the Japanese government conduct an investigation into the actual conditions endured by the comfort women.⁶⁷³ Shimizu, Chief of the Occupation Securement Bureau, Ministry of Labour, answered: “[C]ivilian brokers were the ones who transported the ‘comfort women’ along with the military . . . [Hence,] the investigation cannot be carried out.”⁶⁷⁴ Similarly, when Motooka Shoji again demanded a response to an open letter from a Korean women’s organization at the Budget Committee meeting on 1 April 1991, Yano Sakutaro, Chief of

⁶⁷¹ The evidence considered in this section is based on Exhibit 219, the compilation of newspaper reports of governmental statements and comments prepared for the Tribunal by Kim Puja, a researcher at Kanto Gakuin University. See also Yoshimi, *Comfort Women*, pp. 33-36.

⁶⁷² Yoshimi, *Comfort Women*, p. 33.

⁶⁷³ Exhibit 219; see also Yoshimi, *Comfort Women*, p. 34, quoting Dai 118 kai kokkai sangiin yosan iinkai kaigiroku [118th Diet House of Councillors Committee on the Budget minutes] 19 (6 June 1990).

⁶⁷⁴ Exhibit 219.

the Asian Affairs Bureau of the Ministry of Foreign Affairs, answered: “the investigation was carried out but no material that lends any clues was found.”⁶⁷⁵

958. After Kim Hak-Sun and other Korean former “comfort women” filed suit in the Tokyo District Court in December 1991 seeking apology and compensation from the Japanese government, a Japanese newspaper reported that Chief Cabinet Secretary Kato Koichi stated at a press conference on December 6, 1991 that “comfort stations” had existed but there was no proof that the government was involved in recruitment.”⁶⁷⁶
959. The first significant admission of the government admitting military involvement in the “comfort system” came in response to Professor Yoshimi’s public disclosure on 11 January 1992 of six incriminating documents in the Asahi Shimbun, as previously discussed. On 13 January 1992, Secretary Kato Koichi issued a public statement acknowledging the Japanese military’s involvement in the “comfort system.”⁶⁷⁷ Still, there was no acknowledgement of the sexual violence and slavery inflicted upon the “comfort women.”
960. The most complete acknowledgement of state participation in the “comfort system” to date came with the publication of an official report on 4 August 1993, in connection with the consideration of the issue of Japan’s military sexual slavery by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Cabinet Councilors’ Office on External Affairs released a report, entitled “On the Issue of Wartime ‘Comfort Women,’” containing the findings of the government investigation and document survey as well as an official statement.⁶⁷⁸ The report states, in part, that the military was involved in recruiting “in some areas,” that the women “lived in misery at the comfort stations under a coercive atmosphere,” and that this “severely injured the honour and dignity of many women.” The report and accompanying statement by the Chief Cabinet Secretary have been reproduced in full, *supra*.
961. In the eight years since 1993, it appears that the government has not offered any new information or conducted any further investigations or surveys of official documents to shed light on the nature of government involvement. Rather, the subsequent statements of the Japanese government on the “comfort system” have been, at best, reiterations of the August 1993 statement.⁶⁷⁹
962. The Judges find that, taken together, this report and the various official statements do not reflect either a thorough investigation or a full and unambiguous acknowledgement of the participation of the state of Japan in the “comfort system” or its legal responsibility for the rape and sexual slavery committed therein. Rather, the government substitutes understatement, ambiguity, and euphemism for full disclosure and acknowledgement of official responsibility for, and conditions suffered by, women and girls in the “comfort system.” The inadequacy of these statements is exacerbated by the fact that they followed a series of denials of official responsibility, coercion, and sexual violence inflicted upon the women. These reports and statements were also unaccompanied by full

⁶⁷⁵ Exhibit 219.

⁶⁷⁶ See, e.g., Mainichi Shimbun, 7 December 1991.

⁶⁷⁷ Exhibit 219.

⁶⁷⁸ Exhibit 231. Excerpts from the report are reproduced in the Judgement on the Common Indictment, *supra*.

⁶⁷⁹ See, e.g., The Ministry of Foreign Affairs of Japan, “Recent Policy of the Government of Japan on the Issue Known As ‘Wartime Comfort Women,’” August 2001 (<http://www.mofa.go.jp/policy/women/fund/policy0108.html> (last visited 14 September 2001)).

disclosure of the pertinent documents, and further diluted by inadequate statements of “apology,” discussed *infra*.

963. In considering the inadequacy of the government surveys and statements, we note Professor Yoshimi’s point that these documents were based on hearings into the situation of only some of the Korean “comfort women” and that, notwithstanding that Korean women were disproportionately represented among the “comfort women,” a thorough investigation requires examination of the impact of the system on women of all affected nationalities and ethnicities.⁶⁸⁰ We call attention as well to the importance of devoting particular attention to the question of discriminatory treatment of minorities or indigenous women and girls.
964. Although the 1993 statement finally acknowledged the involvement of the military and the presence of coercion, we find that the statement obfuscates rather than reveals the full responsibility of Japan. In particular, while acknowledging the participation of the military, the statement minimises its direct role, contrary to the documents and testimony available to this Tribunal which demonstrate that civilian recruiters and proprietors were clearly acting as agents of the military and that the military controlled and was often present in the recruitment process. By acknowledging only that the “comfort women” lived under a “coercive atmosphere,” the statement conceals the direct and utter brutality to which the Japanese military knowingly and intentionally subjected the “comfort women” as an integral part of its war effort. Furthermore, by stating that the women “lived in misery” and suffered “injury to their honour and dignity,” the government avoided admitting that they were raped repeatedly and subjects of a system of sexual slavery.
965. While we understand that the expression “injury to honour and dignity” may have been a veiled reference to rape in use at the time, such euphemisms are unacceptable. “Comfort women” and girls were raped until they bled and could not walk. They were made sterile by forced abortion and “treatments” for sexually transmitted diseases. The victims were hung naked from trees in freezing cold weather. The evidence before this Tribunal shows that their treatment was not only harm to honour and dignity. The victims were subjected to physical and emotional torture. Such continued euphemistic references to rape and sexual slavery are particularly offensive in light of other official statements, discussed *infra*, labelling “comfort women” as prostitutes.

2. Failure to Prosecute and Punish Those Criminally Responsible

966. As previously discussed, crimes against humanity are subject under customary international law to universal jurisdiction and exempt from the effect of any statute limiting the time within which prosecution is permitted.⁶⁸¹ When it was recognised that wartime sexual violence inflicted upon the “comfort women” and such other atrocities as the rapes at Mananque had not been prosecuted in the IMTFE, Japan should have initiated domestic prosecutions of those responsible, at all levels, as well as those who took advantage of the system. Japan’s failure to investigate and disclose the truth about past war crimes and crimes against humanity thus resulted in blanket impunity for the perpetrators. We find it significant that Japan has not pursued one prosecution for crimes committed during the war.

⁶⁸⁰ Yoshimi, *Comfort Women*, p. 37.

⁶⁸¹ This Judgement, *supra*.

967. Moreover, we note that the Japanese Ministry of Justice denied the only petition filed by former “comfort women” seeking criminal investigation and prosecution. Twenty-seven Korean “comfort women” and supporters from the Korean Council for the Women Drafted for Military Sexual Slavery by Japan submitted a criminal complaint to the Tokyo Prosecutor’s Office on 7 February 1994. In response, the Japanese government refused even to consider it on the grounds that “the names of the perpetrators were not known in every detail.” It also asserted, in blatant contradiction to international law, that the statute of limitations had run.⁶⁸²
968. By contrast to the performance of Japan, it is reported that between the end of the Second World War and 1988, the Federal Republic and the Democratic Republic of Germany together tried over 91,000 individuals for crimes committed under Nazism.⁶⁸³
969. States, including successor governments, have an obligation to ensure that those who violate such norms are brought to justice. This concept of the due diligence of the state arises from the duty to prevent and prosecute the crimes constituting internationally wrongful acts and repair the harm. Preventive and remedial obligations are thus themselves obligations for the breach of which the Japanese state bears direct responsibility.⁶⁸⁴
970. The obligation to investigate and prosecute crimes of this dimension was well settled before the Japanese aggression in the 1930s. The 1926 Slavery Convention and the Trafficking Conventions articulated the obligation to investigate and punish.⁶⁸⁵ So did the ILO Forced Labour Convention (Article 25). This obligation, in relation to the crimes committed here, was one of customary status by the time of the Japanese aggression. The universal obligation to investigate and punish “grave breaches” of the laws of war, as adopted in Articles 146 and 147 of the Fourth Geneva Convention, codified pre-existing customary international law.
971. The 1925 *Janes Case*⁶⁸⁶ articulated and applied this notion of due diligence, further reflecting the applicability of this principle at the time of the events charged herein. The claim was made by the US against Mexico to the US/Mexican Claims Commission in respect of Laura Janes, the widow of a murdered American citizen. The US claimed compensation on behalf of Laura Janes for the failure by Mexico to take steps to investigate and prosecute the murder of her husband. The Commission awarded \$12,000 on the basis of a denial of justice resulting from the failure of Mexico to fulfil its international obligations to prosecute and punish the offender. The judgement underlined the significant injury suffered by the individual.
972. The principle that the state has an obligation of due diligence to prosecute human rights violations is firmly established. For example, the more recent and widely cited *Caso*

⁶⁸² Exhibit 21, Won Soon Park, Japanese Reparations Policy and the “Comfort Women” Question, Positions: E. Asia Cultures Critique, Spring 1997, p. 125.

⁶⁸³ Axel Marschik, The Politics of Prosecution: European national approaches to war crimes, in T.L.H. McCormack & G.J. Simpson, eds., *The Law of War Crimes: National and international approaches*, 1997, pp. 65, 74.

⁶⁸⁴ See, e.g., Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale Law Journal*, 1991, p. 2537. See also the Annual Report for 1985-86 by the Inter-American Commission on Human Rights, *supra*.

⁶⁸⁵ This Judgement, *supra*.

⁶⁸⁶ *Laura Janes et al. (USA) v. United Mexican States*, 16 November 1925. Reports of International Arbitral Awards, vol. IV, (1926), p. 82.

Velasquez-Rodriguez v. Honduras,⁶⁸⁷ the Inter-American Court of Human Rights reiterated the principle, demonstrating that the standard of due diligence has been accepted since at least 1925 to the present day. Further, Article 14(2) of Chapter III of the ILC's Draft Articles 2000 incorporates the long-standing customary rule that a breach of an international obligation having a continuing character "extends over the entire period during which the act continues and remains not in conformity with the international obligation." There is no statute of limitations for crimes of this gravity and the obligation of due diligence is a continuing one.

3. *Failure to Provide Reparations*

973. As we will discuss in the following section, the broad concept of reparations as it has evolved in international law includes all of the aspects of state responsibility discussed in this Part as continuing obligations. The Charter of this Tribunal identifies the failure to provide reparations to the victimised as a separate category, which, in context, we understand to encompass the issues of apology and compensation, as discussed below.

(a) *Continuing Failure to Make a Full and Genuine Apology*

974. A key issue relevant to Japan's state responsibility for the sexual slavery system is whether it has made a valid apology on behalf of the state to the victims. In their testimony at the hearings, the survivors emphasised the importance of receiving a full apology directly from the Japanese government and from perpetrators who remain alive. They also fervently rejected the apologies made to date. The issue of apology has caused significant confusion outside of Japan, largely because linguistic differences make translation imprecise. The Judges consider that it is important to be precise about both the efforts that Japan has made to date to apologize and the shortcomings of these efforts, particularly as identified by the survivors and their advocates, so that the Japanese government cannot hide behind unfounded assertions that the matter is settled. As the statements discussed below illustrate, although Japanese officials have issued statements of regret concerning the suffering of the "comfort women," these "apologies" have been grossly deficient.
975. While several high level Japanese officials made statements prior to 4 August 1993 purporting to apologise to the victim-survivors of the "comfort system", the Tribunal considers these of no significance in light of the utter failure to acknowledge that the "comfort system" was involuntary and that the "comfort women" were subjected to sexual violence.⁶⁸⁸ Pressured by rising international criticism on account of the "comfort

⁶⁸⁷ Velasquez-Rodriguez Case, 4 Inter-Am. Ct. H.R. (Ser.C), No. 4; OAS/ser. L/V/III; 19, doc. 13 (29 July 1988) para. 174. ("the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation").

⁶⁸⁸ We note, for example, that a leading Japanese newspaper published the 1992 statement of Secretary Kato which, while not acknowledging Japan's responsibility for sexual slavery, purported to apologize for the vaguely described military involvement in the comfort system in January 1992:

I would like to take up the present opportunity to express wholeheartedly my feelings of apology [owabi] and self-examination of past wrongs [hansei] to those people who had suffered pain and suffering beyond any expression as military comfort women.

Asahi Shimbun, 13 January 1992. Prime Minister Miyazawa Kiichi publicly apologized for the "pain and suffering" of Korean comfort women and girls during an official visit to South Korea in January, 1992, stating:

I express my sincerest feelings of remorse and apology [owabi] and that the people of Korean peninsula experienced unbearable pain and suffering. Recently, the issue of so-called military comfort women came to light, which I find really painful, and feel very sorry about this.

Asahi Shimbun, 18 January 1992.

women,” the observer for Japan made reference to these attempts of apology at the 8th meeting of the Working Group on Contemporary Forms of Slavery of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. He asserted that “the Government of Japan had expressed its sincere apology and remorse to all those, irrespective of nationality or origin, who had indescribable pain and suffering as so-called ‘comfort women.’”⁶⁸⁹

976. In a statement accompanying the 4 August 1993 report “On the Issue of Wartime ‘Comfort Women,’” which contains Japan’s partial acknowledgement of the complicity of the Japanese military in the “comfort system,” Chief Cabinet Secretary Kono Yohei also extended “apologies” and expressed “remorse:”

The Government of Japan would like to take this opportunity once again to extend its sincere apologies [owabi] and remorse [hansei] to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women. It is incumbent upon us, the Government of Japan, to continue to consider seriously, while listening to the views of learned circles, how best we can express this sentiment.⁶⁹⁰

977. In 1994, Prime Minister Murayama Tomiichi expressed his “profound and sincere remorse [hansei] and apologies [owabi]” for Japan’s “acts of aggression, colonial rule, and the like that caused such unbearable suffering and sorrow for so many people.”⁶⁹¹ In 1995, on the fiftieth anniversary of the end of the Second World War, Prime Minister Murayama again offered his “profound apology [owabi] to all those who, as war time comfort women, suffered emotional and physical wounds that can never be closed.”⁶⁹²
978. This Tribunal finds that the efforts at apology outlined above are deficient in several key respects. First, a genuine apology must acknowledge full legal responsibility. As previously discussed, the statements of Japanese officials obscured the true extent of wrongdoing and harm and, most significantly, used words that express only regret and not legal responsibility. Second, the apology is deficient as a matter of process.
979. The Prosecutors contend that the language chosen by Japanese officials did not constitute a genuine apology for or acknowledgement of official responsibility for the crimes inflicted upon the “comfort women.” The Japanese word[s] used – owabi and hansei – have been translated into the English words “apology” and “remorse.” But, the Japanese language includes several terms for apology, reflecting different levels of gravity and responsibility. Understanding the different meanings of the Japanese terms for “apology” illuminates the survivors’ vehement rejection of these statements as genuine apologies.
980. Professor Yoshimi explains that “owabi,” the Japanese word in the government statements that has been translated into English as “apology”, “denotes a sense of apology slightly more weighty than an ‘Excuse me,’ offered when one bumps shoulders with

⁶⁸⁹ Report of the Working Group on Contemporary Forms of Slavery on its eighteenth session, Chairman-Rapporteur Mr. Ioan Maxim, U.N. Doc. E/CN.4/Sub.2/1993/30, 23 June 1993, para. 84.

⁶⁹⁰ Exhibit 231. For the original statement in Japanese, see <http://www.mofa.go.jp/mofaj/area/taisen/kono.html> (last visited 24 November 2001).

⁶⁹¹ Statement by Prime Minister Tomiichi Murayama, 31 August 1994, <http://www.mofa.go.jp/announce/press/pm/murayama/state9408.html> (last visited 6 November 2001).

⁶⁹² Statement by Prime Minister Tomiichi Murayama, July 1995, <http://www.mofa.go.jp/policy/women/fund/state9507.html> (last visited 6 November 2001).

someone on the subway. He recognizes that “it is an expression with a wide scope for interpretation that can range from a very minor sense of being sorry to “shazai,” a serious acknowledgement of wrongdoing and proffering of an apology.”⁶⁹³ He opines, however, that since the Japanese government has not acknowledged any crime, the Prime Minister’s “owabi” can only be interpreted as referring to something trivial.⁶⁹⁴

981. Despite the fact that the English translations of the Japanese government statements all contain the word “apology,” the victims do not recognize the use of “owabi” as opposed to “shazai” as an official apology and their governments take the same position. We note that word “shazai” is significant because in Japanese, Chinese and Korean it contains the word for “guilt” (zai). The Japanese original statements use such expressions that are the equivalent of sorry, remorse or atonement, but never “shazai.”⁶⁹⁵
982. This Tribunal accepts the view of survivors and the explanation of the expert, Professor Yoshimi, that for an apology to be adequate and respectful, the government must make official statements using the word “shazai.” Accordingly, this Tribunal does not accept the Japanese government’s contention that it “has expressed its sincere apologies and remorse to former comfort women on many occasions.”⁶⁹⁶ We note that these weak and often patronizing “apologies” are particularly problematic in light of the fact that they were made after a long history of concealment and denial, followed by ambiguous and partial admissions. The fact that Japanese officials have not repudiated continuing official denials, as discussed *infra*, further undermines the adequacy of the “apologies” made to date.
983. In terms of process, we note that statements of “apology” were not made directly and individually to the survivors and their families or close associates but rather to the public at large in a variety of political and diplomatic contexts. Statements made in domestic political arenas or in the international arena do not substitute for apologies made directly to the individuals whose lives have been profoundly affected. As discussed *infra*, the Peace Treaties, which were concluded without taking into consideration the interests of the victims of the Japanese sexual slavery system and other atrocities cannot be considered a bar to their claims for reparations. Similarly, statements of apology that are restricted to the world of statesmen and stateswomen and are not conveyed to the victims themselves are inadequate. We find it significant that many of the survivors who testified at the hearings did not acknowledge any apology being offered by Japanese officials. We consider this a result of the inadequate content of the “apologies” as well as the manner in which the statements of apology to date have been made.
984. Finally, it is contended that the “apologies” issued by Japanese officials have never been accompanied by a commitment to provide compensation from the state of Japan. Such a commitment would have lent more sincerity to the statements of apology. The initiatives of the Japanese government with respect to compensation are addressed in the next section.

⁶⁹³ Yoshimi, *Comfort Women*, p. 25.

⁶⁹⁴ Yoshimi, *Comfort Women*, p. 25.

⁶⁹⁵ Yoshimi, *Comfort Women*, p. 25.

⁶⁹⁶ Umezu Itaru, *Japan Has Faced Its Past*, *Far Eastern Economic Review*, 10 Aug. 2000, available at http://www.mofa.go.jp/j_info/japan/opinion/umezu.html (last visited 14 Sept. 2001). We consider this article as representing the Japanese government viewpoint on two grounds: Umezu Itaru contributed this article in his official capacity as the Consul-General of Japan in Hong; and the Japanese Ministry of Foreign Affairs posted this piece on its official website along with the other government documents.

(b) *Continuing Failure to Make Official and Fair Compensation*

985. In 1995, the Japanese government made public their plan to have the Asian Women's Fund ("the Fund") pay compensation to victims of Japanese military sexual slavery. In a press conference in August 1994, Prime Minister Murayama had stated that he "would like to find out, together with Japanese people, an appropriate way which enables a wide participation of people so that we can share such feelings."⁶⁹⁷ On 14 June 1995, Chief Cabinet Secretary Igarashi Kozo announced the projects of the "Asian Peace and Friendship Foundation for Women" as a follow up to Prime Minister Murayama's statement.⁶⁹⁸ The activities of the Foundation were, *inter alia*, to "raise funds in the private sector as a means to enact the Japanese people's atonement [tsugunai] for former wartime comfort women" and "to support those conducting medical and welfare projects and other similar projects which are of service to former wartime comfort women, through the use of government funding and other funds."⁶⁹⁹ An accompanying statement by Prime Minister Murayama asserts that the Fund "is an expression of atonement on the part of the Japanese people" toward the "comfort women."⁷⁰⁰ The Fund sought to raise 100 billion yen (about \$8 million US dollars) in private donations and the Japanese government pledged to contribute 500 million yen (about \$4.1 million) to cover the administrative costs of the Fund and to finance medical and social welfare programs for the surviving victims.⁷⁰¹ In the end, the Fund raised only 483 million yen (approximately US\$4 million), permitting the allocation of 2 million yen (or about \$16,667) to each survivor.⁷⁰²
986. Many survivors have rejected this monetary gesture from private donations and demand direct state compensation for the crimes of sexual slavery committed by the state military as they want "honour and dignity, not charity money."⁷⁰³ Nonetheless, the Fund began to distribute the "atonement money" in the Philippines in 1996 over "the vigorous and consistent protests and refusals from many victims and NGOs in the Republic of Korea, Taiwan and the Philippines."⁷⁰⁴ The Fund met with the similar bitter protests of the Korean and Taiwanese governments and public when it secretly paid 7 Korean victims in 1997 and started to implement welfare programs in Taiwan.⁷⁰⁵ In a report to the Committee of Experts of the International Labour Organization, the Japanese government asserted that, as of 1997, approximately 85 to 90 "comfort women" had accepted "atonement money" from the Fund and that some had expressed their gratitude in various ways.⁷⁰⁶ Experts assert, however, that most of the victims in the Philippines, Taiwan, Republic of Korea and Indonesia have refused to accept monies from the Fund and that the five Filipino comfort women who accepted the money have returned an apology letter from Prime Minister Hashimoto because it was not "recognition of the government

⁶⁹⁷ Statement by Prime Minister Tomiichi Murayama, 31 August 1994, *supra*.

⁶⁹⁸ Statement by the Chief Cabinet Secretary, June 14, 1995, *supra*.

⁶⁹⁹ *Ibid*.

⁷⁰⁰ Statement by Prime Minister Tomiichi Murayama, July 1995, *supra*.

⁷⁰¹ Exhibit 218, Postwar responsibilities: Non-fulfillment of obligations for apology, compensation, and punishment, Expert Opinion to the Tribunal submitted by Attorney Totsuka Etsuro, p. 4; see also Yoshimi, *Comfort Women*, p. 24. Given the current dollar-yen exchange rate, \$4.1 million would be a more accurate approximate although the figure of \$5.7 million was used in the Coomaraswamy Report and quoted in turn by Totsuka Etsuro.

⁷⁰² Yoshimi, *Comfort Women*, p. 24.

⁷⁰³ Exhibit 219.

⁷⁰⁴ Exhibit 218, p. 3.

⁷⁰⁵ Exhibit 218, p. 3. Attorney Totsuka reports that the Japanese government and the Fund have been criticized for employing the means of persuasion that caused "enormous stress among many victims."

⁷⁰⁶ International Labour Conference 87th Session 1999, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Organization, para. 7 (CEACR 1999 Report); Yoshimi, *Comfort Women*, p. 24.

admitting its official accountability for the abuses committed against them by the military.”⁷⁰⁷

987. The Prosecutors contend that the Asian Women’s Fund does not satisfy the state of Japan’s responsibility to compensate victims for the harm inflicted and note that this attempt to compensate former “comfort women” ended up infuriating and dividing many of them. As Attorney Totsuka Etsuro indicates in an expert opinion submitted to this Tribunal, the Fund was viewed as expressing the government’s understanding that “the State of Japan had no legal responsibility and that the State could not take its state responsibility.”⁷⁰⁸ We note that the government itself has repeatedly emphasized that the Fund is a private foundation. In 1996, Foreign Ministry Spokesman Hashimoto Hiroshi asserted in a press conference, “[T]he donation itself it now handled by a civil organization called the Asian Fund for Women. The Fund . . . itself will eventually decide the amount of the contribution, and the timing of distributing donations. . . . [T]he collection and distribution of the donations is not handled by the Government itself.”⁷⁰⁹ The rejection of the Fund by many of the survivors is also reported by the UN Special Rapporteur on Violence against Women, Ms. Coomaraswamy, who concluded that the Fund is “a clear statement denying any legal responsibility” and merely “an expression of the Japanese government’s moral concern for the fate of ‘comfort women’”⁷¹⁰
988. The Judges find that the Asian Women’s Fund does not constitute an acceptable mechanism for compensating victims for the wrongs inflicted by the state. We agree with Ms. Coomaraswamy: While the initiative from a moral perspective is “a welcome beginning, [the Fund] does not vindicate the legal claims of ‘comfort women’ under public international law.”⁷¹¹ Privately raised funds cannot be used in lieu of official compensation in satisfaction of the state’s obligation, particularly where there has been for decades no financial barrier to the state’s ability to provide the compensation from the public fisc.⁷¹² The inadequacy, indeed, discriminatory nature of this privatised “moral” approach to compensation is further underscored by contrasting it with the official diplomatic and legislative attempts Japan has made to respond to the compensation claims of some male victims of the Japanese conscription and forced labour program.⁷¹³

⁷⁰⁷ CEACR 1999 Report, para. 4; Exhibit 218, pp. 3-4.

⁷⁰⁸ Exhibit 218, p. 3. We take note as well of Professor Yoshimi’s view that such payments made out of the money amassed through private citizens’ donations enable the Japanese government “to maintain its position of not paying out even one yen in reparations” and also leave it “free to emphasize in private that while it does have some ‘moral responsibility’ to former comfort women, the brunt of that responsibility rests with private citizens.” *Comfort women*, p. 25.

⁷⁰⁹ Press Conference by Press Secretary, 23 April 1996, <http://www.mofa.go.jp/announce/press/1996/4/423.html> (last visited 14 Sept. 2001). This statement came in response to a media speculation that the government would make up the difference when the Fund failed to reach the proposed goal. For the government announced in 1995 that it would do its utmost “to ensure that the goals of the Fund are achieved.” See Prime Minister Murayama’s statement of 1995, *supra*.

⁷¹⁰ See, Coomaraswamy Report, *supra*.

⁷¹¹ Coomaraswamy Report, *supra*.

⁷¹² The Fund proponents themselves also appear divided over the issue of official compensation as indicated in their appeal for donations that states: “Some of us proponents differ in our views. Some, for example, believe government compensation is absolutely necessary, while others believe such compensation will be difficult to realize in a prompt manner because of legal and practical impediments.” An Appeal for Donations for the Asian Women’s Fund, 18 July 1995, <http://www.mofa.go.jp/policy/women/fund/appeal9507.html> (last visited 14 September 2001). The proponents included former government officials, academics, attorneys and journalists.

⁷¹³ This Judgement, *infra*.

(c) *Continuing Opposition to Formal Claims for Reparations Initiated by Survivors*

989. Opposition by the state of Japan to legal efforts by groups of survivors to obtain acknowledgement of legal wrongdoing and compensation is further evidence of its failure to discharge its legal responsibility to make reparations. Survivors have pressed their claims in numerous cases in Japanese courts and also before the International Labour Organisation. Responding to the pleas of victim-survivors and their advocates, two United Nations' Special Rapporteurs have investigated and condemned both the original crimes and the subsequent response of the government of Japan. In all these contexts, Japan has opposed responsibility on legal grounds which we reject herein.⁷¹⁴ Beyond that, the duty to provide compensation and reparations does not depend, however, upon being enjoined to do so by an adjudicative body. It is a positive obligation. Nonetheless, Japan has consistently refused to utilize the occasion of these initiatives to officially acknowledge and settle the survivors' claims.

(i) *Opposition to Court Cases*

990. According to the *amicus curiae* brief submitted to this Tribunal by Suzuki Isomi, the number of civil cases filed in the Japanese courts seeking compensation on account of the Japanese state's violation of humanitarian law during the Second World War totaled more than sixty as of December 2000.⁷¹⁵ Surviving "comfort women" had filed a total of ten complaints: four pending in Prefectural (or trial or district courts), two in High Courts (or appellate courts), two on appeal to the Supreme Court, and two pending review in the Supreme Court. The Supreme Court of Japan, the highest authority for judicial review, has yet to rule on this issue. Two appellate courts have dismissed four claims on the ground of lack of standing. Only one court, the Shimonoseki branch of the Yamaguchi Prefectural Court, ruled against the government. This ruling was reversed by the Hiroshima High Court.⁷¹⁶
991. On 27 April 1998, the Shimonoseki court ruled in favor of the lawsuit filed by three former comfort women and other female forced labourers from the city of Pusan, Korea, against the Japanese government demanding an official apology and compensation.⁷¹⁷ Japan argued that individuals have no right to compensation under public international law to which only the states are parties; and that, even if they had any such right, any legal obligation to provide compensation to the Korean victims of forced labour was resolved completely and finally by the 1965 Treaty on Basic Relations between Japan and the Republic of Korea. Japan also argued that "some private agents . . . assembled

⁷¹⁴ Japan has consistently argued that only the states are parties under international law and that individuals have no independent rights to compensation. Alternatively, it contends that even if an individual has a right of action, a series of bilateral treaties between Japan and her neighboring countries extinguished any potential claim for individual damages. See discussion of these claims this Part, *supra* and *infra*.

⁷¹⁵ See Exhibit 226, Suzuki Isomi, *Amicus Brief on the Position of the Defendants Concerning the State Responsibility for Individual Claims*, Exhibit 226, p. 2.

⁷¹⁶ See Exhibit 229, Fujita Hisakazu, et al. eds., "List of Post-War Compensation Trials in Japan" in *War & the Rights of the Individual: Renaissance of Individual Compensation*, Nippon Hyoron-sha, App., pp. 125-131. See Fn. 12, *supra*, for the current status of the ten civil lawsuits filed by former comfort women against the Japanese government in the courts of Japan.

⁷¹⁷ Taihei Okada, trans., "The 'Comfort Women' Case: Judgement of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan," *Pacific Rim Law and Policy Journal*, vol. 8, No. 1 (Jan. 1999), pp. 66-69. This decision consolidates three cases with different sets of plaintiffs and one common defendant, Japan, and their court case numbers are: 4th year of Heisei (1992), "Wa" No. 349 ["Ko Incident"]; 5th year of Heisei (1993), "Wa" N. 373 ["Otsu Incident"]; and 6th year of Heisei (1994), "Wa" No. 51 ["Hei Incident"]. *Id.*, 108 n.1. The Tokyo High Court also dismissed three (3) claims.

["comfort women"] and they followed wherever the armed forces went."⁷¹⁸ The court rejected the private agent argument based on the findings that "[i]n many places, the armed forces requested establishment of the comfort stations. . . . Even if private agents ran the comfort stations, the Imperial Japanese Forces influenced the management by setting the hours of operation, service fees, and regulations for the comfort station management."⁷¹⁹ Accordingly, the court defined the "comfort women" as "sex slaves [who] were brought to the comfort stations through deception and forcefully turned into 'comfort women' by rape [and] . . . forced to have sex with the Imperial Japanese soldiers." The court found that the "comfort station" was an institution "designed just for sex and the release of sexual desire."⁷²⁰ Although the Hiroshima High Court dismissed the case on appeal on the ground of lack of standing, it did not disturb the trial court's findings as to sexual slavery.⁷²¹

992. The Shimonoseki court also held that the "comfort women" had standing to seek reparation under Japanese law. The court ruled that post-war Japan has "fundamental identity as Imperial Japan" and, therefore, a duty to provide restitution for the acts committed by the Imperial government. It also found that the "comfort women" system violated Article 13 of the post-war Constitution that provides, "All people should be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other government affairs."⁷²² The court found that "Japanese Diet members, especially since the government published the informal remarks of the Cabinet Secretary and acknowledged 'moral responsibility' in August 1993, had a legal responsibility to establish legislation providing for compensation," and had not done so for a reasonable period.⁷²³ The court concluded that the government violated Article 1 of the State Liability Act ("Kokka baishoho"), Law No. 125 of 1947, that provides individuals a right to demand compensation from the government "when public servants violate their professional legal duties and inflict damage on such Individuals."⁷²⁴ Accordingly, the court ordered that each woman be awarded 300,000 yen (about \$2,500) in damages.⁷²⁵ The Hiroshima High Court reversed the Shimonoseki judgement on the ground that that individuals lack standing under international law. Not only does this Tribunal disagree with the Hiroshima court ruling as a matter of international law; we note also that, as a matter of principle, international law does not extinguish domestic law or remedies that are more protective of human rights.⁷²⁶
993. Moreover, we emphasise that the survivors' lawsuits provided an opportunity to the government of Japan to attempt positively to discharge its state responsibility to disclose the truth and provide reparations. Unfortunately, neither the executive branch nor the

⁷¹⁸ Taihei Okada, *supra*, p. 67.

⁷¹⁹ Taihei Okada, p. 67.

⁷²⁰ Taihei Okada, pp. 76, 99-100.

⁷²¹ Similarly, when the Tokyo District Court dismissed a compensation claim made by the Dutch comfort women and internment camp inmates on lack of standing, it nonetheless found that the plaintiffs suffered various injuries "in violation of relevant rules of international law." Claim for Compensation from Japan Arising from Injuries Suffered by Former POWs and Civilian Internees of the Netherlands, Matter of Claim for Damages, No. 1218 (Civil), Decision of 20 November 1998 (following oral arguments of 18 May 1998), Civil Division No. 6 of the Tokyo District Court, rpt. in Fujita, p. 118.

⁷²² Taihei Okada, p. 100. Further, the court opined that "the 'comfort woman' phenomenon could have been a violation of the International Treaty Concerning the Slave Trade of Women and Children (1921) or the International Labor Treaty (1930)."

⁷²³ Taihei Okada, p. 98.

⁷²⁴ Taihei Okada, pp. 96, 103.

⁷²⁵ Taihei Okada, p. 103.

⁷²⁶ See, e.g., Convention Against Torture, *supra*, Articles 14(2) and 16(2); International Covenant on Civil and Political Rights, *supra*, Article 5(2).

legislature took up this opportunity. This Tribunal disagrees with the decisions of the Japanese courts dismissing the claims of former “comfort women” on the grounds that individuals have no right to claim compensation under public international law, and notes that these decisions appear to have contributed little to the clarification of the executive branch’s responsibility. The resistance to the positive obligations of state responsibility affected the political branches as well. Subsequent responses by the Japanese society further affirm the failure of the Japanese government to accept its past wrongdoing and make genuine reparation. We note that the rationale of the court decisions prompted some Japanese civic groups and politicians to demand domestic legislation to compensate the comfort women and to identify and prosecute those who were liable for the “comfort station system,” but that these efforts were unsuccessful.⁷²⁷

(ii) Opposition to the Reports of the International Labour Organisation (ILO) Committee of Experts

994. As previously noted, the ILO Committee of Experts has repeatedly determined that the “comfort station” system of the Japanese Imperial Forces is sexual slavery in violation of the 1930 Convention Concerning Forced or Compulsory Labour (No. 29) ratified by Japan in 1932.⁷²⁸ Ruling that compensation is an appropriate remedy under the Convention, the Committee urged Japan to provide compensation voluntarily. Pursuant to the Convention, the Committee opined that only a government can provide compensation and wages and that the Committee does not have the power to order the relief.⁷²⁹ Furthermore, the Committee has suggested that, “in view of the time that has elapsed since these events, the government will give proper consideration to this matter expeditiously”⁷³⁰ and compensate the victims “before it is too late to do so.”⁷³¹
995. Japan has defended its position based, in part, on its having satisfied its international legal obligations under the peace treaties, its “verbal apologies” and the Asian Women Fund initiative.⁷³² The 2001 report of the Committee concluded that the Peace Treaties extinguished individual claims,⁷³³ a position with which this Tribunal disagrees for the reasons stated hereinafter. Noting the rejection of the Fund monies by the majority of

⁷²⁷ Yoshimi, *Comfort Women*, p. 27. Submissions to this Tribunal indicate that a group of legislators who formed the League of Diet Members for the Establishment of a Fact-Finding Law for the Sake of Lasting Peace “to focus exclusively on the single issue of the establishment of fact-finding committees” submitted a draft bill for war reparations, which did not pass the Diet. Exhibit 228, Draft Outline of Legislation for War Reparations. The Japanese Federation of Bar Associations also recommended in 1995, 1997 and 1998 that the government “establish legislation to provide for an investigation into the facts of the comfort women issue, an apology, and compensation.” Yoshimi, *Comfort Women*, p. 27. The Federation also opined that the China-Japan Joint Communiqué of 29 September 1972 in which China renounced its demands for war reparations from Japan “in the interest of the friendship between the Chinese and Japanese peoples” had not waived the right of Chinese nations to demand reparations for their losses and damages. JFBA, “Supplementary Explanation of the Recommendation on the Issue of ‘comfort women’”, June 1995, pp. 10-12, quoted in Exhibit 218, p. 13. Attorney Toksuka reports that JFBA’s demand was also unsuccessful. See Joint Communiqué of the Government of Japan and the Government of the People’s Republic of China, Japanese Ministry of Foreign Affairs official website, <http://www.mofa.go.jp/region/asia-paci/china/joint72.html> (last visited 21 November 2001.)

⁷²⁸ See International Labour Conference, 83rd Session, Report III (Part 4A), Convention 29 on Japan, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Organization (1996) (CEACR 1996); 85th Session, CEACR 1997; 87th Session, CEACR 1999; and 89th Session, CEACR 2001.

⁷²⁹ *Ibid.* (common to all four reports). Further, the Committee reminded Japan “the illegal exaction of forced or labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying the Convention to ensure that the penalties imposed by law are really adequate and strictly enforced.” *Ibid.* para. 14. The Committee also noted that indecency through compulsion and rape were punishable offences before the war under the then Penal Code of Japan (Act No. 45 of 24 April 1907). CEACR 1997. See, e.g., para. 15.

⁷³⁰ CEACR 1996.

⁷³¹ CEACR 2001, para. 10.

⁷³² Report of the Japanese government, 31 May 1996, as quoted in CEACR 1997, para. 5.

⁷³³ CEACR 2001, para. 3.

survivors, however, the Committee also ruled that the circumstances suggest “that the expectations of the majority of the victims have not been met”⁷³⁴ and urged that the Japanese government “find an alternative way . . . to compensate the victims . . . in a manner that will meet their expectations.”⁷³⁵ But here again, Japan has devoted considerable efforts and resources to defeating the “comfort women” claims rather than satisfying them.

(iii) Opposition to the Reports of UN Special Rapporteurs

996. The Japanese government has also refused to accept and indeed has actively opposed the recommendations made in 1996 by the UN Human Rights Commission’s Special Rapporteur on Violence against Women, Radhika Coomaraswamy, and in 1998, by the UN Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices in Armed Conflict, Gay J. McDougall, appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Both reports urged, among other things, that the government pay compensation to individual victims of Japanese military sexual slavery and identify and punish perpetrators involved in the establishment, recruitment, maintenance and institutionalisation of “comfort stations”.
997. Ms. Coomaraswamy found that the Japanese Imperial Forces committed military sexual slavery in violation of then prevailing international law; and that Japan has a legal responsibility to compensate the victims and to punish the perpetrators.⁷³⁶ Accordingly, she recommended that Japan apologize individually to each of the surviving women; recognize the systematic and forcible drafting of women by and/or with the knowledge of the government; recognize the systematic recruitment of women for purposes of sexual slavery as a crime against humanity and a gross violation of international humanitarian law; accept moral and legal responsibility for such crimes; and pay compensation from governmental resources to the surviving victims.⁷³⁷ The Japanese government responded to the Coomaraswamy recommendations before the UN Commission on Human Rights by challenging the report and demanding that the Commission reject it.⁷³⁸ But the Commission rejected Japan’s demand, welcomed her work and took note of this report including her mission report on Japan’s military sexual slavery in its resolution on the elimination of violence against women.⁷³⁹ Nonetheless, an official of Japan’s Foreign Ministry attempted to undermine its force by claiming that the Commission did not adopt the report because the expression “take note” used by the Commission has no positive meaning.⁷⁴⁰
998. Similarly, in 1998, the UN Special Rapporteur, Ms. Gay McDougall, concluded that Japan’s military sexual slavery violated international law and that the Japanese government has yet “to take the necessary final steps to provide adequate redress” which she found to be legally required.⁷⁴¹ Specifically, Ms. McDougall concluded that “it is

⁷³⁴ CEACR 1999, para 9.

⁷³⁵ CEACR 2001, para. 10.

⁷³⁶ Coomaraswamy Report, U.N. Doc. E/CN.4/1996/53/Add.1 (4 Jan. 1996).

⁷³⁷ Coomaraswamy Report.

⁷³⁸ Exhibit 218 (Totsuka), p. 4.

⁷³⁹ The elimination of violence against women, U.N. Commission on Human Rights resolution, 1996/49, U.N. Doc. E/CN.4/RES/1996/49 (19 April 1996), para 1.

⁷⁴⁰ Exhibit 218, p. 4 (Totsuka), quoting a testimony dated 16 May 1996 by Kazuo Asakai, a Foreign Ministry official, to the Committee of Legal Affairs of Japan’s House of the Councillors.

⁷⁴¹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Systematic rape, sexual slavery and slavery-like practice during armed conflict Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1998/13 (12 August 1998), Appendix, para. 69 (McDougall Final Report).

improper for Japan to argue that the settlement agreements or any other post-war treaties intended to resolve all claims involving the ‘comfort women’” since Japan concealed during the negotiating period the military involvement in the comfort stations and continues to deny legal liability.⁷⁴² Ms. McDougall further expressed her opinion that “the rights and obligations of States and of individuals . . . cannot, as a matter of international law, be extinguished by treaty, peace agreement, amnesty or by any other means.”⁷⁴³ While welcoming the creation of the Fund “out of a sense of moral responsibility to the ‘comfort women’,” the Special Rapporteur found that “anything less than full and unqualified acceptance by the Government of Japan of legal liability and the consequences that flow from such liability is wholly inadequate.”⁷⁴⁴ Accordingly, the Special Rapporteur recommended, among other things, that Japan should establish a new administrative fund with appropriate international representation to provide legal compensation.⁷⁴⁵ The Japanese delegate rejected Ms. McDougall’s recommendations before the Sub-Commission on 14 August 1998.⁷⁴⁶ Her recommendations were endorsed by the Sub-Commission in its resolution.⁷⁴⁷

4. *Failure to Take Measures to Protect the Integrity, Well-being and Dignity of the Human Person*

(a) *Abandonment of Women Post-War*

999. The evidence demonstrates that at the end of the war, Japan killed or abandoned “comfort women” and girls. To the extent the military undertook to repatriate the “comfort women”, the expert evidence indicates that it was almost exclusively confined to Japanese women.⁷⁴⁸ The failure of the Japanese state at the end of the Second World War to return the “comfort women” to their own countries constituted a violation of Article 20 of the 1907 Hague Regulations that required the repatriation of prisoners of war to their country as soon as possible after the conclusion of peace. As discussed in the Judgement on the Common Indictment, *supra*, we consider that the Regulations reflected minimum and elementary standards of humanity and that the “comfort women” were entitled to at least the same protections as prisoners of war.⁷⁴⁹

(b) *Continuing Failure to Repudiate Denials of Coercion by High-Ranking Government Officials*

1000. The Prosecutors have provided information indicating that on a number of occasions since 1993, high-ranking Japanese officials have made public statements that reiterated and resuscitated the earlier false and stigmatising accusation that the “comfort women” were volunteers or prostitutes. For example, on 4 May 1994, Minister of Justice Nagano

⁷⁴² McDougall Final Report, paras. 56-57.

⁷⁴³ McDougall Final Report, para. 57.

⁷⁴⁴ McDougall Final Report, paras. 64, 69.

⁷⁴⁵ McDougall Final Report, paras. 63, 65.

⁷⁴⁶ Totsuka, p. 12. The Japanese delegate stated:

The Government of Japan has sincerely addressed and settled the issues relating to the war in accordance with the San Francisco Peace Treaty, bilateral peace treaties and other relevant international agreements. . . . However, we regret to say that the Government of Japan cannot agree with the legal interpretations expressed in the appendix to this report nor can we accept its conclusion and recommendations which request the Japanese Government to take steps to provide redress rather than that which we are already undertaking.

⁷⁴⁷ U.N. Doc. E/CN.4/Sub.2/1998/18, paras. 5, 6, 9.

⁷⁴⁸ Professor Yoshimi reports that the Army issued a repatriation order in September 1944 and sent back Japanese women but did not return other women except in a few exceptional cases. Yoshimi, *Comfort Women*, p. 32.

⁷⁴⁹ IMTFE Judgement (Röling), pp. 416-417.

Shigekato stated that the “comfort women were licensed prostitutes at the time, so one cannot apply today’s standard whether it constituted discrimination against women and/or Koreans.”⁷⁵⁰ This statement prompted violent protests from China, Korea and Vietnam and consequently Nagano resigned on May 7.⁷⁵¹

1001. Further, on 4 June 1996, Itagaki Tadashi, a member of the Upper Diet (or the House of Councillors), stated in response to citizens’ groups: “It is hard to believe that the military forced the women into becoming ‘comfort women.’ And these women must have been paid.”⁷⁵² On the same day, Okuno, a member of the Lower Diet (or House of Representatives) remarked at a press conference, “Comfort women were there to make money. There was no forced recruitment.”⁷⁵³ On 24 January 1997, Chief Cabinet Secretary Kajiyama Seiroku also stated, “it is not appropriate to teach about ‘comfort women’ without offering knowledge of the social background of the time such as that of licensed prostitution system.”⁷⁵⁴ Less than two weeks later, on 5 February, Shimamura, a member of the House of Representatives and former Minister of Education, stated at a roundtable meeting with the press, “In many cases the local dealers who are often Chinese or Koreans gathered women. There are women who chose to become ‘comfort women’.”⁷⁵⁵
1002. As part of its responsibility to tell the truth, make reparations and prevent recurrence, the state of Japan has an obligation publicly to repudiate statements by government officials purporting to deny that the “comfort system” was one of sexual slavery. In our view, it should also publicly call upon the declarants to repudiate such lies and, if not, to leave office. On the record before us, this Tribunal finds that the government, having allowed these statements to stand, is in breach of these obligations. We emphasise further that these statements, which implicitly or explicitly label “comfort” women as prostitutes, heap new suffering upon the survivors through stigmatising them in the eyes of the Japanese society, and the societies in which they live, and through attempting to undermine the legitimacy of their demands for apology and compensation.
1003. The failure to fully disclose the truth and accept responsibility has the further effect of obstructing the physical and mental recovery and social re-integration of many of the survivors of the sexual slavery system. Their heartrending testimony before this Tribunal makes clear that the failure of Japan, in the immediate aftermath of the war and for over 50 years thereafter, to acknowledge that the system was coercive and to take measures to repair this gross violation has contributed to perpetuating and exacerbating the suffering and isolation of many of the survivors and constitutes a continuing violation of state responsibility.

5. *Discrimination*

1004. The “comfort system,” and its aftermath to this day, has been riddled with discrimination: The original selection of women reflected intersections of ethnic/racial, wealth and gender discrimination. While the conditions of rape and sexual enslavement suffered generally by the “comfort women” were horrific, there is some evidence in this record that those of non-Japanese or non-European origin were generally treated even worse in

⁷⁵⁰ Exhibit 219, pp. 2-3.

⁷⁵¹ Exhibit 219, p. 3.

⁷⁵² Exhibit 219, p. 3.

⁷⁵³ Exhibit 219, p. 3.

⁷⁵⁴ Exhibit 219, p. 4.

⁷⁵⁵ Exhibit 219, p. 4.

terms of conditions of life in the “comfort stations.” There is also some evidence that indigenous women were treated most brutally of all. The difficulties “comfort women” faced in terms of escape, return home and recapturing the lives stolen from them were likewise related to and exacerbated by their gender and race, ethnicity, age and poverty. We note also that it was recently disclosed that, in 1937, Japan tried and punished those who abducted and trafficked Japanese women⁷⁵⁶ to a Navy “comfort station” in 1932. As a result, the Director General in charge of police of Interior Ministry issued a strict order in 1938 that prohibited transportation of Japanese women for prostitution from the Inland Japan to outside areas. No comparable order against trafficking was issued as to any other women, in particular Korean and Taiwanese women.⁷⁵⁷ Instead, Japan claimed a reservation to exclude Korean women from the protection of the 1921 Trafficking Convention.⁷⁵⁸ Even today, the Fund sets different amounts for medical and welfare expenses among the comfort women, depending on their national origins: 2 million yen for Chinese and Korean women and only 1 million for the “comfort women” of other national origins.⁷⁵⁹

1005. The contrast between the Japanese government’s failure voluntarily to redress the claims of former “comfort women” and their voluntary settlements with other, primarily male, victims of forced labour and consumption indicates continuing discrimination. In 1970, a group of Korean men who had been forcefully taken to the Sakhalin Island and put into involuntary labour filed a lawsuit seeking repatriation and reparations.⁷⁶⁰ Years later, the plaintiffs withdrew the complaint as the governments of Republic of Korea, Japan and Russian Federation sought a diplomatic solution.⁷⁶¹ Prime Minister Murayama stated on 31 August 1994: “this issue cries out for [the government’s] attention particularly from a humanitarian perspective, and the government intends to decide upon the support policies as soon as possible.”⁷⁶² Thereafter, Japan agreed to arrangements for the permanent repatriation of ethnic Koreans residing in Sakhalin to either country of their choice at government expense.⁷⁶³
1006. In another case, a group of Taiwanese victims, who had been drafted by the Japanese military during the Second World War, and their descendants filed a suit in 1977 to demand reparations for their war-related injuries and death pursuant to Japan’s “Engo-ho” (compensatory law for war-related injuries and death) and “Onkyu-ho” (state employees benefits law).⁷⁶⁴ The victims argued that the nationality provision in the two statutes excluding veterans of the Korean or Taiwanese origin who were members of the Imperial Army violated the non-discrimination clause in Japan’s post-war Constitution.⁷⁶⁵ After 15 years of litigation, Japan’s Supreme Court dismissed the claim in 1992 on the grounds that the legislature has discretion to determine eligibility for government benefits and that it was reasonable for the government to treat former citizens of Japan differently and deny them benefits. Despite having no legal obligation to provide compensation, Prime

⁷⁵⁶ Exhibit 218, p. 11.

⁷⁵⁷ Exhibit 218, p. 11. In another apparent act of discrimination, the Dutch Military Tribunal at Batavia prosecuted the rape and enslavement crimes against Dutch women while ignoring those against native Indonesian women. Batavia Judgement, *supra*.

⁷⁵⁸ This Judgement, *supra*.

⁷⁵⁹ An Appeal for Donations, *supra*.

⁷⁶⁰ Exhibit 229, p. 126.

⁷⁶¹ Exhibit 21; p. 125.

⁷⁶² “Statement by Prime Minister Tomiichi Murayama,” of 31 August 1994, Press Release, <http://www.mofa.go.jp/announce/press/pm/murayama/state9408.html> (last visited 14 September 2001).

⁷⁶³ Exhibit 21, p. 125.

⁷⁶⁴ Exhibit 21, p. 125. See also Exhibit 229, p. 126.

⁷⁶⁵ Exhibit 229, p. 126.

Minister Murayama announced in 1994 that “the government intends to work to meet these obligations as soon as possible” as the claimants were increasingly aging.⁷⁶⁶ In 2000, the Diet enacted a law on the payment of condolence to the bereaved families residing in Taiwan of Taiwanese military personnel who died or were injured during the war to offer benefits for a limited period. The victims were each provided two million yen (about \$18,000). Thus, Japan made diplomatic and political efforts to settle, using public funds, with the unsuccessful claimants, who, with the exception of a few female military nurses, were men, while offering the “comfort women,” whose suffering was at least comparable, only empty words of condolence and private money. This Tribunal finds that Japan’s treatment of the “comfort women” – both during the war and post-war – constitutes discrimination based on gender, race, nationality and/or ethnic origin.

6. *The State, Militarism and Gender*

1007. In attributing state responsibility to Japan, the Prosecutors have drawn attention to the impact of militarism in general, and the military structure designed by the state of Japan in particular, upon women as a gender.
1008. By the time of the Second World War, militarism had pervaded the ethos of Japanese society (as well as of many other states) at every level. As the expert evidence of Professor Kasahara has demonstrated, “the Japanese army was an organisation of rigid and pre-modern class system based on military rank.”⁷⁶⁷ The golden code was to “take your superior’s orders as the Emperor’s orders”. The Japanese army demanded absolute obedience to the hierarchical chain of command. This enabled senior officers to tyrannise lower ranks and ordinary soldiers became thus part of “a mere ‘war machine’ that moved at their superior’s order.” This form of militarism, which denied soldiers’ human rights, oppressed their individuality and demanded absolute obedience, can be directly linked with the brutal treatment and sexual violence inflicted upon women and girls in the mass rapes, such as at Nanking and Manzanar, and in the “comfort stations.” The effects of the dehumanising treatment of Japanese soldiers pervaded society, encouraging a culture of brutality.
1009. The capacity of the Japanese military system, its leaders, soldiers and civilian agents, to subordinate and oppress women into sexual slavery flowed, at the same time, from a view of women as inferior, lacking in rights and existing for the purpose of serving others. Cultural acceptance of the dehumanization of women – and particularly women of classes, nationalities and/or races viewed by the dominant group as inferior or subhuman – is in no way unique to Japan. The written opinion of expert witness Minamoto Junko, however, reveals how the elements of Japanese imperial ideology and norms were heightened in the military context. This ideology underpinned the unimaginable inhuman and discriminatory treatment to which the “comfort women” were subjected. Minamoto explains that according to the principle of “kunshin ittai,” ultimate harmony lies in the subjects’ obedience and devotion to the Emperor as one. According to the principle of “messhi houkou,” an individual was supposed to live his or her life for the sake of the Empire. Women were directly subjected to Imperial rule, at the same time as they were subjected to the rule of men in their family, where the male head of household was the “Emperor” of the household. Numerous political and social restrictions on women meant they had little choice about whether to obey men. Poor families sometimes sold their daughters into licensed prostitution, and it was considered

⁷⁶⁶ See Statement of Murayama, 31 August 1994, *supra*.

⁷⁶⁷ Exhibit 212.

“filial duty” to take customers. This ideology of female subordination thus combined with the claimed necessities of the Imperial war effort to produce one of the most brutally misogynist chapters in history.

1010. The Tribunal considers that this direct link between militarism and the abuse of women and gender must be further researched, explicitly acknowledged and addressed in educational and cultural programs. It must be understood as relevant to all concerts of war including internal armed conflicts and other forms of contemporary conflict. Only then can such abuse be realistically challenged and its recurrence in armed conflict in the future, limited.
1011. Moreover, it is clear from the evidence that the Japanese military saw women’s sexuality and sexual integrity as a justifiable sacrifice for the war effort. More generally, the seizure and control of women for military purposes was inherent in the very conduct of war, and women were subjugated to military objectives and grotesquely made the “prize.” Thus, the sexual slavery facilities were first established to prevent resistance in China and growing anti-Japanese sentiment internationally, following publicity of the Rape of Nanking. The notorious conduct of General MATSUI’s troops became internationally known and diplomatically condemned. The Japanese government, in an attempt to avoid further unfavourable attention as that generated by the Nanking atrocities, took the decision to institutionalise rape on an unprecedented scale through the establishment of “comfort stations” system.
1012. The Tribunal heard evidence from Professor Yoshimi that the “comfort stations” were in fact an attempt on the part of the military high command to prevent rapes committed by Japanese soldiers in occupied territories and the spread of sexually transmitted diseases among the troops. The “comfort station” system thus institutionalised and legitimated sexual violence against the “comfort women” in an attempt to curb unauthorised sexual violence. Professor Yoshimi explained to the Tribunal that this strategy, however, failed miserably. Rather than discourage rape, the Japanese military encouraged both officers and troops to see rape as one of the few ‘benefits’ and an entitlement of military life. The reluctance of military commanders to try soldiers accused of rape enabled both “authorised” and unauthorised forms of sexual violence against women to proliferate under the auspices of the Imperial Japanese military. The notion that women could be offered to salve the brutality of military life or protect the integrity of the war mission is unfortunately an old one. In this case, the unprecedented scope, institutionalisation and brutality of the “comfort system” is the product of a culture of objectification of and discrimination against women, cruelly exacerbated as to women from cultures considered inferior by the aggressors, and taken to extremes as part of the culture of militarism.
1013. The Tribunal notes the egregious nature of this institutionalisation of rape, where the previously rampant rape of women by Japanese military personnel throughout the regions they conquered was deliberately translated into covert, organised, managed rape in the “comfort stations”. This bizarre “privatisation” and systematisation of rape in the “comfort station” system demonstrates the discriminatory purpose of the Japanese military and, by extension, the responsibility of the state of Japan, for gross discrimination. This Tribunal considers that Japan has a continuing obligation to take strong measures to address the discriminatory roots of this atrocity, which persist in the culture of militarism and gender inequality, and that Japan has violated that obligation in failing to make a genuine apology, provide compensation, prosecute wrongdoers, reveal the truth, and take vigorous measures to prevent recurrence.

7. *Failure to Take Necessary Measures to Prevent Recurrence: History Textbooks*

1014. The state of Japan's failure to face the truth of its past crimes is reflected in the dearth of official memorials, research institutions, cultural explorations, and special medical and rehabilitative services and programs and institutes for the survivors and their families. It is also reflected, perhaps most pointedly in the inadequate treatment of the history of the "comfort women" in the school textbooks approved by the Japanese Ministry of Education and used in Japanese schools. The record indicates that after taking some steps to make still inadequate references to the "comfort women" in the past few years, Japan has recently regressed by allowing the removal of even these references.⁷⁶⁸ The failure to acknowledge and educate the public, particularly children, about the wrongfulness of these crimes inflicts a continuing wrong upon the survivors of the system. It also creates doubt whether such crimes would be prevented from happening again. Based on the evidence put forward by the Japanese prosecution team, this Tribunal finds that the Japanese government has not only failed to make affirmative efforts to educate the public and future generations of Japan, but has also obstructed positive efforts of textbook authors by removing references to the crimes.
1015. Evidence submitted by the Japanese Prosecution and prepared by the Committee for Truth and Freedom in Textbooks et al. indicates that Japanese textbook companies have eliminated the previous references to "comfort women" "as a result of powerful pressure from the government and the Ministry of Education."⁷⁶⁹ Previous versions by the seven companies that produce junior high school textbooks referred to the "comfort women." However, four out of the seven textbooks being screened by the Ministry of Education for use in April 2002 have eliminated the references to "comfort women" and these four currently dominate the textbook industry, having an eighty percent share of the market.⁷⁷⁰ Of the three textbooks that retain references to the "comfort system," only one places it in the "Postwar Compensation" section, while two treat it as something wholly of the past in the "Japan-China War, Asia-Pacific War" section. Only one textbook actually uses the term "comfort women" (*ianfu*), while the other two refer to more impersonal "comfort stations" (*ianfu shisetsu*).⁷⁷¹ The Committee reports that, since 1999, senior Ministry officials asked the managers of textbook companies "to make the context more balanced" and "to rethink the line-up of authors." Other government officials joined in the pressure as shown in the 31 July 1998 statement by Minister of Agriculture and Forestry Nakagawa: "it is questionable whether it is good to publish the issue of 'comfort women' in a textbook as a fact."⁷⁷² The Committee further reports that one company president confirmed that, in December 1999, sources in the Prime Minister's office contacted the presidents and told them that "we have been reliably informed that you have been asked to deal with the sections on 'comfort women.'" The Japanese government contended that the deletion of references to "comfort women" is the free decision of textbook companies and it could not order the authors to revise the content. On this record, the Judges accept

⁷⁶⁸ Exhibit 220-S-2, The falsification of history under the guise of 'self-censorship' has been forced onto textbook publishers, Report prepared for this Tribunal by Tawara Yoshifumi, Secretary-General of Children and Textbooks Japan Network 21. (12 September 2000)

⁷⁶⁹ Exhibit 220-S-2, p. 3. The Committee explains that the companies submit the content of textbook manuscripts prior to the production of the draft edition to the Ministry and the schools decide which textbook(s) are to be used among the Ministry-approved textbooks.

⁷⁷⁰ Exhibit 220-S-2, p. 1.

⁷⁷¹ Exhibit 220-S-2, p. 1.

⁷⁷² Exhibit 219, p. 4.

the Committee's conclusion, however, that political pressure from the government has compelled at least some of the companies to decide to practice "self-censorship."

1016. The Judges also note that the Supreme Court of Japan has held that "the government has an affirmative duty to ensure that the history textbooks adequately and sufficiently address its wartime atrocities" and that "Japan's school textbooks should include descriptions of the suffering Japan's past aggression had caused its neighbours, and that such inclusion constituted a positive educational consideration."⁷⁷³ Ienaga Saburo filed a lawsuit in 1984 challenging the constitutionality of government screening of textbooks when the Ministry of Education requested him to revise his textbook and eliminate, *inter alia*, the reference to the rape of Chinese women by Japanese soldiers in Nanking. Finding that government screening of school textbooks is constitutional, the Court nonetheless held that the Ministry abused its discretion in ordering the elimination of the reference to Japan's wartime atrocities where there is sufficient research supporting the material.⁷⁷⁴
1017. Furthermore, the obligation to reveal and transmit the truth to future generations and prevent recurrence is a fundamental guarantor of human rights and thus, like other international human rights obligations, takes priority over domestic law. As such, Japan's international obligations of state responsibility compel the government to ensure the teaching and discussion of Japan's past crimes against the "comfort women" in the schools as well as communities. It can do this through minimal regulation of the content of textbooks or through developing and publishing the necessary material itself. Accordingly, the Tribunal finds that the deterioration in Japanese textbook content and Japan's failure to take affirmative steps to inform children of the state's responsibilities are violations of its positive duty to take necessary measures to prevent recurrence; the fact that the deterioration appears to have been encouraged by the state adds to its wrongfulness.

8. *Contemporary State and International Practice Relating to Continuing Legal Responsibility*

1018. There is growing state practice affirming the continuing responsibility of states for redressing crimes against humanity even when many years have passed since the violation. The Tribunal refers in particular to the decisions of Germany to pay reparations, beyond that required by treaty or law to victims of the Nazi aggression and Holocaust, including those subjected to forced labour.⁷⁷⁵ This example is especially pertinent as the crimes committed against the "comfort women" were crimes of forced and compulsory (sexual) labour. It makes no difference whether the labour was in the factories and slave camps producing material for the war effort or in the rape camps of the "comfort women" purportedly maintaining soldiers combat-ready. The Swiss Bank and other settlements respecting property looted by Nazis provide further recent examples of agreements to compensate World War Two victims in Europe.⁷⁷⁶ Japan's refusal to act likewise is contrary to this trend.

⁷⁷³ The "jokoku" (appeal from a High Court) case of Ienaga Saburo claiming compensation, the 3rd Petty Branch of the Supreme Court, Docket Nos. (o)1119 of Heisei 6 nen (1994) (29 August 1997).

⁷⁷⁴ The "jokoku" case of Ienaga Saburo.

⁷⁷⁵ See, e.g., Information submitted by the Government of Germany included in Report of the Secretary-General pursuant to Sub-Commission resolution 1993/29, Addendum, U.N. Doc.E/CN.4/Sub.2/1994/Add. 1 (22 July 1994).

⁷⁷⁶ See also McDougall Final Report, para. 78.

1019. The recent *Pinochet* decision handed down by the House of Lords (UK)⁷⁷⁷ and subsequently re-affirmed by the domestic courts of Chile provides powerful precedent regarding the limits of sovereign immunity, which has been held not to extend to crimes of torture allegedly committed by former heads of state. This case reinforces the importance of the exercise of universal jurisdiction with respect to egregious crimes even many years after the event. Current international law requires an end to the continuing denial of justice suffered by the “comfort women”, including through the introduction of a reparative legislative framework.

F. DEFENCES TO STATE RESPONSIBILITY: THE PEACE TREATIES

1020. State responsibility can be counteracted by circumstances precluding wrongfulness. According to the International Law Commission such circumstances include consent, self-defence, legitimate countermeasures, *force majeure*, distress and necessity.⁷⁷⁸ None of these circumstances were applicable to Japan’s commission of the internationally wrongful acts described above. However, Japan has raised other specific defences which we now consider. As the Tribunal has already noted, Japan contends that any individual claims that the “comfort women” may have had for compensation have been fully satisfied by peace treaties and international agreements between Japan and other states following the end of the Second World War (the “Peace Treaties”). These Agreements contain provisions that in various terms purport to waive Japan’s liability for further claims arising out of the war. There is little doubt that this was intended by the Allied Powers for political reasons. Among the asserted reasons for attempting to limit Japan’s liability were concern that the punitive nature of the Versailles Treaty had contributed to the rise of the Nazis and thus to World War II and the negotiation of these political agreements in the Cold War environment were dominated by fear of Communist (Soviet and, after 1949, Chinese) expansion. The Japanese government has maintained in various contexts that it has legally settled all claims under the terms of the various treaties and diligently fulfilled the obligations and, accordingly, that there is no basis for further claims such as those before this Tribunal.
1021. The Judges will thus address the impact and relevance of the Peace Treaties signed by Japan following the end of World War Two. In the event that Japan’s arguments on this point prove sustainable, the Applicants would be effectively precluded from claiming individual restitution or reparations against the state of Japan.

1. The Impact of the Treaties on the Settlement of Claims

1022. Following its defeat during the Second World War, Japan signed a number of multilateral and bilateral Peace Treaties with the Allied Powers and the states of the Asia Pacific. As a preliminary point, it should be noted, as discussed in the Judgement on the Common Indictment, that the Peace Treaties contain no provisions for amnesties. As such, no restrictions on prosecution exist. The only question is whether these Agreements constitute final settlement of all claims against Japan, including those presented here. The precise relationship between Japan and the various countries differs with the wording of the Treaties. The Peace Treaties insofar as relevant to the current proceedings are excerpted below.

⁷⁷⁷ See, e.g., *Regina v. Bartle et al., Ex Parte Pinochet*, House of Lords, Judgement, 25 Nov. 1998; *In Re Pinochet*, Opinions of the Lords of Appeal for Judgement in the Cause, 17 Dec. 1998.

⁷⁷⁸ ILC Draft Articles 2001, Articles 20-25.

(a) *The San Francisco Peace Treaty*

1023. The relevant articles of the San Francisco Peace Treaty provide:

Preamble

Whereas Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights . . .

Article 2

Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet . . .

Article 10

Japan renounces all special rights and interests in China . . .

Article 11

Japan accepts the judgements of the International Military Tribunal for the Far East and other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan . . .

Article 14

(a) It is recognised that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognised that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.

Therefore,

(1) Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done . . .

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals during the course of the prosecution of the war, and claims of the Allied Powers for . . . military costs of occupation.

Article 22

If in the opinion of any Party to the present Treaty there had arisen a dispute concerning the interpretation or execution of the treaty, which is

not settled by reference to a special claims tribunal or by any agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice . . .

Article 26

. . . Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantage than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.⁷⁷⁹

1024. The Definition of Allied Powers provided by Article 23 of the Peace Treaty included Australia, Canada, Ceylon (present day Sri Lanka), France, Indonesia, the Netherlands, New Zealand, Pakistan, the Philippines, the United Kingdom and the United States. Portugal (the colonial power over East Timor) was not a party to the Agreement. Neither the Peoples' Republic of China nor the Republic of China (Taiwan) were invited to the San Francisco Peace Conference or became parties to the Agreement.

(b) *Treaty of Peace Between Japan and Taiwan*

1025. In the separate Treaty of Peace signed between Taiwan and Japan, Article 11 states that the San Francisco Peace Treaty will apply to any disputes between the two nations:

Unless otherwise provided for in the present Treaty and the documents supplementary thereto, any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty.⁷⁸⁰

(c) *Treaty of Peace and Friendship Between Japan and China*

1026. Japan and the People's Republic of China did not sign a formal peace treaty. Rather, on September 29, 1972, they signed a "Joint Communiqué" aimed at normalising relations and containing Article 5, which stated that the People's Republic of China "renounces its demand for war reparations." These terms were later incorporated and formalised in the Treaty of Peace and Friendship between China and Japan.⁷⁸¹

(d) *Settlement Between Netherlands and Japan*

1027. The Settlement between the Netherlands and Japan explicitly addresses the issue of the claims of Netherlands nationals and provides in pertinent part:

Article I

For the purpose of expressing sympathy and regret for the suffering inflicted during the Second World War by agencies of the government of Japan upon Netherlands nationals, the government of Japan shall

⁷⁷⁹ Treaty of Peace with Japan, signed at San Francisco 8 Sept. 1951, entered into force 28 April 1952, 3 UST 3169 (San Francisco Peace Treaty) (emphasis added).

⁷⁸⁰ Treaty of Peace between Taiwan and Japan, 1858 UNTS. 38, signed at Taipei on 28 April 1952.

⁷⁸¹ Settlement and Treaty of Peace and Friendship between Japan and the People's Republic of China, signed 12 Aug. 1978, 1984 UNTS 269. The Joint Communiqué of the Government of Japan and the Government of the Peoples' Republic of China is available through the official website of Japan at <http://www.mofa.go.jp/region/asia-paci/china/joint72.html> (Last visited 21 Nov. 2001).

voluntarily tender as a solatium the amount of Pounds Sterling equivalent to US\$10,000,000 to the Government of the Kingdom of the Netherlands on behalf of those Netherlands nationals.

Article III

The Government of the Kingdom of the Netherlands confirms that neither itself nor any Netherlands nationals will raise against the government of Japan any claim concerning the sufferings inflicted during the Second World War by agencies of the government of Japan upon Netherlands nationals.⁷⁸²

1028. By Article III, the state of the Netherlands is arguably precluded from pursuing any further claims against Japan for its actions and the actions of its agents affecting Netherlands nationals during World War II.

(e) *Reparations Agreement Between the Philippines and Japan*

1029. The Reparations Agreement provides, in pertinent part:

Article 1

Japan, by way of reparations, shall supply the Republic of the Philippines with the services of the Japanese people and the products of Japan in the form of capital goods, the total value of which will be . . . equivalent to five hundred and fifty million United States dollars . . .

Article 12

2. Any dispute between the two Governments concerning the interpretation and implementation of the present Agreement shall be settled primarily through diplomatic channels . . .⁷⁸³

1030. We note that there is no express waiver of individual claims clause contained in this Agreement. It was only after reaching this Agreement that the Philippines ratified the San Francisco Agreement.

(f) *Treaty on Basic Relations Between Japan and the Republic of Korea*

1031. The Republic of Korea was not a party to the San Francisco Treaty, although that Treaty confirmed the independence of Korea. It is not, therefore, bound by Article 14. Japan's colonization of the Korean peninsula meant that there were particular issues to be resolved. The Treaty on Basic Relations between Japan and the Republic of Korea consists of only 6 substantive articles and was entered into to clarify the basic features of relations between the two countries. Article IV of the Treaty provides in pertinent part:

- (a) The High Contracting Parties will be guided by the principles of the Charter of the UN in their mutual relations.

⁷⁸² Settlement Between the Government of the Kingdom of The Netherlands and Japan Concerning Certain Types of Private Claims of Netherlands Nationals, 13 March 1956, 252 UNTS 3.

⁷⁸³ Reparations Agreement between the Philippines and Japan, 9 May 1956.

- (b) The High Contracting Parties will cooperate in conformity with the principles of the Charter of the UN in promoting their mutual welfare and common interests.⁷⁸⁴

1032. The two states differ on the construction and interpretation of several of the key articles. In addition, the government of Japan, whilst not doubting the legitimacy of the Republic of Korea, has been keen to emphasise that it does not deny the existence of another authority in the northern part of the Korean Peninsula.

1033. The Agreement on the Settlement of Problems concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea, deals with claims. Article II states:

(1) The Contracting parties confirm that [the] problem concerning property, rights and interests of the two contracting Parties and their nationals . . . and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the [San Francisco] Treaty of Peace with Japan . . . is settled completely and finally.

(2) [N]o contention shall be made with respect to the measures on property, rights and interests of either contracting Party and its nationals which are within the jurisdiction of the other contracting party on the date of the signing of the present Agreement, or with respect to any claims of either Contracting Party and its nationals against the other contracting Party and its nationals arising from the causes which occurred on or before the said date.⁷⁸⁵

1034. It can be questioned whether ‘property, rights and interests’ includes claims such as those of the “comfort women” against Japan. The two states adopted Agreed Minutes of their negotiation of the Peace Treaty in which they agreed that “property, rights and interests means all kinds of substantial rights which are recognized under law to be of property value.”⁷⁸⁶ This would appear to exclude the “comfort women’s” extensive claims. Korea submitted an outline of claims of the Republic of Korea (called the Eight Items) at the negotiations. There is no evidence that this list included the claims of the comfort women for crimes against humanity committed against them and indeed the Treaty provisions encompass “either the disposition of property or the regulation of commercial relations between the two countries, including the settlement of debts.”⁷⁸⁷

2. *The Issue of the Peace Treaties’ Waiver of Individual Claims*

(a) *Waiver as to Crimes Against Humanity*

1035. As we stated earlier in this Judgement, the Peace Treaties raise the question of the state having the power to waive the rights and claims of individual victims. The Judges consider that the principle that the harm in this context is harm to the state constitutes a

⁷⁸⁴ Treaty on Basic Relations between Japan and the Republic of Korea, signed at Tokyo on 22 June 1965, 583 UNTS 33.

⁷⁸⁵ Agreement on the Settlement of Problems concerning Property and Claims and on Economic Cooperation between Japan and Korea, 583 UNTS 258, 22 June 1965.

⁷⁸⁶ Agreed Minutes, 583 UNTS 290, para. 2(a), 22 June 1965.

⁷⁸⁷ International Commission of Jurists, *Comfort Women, An Unfinished Ordeal*, Report of a Mission (1994), pp. 164-65 (submitted in evidence).

legal fiction that was developed to permit states to assert state responsibility for the commission of internationally wrongful acts against individuals and to control the assertion of claims. Such reasoning is not relevant to crimes against humanity where the harm is to the individual members of the targeted civilian populations and the perpetrator may be the individual's state itself. This position is reflected in human rights theory and, increasingly, in human rights practise where the individual can bring a claim on her or his own behalf before an international body after exhausting local remedies for the violation incurred. These developments also reflect the emergence of the recognition of the individual as a central actor in international law.

1036. In addition, the *Pinochet* litigation before the UK House of Lords has established that crimes such as torture, due to their very nature, can never be legitimate acts of state and, thus, there can be no immunity from accountability.⁷⁸⁸ By extension, this principle must apply to rape, also recognised as a serious crime and a form of torture, and to sexual slavery as well as to crimes against humanity generally. Further, as a corollary to the refusal of immunity from accountability for the commission of such crimes, no state can waive the liability of another state for crimes against humanity. On this basis, the state of Japan is prevented from attempting to evade liability for violations of crimes against humanity by hiding behind the terms of the Peace Treaties. In particular, the waiver included within the San Francisco Peace Treaty is invalid on the ground that neither the Allies nor those victimised states which accepted in some form the terms of the treaty, had legal power or right to waive the liability of Japan for crimes against humanity, including the rape and sexual slavery committed against the former "comfort women" or other victims of crimes against humanity.
1037. Nevertheless, in order to further explain the basis of this Tribunal's legal judgement in relation to the legal arguments surrounding the Peace Treaties, we make the following additional comments in relation to the application of the Peace Treaties and additional legal arguments pressed by Japan in other contexts.

(b) *Waiver as to Claims Not Presented*

1038. The Judges attach weight to the fact that the claims forming the subject matter of these proceedings (that is, the internationally wrongful acts committed against the "comfort women") were not explicitly discussed during the Peace Treaty negotiations. As such, we are persuaded that even if the waiver of claims by the Allied Powers articulated in Article 14 of the San Francisco Peace Treaty were subsequently held to be valid, the normal principles of treaty interpretation would preclude a finding that this waiver was intended, by either party, to include the claims relating to the current proceedings. Further, the lump-sum agreements in the various treaties were, as discussed below, motivated by a desire to sharply limit Japan's liability for economic and geopolitical reasons.

(c) *Waiver as to Victim States Not Participating*

1039. We also note that the Peace Treaties were concluded between states. It is an axiomatic principle of international law that treaties are only legally binding on those states which are Parties to them.⁷⁸⁹ The fact that some of the victimised states were not parties to the San Francisco Peace Treaty negotiations and never acceded to them precludes any claim of waiver as to their nationals under international law.

⁷⁸⁸ See *In Re Pinochet*, *supra*.

⁷⁸⁹ Vienna Convention on the Law of Treaties, 23 May 1969, Article 34, 8 ILM 679.

1040. The principle that these treaties were negotiated by, and are binding only upon states has further significance here, given that the process excluded the victimised people. The Tribunal finds it very troubling that the states of which the women victimised by rape and sexual slavery, crimes against humanity were nationals, did not put these claims forward in the post-war negotiations. Their failure to do so, however, does not negate the accountability of Japan to make proper efforts to repair the harm inflicted, nor the obligation of these and other states to use all available means to press for recognition and satisfaction of the claims.

(d) *Waiver and the Principle of Obligation Erga Omnes*

1041. The Judges recognise that, as a general matter, the injured state may waive responsibility and, as a result, the claim is extinguished. However, as already noted, crimes against humanity by definition are committed against individuals and not against states. Moreover, as obligations owed *erga omnes*, they constitute an offense against the entire world community. As was asserted by the International Court of Justice:

[A]n essential difference should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-a-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive . . . from the principles and rules concerning basic rights of the human person, including protection from slavery and racial discrimination.⁷⁹⁰

1042. The examples of such obligations given by the Court – slavery and racial discrimination – are especially applicable to the facts before this Tribunal. In his Third Report on State Responsibility, the Special Rapporteur on State Responsibility made clear that the category of norms which are generally accepted as universal in scope and non-derogable as to their content, and in the performance of which all states have a legal interest, is *small* but that it includes “the prohibition of the use of force in international relations, the prohibitions of genocide and slavery, the right of self-determination, and those other human right and humanitarian law obligations which are recognised as non-derogable by general international law.”⁷⁹¹
1043. This analysis supports the position that it is legally impossible, in our view, for a state to waive the claims of the individuals injured because the injury is done to all. Article 48(1)(b) of the ILC Draft Articles 2001⁷⁹² also allows any state – irrespective of whether it is the injured state – to invoke responsibility and demand accountability where the obligation is owed to the international community as a whole. And Article 48(2)(b) provides that such a state may claim reparations for the “beneficiaries of the obligation breached.” Accordingly, it is legally impossible for bilateral or multilateral agreements, even agreements concluded by states of which the victims are nationals, to waive the interests of non-participating states in redressing a crime done to all.

⁷⁹⁰ Barcelona Traction, Light and Power Co. Ltd. (New Application: 1962) (Belgium v. Spain) 1970 ICJ Rep. 3, paras. 33-34 (5 February).

⁷⁹¹ U.N. Doc A/CN.4/507/Add.4, 4 August 2000.

⁷⁹² ILC Draft Articles 2001.

1044. Beyond this, the people of the world – and not only states – have a compelling interest in establishing accountability for crimes against humanity. While acknowledging that the ILC Draft Articles 2001 refer to states that are not directly injured by the breach of an *erga omnes* obligation, the Tribunal rejects the proposition that the international community is comprised only of states. We note that the International Law Commission's Special Rapporteur on the Draft Articles did not accept a definition of the international community that was restricted to states. Instead, he opined that "the international community includes entities in addition to States."⁷⁹³ He gave as examples such entities as the European Union and the International Committee of the Red Cross, but there is no reason why the *omnes* – (or all) – should not refer to all people particularly those peoples and people who are the victims of the offending conduct. Thus the failure of any state, be it a victimised state or one interested as part of the world community or *omnes*, to recognise or press the claims of those victimised by crimes against humanity cannot, in law, extinguish those claims.
1045. Moreover, this Tribunal, deriving its authority from the peoples of the Asia-Pacific region victimised by the Japanese military aggression and its military sexual slavery system, and ultimately from the people of the world, sits and renders judgement to give voice to the unextinguished claims. Among its purposes is to encourage the states of the world – many of whom have, in various contexts, expressed their condemnation of Japan's military sexual slavery system and its resistance to making reparations to the survivors – to discharge their responsibilities as part of the community of nations and accelerate their efforts to achieve a just resolution and ensure the accountability of the Japanese state.

3. *Treaties Not an Articulation of the Traditional Doctrine of Diplomatic Protection*

1046. The Tribunal has been persuaded in the current proceedings by Professor Kalshoven's careful analysis of the position of the Peace Treaties. It attaches weight to the Professor's assertion that the Peace Treaties and their provision for negotiation of lump sum compensation do not represent a formal articulation of the traditional doctrine of diplomatic protection. As he stated:

[L]ump-sum agreements have nothing to do with diplomatic protection. Diplomatic protection is the conscious decision by a government to 'espouse' the case of its national who has attempted, and failed, to get satisfaction from the foreign State in the course of a procedure in which he has exhausted all local remedies. Lump-sum agreements are generally concluded without even an attempt to find out whether potential individual claimants have followed this road of exhaustion of local remedies. And once again, individuals could only have done this if they had a right, and the opportunity, to bring claims against the other State before the courts of that State.⁷⁹⁴

4. *The Peace Treaties as Political Rather Than Legal Settlements*

1047. The Tribunal is also persuaded by Professor Kalshoven's analysis that lump-sum agreements are concluded for political reasons, rather than to compensate individual

⁷⁹³ Fourth Report on State Responsibility, submitted by James Crawford, Special Rapporteur, U.N. Doc. A/CN.4/517 (2000), para. 36 (4th Report).

⁷⁹⁴ Exhibit 230, Fritz Kalshoven, Supplementary Expert Opinion, dated 18 November 1999.

damage and injury.⁷⁹⁵ Given that the damage and injury caused to individuals by the Japanese military sexual slavery system and rape such as at Mapanique was not acknowledged or considered at the time of the conclusion of the Peace Treaties, this Tribunal finds persuasive Professor Kalshoven's assertion that:

Lump-sum agreements are inter-State agreements; they are concluded for political reasons and are not, or at most only very partially, based on the damage and injury suffered by individual persons of the nationality of the State that receives money under the agreement. Often, the individual damage and injury are unknown at the time of the conclusion of the agreement, and therefore simply cannot have been taken into account in 'calculating' the payment under the agreement.⁷⁹⁶

1048. The political nature of the settlements contained within the Peace Agreements is starkly apparent in this case. In addition to not wanting to punish Japan economically for its war of aggression and the devastation it wreaked, the Allies, and particularly the United States, had as their overarching goal to prevent Soviet influence in the region. The United States acknowledged this recently in its "Statement of Interest" filed in the United States federal court, presenting claims of former "comfort women" from the Philippines, China, Taiwan and South Korea. The Statement of the United States argued against recognition individual claims in these terms:

The [San Francisco] Treaty was considered as a part of a package, ... relating to the Pacific region, reflecting the United States' view of the Treaty as an integral part of its political and foreign relations goals in that region.

The Allies' intent was to effect as complete and lasting a peace with Japan as possible by closing the door on litigation of war-related claims, and instead effecting the resolution of these claims through political means. This policy decision was made in order to allow Japan as a nation to rebuild its economy and become a stable force and strong ally in Asia To that end, the United States actively facilitated and encouraged Japan's efforts to enter into peace treaties and/or claims settlement agreement with non-signatory nations such as China, Korea, Burma and Indonesia.⁷⁹⁷

This is a transparent admission of the political nature of this effort to extinguish individual claims for war-related injury. It is also an effective warning of the danger to the principle of accountability of permitting a geopolitical negotiating process to extinguish the claims of the injured.

5. *Changed Circumstances*

1049. There is further significance today to the fact that the restriction of the reparation claims against Japan at the time of the Peace Treaties was based on Japan's economic weakness. The wording in Article 14(a) of the San Francisco Peace Treaty that "the resources of Japan are not *presently* sufficient" indicates that this was not envisaged, at the time, as permanent, but rather was considered a temporary bar on claims because of the special

⁷⁹⁵ Exhibit 230.

⁷⁹⁶ Exhibit 230.

⁷⁹⁷ Hwang Geum Joo, et al. v. Japan (Civil Action No. 00-CV-2288), renumbered CO-CV-2233 (D.D.C. filed 18 Sept. 2000).

circumstances then prevailing in Japan. The requirements for the application of the doctrine of fundamental change of circumstances (*rebus sic stantibus*) for the termination of a treaty are laid out in Article 62 of the Vienna Convention on the Law of Treaties. The requirements are that: “(a) ‘the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty.’” It might be argued that the fundamental change of Japan’s economic circumstances in terms of its now powerful economic strength and the changed political circumstances after the collapse of the Soviet Union go to the basis of the waiver provision and change the obligations of the San Francisco Treaty.

1050. The Judges further take judicial notice of media reports of subsequent agreements made by Japan to pay reparations for damages caused by its illegal wartime activities.⁷⁹⁸ Such agreements might activate Article 26 of the San Francisco Agreement allowing for further reparations at the behest of the parties. The same might be argued of the Treaty with the Philippines, which did not include a waiver clause. As this argument has not been made to the Tribunal the Judges will not explore it further, except to note the potential for consideration of the issues by the International Court of Justice, under Article 22. We support the often asserted view that there can be “no peace without justice.” The long and courageous battle for reparations waged by the aging survivors of the “comfort system” attests to the necessity of accountability if the survivors are to have peace. It also makes clear the crucial importance of the principle we affirm here: that as to crimes against humanity, the bargains of states cannot extinguish the claims of injured people.

6. *The Gendered Nature of the Peace Treaties*

1051. We also find persuasive the arguments of the co-Chief Prosecutors regarding the inherent gender bias underlying the Peace Treaties. We note that women, either as individuals or as a group, did not have an equal voice or equal status to men at the time of the conclusion of the Peace Treaties, with the direct consequence that the issues of military sexual slavery and rape were left unaddressed at that time and formed no part of the background to the negotiations and ultimate resolution of the Peace Treaties. The Tribunal considers that such gender blindness in international peace processes contributes to the continuing culture of impunity for crimes perpetrated against women in armed conflict.

7. *Article 3 of the 1907 Hague Convention*

1052. The Tribunal further notes that Article 3 of the 1907 Hague Convention provides an additional foundation for recognising compensation claims by individuals,⁷⁹⁹ and that, in accordance with our earlier findings, it is applicable to the state of Japan. We note that the state of Japan takes the position that Article 3 does not confer a direct, individual right of compensation, but refers only to the responsibility between states. While recognising that the Japanese courts have accepted Japan’s contention, this Tribunal is not in accord. Rather, based on the negotiating history and the text, this Tribunal accepts the expert view of Professor Kalshoven and other experts that Article 3 was intended to confer an

⁷⁹⁸ Steven Clemons, “Recovering Japan’s Wartime Past – and Ours,” *The New York Times*, 4 September 2001, p.A-27. Clemons also refers to a recently declassified secret exchange of letters between Japan and the Netherlands affirming that the latter had not expropriated the private claims of its nationals by becoming a party to the San Francisco Peace Treaty.

⁷⁹⁹ Article 3 provides: “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

independent individual right to compensation for victims of violations of the annexed Regulations. We find it further significant that Article 3 was so drafted to provide an additional sanction against an occupying state in order to enhance adherence to the Hague Regulations with respect to persons under its jurisdiction. As Professor Kalshoven explains:

[I]t should be understood that the liability for compensation provided in Article 3 [of the Hague Convention] means State responsibility, and was set forth, for the purpose of making armed forces and their members strictly adhere to the Regulations, as a sanction against the belligerent party whose armed forces or its members have committed acts in violation of the regulations in order to make the provisions more effective. *It should not be understood further than to mean that it provides individual victims, who have been inflicted damage as a result of acts in violation of those provisions, with the right to claim compensation directly against the belligerent State* (emphasis supplied).⁸⁰⁰

G. CONCLUSION

1053. For the above reasons, the Judges find that the application for state responsibility is valid and that the Japanese government is liable for the harm inflicted by the Japanese military sexual slavery system. With respect to Japan's reliance on the Peace Treaties, the Tribunal finds that the negotiating parties had no power to waive the claims of individuals for harm suffered as a result of the commission of crimes against humanity and we reject the assertion that these claims were effectively or permanently waived. Further, we find that Article 3 of the 1907 Hague Convention was intended to protect the right of the victimised persons and those who are permitted to claim on their behalf to seek compensation as individuals.

⁸⁰⁰ Exhibit 230. The Kalshoven interpretation is supported by Eric David, Professor of International Law, International Criminal Law and Law of Armed Conflict, University of Bruxelles, in War and the Rights of Individuals: Renaissance of Individual Compensation (Josalazu Fujita, Isomi Suzuki, Kantaro Nagano (eds.)) (2000).

PART VII – REPARATIONS

A. INTRODUCTION

1054. Reparation is a crucial form of redress which should be afforded to victims of crimes. The obligation to respect and enforce international law has been the subject of many reports⁸⁰¹ and there is no doubt that every state has the legal duty to respect and enforce human rights and humanitarian law. This obligation includes the duty to “afford remedies and reparation to victims.”⁸⁰² In the 1928 *Chorzow Factory* case, the Permanent Court of International Justice regarded the obligation to make reparation for an international wrongful act as “a general principle of international law.”⁸⁰³ That general principle has developed into a legal and moral duty.⁸⁰⁴
1055. Any violation of human rights or humanitarian law gives rise to a right of reparation for the victim, although “[p]articular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide, slavery and slavery-like practices . . . and systematic discrimination, in particular based on gender.”⁸⁰⁵
1056. In accordance with our finding that the crimes committed against the “comfort women” were international wrongful acts attributable to the government of Japan, the state incurs civil and criminal responsibility for the violations. In conformity with the longstanding principle of international law that the state must provide a remedy for its wrongs,⁸⁰⁶ the government of Japan is accordingly obliged to provide reparation to the former “comfort women” for the crimes committed against them by or with the complicity of the Japanese government and military.
1057. In addition, in light of the continuing violation, we apply the evolving concept of reparations under international law. Thus, having identified the rape and sexual slavery committed herein as internationally wrongful acts during 1937-1945, we examine the state’s responsibility to provide compensation, restitution, rehabilitation, satisfaction, and

⁸⁰¹ Most particularly, the subject of reparations has been addressed by Mr. Theo van Boven, who was tasked by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of human rights abuses (E/CN.4/Sub.2/1993/8 of 2 July 1993), and this draft report resulted in two subsequent reports on basic principles and guidelines (E/CN.4/Sub.2/1996/17 of 24 May 1996; E/CN.4/1997/104 of 16 January 1997.) The reports of Mr. Louis Joinet, Special Rapporteur of the Sub-Commission on the question of impunity of perpetrators of violations of human rights also elaborated basic principles and guidelines on impunity, including two reports addressing reparation for victims of human rights violations (E/CN.4/Sub.2/1997/20 of 26 June 1997; and E/CN.4/Sub.2/1997/20/Rev. 1 of 2 October 1997). Additionally, the Commission on Human Rights commissioned Mr. M. Cherif Bassiouni to report on the basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (E/CN.4/1999/65 of 8 February 1999; and E/CN.4/2000/62 of 18 January 2000.)

⁸⁰² Van Boven Principles, 1996, principles 1 & 2, and Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, 24 May 1996, Annex, Basic Principles and Guidelines on the Right to Reparation for United Nations Commission on Human Rights, Victims of Gross Violations of Human Rights and Humanitarian Law, principles 1 & 2 [Revised Basic Principles, van Boven, 1996].

⁸⁰³ *Chorzow Factory (Indemnity) Case*, (Germany v. Poland), 1928 PCIJ, Series A, No. 17, at 29 (Sept. 13).

⁸⁰⁴ See, e.g., 2001 Draft Articles on State Responsibility (2001) Article 30.

⁸⁰⁵ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Basic Principles and Guidelines on the right of victims to reparation, U.N. Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, at 7-8 [van Boven Guidelines, 1993].

⁸⁰⁶ United Nations Commission on Human Rights, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, U.N. Doc. E/CN.4/2000/62 (18 January 2000) [Bassiouni Final Report], paras. 3(e), 16.

guarantees of non-repetition as these concepts have been articulated in more recent UN documents.

1058. In examining the scope of the government of Japan's obligation to provide reparations, we refer to a fundamental principle of international law that "the breach of an international duty involves an obligation to make reparation in an adequate form."⁸⁰⁷ To fulfil this obligation, the reparation must be "adequate, effective and prompt."⁸⁰⁸ In order to be deemed fair, the reparations or other remedies provided must be "proportional to the gravity of the violations and the harm suffered."⁸⁰⁹
1059. The form of reparations due is dependent upon the particular facts of the case, but may include restitution, compensation, rehabilitation, and satisfaction. These encompass such things as an acknowledgement of illegality and responsibility, a formal apology, access to justice (criminal, civil, and administrative), and access to factual information concerning the violations. The government must also take steps to protect the identity of those survivors/victims who do not want to be identified.
1060. The applicants are seeking reparations for two kinds of harm inflicted on the survivors of Japan's military sexual slavery: harm that flows from the original violations and harm incurred from subsequent acts and omissions that are contrary to the Japanese government's obligations to provide full and adequate reparations. This case gives powerful meaning to the concept of continuing violation and indeed the testimony of the survivors reveals the constant reiteration of pain and the reinforcement of secrecy and shame as a result of the government of Japan's concealment, denials, and obfuscation of the truth and its failure to fulfil its fundamental responsibility. We note that for over 56 years, successive governments of Japan have continually failed in their obligation to provide remedies expeditiously.⁸¹⁰
1061. We agree that the victim/survivor is the appropriate "moral and conceptual point of departure" for the development of a legal framework of international guidelines governing the right to reparation.⁸¹¹ Atrocities perpetrated intentionally, systematically, and against a huge number of victims, as here, are especially egregious and deserve proper censure.
1062. Reparations promote justice by providing certain means of redress for the violations.⁸¹² Reparations may be claimed by direct victims, their immediate families, dependants, or "other persons or groups of persons connected with the direct victim."⁸¹³ A "victim" is one who, individually or collectively, has suffered harm. This harm encompasses, among

⁸⁰⁷ Chorzow Factory (Jurisdiction) Case, op cit at n 1. *supra* Chorzow Factory (Merits), Permanent Court of International Justice (PCIJ), Judgement No. 13, Series A, No. 8-17, 1927.

⁸⁰⁸ Bassiouni Final Report, para. 15.

⁸⁰⁹ Bassiouni Final Report, para. 15.

⁸¹⁰ Bassiouni Final Report, para. 15.

⁸¹¹ United Nations Commission on Human Rights, Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43, UN Doc. E/CN.4/1999/65 (8 February 1999) [Bassiouni 1999 Report], paras. 83, 84.

⁸¹² Bassiouni Final Report, para. 15. The Joinet Report (E/CN.4/Sub.2/1997/20, 26 June 1997) refers to and treats somewhat separately "the right to know," "the right to justice," and "the right to reparation."

⁸¹³ United Nations Commission on Human Rights, Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, UN Doc. E/CN.4/Sub.2/1996/17, para. 6 [van Boven Principles, 1996].

other things, “physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.”⁸¹⁴

1063. The law of state responsibility “requires a state to make reparations when it fails to comply, through an act or omission attributable to it, with an obligation under international law.”⁸¹⁵ Moreover, the forms of remedies available from the state are not necessarily discretionary, particularly when the violation is the result of intentional state wrongdoing. That the crimes were committed by or attributable to the state is especially disturbing. This is not a case of a state failing to protect – the state of Japan aggressively and intentionally caused the harm. Thus, “[t]he remedies afforded should reflect the breach of trust involved because, in general, the more outrageous the wrongdoer’s conduct, the more outraged and distressed the victim will be and the greater the harm that will be suffered.”⁸¹⁶ The reparations should be comprehensive and include any or all forms that are applicable to the situation and cover all injuries suffered by the victims.⁸¹⁷
1064. The most common forms of reparation – satisfaction, restitution, compensation, and rehabilitation – must all be considered, as the needs of the large victim group may vary greatly. Further, the extended period of time over which the crimes occurred, covering years in some instances, coupled with the excessive time period during which additional violations have accrued as a direct result of the failure of the government of Japan to take responsibility for the crimes and provide reparation after the war, necessitates a broad scope of applicable remedies, including reparation.

1. Satisfaction

1065. The concept of satisfaction encompasses public acknowledgement of the state’s wrongdoing together with concrete steps to repair the relationship between the victim and the state and civil society as a whole. Satisfaction encompasses symbolic measures taken for “moral and collective reparation,” and arises in part from the “duty to remember.”⁸¹⁸ Satisfaction can include any or all of the following measures, which are not exhaustive:

- (a) Cessation of continuing violations;
- (b) Verification of the facts and full public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
- (c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;

⁸¹⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. A/RES/40/34, 29 November 1985, Annex, at Principle 1.

⁸¹⁵ Dinah Shelton, *Remedies in International Human Rights Law*, 1999, p. 93.

⁸¹⁶ Dinah Shelton, *Reparations for Victims of International Crimes*, in *International Crimes, Peace, and Human Rights* (Shelton ed., 2001), p. 140.

⁸¹⁷ Bassiouni Final Report, paras. 21, 22, 23, 24, 25; Joinet Report, Annex, Principle 39.

⁸¹⁸ United Nations Commission on Human Rights, Question of the impunity of perpetrators of human rights violations (civil and political), Final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, U.N. Doc. No. E/CN.4/Sub.2/1997/20 (26 June 1997) [Joinet Report], Annex, Principle 2 and Principle 44. For an analysis of the “moral responsibility” of the government of Japan, see Report on the mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, Addendum to the Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, UN Doc. E/CN.4/1996/53, Add.1, 4 January 1996, paras. 125-135.

- (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely associated with the victim;
- (e) Apology, including public acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial or administrative sanctions against persons responsible for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that have occurred in international human rights and humanitarian law training and in educational material at all levels;
- (i) Preventing the recurrence of violations . . . ⁸¹⁹

2. *Official and Full Acknowledgement*

1066. As previously set forth in this Judgement, successive governments of Japan have continually violated the duty to acknowledge its wrongdoing concerning the “comfort system.” This violation continues until this day. The guarded admissions of the state of Japan continue to minimise the harm inflicted while its failure to countermand the denials continues to exacerbate the survivors’ suffering. Many of the survivor-witnesses underscored their need for a meaningful apology. A sincere apology fully acknowledging the wrongdoing and clearly accepting full legal responsibility is required. Verifying the facts and publicly disclosing the truth must be done “to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others.”⁸²⁰ Revealing the truth is a fundamental requirement of justice.⁸²¹
1067. Despite its obligations, the Tribunal finds that the official position of Japan has moved from the destruction of inculcating documents to denial to acknowledgment of culpability that remains partial and ambiguous. Confronted with allegations, instead of acknowledging the crimes the government of Japan initially denied any involvement in the “comfort stations,” and implied that the women were voluntary prostitutes. Only in the face of undeniable evidence of the government of Japan’s military involvement in the “comfort stations” did the government belatedly offer a general “apology” while simultaneously denouncing that it had incurred or continued to owe any legal responsibility.
1068. The Tribunal finds that the state of Japan’s continuing resistance to fully acknowledging its wrongdoing and its efforts to shift blame onto the victims has perpetuated the shame and silence, inflicted indescribable pain upon the survivors, and deprived them of the possibility of living in peace with themselves and with their families and communities. As the Secretary-General of the United Nations recently said in relation to an historic judgement of the International Criminal Tribunal for Rwanda: “There can be no healing without peace, there can be no peace without justice, and there can be no justice without

⁸¹⁹ Bassiouni Final Report, para. 25. In addition, satisfaction includes preventing the recurrence of violations by such means as: Ensuring effective civilian control of military and security forces; . . . ; strengthening the independence of the judiciary; protecting persons in the legal, media and other related professions and human rights defenders; conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials; promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises; creating mechanisms for monitoring conflict resolution and preventive intervention. Bassiouni Final Report, para. 25(I).

⁸²⁰ Bassiouni Final Report, para. 25(b).

⁸²¹ See e.g., van Boven 1993 Final Report.

respect for human rights and the rule of law.”⁸²² The partial admissions of the state of Japan continues to minimize the harm inflicted while its failure to countermand the denials continues to exacerbate the survivors’ suffering. Until the government of Japan acknowledges that it was the victimizer and that the “comfort women” were innocent and blameless pawns victimised by the state and its military, full redress is impossible.

3. *Preservation of Memory*

1069. Closely related to apology, which facilitates healing and acknowledges responsibility, preservation of memory concerns disclosing fully the factual records and other evidence of the “comfort system” and creating a public historical record for telling, investigating, and retelling the full story. During this process, efforts must be made to ensure that the privacy of victims is respected. Accurately recording and preserving the memory of wrongdoing and the harm to victims serves to rehabilitate the victims in the public eye and ensure the non-recurrence of such horrific behaviour in future generations.
1070. The Tribunal finds that the efforts of the government of Japan to educate the people of Japan and future generations are sorely lacking in regard to the formal education through text books, official memorials, and commemorative days devoted to examining the history and engendering respect for the victimised women. Jose Zalaquett, a member of the Chilean Commission for Truth and Reconciliation, noted that if the “ghosts of the past [are] not exorcised to the fullest extent possible, [they] will continue to haunt the nation.”⁸²³ This was true in Latin America and it is true in Asia and elsewhere.

4. *Gender Training, Empowerment, and Equality*

1071. The brutal expropriation of women’s bodies, sexuality, youth, fertility, self-esteem, security, future and hope is more likely to occur in a culture that devalues females and which sanctions the subordination and dehumanisation of girl-children and women. This treatment is usually based on women’s gender as well as their perceived inferiority and vulnerability due to national and racial identity, including indigenous status, and poverty. Unfortunately, the Japanese culture of rendering women, particularly outside the home, invisible or less significant than men, is not at all unique.
1072. It is critical that the sexual enslavement of the “comfort girls and women” not be treated as an anomaly. Rather, the underlying ideology and political, economic and social structures which combine to validate women’s inequality and subordination and, thereby, immunise violence against women and girls in the public and private arenas and must be addressed at all levels of society. Efforts must be made to expose the attitudes and conditions contributing to the devaluation of women and to reverse such attitudes through broad education, training and support to women and girls to enable them to overcome the legacy of gender inequality.

5. *Access to Judicial Redress*

1073. In addition to civil remedies, it is appropriate to apply criminal sanction to individuals who commit crimes. Fundamental responsibility rests with those responsible for establishing and maintaining the “comfort system” and their agents, physical perpetrators,

⁸²² Secretary-General of the UN, Kofi Annan, Press Release, Secretary General/S6/sm/668/L/2896, 2 September 1998.

⁸²³ Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 *Hastings LJ* (1992), pp. 1425, 1429.

station owners or managers, and superiors on the hierarchical ladder who had a duty to prevent, halt, or punish crimes committed by subordinates under their authority and control, but who failed to take the necessary and reasonable steps to do so. Administrative sanction, truth-telling and public shaming may in some circumstances be more appropriate than criminal prosecution.

6. *Restitution*

1074. The purpose of restitution is to “restore the victim to the original situation before the violations...occurred.”⁸²⁴ It includes restoration of liberty, ... enjoyment of family life and citizenship, return to one’s place of residence, restoration of employment, and return of property.”⁸²⁵ In the law of remedies, restitution is preferable when possible, so as to restore the victim to her pre-injury position. When restitution is impossible, money is usually awarded as a substitute. Clearly, a state cannot bring a dead person back to life, “nor can a rape or torture victim have the rape or torture expunged. In such cases, money becomes a substitute for the pre-injury status.”⁸²⁶ While it is impossible to restore the former “comfort women” to their situation before the violence inflicted upon them, it may be possible to return them to their country of residence if they wish; to provide them with some of the material well-being including long-delayed health care, they might otherwise have enjoyed; and to erase any criminal records of, for example, prostitution or unlawful immigration, which may have resulted from their victimisation as “comfort women.”
1075. It is incumbent on the government of Japan to take vigorous measures, in consultation with the survivors, to restore the honour and social status of survivors. They must be restored in not only their own eyes, but also the eyes of society. Additionally, restitution of material losses, such as repatriation of survivors who wish to be, return of any property taken, or return of the remains of the deceased, would also provide a measure of remedy.

7. *Compensation*

1076. This form of remedial provision is appropriate for “any economically assessable damages” both material and emotional, which includes physical or mental harm, including pain, suffering and emotional damage from the initial violence and enslavement and continuing violations; lost opportunities, including education; material damages, including loss of education and earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services.⁸²⁷ Physical and emotional suffering should be recognized as encompassing the lifelong loss of pleasure from sex or sexuality, the loss of reproductive capacity or health and the harm to children, the loss of security in the world and trust in others, the loss of the sense of integrity and belonging in one’s body, and the long period of isolation from family and society, and the impact of this atrocity on future generations.
1077. To be in compliance with international law, compensation must come from the source of the wrongdoer, the government of Japan and any other responsible party. The

⁸²⁴ Bassiouni Final Report, para. 22.

⁸²⁵ Bassiouni Final Report, para. 22.

⁸²⁶ Dinah L. Shelton, *Reparations to Victims at the International Criminal Court*, in *The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79): Recommendations for the Court Rules of Procedure and Evidence* (Center on International Cooperation, New York University), prepared for the 26th July – 13 August 1999 ICC Prep. Com., available at www.nyu.edu/pages/cic/pubs/ReparVictimsNew.html.

⁸²⁷ Bassiouni Final Report, para. 23. Article 3 of 1907 Hague Convention IV recognizes that states may be required to pay compensation for violations of international humanitarian law.

compensation must be adequate to the material harm, lost opportunities and emotional suffering of the victims, their families and close associates for the crimes committed and the ensuing harms resulting from the denial of truth and timely remedial measures. The Tribunal considers that the Asian Women's Fund, vehemently rejected by many of the survivors, is neither appropriate nor adequate. Determination of the proper amount of compensation should be made in consultation with survivors, the families of those who are deceased, and appropriate advocates and experts, and may draw upon international practice for similar or related atrocities.⁸²⁸

1078. The Inter-American Court of Human Rights recognised that abuses committed by governments may have a more harmful effect on the victim than abuses committed by non-state actors. In *Loayza Tomayo v. Peru (Reparations)*, the Court emphasised that the state has a duty to protect individuals and it found that crimes committed by the state are exceptionally egregious and destructive.⁸²⁹
1079. The Tribunal finds that the delay in making reparations and acknowledging the crimes exacerbated the injuries and caused additional and continuing suffering in the nature of shame, ostracism, anger, sorrow, despair, isolation, the inability to find peace, economic hardship and impoverishment, loss of companionship, and unredressed health problems. These profound losses are also subject to compensation to the present, as are the lost opportunities.

8. Rehabilitation

1080. Rehabilitation may include services afforded to both the victim and the victimizer. It includes medical and psychological care as well as legal and social services.⁸³⁰ In the present case, the continuing nature of the violations intensifies the need and urgency for all applicable forms of reparation. The murder or abandonment of the women at the end of the war, the destruction of evidence that would reveal the full extent of these crimes, the denial and attempted erasure of the women's experience of sexual slavery and rape by naming it "prostitution," the refusal to take legal or moral responsibility for the crimes or to provide fair reparations, have inflicted an additional layer of harm on the survivors and other victims. Trauma, especially when resulting from mass violence and sexual violence, often results in long-lasting post traumatic stress which may require special care and treatment.
1081. The conditions to which the "comfort women" were subjected were extreme and some of the most vile imaginable: Many survivors reported seeing their families abused, being raped in front of their family members, being abducted or tricked and taken to a different country, being enslaved to effectuate continuous rape over a period of weeks, months, or years, and then being shunned by society, left without a means to support themselves. The assistance that would need to be provided to survivors of such atrocities is considerable. The physical violence alone would typically result in severe damage to the body, such harm having been exacerbated by aging without health care.
1082. Rehabilitation may require educating, training, and treating the victimiser to ensure that the victimisation will not continue or be repeated. Victimisers too may need to come to

⁸²⁸ For a full review of state and international practices regarding remedies for violations of human rights and humanitarian law, see Shelton, *Remedies in International Human Rights Law*.

⁸²⁹ *Loayza Tomayo v. Peru*, Judgement of Nov. 27, 1998, 43 Inter-Am. Ct. H.R. (ser.C)(1998).

⁸³⁰ Bassiouni Final Report, para. 24; van Boven Principles, 1996, para. 14.

terms with their guilt and the causes of the crimes and their participation in them, in order to be more productive members of society.

1083. The testimony of the survivors demonstrates that the physical and mental violence inflicted upon the “comfort women” has not healed, and that efforts need to be taken to ensure that, to the extent possible, comfort and reduction of pain is finally afforded after all these years. This may also include providing living conditions that are comfortable and supportive, and supplies that ensure an adequate standard of living. This is particularly important as the victims were denied educational opportunities and work experiences that would have facilitated their earning capacity. The abuses also resulted in many survivors having difficulty in marrying; particularly in patriarchal societies where males are given job preference and unmarried women are scorned in public and private life, such results would have devastating consequences.
1084. It has previously been recognized that there is no statute of limitations for gross violations of human rights, whether committed during wartime or peacetime: “Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law. Civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations.”⁸³¹
1085. In sum, we find that the government of Japan owes a duty to provide reparation in various forms. There should be a dialogue between the government, the survivors and their representatives, and experts to ensure that the general and specific voices and needs of all women are heard. An appropriate remedy for one may not be appropriate for another. Individual needs and wants of the victim-survivors should be taken into account. The magnitude and scope of the harm demand extraordinary efforts to reverse long denied redress.

⁸³¹ van Boven Principles, 1996, Principle 9.

B. RECOMMENDATIONS

1086. The Tribunal holds that in order to fulfil its responsibility, the government of Japan must provide each of the following remedial measures:

1. Acknowledge fully its responsibility and liability for the establishment of the "comfort system," and that this system was in violation of international law.
2. Issue a full and frank apology, taking legal responsibility and giving guarantees of non-repetition.
3. Compensate the victims and survivors and those entitled to recover as a result of the violations declared herein through the government and in amounts adequate to redress the harm and deter its future occurrence.
4. Establish a mechanism for the thorough investigation into the system of military sexual slavery, and allow for public access and historical preservation of the materials.
5. Consider, in consultation with the survivors, the establishment of a Truth and Reconciliation Commission that will create an historical record of the gender-based crimes committed during the war, transition, occupation, and colonisation.
6. Recognize and honour the victims and survivors through the creation of memorials, museums, and libraries dedicated to their memory and the promise of "never again."
7. Sponsor both formal and informal educational initiatives, including meaningful inclusion in textbooks at all levels and support for scholars and writers. Efforts should be made to educate the population and, particularly, the youth and future generations concerning the violations committed and the harm suffered; research should endeavour to examine the causes of the crimes, societies ignoring of the crimes, and ways to prevent reoccurrence.
8. Support training in the relationship between the military and gender inequality and the prerequisites for realizing gender equality and respect for the equality of all the peoples of the region.
9. Repatriate survivors who wish to be repatriated.
10. Disclose all documents or other material in its possession with regard to the "comfort stations."
11. Identify and punish principal perpetrators involved in the establishment and recruitment of the "comfort stations."
12. Locate and return the remains of the deceased upon the request of family members or close associates.

1087. The Tribunal further recommends that the former Allied nations:

1. Immediately declassify all military and governmental records concerning the establishment and operation of the "comfort system" and the reasons why it was not prosecuted before IMTFE.
2. Immediately declassify all military and governmental records concerning the failure to prosecute the Emperor HIROHITO before the IMTFE.
3. Acknowledge their own failures to investigate and prosecute the crimes committed against the former "comfort women" initially in the post-war trials and in the intervening 56 years, and take measures to investigate, disclose and, in appropriate cases, prosecute surviving perpetrators.

1088. The Tribunal further recommends that the United Nations and all the states thereof:

1. Take all steps necessary to ensure that the government of Japan provides full reparations to the survivors and other victims and those entitled to recover on account of the violations committed against them.
2. Seek an advisory opinion of the International Court of Justice as to the illegality and continuing liability of the government of Japan in regards to the former "comfort women."

PART VIII – CONCLUSION

1089. Repeatedly in history, states have ignored crimes of sexual and gender violence committed against women in armed conflict violence. This failure is particularly reprehensible where justice is provided for other offenses. The failure of the of Allies to prosecute Japan's military sexual slavery system denied the victimised women equal access to the law and perpetuated the view that their suffering did not merit equal disapprobation or that they were willing participants. This exclusion from justice in the immediate aftermath of the war played an unpardonable role in silencing and shaming the survivors and impeding their healing.

1090. It is our hope that the moral force of this Women's International Tribunal and this Judgement will engage states as well as peoples of the world to bring Japan to recognise its responsibility to repair these atrocities, to right these wrongs, and to enable future generations to go forward on the basis of respect for women's equality and dignity.

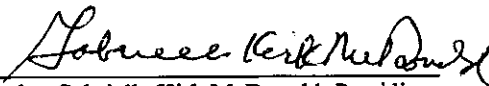
1091. The courage of the survivors, their yearning for justice, and their solidarity has inspired a worldwide movement for women's human rights and against gender violence to ensure that such crimes never again be overlooked nor allowed to occur. That crimes against women have begun to be prosecuted in the recently established international criminal tribunals and have been codified in the Rome Statute of the International Criminal Court is one of the fruits of their efforts and has laid the foundation for ending impunity for violence against women.

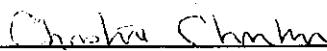
1092. This Tribunal makes clear that if states fail to fulfil their duty to investigate, prosecute, condemn and punish the perpetrators of crimes against women and to provide the full range of reparations to victims in timely fashion, then the women and peoples of the world will step into the chasm and call both the wrongdoers and the world to account. Survivors, their families and loved ones, activists, researchers, lawyers, translators and scholars from many countries, including, importantly, Japan the victimiser country, have united to make this Tribunal possible. In doing so, they have shaped a new and powerful mechanism of justice.

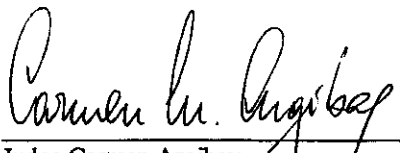
1093. The crimes committed against these survivors remain one of the greatest unacknowledged and unremedied injustices of the Second World War. There are no museums, no graves for the unknown "comfort woman," no education of future generations, and there have been no judgement days, for the victims of Japan's military sexual slavery and the rampant sexual violence and brutality that characterised its aggressive war.

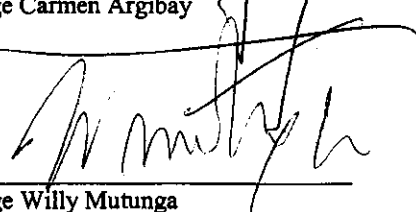
1094. Accordingly, through this Judgement, this Tribunal intends to honour all the women victimized by Japan's military sexual slavery system. The Judges recognise the great fortitude and dignity of the survivors who have toiled to survive and reconstruct their shattered lives and who have faced down fear and shame to tell their stories to the world and testify before us. Many of the women who have come forward to fight for justice have died unsung heroes. While the names inscribed in history's page have been, at best, those of the men who commit the crimes or who prosecute them, rather than the women who suffer them, this Judgement bears the names of the survivors who took the stand to

tell their stories, and thereby, for four days at least, put wrong on the scaffold and truth on the throne.⁸³²


Judge Gabrielle Kirk McDonald, Presiding


Judge Christine Chinkin


Judge Carmen Argibay


Judge Willy Mutunga

⁸³² Compare the quotation of James Russel Lowell, "Truth forever on the scaffold, Wrong forever on the throne."

APPENDICES

**Charter of the
Women's International War Crimes Tribunal 2000 for the Trial of Japanese
Military Sexual Slavery**

**(INCORPORATING MODIFICATIONS AGREED UPON
DURING THE HAGUE MEETING, 26-27 OCTOBER 2000)**

Preamble

Witnessing the passage of the 20th century without any justice done to women victims and survivors of sexual slavery committed by the Japanese Military in various Asian countries under its colonial domination and military occupation before and during the Second World War, being one of the most horrendous forms of wartime sexual violence known in this century;

Witnessing *also* that violence against women, especially during armed conflicts, continues to be unabated in many parts of the world today;

Noting that violence against women has received further international attention through the Vienna Declaration adopted at the World Conference on Human Rights in 1993 and the Beijing Platform of Action adopted at the Fourth World Conference on Women in 1995, which explicitly stated that violence against women during armed conflict, including rape and sexual slavery, was a war crime, and that its truth should be identified and disclosed, the victimised properly redressed, and the perpetrators punished;

Taking note that the International War Crimes Tribunals for the former Yugoslavia and Rwanda, established by the United Nations in the early 1990s, have prosecuted those who were responsible for violence against women and the International Criminal Court covers, under its jurisdiction, violence against women during war and armed conflicts committed after the entry into force of its Statute;

Whereas the Japanese Military Sexual Slavery has been a particularly grave and egregious form of violence against women in violation of the then existing principles of international law and deeply shocking the conscience of humanity;

Noting that the military tribunals conducted by the Allied Powers throughout Asia following the end of the Second World War seldom prosecuted Japan's Military Sexual Slavery and other cases of sexual violence against women as war crimes, and that, in the subsequent decades, the existing national and international systems of justice have failed to bring the perpetrators to justice;

Cognizant that women survivors of the Japanese Military Sexual Slavery continue to suffer, both physically and psychologically, from these violations and from the failure to provide justice, including individual compensation and other reparations, and prosecution of the perpetrators of these crimes;

Aware that after the long and torturous silence, survivors of this slavery have demanded in the 1990s that justice be done and their long denied human rights be restored to them;

Alarmed that even after half a century after the crimes were committed, the survivors do not receive a word of acknowledgement of the crimes by the perpetrators, nor is there any genuine apology made or reparations provided by those responsible for the crimes committed against them while one survivor after another is passing away without any redress;

Mindful of the moral responsibility of every member of the global civil society and also a common task for the international women's movement to restore justice for the women victims and survivors of wartime sexual violence, including sexual slavery;

Determined to restore justice, human rights, and dignity to all victimized women, to contribute to ending the cycle of impunity for violence against women in wartime and armed conflict situations, and thereby to prevent repetition of such crimes;

Convinced that this effort will also contribute toward creating a 21st century and a new millennium free of war and violence against women by making the full documentation public to the world as indelible records of the 20th century history;

Desiring to hold a Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, the primary task of which will be to bring out truths and to establish the legal responsibility of states and individuals involved in sexual violence, especially the sexual slavery of "comfort women" at "comfort stations" perpetrated by the Japanese Imperial Army in connection with Japan's colonial domination and war of aggression throughout the Asia-Pacific region;

Convinced that the Tribunal is competent to render its Judgements respecting responsibility for the commission of crimes against women in light of the principles of law, human conscience, humanity and gender justice that were an integral part of international law at the time of the offenses, and that should have been applied by, the International Military Tribunal for the Far East, as well as taking into account the subsequent developments in international law, particularly in relation to women's human rights, which have come to be recognized by the international community as a priority matter as the result of brave struggles of many people, including women survivors themselves, insofar as these developments illuminate the proper application of international law to the crimes against women and embody evolving principles of state responsibility for past violations;

Mindful that while the Tribunal, as a people's and women's initiative, has no real power to enforce its Judgements, it nonetheless carries the moral authority demanding their wide acceptance and enforcement by the international community and national governments;

Urging once again that States and intergovernmental organizations take necessary measures to bring to justice the persons responsible for the crimes and to provide reparation, including apology, compensation and rehabilitation.

The International Organizing Committee, composed of organizations from the offending country (Japan), organizations from areas where people were victimized (South and North Korea, China,

Taiwan, the Philippines, Indonesia, Malaysia, and others); and the International Advisory Committee (comprising eminent scholars and human rights activists)

Adopts hereby the Charter of Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery.

Article 1

Establishment of the Women's International War Crimes Tribunal

The Women's International War Crimes Tribunal ("the Tribunal") is hereby established. It shall have power to exercise jurisdiction over individuals and States pursuant to the provisions of the present Charter. It shall conduct a public trial on such dates and places as may be determined by the International Organizing Committee.

Article 2

Jurisdiction of the Tribunal

The Tribunal shall have jurisdiction over crimes committed against women as war crimes, crimes against humanity and other crimes under international law and shall cover all countries and regions that were colonized, ruled or under the military occupation and to all other countries that were similarly victimized by Japan before and during the Second World War. These crimes include, but are not limited to, the following acts: sexual slavery, rape and other forms of sexual violence, enslavement, torture, deportation, persecution, murder, and extermination.

The Tribunal shall also have jurisdiction over acts or omissions of States in violation of international law with respect to the crimes as referred to in the above paragraph.

The Tribunal shall also have jurisdiction over claims involving State responsibility under international law as referred to in Article 4.

The jurisdiction of the Tribunal shall extend to the present day.

Article 3

Individual criminal responsibility

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 of the present Charter shall be individually held responsible for the crime. Those who have concealed the crimes in Article 2 shall be individually held responsible.

The fact that such a crime referred to in Article 2 of the present Charter was committed by a subordinate does not relieve his superior or military commander of criminal responsibility if that superior or commander knew, or had reason to know, that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent or repress their commission or submit the matter to the competent authorities for investigation and prosecution.

Article 4

State responsibility

State responsibility arises from the following:

- (a) commission of crimes or acts as referred to in Article 2 by military forces, government officials and those individuals acting in their official capacity.
- (b) acts or omissions by States such as
 - (i) concealment, denial or distortion of the facts or in any other manner its negligence or failure to meet its responsibility to find and disclose the truth concerning crimes referred to in Article 2;
 - (ii) failure to prosecute and punish those responsible for said crimes;
 - (iii) failure to provide reparations to those victimized;
 - (iv) failure to take measures to protect the integrity, wellbeing and dignity of the human person;
 - (v) discrimination based on such ground as gender, age, race, color, national, ethnic or social origin or belief, health status, sexual orientation, political or other opinion, wealth, birth or any other status; and
 - (vi) failure to take necessary measures to prevent recurrence.

Article 5

Official Capacity and Superior Orders

The official position of any accused person, whether as the Emperor, the Head of the State or Government, a military commander or a responsible government official, shall not relieve such person of criminal responsibility, nor mitigate punishment.

The fact that the crimes are committed pursuant to an order of a superior or of a Government alone shall not relieve a person of criminal responsibility.

Article 6

Non-applicability of the statute of limitations

The crimes within the jurisdiction of the Tribunal shall not be subject to any statute of limitations.

Article 7

Organization of the Tribunal

The Tribunal shall consist of the following organs:

- (a) Judges;

- (b) Prosecutors; and
- (c) A Registry.

Article 8

Qualifications and election of judges and prosecutors

The judges and the prosecutors shall be appointed by the International Organizing Committee among internationally renowned persons in the field of human rights, taking due consideration of the following:

- (a) gender balance;
- (b) regional balance; and
- (c) contribution in advocacy, protection and promotion of women's human rights.

Article 9

Rules of procedure and evidence

The judges of the Tribunal shall decide matters concerning the rules of procedure and evidence for the conduct of the trial, the protection of victims and witnesses and other appropriate matters of the Tribunal as they deem necessary. The following shall be admitted as evidence:

- (a) documentation: Written evidences such as official documents, affidavits/depositions, signed statements, diaries, letters/notes or other documents, experts' views, photos and other visual documents;
- (b) personal evidence: Written or oral testimonies of survivors and witnesses, statements of expert witnesses; and
- (c) material evidence: Other relevant physical and material evidence.

Article 10

The Registry

The International Organizing Committee establishes a Registry to the Tribunal. The Registry shall be responsible for the administration and servicing of the Tribunal.

Article 11

Prosecutors: Investigation and Indictments

1. The Prosecutors shall be responsible for the investigation and prosecution of the crimes referred to in Article 2 of the present Charter, taking into account gender and cultural issues and the trauma faced by the victimized.
2. The Prosecutors shall initiate investigation on the basis of information received from individuals, survivors, non-governmental organizations, or any source, and shall have the

power to question suspects, those victimized and witnesses, to collect evidence and to conduct on-site investigations in order to establish the truth.

3. The prosecutors shall submit indictments to the Tribunal if, upon investigation, there is a reasonable basis for a prosecution.

Article 12

Trial Proceedings

1. The Tribunal shall read the indictments from the prosecutors at the commencement of the trial, and shall ensure a fair and expeditious trial.
2. The hearings shall be held in public.

Article 13

Participation and protection of those victimized and witnesses

The Tribunal shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of those victimized and witnesses of sexual violence and any other person at risk on account of their testimony, having regard to the nature of crimes being dealt with and taking trauma into account. Such protection measures shall include, but shall not be limited to, audio-visual proceedings and other protective measures to safeguard the identity of those victimized, wherever necessary.

Article 14

Judgements

1. The judgement shall be delivered in public and rendered by a majority of the judges of the Tribunal. The judges may issue a separate opinion, concurring in or dissenting to the judgement.
2. The judgement shall state clearly whether the accused has been found guilty or not guilty of the alleged crime or whether there is insufficient evidence available to the prosecutors upon which such a determination, according to a majority of the judges may be based, and the Tribunal shall give reasons for the particular judgement.
3. The judgement may make a recommendation to a person or State held responsible to offer redress to those victimized, including apology, restitution, compensation and rehabilitation.
4. Copies of the judgement shall be sent to the survivors, the accused or their attorneys, the government of Japan, the governments of the States concerned, and international agencies including the United Nations High Commissioner for Human Rights, and shall be widely distributed throughout the world as historical documents.

Article 15

Cooperation

1. The Tribunal may ask every individual, nongovernmental organization, Government, intergovernmental organization, United Nations organs and other international bodies to cooperate fully with the Tribunal in the investigation and prosecution of persons and states responsible for acts referred to in Article 1 of the present Charter.
2. The Tribunal may ask every individual, non-governmental organization, Government, intergovernmental organization, United Nations organ and any other international body to respect any request for assistance or a judgement issued by the Tribunal, including, but not limited to:
 - (a) The identification and whereabouts of persons or the location of items;
 - (b) The taking of testimony and the production of evidence;
 - (c) The voluntary appearance of persons as victims, as witnesses or as experts before the Tribunal;
 - (d) The examination of places or sites;
 - (e) The provision of relevant information, records and documents, official or otherwise, and the full opening of wartime archives;
 - (f) The protection of victims and witnesses and the preservation of evidence;
 - (g) Facilitating or conducting the investigation and prosecution of the persons responsible for the crimes in compliance with its respective international obligations;
 - (h) The provision of reparation, including apology, compensation and rehabilitation in compliance with its respective international obligations; and
 - (i) Any other type of assistance with a view to facilitating the objectives of the Tribunal.

**THE WOMAN'S INTERNATIONAL WAR CRIMES TRIBUNAL 2000
FOR THE TRIAL OF JAPANESE MILITARY SEXUAL SLAVERY**

THE PROSECUTORS

v.

EMPEROR HIROHITO et al.

COMMON INDICTMENT - AMENDED

1. The Prosecutors of the Women's International War Crimes Tribunal on Japanese Military Sexual Slavery (hereinafter the "Tribunal"), pursuant to their authority granted under Article 2 of the Charter of the Women's International Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery (hereinafter, the "Charter"), charge the accused, Emperor Hirohito, Iwane Matsui, Shunroku Hata, Hisaichi Terauchi, Seishiro Itagaki, Hideki Tojo, Yoshijirou Umezumi, Seizo Kobayashi, and Rikichi Ando with:

Crimes Against Humanity: Sexual Slavery and Rape

as recognized in Article 2(l) of the Charter.

2. The Prosecutors of the Tribunal further, pursuant to their authority granted under Article 2 of the Charter, charge the accused Emperor Hirohito and Tomoyuki Yamashita with:

Crimes Against Humanity: Rape

as recognized in Article 2(1) of the Charter.

3. The Prosecutors of the Tribunal further allege, pursuant to their authority under Article 4 of the Charter, that reparations and compensation for violations of international law are owed to the remaining survivors or descendants of deceased victims based on the state responsibility of:

THE GOVERNMENT OF JAPAN

as recognized under Article 4 of the Charter.

FACTUAL BACKGROUND

INTRODUCTION

4. From the late nineteenth century to the mid-twentieth century the Japanese government pursued expansionist policies in north and southeast Asia that culminated in the Asia-Pacific War and the unconditional surrender of Japan in 1945. Japan colonized Taiwan in 1895 and subsequently subjugated Korea in 1905. In 1931, Japan invaded Manchuria, followed by Shanghai in 1932 and Nanking in 1937. In direct response to the notorious scale of sexual violence inflicted upon Chinese women by the Japanese invading troops, Japan instituted a system of “comfort stations.” Between 1937 until Japan’s military defeat in 1945, the Japanese government and the Japanese Army and Navy enslaved Korean, Chinese, Filipino, Indonesian, Timorese, Burmese, Malay, Taiwanese, Eurasian, Pacific Islanders, Dutch and Asian aboriginal women in order to furnish Japanese troops engaged in active military service with sexual recreation. From 1937 through 1945, the period of time covered by this indictment, an estimated tens of thousands of women from Asian countries that were occupied, colonized or subjugated by Japan were forced to serve as military sexual slaves in “comfort stations” authorized by the Japanese government.

TAIWAN

5. In 1895, as the result of the Japanese-Sino war, Japan extended its rule over Taiwan by the terms of Article II of the Shimonoseki Treaty.¹ Japan appointed Governors-General² to administer Taiwan. Taiwan remained a colony of Japan during the armed conflict between China and Japan in the 1930’s and throughout the Asia-Pacific War until the Japanese surrender in 1945.³ Commencing in 1937, Taiwanese women were abducted, forcibly removed, falsely

¹ Taiwanese Indictment paragraph 3.

² Taiwanese Indictment paragraphs 11, 45 - 47.

³ Taiwanese Indictment paragraph 41.

recruited or otherwise deceived or coerced into servitude at the “comfort stations.”⁴ The Japanese government, in tandem with the Governor-Generals of Taiwan, and the Japanese Armed Forces transported and “stationed” Taiwanese women in comfort stations located in Hainan Island and Kwantung (Guandong) Province in occupied China, Hong Kong, Singapore and Lasho province in Burma.⁵ Although many Taiwanese women were sent to “comfort stations” in Japanese occupied territories, others were coerced into providing sexual services to the Japanese Army stationed in Taiwan.⁶ The Taiwanese women endured sexual slavery and other forms of inhumane treatment and at times death at the hands of the Japanese armed forces.⁷

KOREA

6. In 1905, Korea became a Protectorate of Japan. In the 1910 Treaty of Annexation, the Korean Emperor ceded all sovereign power over Korea to the Japanese Emperor, who completely subjugated the Korean population.⁸ Japan ruled Korea until 1945 through a succession of Japanese appointed Governors-General and the Korea Army. From 1937 until 1945, the Japanese government enacted the Act of State General Mobilization and forcibly conscripted Korean men into the Japanese Army and Korean women into the National Labour Service Corp.⁹ Within this context, and by the ruse of deceitful recruitment, as well as abduction and kidnapping, many Korean women were sent to “comfort stations” in China, Burma and southeast Asia.¹⁰ The Governors-General of Korea as well as other Japanese army commanders and governmental officials participated in enslaving Korean women.¹¹ Due to Korea’s complete subjugation, Korean women constituted the majority of women forced into military sexual enslavement by the Japanese Government. In the “comfort stations,” Korean women were thus subjected to sexual torture, including rape, as well as to starvation, physical maiming other inhumane acts, and, at times, death.¹²

CHINA

7. The military invasion and eventual political domination of China was a Japanese strategic objective in the first half of the twentieth century.¹³ When Manchuria “fell” to Japan in 1931, soon followed by Shanghai,¹⁴ Nanking¹⁵ and the remaining territory of China, the Japanese government swiftly moved to establish “comfort stations” to redress the acknowledged problem of massive rapes committed by the Japanese troops against Chinese women.¹⁶ “Comfort stations” were set up in Manchuria, Shanghai,¹⁷ Zhejiang, Hunan, Fujian and various locations in the south

⁴ Taiwanese Indictment paragraphs 53 - 55.

⁵ Taiwanese Indictment paragraphs 8 & 47.

⁶ Taiwanese Indictment pages 4, 6 & 11

⁷ Taiwanese Indictment pages 6 - 8.

⁸ Japan annexed Korea in 1910, thereby indirectly increasing Japanese rights in China, since Korean settlers in Manchuria thereby became the subjects of the Japanese Empire. The number of Koreans in Manchuria by 1 January 1928 amounted to 800, 000 people. See II The Tokyo Judgement 38 (Dr. B.V.A. Röling ed. 1977) (hereinafter “Tokyo Judgement”).

⁹ Korean Indictment page 3-4.

¹⁰ Korean Indictment paragraphs 49 & 50.

¹¹ Korean Indictment pages 4-5 & 8.

¹² Korean Indictment, paragraphs 63, 65, 67, 69, 71 and 74 respectively.

¹³ Chinese Indictment page 2; see also the Tokyo Judgement at 53-54.

¹⁴ Chinese Indictment page 8.

¹⁵ Chinese Indictment page 9.

¹⁶ Chinese Indictment pages 3 -6

¹⁷ Taiwanese Indictment page 4.

and north of China.¹⁸ As part of the conquered population, Chinese women were frequently captured, kidnapped, ordered to leave their villages, and forcibly retained in the “comfort stations.”¹⁹ In 1938, the Guangzhou area of occupied China alone reportedly had over one thousand women enslaved in “comfort stations.” By 1945, the Japanese Army operated a system of military sexual enslavement throughout occupied China.²⁰ Notwithstanding the Japanese government’s administrative response to massive rapes, Chinese women continued to be sexually assaulted by Japanese occupational forces.²¹

INDONESIA

8. Indonesia, known as the Dutch East Indies, was a colony of the Netherlands until 1947.²² In 1941, the official Japanese war strategy included the planned invasion and occupation of Indonesia. The Japanese forces that landed in Java on March 8, 1942, overthrew Dutch sovereignty and divided Indonesia into military occupation zones.²³ The Japanese Army, under the command of the Southern Expeditionary Forces, controlled the islands of Java, Sumatra and Borneo²⁴ and the eastern region of Indonesia. Japanese occupation policies centered on conscription of Indonesian men and women as a means to sustain the Japanese war effort.²⁵ Under such programs, many Indonesian females between 13 and 17 years of age were forcibly and deceptively sent to “comfort stations.”²⁶ The Japanese occupiers meanwhile incarcerated the Dutch population of Indonesia in several local detention camps.²⁷ Some Dutch women were then removed from detention camps and placed in “comfort stations” to serve Japanese officers.²⁸ Taiwanese and Korean women who were enslaved by the Japanese army were sent to “comfort stations” in Indonesia, while many Indonesian women were sent abroad to “comfort stations” in Burma, Singapore and the Philippines.²⁹

THE PHILIPPINES

9. At the conclusion of the nineteenth century, the Philippines became a U.S. protectorate.³⁰ On December 8, 1941, one day after the Japanese attack on Pearl Harbor in the Hawaiian Islands, the Japanese Army attacked Mindanao Island in the Philippines.³¹ The Japanese Army invaded Manila on January 2, 1942, effectively defeating the Filipino forces and subjugating the Filipino population to four years of military occupation.³² In accordance with Japanese governmental policy, “comfort stations” were established wherever sizeable Japanese Army garrisons existed.³³ The successive Commanders of the 14th Area Army, under the command of the Southern Expeditionary Forces, established “comfort stations” in Manila, Iloilo, in the Panay Island and

¹⁸ Chinese Indictment pages 8-14 and 16-17.

¹⁹ Chinese Indictment page 7.

²⁰ Chinese Indictment pages 18 and 20.

²¹ Chinese Indictment pages 15-16.

²² Indonesian Indictment page 2.

²³ *Id.* See also Netherlands Indictment page 1 paragraphs 2 and 3.

²⁴ Indonesian Indictment page 5.

²⁵ Indonesian Indictment page 2

²⁶ *Id.*

²⁷ *Id.* See also Netherlands Indictment paragraph 4.

²⁸ *Id.* See also Netherlands Indictment paragraph 12.

²⁹ *Id.* See also Netherlands Indictment paragraph 9.

³⁰ Filipino Indictment page 2.

³¹ Filipino Indictment pages 2 - 3.

³² Filipino Indictment page 3.

³³ Filipino Indictment paragraph 16.

Tacloban in Leyte Island.³⁴ Filipino women were forced to sexually serve the Japanese soldiers in other stations such as Cayagan de Oro City, Butuan, and Masbate.³⁵ In some cases, the Japanese Army administered the “comfort stations” yet licensed civilians to operate them.³⁶ Due to the presence of the Japanese occupational forces, Filipino women were frequently captured and raped for several days or longer by Japanese soldiers at locations where formal “comfort stations” had not been established.³⁷ Thus the creation of “comfort stations” did not eradicate massive sexual violations by Japanese soldiers. A notorious planned mass rape occurred in Mapanique, on November 23, 1944. In that military operation, Japanese forces executed Filipino men and then proceeded to rape the village women at the nearby army garrison in the infamous Bahay na Pula (Red House).³⁸

EAST TIMOR

10. The Portuguese colonized the island of Timor in 1702.³⁹ In 1896, East Timor became a separate colony ruled by the Portuguese while the remaining part of Timor came under Dutch rule. Allied troops landed in East Timor on December 17, 1941, and retreated in 1942 when the Japanese forces invaded Dili, the capital, and then occupied the country.⁴⁰ After evacuation of the Allied forces, in January 1943, the Japanese military conducted punitive expeditions against the Timorese inhabitants who were suspected sympathizers of the Allied forces.⁴¹ The Japanese military occupation resulted in the establishment of “comfort stations” in places such as Suku Fatubosa, Bobnaro, Aileu and Dili. East Timorese girls and women were forcibly recruited from various parts of the island to serve Japanese military personnel sexually and as forced laborers.⁴² The “comfort stations” were facilitated through the Liurajs, traditional kings, who during occupation were compelled to turn over their residences to the Japanese military for use as “comfort stations.”⁴³ The women and girls were made to endure multiple acts of sexual violence, at times committed by more than one Japanese soldier.⁴⁴ Women from China and Indonesia were also made to serve in comfort stations in East Timor.

MALAYSIA

11. The Japanese attacked Malaysia on December 8, 1941, shortly after the attack on Pearl Harbor.⁴⁵ After capturing Singapore on February 15, 1942, the Lieutenant-General of the 25th Army set up a military government and ruled the occupied territories.⁴⁶ Japanese troops entered towns demanding that community leaders provide women for the “comfort stations” to serve soldiers’ sexual needs.⁴⁷ Soldiers also forcibly kidnapped young girls and women from their homes.⁴⁸ Comfort stations were set up in various locations including Kuala Pilah, Negri

³⁴ Filipino Indictment paragraph 19.8.

³⁵ Filipino Indictment paragraphs 20 - 21.

³⁶ Filipino Indictment paragraph 18.

³⁷ Filipino Indictment paragraph 25.

³⁸ Filipino Indictment pages 25 - 31.

³⁹ East Timor indictment, see page 2.

⁴⁰ East Timor indictment, see page 3.

⁴¹ Id.

⁴² Id. at 10.

⁴³ East Timor indictment, see page 4.

⁴⁴ Id.

⁴⁵ Malaysia indictment, see page 2.

⁴⁶ Malaysia indictment, see page 3.

⁴⁷ Malaysia indictment, see page 4.

⁴⁸ Id.

Sembilan, Penang, Kuala Lumpur, Malacca, Johore Bahru, Port Dickson and other locations.⁴⁹ Women were subjected to sexual slavery including continuous and multiple rapes accompanied by other physical violence.⁵⁰ The Japanese government knew that this system of sexual slavery existed.

SYSTEM OF COMFORT STATIONS

12. The overall Japanese strategy aimed to militarily defeat its enemies and to expand Japanese political domination into east and southeast Asia. The establishment of facilities of sexual slavery or “comfort stations” was integral to the military strategy and was authorized at the highest military and political levels.⁵¹ There were several military objectives behind the “comfort stations.” The most clearly documented objective was the intent to deter Japanese soldiers from raping local women and thus contain the anti-Japanese sentiments among the occupied population.⁵²

13. In 1932, in the aftermath of the takeover of Shanghai, the frequency of rapes of Chinese women caused Japan to be concerned about its international image and the security of its occupation forces.⁵³ After 1937, as the Japanese military actions escalated in Shanghai, Nanking, Hankou and Kwantung (Guandong) areas of China, the forcible or deceptive recruitment of non-Japanese women intensified.⁵⁴ From 1941 until the unconditional surrender of Japan in 1945, “comfort stations” proliferated alongside of Japanese military operations.⁵⁵ The War Ministry institutionalized the military sexual slavery system.⁵⁶

14. Concomitantly with the military operations, the Commander of the Central Chinese Area Army and the Commander of the Kwantung (Guandong) Army, and the North China Area Army, through their Chiefs of Staff directed the setting up of “comfort stations.”⁵⁷ In July 1941, the Commander of the Kwantung (Guandong) Army through his Staff Officer requested that 20,000 comfort women from the Korean peninsula be transported to China in preparation of the Guandong Army Special Exercise.⁵⁸ Thus, between 1937 and 1945, successive Commanders of

⁴⁹ Id.

⁵⁰ Malaysia indictment, see page 7.

⁵¹ Japanese Indictment Pages 4-5 (stating that the core organs of the Japanese army came to control the comfort stations as of the outbreak of the Asia-Pacific War on December 8 1941); Japanese documents linking the Emperor to the system of comfort stations; Filipino Indictment paragraph 19 and sub-paragraphs following (detailing rules and regulations issued through official channels to govern comfort stations); Taiwanese Indictment paragraph 9; Korean Indictment paragraphs 40-41; Chinese Indictment page 6; Indonesian Indictment paragraph 11; see also Ustinia Dolgopol & Snehal Paranjape, Comfort Women an Unfinished Ordeal: Report of a Mission 29-30 (International Comm’n of Jurists 1994) (hereinafter “ICJ Report”). The research on which this report is based was carried out by the authors, at the request of the International Commission of Jurists, by visiting the Philippines, the Republic of Korea, the Democratic People’s Republic of Korea and Japan. The authors interviewed survivors of the system of “comfort stations,” as well as soldiers, governmental officials, representatives from non-governmental organizations, lawyers, academics and journalists and reviewed relevant documents. See id. at 7.

⁵² See ICJ Report at 31.

⁵³ Japanese Indictment page 3; Chinese Indictment page 5; Taiwanese Indictment paragraph 5; see also ICJ Report at 25.

⁵⁴ Id.

⁵⁵ Japanese Indictment pages 2, 4 - 5 & 9; Chinese Indictment page 11; Korean Indictment paragraphs 36 - 44 (detailing criminal responsibility for the planning and implementation of the comfort stations); Filipino Indictment paragraph 19 and following sub-paragraphs; Indonesian Indictment paragraphs 11 - 14.

⁵⁶ Japanese Indictment pages 4 - 5.

⁵⁷ Japanese Indictment page 3; Chinese Indictment page 6.

⁵⁸ Japanese Indictment page 2.

the China Expeditionary Armies authorized and otherwise participated in recruitment for “comfort stations” and their subsequent operation.⁵⁹

15. The establishment of “comfort stations” in China involved high-level Japanese military and cabinet figures as well as the Governors-General of Taiwan and Korea.⁶⁰ In 1938, the Commander of the 21st Army requested a shipment of several hundred Taiwanese women. Continuing throughout 1939, the succeeding Commander of the 21st Army continued the policy of “comfort stations” by accepting previously “ordered shipments” of women and by initiating new requests. Those new requests were then relayed by the Japanese prefectural governors via the Home Ministry.⁶¹ In 1941, the War Minister was also the Prime Minister of Japan.⁶² The constitutional responsibilities of the Prime Minister included informing and advising the Head of State about the execution of governmental policies.⁶³

16. In 1942, the Commander of the Japanese Southern Expeditionary Army directed a request to the War Ministry to authorize the Japanese army in Taiwan to deliver 50 women to Borneo.⁶⁴ As a result, the War Ministry approved the hiring of three civilian brokers to secure the Taiwanese women who would satisfy the sexual needs of the Southern Expeditionary Army.⁶⁵

17. The Allied Report on the Amenities in the Japanese Armed Forces, based upon captured Japanese documents, unfailingly demonstrates that “comfort stations” were highly regulated as a matter of official policy.⁶⁶ For example, the “comfort stations” in the occupied Shanghai South Sector were obliged to: keep a fixed rate chart; conduct weekly venereal examinations and physical inspections; issue licenses to “brothel entertainers”; ensure that the private parts of the women were washed after each act; and submit detailed work statements to the Billet Commander every Saturday.⁶⁷ The Allied Report’s description of “comfort stations” run by civilians in the Philippines confirmed that the Officer-in-Charge of the Manila Sector Line of Communications, with the sanction of the Army Commanding General, regulated all aspects of the “comfort stations” including: approval of the selection of managers; location of the establishment; admission, according to rank of army personnel; access of designated civilians; and hours of operation.⁶⁸

18. The hierarchy of rank recognized in the Japanese Armed Forces was imprinted on the regulation of “comfort station.”⁶⁹ The Allied Report documents that officers were permitted to use the “comfort stations” in the evening with the “right” to spend the night.⁷⁰ Non-commissioned officers and enlisted men or civilian laborers were confined to shorter access,

⁵⁹ Japanese Indictment pages 3 – 4; see also ICJ Report at 30-47 (detailing the documentary evidence describing the system of comfort stations).

⁶⁰ Japanese Indictment pages 1 - 2 & 7 - 8; Chinese Indictment pages 7 – 13; see also ICJ Report at 29 & 41.

⁶¹ See Expert Opinion of Professor Yoshimi.

⁶² Id. (noting that General Hideki Tojo held both positions at that time).

⁶³ Japan Const. art. 55 (1889).

⁶⁴ Japanese Indictment page 5; Indonesian Indictment paragraphs 12 - 13 (actually stating that the request was for forty women to be sent to Borneo); see also ICJ Report at 41.

⁶⁵ Japanese Indictment page 5.

⁶⁶ Allied Research Report on Amenities in the Japanese Armed Forces 9-20 & 27 (15 November 1945) (“Allied Report”) as cited in the ICJ Report at 32-41. The Allied Report is a summary of information gathered by the United States Army at the close of World War II based mostly on captured documents and interviews with prisoners of war. See Allied Report at preface page (not numbered).

⁶⁷ Id. at 12-13.

⁶⁸ Id. at 9-12; see also Taiwanese Indictment paragraphs 19.7 - 19.8.4.

⁶⁹ See Allied Report at 18.

⁷⁰ Allied Report at 10 & 13; see also Taiwanese Indictment paragraph 19.6.

either in the morning or afternoon.⁷¹ Other hierarchical constraints intoned the overt racism of the Japanese policies. European-Dutch women were supplied to “comfort stations” that served Japanese officers, aboriginal Asian women mostly serviced laborers or low-ranking servicemen.⁷²

19. Irrespective of national origin, racial background, class status, or the type of “comfort station,” the enslaved women suffered untold physical and mental torture. Starting with forced or deceitful recruitment or abduction,⁷³ often accompanied by threats, beatings, humiliating examinations and initial rapes,⁷⁴ Japanese policies generated continuing crimes upon women from subjugated or occupied countries. Upon arrival at any one of the hundreds of “comfort stations” the women were reduced to slaves, made to endure daily sexual violence including countless rapes, subjected to constant confinement in narrow cells, death threats, starvation rations, social isolation, countless beatings, maiming, and at times exposed to enemy fire and even murdered by retreating Japanese forces.⁷⁵ As a consequence of the Japanese military slavery system, numerous women contracted venereal diseases and urinary infections. Some endured unsafe medical procedures such as abortions or removal of their sexual organs and suffered chronic mental disorders.⁷⁶

THE ACCUSED

20. The accused are **Emperor Hirohito, Iwane Matsui, Shunroku Hata, Hisaichi Terauchi, Seishiro Itagaki, Hideki Tojo, Yoshijirou Umezu, Seizo Kobayashi, Rikichi Ando, and Tomoyuki Yamashita.**

Positions and Authority of the Accused

21. From 1937 until 1945 the accused, **Emperor Hirohito**, was the invested Head of State of Japan, under the provisions established by the Meiji Constitution.⁷⁷ As Head of State, **Emperor Hirohito** was the *de jure* leader of Japan. His political powers were independent from and superior to the legislative, judicial and administrative powers of the Japanese government.⁷⁸ His political position was superior to that of the Prime Minister, the Ministry of War, the Home Ministry, and other cabinet members.⁷⁹ As his subordinates, the Ministers were bound by the

⁷¹ Id.

⁷² The Netherlands Indictment paragraphs 9 - 11.

⁷³ Japanese Indictment pages 2 & 4; Chinese Indictment pages 6 - 7, 23 - 24; Taiwanese Indictment paragraphs 12-17; Filipino Indictment paragraphs 21 - 21.4.4, 30.1, 31.2; Indonesian Indictment paragraph 16; Korean Indictment paragraphs 45 - 55.

⁷⁴ Japanese Indictment pages 2 & 4; Chinese Indictment pages 6 - 7, & 19, 23 - 24; Taiwanese Indictment paragraphs 18 - 20; Filipino Indictment paragraphs 21 - 21.4.4, 23, - 26, 30.4; Indonesian Indictment paragraphs 19 - 23, 31.4; Korean Indictment paragraphs 45 - 55.

⁷⁵ Id.

⁷⁶ Japanese Indictment pages 13 - 14; Chinese Indictment pages 23 - 24; Taiwanese Indictment paragraphs 18 - 23; Indonesian Indictment paragraphs 20 - 26; Korean Indictment paragraphs 63 - 68 & 74 - 75.

⁷⁷ Japan. Const. arts. 1 & 4.

⁷⁸ Id.

⁷⁹ Id.; see also Japan Const. art. 55.

constitution to serve **Emperor Hirohito** and to advise him about domestic and international political relations and military operations of Japan.⁸⁰

22. As Head of State, **Emperor Hirohito** was also the Supreme Commander of the Japanese Army and Navy.⁸¹ The Supreme Commander was superior to and held command responsibility over the military Chiefs of Staff, their commanding generals and other armed forces personnel.⁸² **Emperor Hirohito** exercised ultimate command authority of the Japanese Army, including direct jurisdiction over each of Japan's Expeditionary Armies and Japan's Area Armies that invaded and occupied China, Indonesia (the Dutch East Indies), the Philippines, Malaysia and Burma.⁸³ As Supreme Commander, **Emperor Hirohito** possessed the authority to instruct the Imperial Military Headquarters to formulate national war policies, to plan and conduct military operations, to supervise support of military operations as well as to ensure the overall war making capacity of Japan.⁸⁴

23. As Head of State and Supreme Commander, **Emperor Hirohito** also exercised ultimate political and military rule over the Japanese ruled territories of Korea and Taiwan.⁸⁵ Japanese army divisions permanently stationed in these possessions were subordinate to the command of the Chiefs of Staff and to Supreme Commander, **Emperor Hirohito**.⁸⁶ Each Japanese possession was administered by a Japanese appointed Governor-General who obligatorily reported directly to **Emperor Hirohito**.⁸⁷ As such, the accused was apprised of the governing policies, military operations, and general status of Japanese interests in each colony during the time period at issue in this indictment, 1937 to 1945.⁸⁸ The Governors-General were in a subordinate position to the accused, **Emperor Hirohito**.

24. In addition to his *de jure* authority as Head of State and Supreme Commander, the accused, **Emperor Hirohito**, had and exercised *de facto* authority. He was revered as a spiritual leader and ruled Japan and the Japanese people by divine provenance.⁸⁹ His orders, decisions, directives and policies were as such, unquestioned and unconditionally obeyed by members of the Japanese government, the Japanese armed forces and the Japanese people.

25. Accused **Iwane Matsui** held two positions between 1937 and 1938. In 1937, he was recalled from retirement to command the Shanghai Expeditionary Forces.⁹⁰ Also in 1937, he was appointed Commander of the China Expeditionary Force, a position directly subordinate to the Emperor.⁹¹ He remained Commander of the China Expeditionary Force only until February 1938.⁹² In these positions, **Iwane Matsui** commanded the troops that captured Nanking in 1937.⁹³ In the Tokyo Judgement, he was found guilty of the atrocities committed in Nanking.⁹⁴

⁸⁰ Japan Const. art. 55.

⁸¹ Japan Const. arts. 11 & 12.

⁸² *Id.*

⁸³ *Id.*; see also Japanese Indictment pages 5, 9-10; Taiwanese Indictment paragraphs 32 - 34; Indonesian Indictment page 21.

⁸⁴ *Id.*

⁸⁵ Korean Indictment paragraph 1; Taiwanese Indictment paragraph 3.

⁸⁶ *Id.*

⁸⁷ Taiwanese Indictment paragraphs 4, 11 & 34; see also Expert Opinion of Professor Yoshimi.

⁸⁸ Japanese Indictment 9-10 and supporting documents.

⁸⁹ Japan Const. art. 3.

⁹⁰ See Tokyo Judgement at 453.

⁹¹ *Id.*

⁹² *Id.* at 277.

⁹³ *Id.* at 453-54

26. In February 1938, accused **Shunroku Hata** was appointed to be Commander of the Central China Expeditionary Forces.⁹⁵ Three days after that appointment, he became leader of all Expeditionary Forces in China.⁹⁶ During a brief period of time sometime during the spring or summer of 1939, **Shunroku Hata** served as the Aide-de-Camp to the Emperor.⁹⁷ In August 1939, **Shunroku Hata** became the Minister of War and remained in that position until July 1940.⁹⁸ From March 1941 until November 1944, **Shunroku Hata** returned to the field as Commander of the China Expeditionary Forces.⁹⁹

27. From 1937 to 1945, the accused **Hisaichi Terauchi** held two high-ranking positions in the Japanese government.¹⁰⁰ In 1938, **Hisaichi Terauchi** was the Commander of the North China Area Army. In addition, from November 1941 until the end of the war in 1945, **Hisaichi Terauchi** was also the Commander of the Southern Expeditionary Forces.¹⁰¹ As such, he commanded the Japanese Army in the Philippines, Indonesia, Malaysia, Timor and Burma.

28. From 1937 to 1945, accused **Seishiro Itagaki** held a number of high-ranking positions. From June 1938 until August 1939, **Seishiro Itagaki** was the War Minister and as such was responsible directly to the Emperor.¹⁰² As of September 1939, **Seishiro Itagaki** held the position of Chief of Staff of the China Expeditionary Force.¹⁰³ From July 1941 until April 1945, **Seishiro Itagaki** served as Commander of the Korean Army.¹⁰⁴ From April 1945 until Japan's surrender, **Seishiro Itagaki** commanded the 7th Area Army, which operated in the areas of Java, Sumatra, Malaya, Borneo and other surrounding islands in Indonesia.¹⁰⁵

29. During the relevant time period, accused **Hideki Tojo** held successive positions in the Japanese government. In 1937, **Hideki Tojo** was Chief of Staff of the Kwantung (Guandong) Army.¹⁰⁶ In May 1938, **Hideki Tojo** became Vice Minister of War.¹⁰⁷ From 1941 until July 1944, **Hideki Tojo** held three positions simultaneously: Prime Minister, War Minister, and Head of the Home Ministry.¹⁰⁸ As Prime Minister, **Hideki Tojo** was in a position to review the actions of all governmental ministries involved in the war effort. **Hideki Tojo** was responsible under the Meiji Constitution to report to and to advise the Emperor about the functioning of the government.¹⁰⁹

⁹⁴ Id.

⁹⁵ Tokyo Judgement at 277.

⁹⁶ Id.

⁹⁷ Id. at 446 (stating that Hata was the Emperor's Aide-de-Camp during the Nohoman Incident) & 152 (stating that the attack on Nohoman began in May 1939 and concluded in September 1939).

⁹⁸ Id. at 445-46.

⁹⁹ Id. at 446.

¹⁰⁰ In addition, General Terauchi held high positions of power prior to 1937. He was the Commander of the Taiwan Forces in 1934 and Minister of the Army in 1936. From August of 1936 until January 1937, he was the Minister of War.

¹⁰¹ Korean Indictment paragraph 21.

¹⁰² Japanese Indictment page 4; Korean Indictment paragraph 19 (incorrectly stating that Itagaki was the Vice-Minister of the Army); see also Tokyo Judgement at 152.

¹⁰³ Korean Indictment paragraph 19.

¹⁰⁴ Id.; see also Tokyo Judgement at 449.

¹⁰⁵ Tokyo Judgement at 449.

¹⁰⁶ Korean Indictment paragraph 15.

¹⁰⁷ Tokyo Judgement at 462 (please note that the Korean Indictment refers to this position as the Vice Minister of the Army.)

¹⁰⁸ Id.

¹⁰⁹ Korean Indictment paragraphs 39-43.

30. From March 1936 until May 1938, accused **Yoshijirou Umezu** was Vice Minister of War.¹¹⁰ **Yoshijirou Umezu** was then Commander of the 1st Army in May 1938, and finally Commander of the Kwantung (Guandong) Army from September 1939 until July 1944 and Chief of Staff in July 1944.¹¹¹

31. Accused **Seizo Kobayashi** was the Governor-General of Taiwan from 1936 until 1940.¹¹²

32. Accused **Rikichi Ando** was the Commander of the 21st Army from at least November 1938 until sometime in 1942.¹¹³ From 1942 until 1944, **Rikichi Ando** served as Commander of the Taiwan Army.¹¹⁴

33. The accused **Tomoyuki Yamashita** was the Commanding General of the 14th Army from September 1944 to September 1945.¹¹⁵ In this position, he commanded and was responsible for the troops operating in the Philippines during that period.¹¹⁶ **Tomoyuki Yamashita** issued the guidelines¹¹⁷ and was responsible for the attack of the 14th Army directed against the inhabitants of Mapanique, which included massive sexual violence against the female population.¹¹⁸

GENERAL ALLEGATIONS

34. Unless otherwise specified, all criminal acts or admissions set forth in the indictment were committed between 1937 and 1945 in the countries indicated in the predicate paragraphs that precede the charges.

35. In each Count alleging crimes against humanity, the acts or omissions were committed as part of a widespread or systematic attack directed against the civilian population.

36. The attack against the civilian population occurred during the armed conflict between China and Japan from 1932 to 1941. The attack continued during the Asia-Pacific War of 1941-1945.

37. The accused, **Emperor Hirohito**, **Iwane Matsui**, **Shunroku Hata**, **Hisaichi Terauchi**, **Seishiro Itagaki**, **Hideki Tojo**, **Yoshijirou Umezu**, **Seizo Kobayashi**, **Rikichi Ando**, and **Tomoyuki Yamashita** are individually responsible for the crimes alleged against them in this indictment, pursuant to Article 3 of the Charter. Individual Responsibility includes planning, instigation, ordering, committing or otherwise aiding and abetting in the planning, preparation, or execution of a crime in Article 2.

38. The accused, **Emperor Hirohito** exercised the ultimate political and military authority in Japan. He commanded the Japanese Army and Navy, including the Japanese Expeditionary Forces and Japanese Area Armies, and controlled the entire populations of occupied, colonized

¹¹⁰ See Tokyo Tribunal at 463.

¹¹¹ Korean Indictment paragraph 22; see also Chinese Indictment page 11.

¹¹² Taiwanese Indictment paragraph 45.

¹¹³ Japanese Indictment page 4.

¹¹⁴ Id. page 5.

¹¹⁵ Filipino Indictment paragraph 12.

¹¹⁶ Id.

¹¹⁷ Id. at paragraph 35.2

¹¹⁸ Filipino Indictment paragraphs 35.1 - 36.

and subjugated countries. Inasmuch as the accused was in a position of superior authority, pursuant to Article 3 of the Charter, he is criminally responsible for the acts of his subordinates, including members of the armed forces, members of the Japanese Cabinet, the Governors-General of Korea and Taiwan, and civilians authorized to act on behalf of his military and political subordinates.

COUNTS 1-2

“COMFORT STATION” CRIMES

39. From 1937 through 1945, during the armed conflict between China and Japan and throughout the Asia-Pacific War, the Japanese government, and armed forces, led by **Emperor Hirohito**, instituted a system of military sexual slavery to provide sexual services to the Japanese armed forces. Referred to by the Japanese authorities as “comfort stations,” these establishments were set up throughout the conquered and occupied countries and controlled by the Japanese Army and the Japanese Navy, including, but not limited to China, Indonesia, the Philippines, Taiwan, East Timor, Malaysia and Burma.

40. Thousands of women were enslaved, and subjected to continuous mental and physical suffering, countless acts of sexual violence, including countless rapes, other forms of sexual torture, starvation, threats, confinement, isolation, other forms of inhumane acts and at times death at the hands of the Japanese Army, the Japanese Navy and their agents.

Specific Charged Acts

41. In December 1937, shortly after the Central China Area Army invaded Nanking under the command of **Iwane Matsui**, and following the international outcry regarding the massive number of rapes committed during that invasion, **Iwane Matsui** oversaw the setting up of “comfort stations” in the cities and towns between Nanking and Shanghai in an attempt to control the behavior of his troops.¹¹⁹ At least twenty “comfort stations” were established in Nanking.¹²⁰

42. In March 1938, Vice-Minister of War **Yoshijirou Umezu**, acting on the authority of the Minister of War, set up “comfort stations” in northern China. Continuing the establishment of “comfort stations,” in June 1938 when **Hisaichi Terauchi** commanded the North China Area armies, similar orders were issued to establish “comfort stations” to serve each unit under his command.¹²¹ He thus oversaw the implementation of the policy of “comfort stations.” **Hisaichi Terauchi** therefore bears responsibility for those orders and the actions taken to carry them out. The Vice Minister of War, **Yohshijirou Umezu**, also bears responsibility for these actions.

43. In November 1938, **Rikichi Ando**, upon becoming Commander of the 21st Army, assumed responsibility for the continuing recruitment, establishment and development of “comfort stations” initiated by his predecessor. His predecessor had requested the Home Ministry to recruit women to staff “comfort stations” for the troops of the 21st Army.¹²² The Home Ministry had referred a request that the Governor-General of Taiwan provide women for “comfort stations” and drafted plans to supply the 21st Army with women for the “comfort

¹¹⁹ See Expert Opinion of Professor Yoshimi.

¹²⁰ Chinese Indictment pages 8-9.

¹²¹ See Expert Opinion of Professor Yoshimi.

¹²² Id.

stations.”¹²³ **Seizo Kobayashi**, the Governor-General of Taiwan, and **Rikichi Ando**, Commander of the 21st Army, thus bear responsibility for those acts.¹²⁴

44. In or around July 1941, **Yoshijirou Umezu**, as Commander of the Kwantung Army, oversaw the plan to recruit as many as 20,000 “comfort women” for the troops preparing to invade the U.S.S.R.¹²⁵ With assistance from the Governor-General of Korea, and the Commander of the Korea Army, **Seishiro Itagaki**, at least 3,000 women were forcibly “recruited” and deported from Korea to northeastern China to be military sexual slaves.¹²⁶ For these actions, **Yoshijirou Umezu**, and **Seishiro Itagaki** bear responsibility. As War Minister at the time, and thus as overall Commander of the war effort, **Hideki Tojo** also bears responsibility for these actions.

45. From 1941 through 1944, **Shunroku Hata**, as Commander of the Central China Expeditionary Forces, was responsible for actions of troops under his command. The Tokyo Judgement found that **Shunroku Hata’s** troops, while moving south through China in the areas of Hankow and Kwelin in 1944, “recruited women labor [sic] on the pretext of establishing factories [then] forced the women thus recruited into prostitution for Japanese troops.”¹²⁷ **Shunroku Hata** is responsible for that fraudulent recruitment and the subsequent crimes committed against women forced to work in the “comfort stations” created to serve his troops in Central China. As War Minister at the time, and thus as overall Commander of the war effort, **Hideki Tojo** also bears responsibility for these actions.

46. In March 1942, **Hisaichi Terauchi**, then Commander of the Southern Expeditionary Army in southeast Asia, requested that the War Ministry, then headed by War Minister **Hideki Tojo**, provide “comfort women” from Taiwan for facilities in Borneo.¹²⁸ **Rikichi Ando**, head of the Army in Taiwan, **Hisaichi Terauchi** and **Hideki Tojo** bear responsibility for those actions. **Hisaichi Terauchi**, as Commander of the Southern Army also bears responsibility for the “comfort stations” established and operated throughout Japanese occupied southeast Asia between 1941 until 1945.

47. As Supreme Commander of the Army and Navy, as well as the *de jure* and *de facto* Head of State for Japan during all of the incidents listed in paragraphs 39 through 45, **Emperor Hirohito** bears responsibility for each incident in addition to each defendant listed therein.

48. Taken together, and with the additional evidence that the Prosecutors will introduce to describe the existence and functioning of the overarching system of military sexual slavery, the incidents described in paragraphs 38 through 46 provide sufficient facts to find that each defendant planned, participated in and/or condoned or omitted to act in regard to the illegal system of military sexual slavery perpetuated through the “comfort stations” from 1937 through 1945. In addition, each defendant is also responsible for the rapes perpetrated against the “comfort women” in perpetuation of the system of “comfort stations.”

49. The Prosecutors reallege and incorporate the general allegations in paragraphs 34-39, and paragraphs 39 through 48 insofar as they relate to **Emperor Hirohito**, **Iwane Matsui**, **Shunroku**

¹²³ Id.

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Tokyo Judgement at 393.

¹²⁸ See Expert Opinion of Professor Yoshimi; see also Taiwanese Indictment paragraph 12.

Hata, Hisaichi Terauchi, Seishiro Itagaki, Hideki Tojo, Yoshijirou Umezū, Seizo Kobayashi and Rikichi Ando.

50. For their direct participation, as pursuant to Article 3 of the Charter, **Emperor Hirohito, Iwane Matsui, Shunroku Hata, Hisaichi Terauchi, Seishiro Itagaki, Hideki Tojo, Yoshijirou Umezū, Seizo Kobayashi, and Rikichi Ando** are charged with Crimes Against Humanity as listed below. In addition, **Emperor Hirohito** is charged in the alternative for his position as a superior and as the Supreme Commander, pursuant to Article 3 of the Charter with Crimes Against Humanity:

Count 1: SEXUAL SLAVERY, as recognized by Article 2(l) of the Charter,

Count 2: RAPE, as recognized by Article 2(l) of the Charter.

COUNT 3

MASS RAPE AT MAPANIQUE

51. In 1942, the invasion of the Philippines was notorious for the rapes inflicted upon the female population of Manila. These rapes prompted the Japanese government to institute and later to intensify the military sexual slavery system. Nevertheless, rapes of the local women by the Japanese occupational forces continued in the Philippines. In addition, women were captured and taken to make-shift locations or the individual barracks for the purpose of sexual abuse by the Japanese soldiers, where they were forced to stay for days, weeks or months.

52. The notorious mass rape of Filipino women in Mapanique, on November 23, 1944, at the army garrison in the infamous Bahay na Pula (Red House) was planned and executed by the Japanese Army. While the Filipino men suspected of being guerrilla fighters were tortured and executed, the women and children were sexually tortured, including forced nudity, gang rapes and public rapes. In addition, the women were subjected to egregious forms of mental suffering, witnessing relatives killed, tortured and raped.

53. Paragraph 8, and the general allegations in paragraphs 34-38, as well as paragraph 51 and 52, insofar as they relate to **Emperor Hirohito** and **Tomoyuki Yamashita**, are hereby re-alleged and incorporated.

54. For their participation in the Mapanique mass rapes as pursuant to Article 3 of the Charter, and or in the alternative for their positions as superiors and commanders as pursuant to Article 3 of the Charter, **Emperor Hirohito** and **General Tomoyuki Yamashita** are charged with Crimes Against Humanity:

COUNT 3: RAPE as recognized by Article 2(l) of the Charter.

The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery

APPLICATION INSTITUTING PROCEEDINGS

filed in the Registry of the Court on 20 November 2000

**Women survivors and victims of Japan's Military Sexual Slavery
(The People of the Asia-Pacific Region v. Japan)**

Re: Application for Restitution, Reparations and Satisfaction

By: The People of the Asia-Pacific Region through their representatives who seek to protect the rights of women in the Asia-Pacific Region

Against: Japan

The People of the Asia-Pacific region respectfully request that Japan be ordered to make full restitution and pay reparations for all material and moral damages done by officials of Japan.

Subject of Dispute

1. As set out in the paragraphs of the common and country indictments submitted to the Tribunal various officials of the State of Japan violated the rights of the women who are survivors and victims of Japan's military sexual slavery. These violations constitute breaches of Japan's international obligations.
2. After numerous attempts to achieve a satisfactory resolution to this issue, the People of the Asia-Pacific region file this application with the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery with a view to obtaining a finding that Japan is guilty of serious violations of international law committed upon the person of each and every woman subjected to military sexual slavery.

Basis for Jurisdiction

3. Sovereignty ultimately resides in the people of each state and territory and therefore the region. This Tribunal has been given jurisdiction over this application by the People of the Region so that it may adjudicate this matter.
4. Women from Japan have been included in the Application because they have no reasonable hope of achieving a resolution of this matter within their own country and they are part of the larger class of women who bring this application through their representatives.

Legal Grounds

5. The People as the ultimate holders of sovereignty have the right to require States to adhere to their international obligations, particularly those that relate to the protection of the individual and concern serious breaches of international humanitarian law, international human rights law and customary norms of international law.

6. The Women are entitled to have their rights asserted by the global community, as it is a fundamental tenet of modern international law that certain rights transcend national boundaries.

7. The People of the Asia Pacific region are entitled to institute proceedings against Japan as it has violated major principles of international law that profoundly affect the dignity of the human person.

8. The particulars of those legal violations are as follows:

- 8.1 Officials of the Japanese government and military consciously decided to establish and maintain a system of military facilities for sexual slavery. All acts necessary to build this system were authorised by those acting in their official capacity. Such acts included but were not limited to: the recruitment of women by force and deceit; the building of facilities or the use of existing structures for such facilities; the allocation of material resources such as furniture, bedding and clothing; and the use of medical personnel of the armed forces to facilitate the operation of these facilities. Acts committed by officials that are attributable to the State of Japan and constitute violations of its international obligations are set out in the common and country indictments. All these acts were done either with knowledge of the consequences or with reckless disregard for the consequences that included rape, torture, murder, slavery, mutilation and inhumane treatment. Such acts were in violation of Japan's obligations pursuant to international humanitarian law, the international law of human rights and general international law.
- 8.2 In carrying out the plan to establish and maintain a system of military facilities for sexual slavery, officials of the State of Japan engaged in acts which constituted the trafficking of women and children contrary to Japan's international obligations.
- 8.3 At the time the system for military sexual slavery was put into place, the international community had accepted that men and women were to be treated equally. The creation of a system that allowed the systematic rape, torture, murder, mutilation and brutalisation of women was a breach of Japan's international obligations.
- 8.4 Equality among the races was a fundamental tenet of the League of Nations and was a customary norm of international law. The creation and maintenance of the system of military sexual slavery violated Japan's international obligations as it was sustained on the basis that non-Japanese people were inferior to Japanese people.
- 8.5 In violation of its obligations concerning the treatment of civilian detainees, the State of Japan took women from civilian internment camps and placed them into facilities for military sexual slavery knowing that they would be raped, tortured and treated inhumanely.

- 8.6 Officials of the Japanese government engaged in a course of conduct designed to destroy evidence of the war crimes and crimes against humanity committed by its military contrary to its obligations under international law.
- 8.7 The failure to prosecute those responsible for war crimes and crimes against humanity is a violation of Japan's obligations under international law.
- 8.8 The forcible and deceitful taking of women was a violation of Japan's obligations under the Convention Concerning Forced or Compulsory Labour.
- 8.9 By its ongoing refusal to investigate these matters thoroughly, the State of Japan continues to violate the obligations it has to the international community.
- 8.10 The State of Japan further violated its international obligations by refusing to acknowledge its participation in the above acts when presented with evidence that officials of the former government had engaged in the course of conduct set out in paragraphs 8.1 to 8.6 above. This violation was exacerbated by the repeated refusal of the government to heed the requests for satisfaction and reparations made by the international community through the offices of the United Nations, in particular Special Rapporteurs on human rights matters appointed by duly constituted bodies of the United Nations.
- 8.11 The State of Japan has allowed members of the government and supporters of the government to engage in acts which have as their purpose the destruction of the reputation of the women whose lives have been affected by the system of military sexual slavery. Its failure to control the acts of these individuals displays a contemptuous disregard for the rights of women. This continuing violation is a reflection of the gender and racial bias that permeates the government's actions in this area.
- 8.12 The State of Japan has further breached its international obligations by displaying a contemptuous disregard for the human rights mechanisms of the United Nations, in particular the right of the international community to monitor compliance with human rights norms and practices.
- 8.13 The refusal of the State of Japan to compensate directly all women affected by the system of military sexual slavery is an act of gender bias and therefore is itself a breach of Japan's international obligations.
- 8.14 By allowing members and supporters of the government to make comments that suggest rape in war is not a breach of international law, the State of Japan is in breach of its obligations under the Geneva Conventions of 1949 and the general principles of international humanitarian law in that it has failed to ensure respect for the provisions of those Conventions. The obligation to ensure respect for the Conventions places an affirmative obligation on the government to educate the public as well as the Armed Forces about the types of conduct prohibited by international humanitarian law.

Factual Basis of Claim

9. The facts demonstrating the above violations of Japan's international obligations will be proved at trial and are particularised in the common and country indictments.

Decision Requested

10. The People of the Asia-Pacific region request that Japan be declared in breach of its international obligations and that it be ordered to make appropriate forms of restitution, reparations and satisfaction. The orders for restitution and reparations should be in keeping with the nature of the harms inflicted by the Government of Japan, particularly the ongoing nature of those harms.

11. The harms inflicted by the State of Japan on the women subjected to the system of military sexual slavery include but are not limited to the following:

- 11.1 Systematic and repeated rape
- 11.2 Torture
- 11.3 Mutilation
- 11.4 Slavery
- 11.5 Sexual Slavery
- 11.6 Murder
- 11.7 Inhumane treatment
- 11.8 Emotional Trauma
- 11.9 Psychological illness
- 11.10 Physical illness
- 11.11 Isolation
- 11.12 Interference with or destruction of family relations
- 11.13 Pain and suffering, including recurrent nightmares
- 11.14 Damage to reputation
- 11.15 Loss of opportunities, such as education
- 11.16 Loss of earnings and earning capacity
- 11.17 Damage to Personal Dignity
- 11.18 Permanent deprivation of the enjoyment of life
- 11.19 Interference with sense of community and sense of belonging to a given society

- 11.20 Being subjected to gender discrimination
- 11.21 Being subjected to racial discrimination
- 11.22 Costs required to obtain legal and other forms of expert assistance.
- 11.23 Costs associated with medical and other health related services, social services and medicine.

12. The People of the Asia Pacific region request the Tribunal to take into account the aggravation of the injuries suffered by the women as a result of the failure of the government of Japan to address this issue in an appropriate fashion as of 1992.

13. It has not been possible for the applicants or the women to exhaust local remedies as the law as applied in Japan is not in keeping with international law.

14. The specific forms of relief requested by the Applicants are as follows:

- 14.1 The issuance of an apology and guarantees of non-repetition.
- 14.2 The establishment of a mechanism for the thorough investigation into the system of military sexual slavery and the creation of a designated archive.
- 14.3 A full and frank public disclosure of the truth and acceptance of responsibility.
- 14.4 Restoration of the Honour of the Victims and Survivors through the creation of Memorials and a Museum.
- 14.5 Taking of steps to educate the Japanese public about the system of military sexual slavery.
- 14.6 Creation of scholarships and grants for those wishing to research this and related issues.
- 14.7 The payment of compensation adequate to redress the harm.
- 14.8 Return of the Bones of the Deceased
- 14.9 Repatriation of Survivors who wish to be repatriated.
- 14.10 Bringing to justice those responsible for war crimes and crimes against humanity.
- 14.11 Strengthening the independence of the judiciary.

Respectfully requested by the People of the Asia Pacific Region through their representatives who seek to protect the rights of women in the Asia-Pacific Region

ACKNOWLEDGEMENTS

The Judges deeply appreciate the dedicated and exceptional work of many people (too many to name here) including the courageous survivors and their advocates, the prosecution teams, the expert and perpetrator witnesses, and the registrars. The Judges also recognize those who made the extraordinary proceedings of this Tribunal possible as well as those who provided indispensable assistance to us in the preparation of this Judgement:

The International Organising Committee (IOC) which was responsible for the organisation of the entire process of this Tribunal, and, in particular, the IOC Convenors:

Professor Yun Chung-Ok,
Korean Council for the Women Drafted for Military Sexual Slavery, Korea

Yayori Matsui,
Violence Against Women Network in War (VAWW-NET), Japan

Indai Lourdes Sajor,
Asian Center for Women's Human Rights (ASCENT), The Philippines

The Legal Advisors to the Judges, coordinated by the International Women's Human Rights Law Clinic (IWHR) of the City University of New York School of Law and consisting of noted experts in international criminal law and women's human rights:

Kelly Askin, USA; Barbara Bedont, Canada; Betty Murungi, Kenya; and
Rhonda Copelon, Professor of Law & IWHR Director, USA.

and the Legal Assistants including IWHR interns Chyrel Allicock '01, Molly Graver '01, Tina Minkowitz '01, Sendi Katalinic '02, Mira Sun '02, and Amelia Toledo '02; Karuna Nundy, Columbia LL.M '01; Jane Gordon, London School of Economics LL.M '00, Kenji Fukuda, CUNY '03, and Amy Weismann, Esq.

The translators, coordinated by Seki Noriko, who worked tirelessly to enable communication across many languages, and

Foundations and institutions which contributed specifically to the preparation and presentation of the Judgement:

NOVIB, OXFAM, The Netherlands

Chinese Alliance for the Memory of the Victims of the Nanking Massacre, USA

Global Fund for Women, USA

Jacob Blaustein Institute for Human Rights, USA

MAMA CASH, The Netherlands

Rights and Democracy, Canada

City University of New York School of Law, USA