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"Comfort Women" and International Law

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'Closed' International Law: 'Comfort Women' Issues Revisited

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I. The 'Intangible'

The joint research project sponsored by the American Society of International Law regarding the United Nations Legal Orders has recently come to fruition in the form of two volumes totaling over one thousand pages.[1] For those who wish to know how the UN system has developed, this is no doubt the most appropriate form of presenting the information. However, this is only true in relation to the footprints of that development which has taken place on the surface. Unfortunately, those events which have occurred in the dark recesses of history and have never become tangible remain unspoken of in most of the studies pursued in this work. By merely focusing on those elements which have been actually integrated into the legal system it is difficult to grasp the whole picture. Rather it may in fact be the case that those invisible elements which were not discussed openly may include information which can explain more fully the actual truth.

The inquiry into the 'intangible' confronts directly the problem of what Max Weber called 'value-rationalism', which necessarily ignites a process of re-examining the value premises which dictate the purposes and beneficiaries of the legal system.[2] This is not simply a task to revisit the past, undertaken from a romantic sense of nostalgia. Rather, the true nature of this job is to uncover the value limitations which structure the legal system, and to 'open up' the way[3] for more universal values for the future. If now is a time when problems are coming to the forefront, then this is all the more true.

One fundamental challenge which face international law regarding the issue of the former

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[1] Schacter, O. and Joyner, C. (eds), United Nations Legal Order, (2nd Volumes, 1995).
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Japanese Imperial Army's W.W.II 'comfort women[4]' also lies therein. The significance of this issue being addressed by international law academics is not only related to the problems of interpreting and making a specialist judgment on events which happened over 50 years ago, according to the positive law of the time. Perhaps the more significant aspect is the illumination of the positive law, or rather of the value premises which determine its interpretation, application, and to bring to light its limitations. In concrete terms, the issue of the 'comfort women' creates an opportunity to 'open up' international law, which has been closed according to certain values, and to take it forward into the future. If you ask why such gross violations of humman rights have been neglected until now, the answers given will almost certainly include such statements as: 'It is due to Cold War structural pressures,' and 'The issue could not be addressed due to lack of freedom of speech and travel in the countries concerned,' and so on. It could also be said that the age and failing health of the victims my also be a factor. In any case it is no doubt that this issue has been simply neglected by the international law community. The Cold War is now over, and we have come to a point in time where the victims themselves have brought legal charges against the Japanese state, and the Japanese Government denies legal responsibility by putting emphasis on a specific interpretation of international law. The door to state legislation which would provide for individual compensation remains firmly closed. The meaning of this must be questioned.

The main purpose of this paper is not to scrutinize the propriety of the government's interpretation of the law from a technical point of view, but rather the main focus is to examine the nature of the value premises guiding the government's legislative inaction against state responsibility and compensation. Moreover, by examining the legal stance of the Japanese government and the contrast provided by the current trend in the international community, I would like to bring to the surface the international phase of the 'comfort women' issue and the challenges for international law.

II. Three 'Isms'

[4] In this paper 'comfort women' refers to 'women who were forced to provide sexual services for military personnel, while deprived of their freedom for a certain period of time by Japanese military,' as defined by YOSHIMI Yoshiaki, in his book Jugun Ianfu ('Comfort Women'), (1995, Iwanami Shoten), p. 11.

The most detailed expression of the Japanese Government 's legal stance on the issue can be found in the refutation document[5] written in response to the report[6] by the Special Rapporteur of the United Nations Commission on Human Rights, Ms. Radhika Coomaraswamy. The refutation elucidates the weaknesses of the Special Rapporteur's report, both legally and factually, by using such provocative phrases as 'questionable sources', 'one-sided content which invites misunderstanding' and 'expression of subjective viewpoint.' The document, based on a fined-tuned legal argumentation, appears worthy of a proper evaluation from an international law perspective. However, it is precisely because of this that the refutation conceals a problem that cannot be overlooked.

The mainstay of the legal argument of the Coomaraswamy Report was a report by the International Commission of Jurists (ICJ). The ICJ was able to publish its report on the issue one step ahead of Coomaraswamy in November 1994 after carrying out a field work. The legal questions regarding the 'comfort women' issue had begun to crystallize at the beginning of the1990s, and this process was accelerated following the publication of the ICJ report.[7] Furthermore, for the victims this report developed arguments which supported their various claims, and paved the way for the issues to be taken not only in the Japanese courts, the United Nations Human Rights Commission, and the Sub-commission on Human Rights, but also by the International Labour Organization (ILO) and other United Nations sponsored special conferences.

If we lump together the diverse views of the victims, it is claimed that by its actions the Japanese Government violated the following international laws:

-A series of United Nations treaties prohibiting trafficking in women and girls for prostitution;
-ILO Convention No.29 on forced labour;
-international customary rules prohibiting slavery and slavery like practices
-Hague Regulations respecting the Laws and Customs of War on Land Warfare (respect for

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family honour, individual life, and property)

-Failure to carry out duty to punish those responsible for crimes against humanity.

The victims state that since the issue of the 'comfort women' was not discussed at all at the time of the conclusion of the San Francisco Peace Treaty and the relevant accord with South Korea, it has yet to be legally resolved. They also contend that the right to compensation resulting from the violation of international law allows the former 'comfort women' to demand compensation in their own names. (These points have been expanded elsewhere[8] and so will not be repeated here.)

The Japanese Government completely denies all claims for compensation made by the former 'comfort women, ' and the government's stance is outlined in the aforementioned refutation statement to the Coomaraswamy Report. The remainder of this paper will briefly examine the points raised therein.

Firstly, with regard to the treaties prohibiting trafficking in women and girls; according to these treaties it is the responsibility of each State party to take measures to realise the objectives of the treaty. The question of whether or not these treaties can be applied in the case of the 'comfort women' requires serious consideration, but supposing that this were possible, at the time of WW2 Japan had taken the necessary measures proscribed by the treaty and there was therefore no violation of obligations under the treaty.

Secondly, regarding the standards prohibiting slavery; the 'comfort women' do not fall into the category of slaves as defined by the relevant treaties. Even supposing that they could be classified as such, the prohibition of slavery had not been integrated into customary law and Japan was therefore not bound by it.

Thirdly, regarding the Hague Regulations; the provisions requiring respect for family honour, and rights etc. are no more than general principles, and cannot be interpreted as prohibiting rape.

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[8] 'Ianfu' Mondai to Kokusai Ho, ('Comfort Women' and International Law), Senshuu University Institute for Social Science Department, *Research Institute Monthly Report No. 371, May 1994.*

Fourthly, regarding crimes against humanity; this concept of criminality was almost unknown at the time of the war. Of course, violation of international law does not lead directly to the state's obligation to prosecute individual culprits. Prosecution would be in accordance with the domestic penal code, but there is no such law in Japan dealing with rather ambiguous categories such as 'crimes against humanity.' Prosecution could be made correspondingly for murder or bodily injury, but in the case of the 'comfort women' issue, the statute of limitations has expired making pursuit of criminal responsibility an impossibility.

Fifthly, on the question of the Forced Labour Convention (ILO Convention No.29); since the Coomaraswamy Report did not mention this, neither does the refutation, and the Japanese Government did not make any particular comment when the ILO Committee of Experts on the Application of Conventions and Recommendations stated that there had been a violation.[9] However, on June 22 1995, a government high-ranking official responded to questions in the House of Councillors Foreign Affairs Committee with the suggestion that the treaty may have been suspended during the war, and that there could be no incidence of its violation.[10]

In its refutation the Japanese Government reaffirmed its hitherto position that all issues concerning international law were settled by the San Francisco Peace Treaty, the Agreement on the Settlement of Problems Concerning Property and Claims on Economic Cooperation Between Japan and Republic of Korea, and other relevant treaties.

Furthermore, on the question of individuals as subjects of international law and the legal claims for compensation of the former 'comfort women', the position of the Japanese Government, based on the principle that international law fundamentally regulates relations between states, is in direct contradiction to that of the victims.

Since interpretation is the quintessential aspect of the operation of law, it is not particularly surprising that the victims and the Japanese Government hold such different views on the same rules. However, the government's refutation is coloured by legal-technocratic thinking (and it is extremely thorough technocracy!) I am mistrustful of such an approach

[9] Report of the Committee of Experts on the Applications of Conventions and Recommendations, International Labour Conference 83rd Session 1996, p.85.
[10] Minutes of the 129th meeting of the House of Representatives Foreign Affairs Committee, No. 4, p. 10.

which lacks careful consideration of value-rationality, and all the more so with thorough technocracy. Regardless of the rights and wrongs of such an approach, it can be said that it was perhaps inappropriate for the Japanese Government to present its refutation document, so technocratic as it is at such a forum as the UN Human Rights Commission, whose mandate includes problems of value-rationality at the root of the study of undisguised political power.

Of course, even supposing that the interpretation of international law contained in the Japanese Government's refutation were correct, based on a recognition of the terrible nature of the events of the past, it would not be unreasonable nor impossible to investigate a means by enacting domestic legislation to ease suffering of the former 'comfort women,' which has continued from the time of the war to this day. Even if it can be said that there has been no violation of international law there is no reason why domestic law cannot be established immediately.

However, the government will not falter even on this point. According to the government, 'In issues of claims and reparations, which were settled according to international treaties (between states), compensation cannot be given to individuals.[11]' The Japanese Government therefore upholds its hitherto stance that there cannot be compensation from state funds in order to restore the dignity of the former 'comfort women.'

The reasoning behind this will not be discussed further here. However, it should be born in mind from the beginning that whatever the reason for this stance the denial of legal responsibility has created the current situation where compensation has been completely ruled out, and that this position cannot help but reflect a specific set of value premises. Whether or not this is the outcome envisaged by the Japanese Government is not the issue, but rather the problem is that as a consequence of this very non-action on their part a situation has arisen which supports those values. Below, therefore, I would like to examine the values projected by the government in terms of three 'isms'.

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[11] Minutes of the 129th Session of the National Diet of the House of Councillors Foreign Affairs Committee, No. 4, p. 11. No matter how the work of providing atonement to 'comfort women' through the Asian Women's Fund could highly be evaluated from the moral view point, that does not alter the same position that the atonement is different from compensation by the Government. Taking the political environment into consideration, it does appear that, as Government's involvement becomes deeper and deeper, the work of the Fund is more pushing the "way" of Governmental compensation away further. Because of the option being existed between the work of the Fund and the governmental compensation, the value of the Fund's work does appear diminishing.

1. Colonialism/Racism (Ethnic Discrimination)

Although there is disagreement on the number of 'comfort women,' it is thought that between 80,000 and 200,000 women were forced to provide sexual services for the Japanese military. What seems certain however is that the overwhelming majority of these women came from the Korean Peninsula. In addition, not a small number of women from China, the Philippines, Malaysia, and other countries in South East Asia were also forced to provide the so-called 'comfort.'

Even without going into a close breakdown, there is little doubt that an element of colonialism and racism or ethnic discrimination was clearly at work. What is more, the attitude of the Japanese Government in denying legal responsibility gives contemporary state approval to the continuing existence of these elements. Of course some responsibility for this situation also lies with the Allied Nations, beginning with the Americans, who neglected victims in Asia when drawing up postwar settlements. However, for the Japanese Government in the present day this is not a sufficiently valid excuse to absolve Japan of its responsibility. In this Post Cold War era failure to recognize the omission of the past will do nothing but ensure the continuation of the current state of affairs.

2. Androcentrism

Sexual abuse during wartime is not unusual, and is little more than an explicit expression of androcentrism, and one aspect of the 'comfort women' is certainly a result of just that. It would be reasonable to say that the fact that the 'comfort women' issue was not even mentioned during the negotiations leading up to the conclusion of the 1965 Agreement on Basic Relations Between Japan and the Republic of Korea, is a sure sign of such androcentrism at work. Regardless of whether or not this assertion is true, not only is the factor of sexual discrimination in the 'comfort women' issue now clear, and the neglect on the part of the state to take measures to ease the suffering of those involved can only be said to be a further example of its misogyny and androcentricism.

3. Statism

In the legal debate surrounding the 'comfort women' issue, the Japanese Government have consistently rejected the independent individual claims against it under international law, and the claims made by former 'comfort women' themselves. Within this premise lies the assumption that the individual cannot be a subject of international law.

The refutation document to the Coomaraswamy Report contains the interpretation that even the International Covenant on Civil and Political Rights, which is the pivotal document of international human rights law, does not provide for anything other than the relationship of rights and obligations between states. This opinion has been echoed in the following way even in domestic court cases; according to Article 2, paragraph 2 of the Covenant "rights stipulated in substantive articles of the Covenant only become enforceable for individuals following legislation at domestic level. Therefore, despite stipulations for rights in the Covenant, it does not necessarily follow that an individual may claim the protection of those rights by a state.[12]' That is to say, enjoyment of rights and benefits provided for under the International Covenant on Civil and Political Rights by individuals is subject to government supplementary approval at domestic level.

Japan does not accept any form of individual communication system, including that contained in the Optional Protocol to the International Covenant on Civil and Political Rights. Accordingly, under Japanese jurisdiction individuals have no direct recourse to international law whatsoever, whether in domestic or international contexts.

This is undoubtedly a typical expression of state-centristic thinking, whereby the state (i.e. the policy-making elite) limit application of international law by removing it totally from the grasp of individuals.

III. Experiments in Deconstruction

The three 'isms' which have come to light as a result of the 'comfort women' issue are an expression of the Japanese Government's closed attitude to international law. It may also be said that the closed nature of the law itself is also reflected. That notwithstanding, what

[12] Judgement of 11 October 1995, Osaka District Court, 901 *Hanrei Taimuzu* 93-94.

must not be overlooked is that the three 'isms' which have become apparent during this debate are becoming widely recognized as symbolic of problems which need to be tackled by the international community as a whole, and that we need to investigate ways of 'opening up' international law which has been 'closed' according to certain values.

With regard to the first 'ism' - colonialism/ racism or ethnic discrimination, it is perhaps not necessary to elaborate, since it is widely acknowledged that the gaining of independence of many former colonies from the beginning of the 1960s provided them with an opportunity to begin to tackle many of their problems. It can be said that the 1960 Declaration of Granting of Independence to Colonies and the 1965 Convention on Elimination of All Forms of Racial Discrimination represent symbolic documents in that process. More recently there has been a renewed commitment to the process of de-colonization, with the inclusion of principles aimed at the protection of the rights of indigenous peoples, etc.

In the present day, overcoming androcentrism is one of the most urgent tasks directly facing international law.[13] The state - the principal subject of international law - and its collective expression, the international organization, may seem to be neutral at first glance, but are in fact without exception androcentric. Therefore it is not surprising that the values of the system which has produced international law are reflected strongly therein.

One aspect of this, which is occasionally criticized, is the simplistic division of social life into public and private spheres. At first glance the law, of which it is the function to provide protection to members of the public, seems neutral, but in fact the law displays extreme androcentricism. For example, look at the issue of violence: violence in the public sphere is a crime and serious human rights violation to be suppressed, as opposed to violence in the domestic sphere, about which the law expresses little concern.

There are many possible reasons to justify this phenomenon, but when we recognize that it is mostly men who are active in the public sphere, and mostly women in the private, it becomes clear to the benefit of which side the law has been developed to protect. We can see this division clearly in, for example, the definition of torture; it is not exaggeration to say

[13] See eg. Charlesworth, Chinkin & Wright, 'Feminist Approaches to International Law,' American Journal of International Law, Vol. 85, p.613 (1991).

that the definition of torture in treaties prohibiting it deals excessively with torture as experienced by men. The actual definition of torture is certainly written in gender-neutral terms, but if you look at the application of this in reality it is used to the great disadvantage of women.

This criticism can also be raised at the concept of refugees, which sets out at its core the reason of 'persecution.' Contrary to the generous application of the Convention refugee definition to male asylum-seekers most often involved in political activities in the public sphere, it remains extremely difficult for women victims of war or violence in a private context to be recognized as refugees. This is without doubt a consequence of the inherent androcentrism of the system.

There has been a tremendous gathering of momentum in the international community as a whole to gouge out the androcentricism in international law which has been cloaked in the terminology of neutrality, objectivity and universality, and this trend is reflected in the proliferation of international institutions and conferences since the beginning of the 1990s. With the 1993 Second World Conference on Human Rights, which was literally dominated by the slogan 'Women's Rights Are Human Rights' and the Fourth UN Conference on Women in 1995, we have began to see a process of redefining the areas stipulated for under international law. This is not unrelated to the increased level of academic interests in economic, social and cultural rights. The very process of uncovering the basis of the law in the economic, social, and cultural spheres will result in the expansion of legal protection to women active in those spheres.

Criticism of the third 'ism' - statism - has also become more audible since the beginning of the 1990s. Statism, based on the 'Westphalia Paradigm', has been thought of as the unifying paradigm in international law, and this is reflected in the traditional definition of international law, where international law stipulates the relationship between states. The state is centre-stage, and this has resulted in an international law which is remote from citizens' interests. Despite the introduction, following the end of WW2, of international human rights law based on the principles of universalism, there has been no wavering from the path of statism. International human rights law has been allowed to exist within a framework of statism, and even the human rights NGOs have worked within this system, and

in doing so contributed to supporting it.

However, since the end of the 1980s there has been a considerable change in circumstances, beginning with the increased control over their own destiny of the UN and human rights treaty bodies, who had been originally conceived in an environment of statism, and the subsequent development of activities based on the ideas of universalism. Since the beginning of the 1990s NGOs, including those not in consultative status with the UN, have begun to take responsibility for part of the public functions so far the sole responsibility of governments. In other words, there has been some devolution of power.

A new trend has emerged whereby power which was concentrated in the state is devolving upon non-governmental sectors. That the state has been the principal subject of international law is a legal expression of realities where most power in the international society is held exclusively in the hands of states. However, that premise is continuing to be broken down. Furthermore, as a result of the inevitable momentum of the internationalization of networks, it has become impossible to centralize and control access to information which supported the state's monopoly on power. In addition, from the 1980s onwards, with pressure from the market mounted, the process of relativization of states particularly advanced, and we saw considerable weakening in the ability of the state to provide people with an identity-basis.

As Sakamoto Yoshikazu correctly states, 'the traditional state system is increasingly maintained by governments and nationals who, despite tremendous structural changes the world is undergoing, still hang on to the age-old traditional notion of sovereign state in the fields of foreign affairs and security'. The retreat from statism means liberation from the hands of governmental decision making elites, who have monopolized international law in the name of the state, or in other words, the 'opening-up' of international law for civil society. This presents a drastic challenge to the Westphalia Paradigm upon which international law is based.[14]

Through facing the 'comfort women' issue, the Japanese Government has encountered opportunities directly facing the limit of international law. Whilst I do not believe that the

[14] SAKAMOTO, Y., 'Sotaika no Jidai' (The Age of Relativization), Sekai, January 1997, p. 58.

government's view is the only sustainable interpretation of the relevant international rules, if we suppose that this were the case, then the government must have also felt strongly the law's limitations. However, if from such a position the government chooses the conclusion that 'therefore state compensation is an impossibility,' it is as good as giving its approval to those limits. As I have stated above, the international community has been making various efforts to overcome the imperfections in international law, and the inaction of the Japanese Government stands out in all the sharper contrast because of this. At the very least the stance of the Japanese Government does not project a positive message to the international society making efforts to 'open-up' international law based on principles of universalism. It is not a question of how we process the past, but instead what is being questioned is how we can link the past with the present and the future. Legal action not based on this perspective does not only avoid connecting with the future, it conversely paved the way to an impasse. This is exactly what is meant by 'backward steps.'

IV. An Appeal to Academics of International Law

The 'comfort women' issue poses some difficult questions regarding the value premises which underpin international law - what is international law for, and who is it for? How should academics of international law answer these fundamental questions?

According to Thomas Franck, the most important point is that of how to enforce rules expressed in the form of customs or treaties made between countries, and that legitimacy can be presented as the key concept, although 'justice' is not included among the key reasons which ensure legitimacy. He says, 'it is the priorities and sensitivity of the dominant, rather than some concept of justice common to all people, which frames the content of international rules and ensures their enforcement.[15] 'Justice' is restricted to an issue for domestic law.

Franck states that enforcement is important, even if the rules are unjust. This is no doubt true from the perspective of maintaining order, but surely international law academics should not concern themselves only with encouraging enforcement, but also with the identification

[15] Franck, T., The Power of Legitimacy Among Nations, p. 226 (1990)

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[8] 'Ianfu' Mondai to Kokusai Ho, ('Comfort Women' and International Law), Senshuu University Institute for Social Science Department, *Research Institute Monthly Report No. 371, May 1994.*

Fourthly, regarding crimes against humanity; this concept of criminality was almost unknown at the time of the war. Of course, violation of international law does not lead directly to the state's obligation to prosecute individual culprits. Prosecution would be in accordance with the domestic penal code, but there is no such law in Japan dealing with rather ambiguous categories such as 'crimes against humanity.' Prosecution could be made correspondingly for murder or bodily injury, but in the case of the 'comfort women' issue, the statute of limitations has expired making pursuit of criminal responsibility an impossibility.

Fifthly, on the question of the Forced Labour Convention (ILO Convention No.29); since the Coomaraswamy Report did not mention this, neither does the refutation, and the Japanese Government did not make any particular comment when the ILO Committee of Experts on the Application of Conventions and Recommendations stated that there had been a violation.[9] However, on June 22 1995, a government high-ranking official responded to questions in the House of Councillors Foreign Affairs Committee with the suggestion that the treaty may have been suspended during the war, and that there could be no incidence of its violation.[10]

In its refutation the Japanese Government reaffirmed its hitherto position that all issues concerning international law were settled by the San Francisco Peace Treaty, the Agreement on the Settlement of Problems Concerning Property and Claims on Economic Cooperation Between Japan and Republic of Korea, and other relevant treaties.

Furthermore, on the question of individuals as subjects of international law and the legal claims for compensation of the former 'comfort women', the position of the Japanese Government, based on the principle that international law fundamentally regulates relations between states, is in direct contradiction to that of the victims.

Since interpretation is the quintessential aspect of the operation of law, it is not particularly surprising that the victims and the Japanese Government hold such different views on the same rules. However, the government's refutation is coloured by legal-technocratic thinking (and it is extremely thorough technocracy!) I am mistrustful of such an approach

[9] Report of the Committee of Experts on the Applications of Conventions and Recommendations, International Labour Conference 83rd Session 1996, p.85.
[10] Minutes of the 129th meeting of the House of Representatives Foreign Affairs Committee, No. 4, p. 10.

which lacks careful consideration of value-rationality, and all the more so with thorough technocracy. Regardless of the rights and wrongs of such an approach, it can be said that it was perhaps inappropriate for the Japanese Government to present its refutation document, so technocratic as it is at such a forum as the UN Human Rights Commission, whose mandate includes problems of value-rationality at the root of the study of undisguised political power.

Of course, even supposing that the interpretation of international law contained in the Japanese Government's refutation were correct, based on a recognition of the terrible nature of the events of the past, it would not be unreasonable nor impossible to investigate a means by enacting domestic legislation to ease suffering of the former 'comfort women,' which has continued from the time of the war to this day. Even if it can be said that there has been no violation of international law there is no reason why domestic law cannot be established immediately.

However, the government will not falter even on this point. According to the government, 'In issues of claims and reparations, which were settled according to international treaties (between states), compensation cannot be given to individuals.[11]' The Japanese Government therefore upholds its hitherto stance that there cannot be compensation from state funds in order to restore the dignity of the former 'comfort women.'

The reasoning behind this will not be discussed further here. However, it should be born in mind from the beginning that whatever the reason for this stance the denial of legal responsibility has created the current situation where compensation has been completely ruled out, and that this position cannot help but reflect a specific set of value premises. Whether or not this is the outcome envisaged by the Japanese Government is not the issue, but rather the problem is that as a consequence of this very non-action on their part a situation has arisen which supports those values. Below, therefore, I would like to examine the values projected by the government in terms of three 'isms'.

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[11] Minutes of the 129th Session of the National Diet of the House of Councillors Foreign Affairs Committee, No. 4, p. 11. No matter how the work of providing atonement to 'comfort women' through the Asian Women's Fund could highly be evaluated from the moral view point, that does not alter the same position that the atonement is different from compensation by the Government. Taking the political environment into consideration, it does appear that, as Government's involvement becomes deeper and deeper, the work of the Fund is more pushing the "way" of Governmental compensation away further. Because of the option being existed between the work of the Fund and the governmental compensation, the value of the Fund's work does appear diminishing.

1. Colonialism/Racism (Ethnic Discrimination)

Although there is disagreement on the number of 'comfort women,' it is thought that between 80,000 and 200,000 women were forced to provide sexual services for the Japanese military. What seems certain however is that the overwhelming majority of these women came from the Korean Peninsula. In addition, not a small number of women from China, the Philippines, Malaysia, and other countries in South East Asia were also forced to provide the so-called 'comfort.'

Even without going into a close breakdown, there is little doubt that an element of colonialism and racism or ethnic discrimination was clearly at work. What is more, the attitude of the Japanese Government in denying legal responsibility gives contemporary state approval to the continuing existence of these elements. Of course some responsibility for this situation also lies with the Allied Nations, beginning with the Americans, who neglected victims in Asia when drawing up postwar settlements. However, for the Japanese Government in the present day this is not a sufficiently valid excuse to absolve Japan of its responsibility. In this Post Cold War era failure to recognize the omission of the past will do nothing but ensure the continuation of the current state of affairs.

2. Androcentrism

Sexual abuse during wartime is not unusual, and is little more than an explicit expression of androcentrism, and one aspect of the 'comfort women' is certainly a result of just that. It would be reasonable to say that the fact that the 'comfort women' issue was not even mentioned during the negotiations leading up to the conclusion of the 1965 Agreement on Basic Relations Between Japan and the Republic of Korea, is a sure sign of such androcentrism at work. Regardless of whether or not this assertion is true, not only is the factor of sexual discrimination in the 'comfort women' issue now clear, and the neglect on the part of the state to take measures to ease the suffering of those involved can only be said to be a further example of its misogyny and androcentricism.

3. Statism

In the legal debate surrounding the 'comfort women' issue, the Japanese Government have consistently rejected the independent individual claims against it under international law, and the claims made by former 'comfort women' themselves. Within this premise lies the assumption that the individual cannot be a subject of international law.

The refutation document to the Coomaraswamy Report contains the interpretation that even the International Covenant on Civil and Political Rights, which is the pivotal document of international human rights law, does not provide for anything other than the relationship of rights and obligations between states. This opinion has been echoed in the following way even in domestic court cases; according to Article 2, paragraph 2 of the Covenant "rights stipulated in substantive articles of the Covenant only become enforceable for individuals following legislation at domestic level. Therefore, despite stipulations for rights in the Covenant, it does not necessarily follow that an individual may claim the protection of those rights by a state.[12]' That is to say, enjoyment of rights and benefits provided for under the International Covenant on Civil and Political Rights by individuals is subject to government supplementary approval at domestic level.

Japan does not accept any form of individual communication system, including that contained in the Optional Protocol to the International Covenant on Civil and Political Rights. Accordingly, under Japanese jurisdiction individuals have no direct recourse to international law whatsoever, whether in domestic or international contexts.

This is undoubtedly a typical expression of state-centristic thinking, whereby the state (i.e. the policy-making elite) limit application of international law by removing it totally from the grasp of individuals.

III. Experiments in Deconstruction

The three 'isms' which have come to light as a result of the 'comfort women' issue are an expression of the Japanese Government's closed attitude to international law. It may also be said that the closed nature of the law itself is also reflected. That notwithstanding, what

[12] Judgement of 11 October 1995, Osaka District Court, 901 *Hanrei Taimuzu* 93-94.

must not be overlooked is that the three 'isms' which have become apparent during this debate are becoming widely recognized as symbolic of problems which need to be tackled by the international community as a whole, and that we need to investigate ways of 'opening up' international law which has been 'closed' according to certain values.

With regard to the first 'ism' - colonialism/ racism or ethnic discrimination, it is perhaps not necessary to elaborate, since it is widely acknowledged that the gaining of independence of many former colonies from the beginning of the 1960s provided them with an opportunity to begin to tackle many of their problems. It can be said that the 1960 Declaration of Granting of Independence to Colonies and the 1965 Convention on Elimination of All Forms of Racial Discrimination represent symbolic documents in that process. More recently there has been a renewed commitment to the process of de-colonization, with the inclusion of principles aimed at the protection of the rights of indigenous peoples, etc.

In the present day, overcoming androcentrism is one of the most urgent tasks directly facing international law.[13] The state - the principal subject of international law - and its collective expression, the international organization, may seem to be neutral at first glance, but are in fact without exception androcentric. Therefore it is not surprising that the values of the system which has produced international law are reflected strongly therein.

One aspect of this, which is occasionally criticized, is the simplistic division of social life into public and private spheres. At first glance the law, of which it is the function to provide protection to members of the public, seems neutral, but in fact the law displays extreme androcentricism. For example, look at the issue of violence: violence in the public sphere is a crime and serious human rights violation to be suppressed, as opposed to violence in the domestic sphere, about which the law expresses little concern.

There are many possible reasons to justify this phenomenon, but when we recognize that it is mostly men who are active in the public sphere, and mostly women in the private, it becomes clear to the benefit of which side the law has been developed to protect. We can see this division clearly in, for example, the definition of torture; it is not exaggeration to say

[13] See eg. Charlesworth, Chinkin & Wright, 'Feminist Approaches to International Law,' American Journal of International Law, Vol. 85, p.613 (1991).

that the definition of torture in treaties prohibiting it deals excessively with torture as experienced by men. The actual definition of torture is certainly written in gender-neutral terms, but if you look at the application of this in reality it is used to the great disadvantage of women.

This criticism can also be raised at the concept of refugees, which sets out at its core the reason of 'persecution.' Contrary to the generous application of the Convention refugee definition to male asylum-seekers most often involved in political activities in the public sphere, it remains extremely difficult for women victims of war or violence in a private context to be recognized as refugees. This is without doubt a consequence of the inherent androcentrism of the system.

There has been a tremendous gathering of momentum in the international community as a whole to gouge out the androcentricism in international law which has been cloaked in the terminology of neutrality, objectivity and universality, and this trend is reflected in the proliferation of international institutions and conferences since the beginning of the 1990s. With the 1993 Second World Conference on Human Rights, which was literally dominated by the slogan 'Women's Rights Are Human Rights' and the Fourth UN Conference on Women in 1995, we have began to see a process of redefining the areas stipulated for under international law. This is not unrelated to the increased level of academic interests in economic, social and cultural rights. The very process of uncovering the basis of the law in the economic, social, and cultural spheres will result in the expansion of legal protection to women active in those spheres.

Criticism of the third 'ism' - statism - has also become more audible since the beginning of the 1990s. Statism, based on the 'Westphalia Paradigm', has been thought of as the unifying paradigm in international law, and this is reflected in the traditional definition of international law, where international law stipulates the relationship between states. The state is centre-stage, and this has resulted in an international law which is remote from citizens' interests. Despite the introduction, following the end of WW2, of international human rights law based on the principles of universalism, there has been no wavering from the path of statism. International human rights law has been allowed to exist within a framework of statism, and even the human rights NGOs have worked within this system, and

in doing so contributed to supporting it.

However, since the end of the 1980s there has been a considerable change in circumstances, beginning with the increased control over their own destiny of the UN and human rights treaty bodies, who had been originally conceived in an environment of statism, and the subsequent development of activities based on the ideas of universalism. Since the beginning of the 1990s NGOs, including those not in consultative status with the UN, have begun to take responsibility for part of the public functions so far the sole responsibility of governments. In other words, there has been some devolution of power.

A new trend has emerged whereby power which was concentrated in the state is devolving upon non-governmental sectors. That the state has been the principal subject of international law is a legal expression of realities where most power in the international society is held exclusively in the hands of states. However, that premise is continuing to be broken down. Furthermore, as a result of the inevitable momentum of the internationalization of networks, it has become impossible to centralize and control access to information which supported the state's monopoly on power. In addition, from the 1980s onwards, with pressure from the market mounted, the process of relativization of states particularly advanced, and we saw considerable weakening in the ability of the state to provide people with an identity-basis.

As Sakamoto Yoshikazu correctly states, 'the traditional state system is increasingly maintained by governments and nationals who, despite tremendous structural changes the world is undergoing, still hang on to the age-old traditional notion of sovereign state in the fields of foreign affairs and security'. The retreat from statism means liberation from the hands of governmental decision making elites, who have monopolized international law in the name of the state, or in other words, the 'opening-up' of international law for civil society. This presents a drastic challenge to the Westphalia Paradigm upon which international law is based.[14]

Through facing the 'comfort women' issue, the Japanese Government has encountered opportunities directly facing the limit of international law. Whilst I do not believe that the

[14] SAKAMOTO, Y., 'Sotaika no Jidai' (The Age of Relativization), Sekai, January 1997, p. 58.

government's view is the only sustainable interpretation of the relevant international rules, if we suppose that this were the case, then the government must have also felt strongly the law's limitations. However, if from such a position the government chooses the conclusion that 'therefore state compensation is an impossibility,' it is as good as giving its approval to those limits. As I have stated above, the international community has been making various efforts to overcome the imperfections in international law, and the inaction of the Japanese Government stands out in all the sharper contrast because of this. At the very least the stance of the Japanese Government does not project a positive message to the international society making efforts to 'open-up' international law based on principles of universalism. It is not a question of how we process the past, but instead what is being questioned is how we can link the past with the present and the future. Legal action not based on this perspective does not only avoid connecting with the future, it conversely paved the way to an impasse. This is exactly what is meant by 'backward steps.'

IV. An Appeal to Academics of International Law

The 'comfort women' issue poses some difficult questions regarding the value premises which underpin international law - what is international law for, and who is it for? How should academics of international law answer these fundamental questions?

According to Thomas Franck, the most important point is that of how to enforce rules expressed in the form of customs or treaties made between countries, and that legitimacy can be presented as the key concept, although 'justice' is not included among the key reasons which ensure legitimacy. He says, 'it is the priorities and sensitivity of the dominant, rather than some concept of justice common to all people, which frames the content of international rules and ensures their enforcement.[15] 'Justice' is restricted to an issue for domestic law.

Franck states that enforcement is important, even if the rules are unjust. This is no doubt true from the perspective of maintaining order, but surely international law academics should not concern themselves only with encouraging enforcement, but also with the identification

[15] Franck, T., The Power of Legitimacy Among Nations, p. 226 (1990)

of rules which are unjust.

Of course we cannot make sweeping statements regarding what is just and what is unjust. If we here understand that these concepts are value-dependent, then how can it be said that the analysis of the closed nature of rules cannot be examined within international jurisprudence, which is itself one of the social sciences and as such based on principles of universalism.

In recent years international law has continued to be changed little by little for the mutual benefit of international community. At a glance this might be viewed as an 'opening-up' of international law, but unless the concentration of responsibility for international law in specific sectors or groups is also changed, the danger of 'closedness' remains. For example, there is a tendency to view international law as unaffected by market principles which govern our system of trade, but in reality how can the voices of those people strongly opposed to this system, such as certain citizens and agricultural workers in Asia be evaluated and incorporated? To ignore the voices of those groups located on the margins of, or outside of the system, and to provide an exclusive service to those who wish to achieve the objectives of the system as it stands is equivalent to abandoning one of the roles of international jurisprudence, which is to investigate in great detail the value premises which underpin the system itself.

This is also true in the 'comfort women' issue. Despite the fact that the issue has come to the fore, and a large number of points for discussion by scholars of international law have been raised, (Japanese) scholars of international law have not yet given this sufficient attention. We should be aware of the consequences of this - international law scholars appear to be uncritically giving their support to the present status quo. It is acceptable to argue that international law is not the correct tool with which to solve the 'comfort women' issue, and to present the legal-technical grounds to support this claim, but surely the role of scholars of international law does not end there. There is another important role, namely to identify the value premises which provide for limitations and distortions of the law and its application. That is, to continually question the nature and practice of international law as it is, encumbered with the dominant values of the international community. To ignore these issues is to merely accept current value premises and there may be those who think that it is

reasonable to do so. However, it must not be forgotten that such action in itself is value-driven, and the resulting field of international jurisprudence cannot pretend to be value-free. This is the point for international law which has been brought into focus by the 'comfort women' issue.

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(Most Recent Major Academic Publications)
1 "Organized Hypocrisy: The UN Human Rights Regime", JINKEN KYOUIKU <HUMAN RIGHT EDUCATION>,No.10(2000,forthcoming, in Japanese)
2 "Convention against Torture and Beyond" in GOUMON KINSHI JOUYAKU <CONVENTION AGAINST TORTURE>(Amnesty International Japanese Section ed.1999, forthcoming, in Japanese)
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4 INTERNATIONALIZATION OF HUMAN RIGHTS: CHALLENGES OF INTERNATIONAL HUMAN RIGHTS LAW(1998,in Japanese)
5 REFUGEE DETERMINATION PROCEDURES IN JAPAN: PROPOSALS FOR REFORM(1996, in Japanese)

The Convention on the Elimination of All Forms of Discrimination Against Women and Contemporary Issues Concerning Japanese Women
The 'Comfort Women' Issue - Discussion at CEDAW

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I. Background

Beginning in December 1991, a number of victims of the former Japanese Military's 'comfort women' system, from Korea, the Philippines, the Netherlands, and China, amongst others, began proceedings against the Japanese Government in the Japanese courts, claiming compensation for suffering based on the grounds that there had been a violation of international law, and the majority of these cases are still being considered.[1] Local and Japanese NGOs supporting the former 'comfort women' have been developing their very active lobbying at the various human rights forums, such as the UN Commission on Human Rights, the International Labour Organisation (ILO), and World Conferences on Women (Beijing Conference, 1995). On the other hand, in Japan a group calling themselves the 'Campaign for New History Textbooks[2]' (whose proponents include Tokyo University professor, Nobukatsu Fujioka) claim that the Japanese Government and its former military were not involved in forced drafting of women, and that any mention of the 'comfort women' issue in school textbooks is a manifestation of a 'masochistic view of history.'

In the setting that has made the 'comfort women' issue more topical for discussion, not only within Japan but also at such forums as the United Nations, there has been a strategy on the side of Human Rights NGOs to re-think this issue from the perspective of 'violence against women,' and therefore to treat the issue as a stepstone toward resolving contemporary human rights issues relating to women, particularly violence against women.

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[1] The author recognises and is aware the negative, discriminatory nature of the expression of 'comfort women', but use the term in this text as the words are used by Japanese official documents including court sentences. At present (November 1997), according to the Asian Women's Fund, among the so-called 'war compensation court cases,' there are 6 cases currently proceeding in the Japanese courts where the plaintiffs are former "comfort women,' involving a total of 64 former 'comfort women.'

[2] *'Atarashii Rekishi Kyôkasho wo Tsukuru Kai'*

I think that this strategy has been for the most part successful. Violence Against Women was one of the main agenda at the Beijing World Conference on Women in 1995, and it attracted Japanese NGOs substantial attention. After the Beijing Conference, NGOs started taking up the issue of 'comfort women' in a context of victims of violence. However, the allegations by certain NGOs such as 'the Japanese Government has not apologised to these victims' or 'the Japanese Government is merely waiting for the victims to die' do not seem to ring true in the light of the relevant activities that the Government and the Asian Women's Fund (which I will discuss below) have undertaken for a past few years. In this paper I would like to examine the way in which violence against women is dealt within the international instruments on human rights, to introduce the way in which the 'comfort women' issue has been discussed with by the Committee on the Elimination of Discrimination against Women (CEDAW) and other UN bodies, and examine how the Japanese Government has been attempting to respond to such international concerns.

II. Efforts at the United Nations

1. Declaration on the Elimination of Violence against Women

There was no article specifically dealing with 'violence' in the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, except Article 6, which goes no further than to stipulate for the prohibition of exploitation of women through trafficking or prostitution.

The importance of the human rights of women, and in particular freedom from violence were specifically stressed at the Second World Human Rights Conference at Vienna in 1993. As a result, at the UN General Assembly in December 1993 the Declaration on the Elimination of Violence against Women, whose draft was proposed by the Commission on the Status of Women (CSW), was adopted unanimously.[3] The Declaration points out that violence against women is widespread, and includes violence in the family (at the hands of husband, living together partner or other family member, child abuse, etc.), in the community (commercialised exploitation such as prostitution and trafficking in women, and

[3] UN General Assembly Resolution 48/104

sexual harassment, etc.), or violence by the state (such as violence suffered whilst in detention, or under conditions of armed conflict). Moreover it was noted that violence is suffered by women regardless of race, nationality, income, social class, or culture, that violence prevents women from enjoying their right to equality, and a series of proposals were put to governments (e.g. to establish laws to punish offenders, to educate law-enforcers, etc.)

2. The Coomaraswamy Report

In 1994, at the 50th Session of the Commission on Human Rights, Radhika Coomaraswamy, a law scholar from Sri Lanka, was elected as the Commission's Special Rapporteur on Violence against Women. It is thought that part of the reason for choosing a special rapporteur from South Asia was a politically motivated desire to have a spokesperson from a non Western country to speak out for the 'universality of human rights.' The special rapporteur's term was for three years, and a report was to be submitted every year. At the end of the term a total of three reports were submitted to the Commission on Human Rights, and among these was an addendum to the second report entitled 'Report on the issue of military sexual slavery in wartime,'[4] and this discusses the issue of the former Japanese military 'comfort women' (hereafter in this paper this addendum to the second report will be refereed to as the 'Coomaraswamy Report'.)

The special characteristic of the Coomaraswamy Report is that it discusses the responsibility of the Japanese Government in terms of 'legal' and 'moral' responsibility, and asserts that the government is liable to accept both. It argues that since neither the San Francisco Peace Treaty nor the relevant bilateral treaties contain any articles addressing general human rights violations nor military sexual slavery, such treaties do not provide effective solution to the 'comfort women' issue. Furthermore, it did refer to 'crimes against humanity,' international human rights and humanitarian law such as the Geneva Conventions, the Hague Regulations respecting the Laws and Customs of War on Land, and the treaties and agreements prohibiting the 'white slave trade' and contended that the Japanese Government could not escape from the legal responsibility. Regarding the question of whether or not the victims themselves, as individuals, can be the subjects for

[4] E/CN.4/ 1996/ 53/Add.1. The Special Rapporteur's term was extended for another three (3) years in 1997.

claims under international law without the assistance of their government, Coomaraswamy takes an affirmative stance, and is of the viewpoint that since the international human rights documents approved according to international law cite instances of 'individual' rights to be protected, then the former 'comfort women' can lay claim to these rights.

Regarding moral responsibility, the Coomaraswamy Report welcomes the fact that Japanese Government has already made statements acknowledging this, and is making efforts to offer atonement to the former 'comfort women' through a 'national fund' (hereafter, referred to as the 'Asian Women's Fund'). However, it has made its stance clear that this does not admonish the government of its legal responsibility.

In refutation, the Japanese Government has raised the following objections to the Coomaraswamy Report :

(1) that the special rapporteur has wrongly interpreted international law and is espousing personal opinions;
(2) that the grounds for emphasising the Japanese Government's violation of international law are vague, and that in her argument the special rapporteur has made assertions of 'violations' of treaties that Japan had not ratified at the time of the war;
(3) that the special rapporteur calls for the 'punishment of the perpetrators,' but such matter was already settled according to the Tokyo War Crime Tribunals undertaken by the Allied Powers, and moreover would be a violation of the Japanese Constitution[5].

It may appear as if a big gap exists between the substance of the Special Rapporteur's recommendations and the Japanese Government's refutation. However, those recommended to the Government did include, amongst others, certain elements that the Government had already been implementing, such as 'making public of documents,' issuing a clear public apology,' 'history education,' etc. It may be notable that the Coomaraswamy Report recognises that legal and moral responsibilities are different in nature, and that it 'welcomes' the establishment of the Asian Women's Fund by the Japanese Government.

[5] Abe Kohki, "Closed International Law - 'Comfort Women' Issues Revisited," in Kokusai Jinken (Human Rights International) No.8, 1997, p.23, footnote 6.

3. Consideration of the Coomaraswamy Report at CEDAW

In the Japanese Government's first report to the CEDAW, which was submitted in 1987 and discussed by the committee in 1988, there was no mention of the 'comfort women' issue, and no question regarding the 'comfort women' was raised during the discussion. What is more, neither the second report submitted in 1992, nor the third in 1993 contained any mention of this issue. However, in January 1994, on the occasion that the second and third reports were discussed at the 13th Session of CEDAW in New York, quite a few questions and comments on the 'comfort women' issue were raised by CEDAW members (namely, the Committee members from the Philippines, New Zealand, and Germany). The Japanese Government replied that it had already begun an investigation into the issue, had issued an apology, and although every effort had been made to address the issue to date, the government was considering taking 'measures that will be in place of (state) compensation.[6]'

Subsequently, when the fourth report is discussed at CEDAW, it is, of course, quite likely that it will include an evaluation of the Asian Women's Fund, which was established in 1995, and that the CEDAW members will surely be keen to assess just how sincerely the Japanese Government has tackled this issue.

4. Trends at the United Nations Commission on Human Rights

As a result of proposals from NGOs, from about 1991 onwards, the 'comfort women' issue has been discussed at the UN Human Rights Commission and at its sub-body, the Sub-commission on the Prevention of Discrimination and Protection of Minorities.

It was the 52nd session of the Commission on Human Rights in March 1996 that the Coomaraswamy Report was submitted. In its resolution adopted on the subject of Elimination of Violence against Women, the Commission, referring to her Report, announced that:

1) It welcomed the work of the special rapporteur, and took note of the report;

[6] For discussion outline evaluation of the 2nd Japanese Government Report on the 'comfort women' issue, refer to *Kokusai Josei* No.8 (1994), p.85. It is expected that the 4th Japanese report will be reviewed in January-February 2000 at CEDAW in New York.

2) It praised the work of the special rapporteur for its analysis of violence in community;
3) It praised the special rapporteur's analysis concerning domestic violence.

At the Sub-commission in 1993, its American member Linda Chavez was appointed as the special rapporteur for 'systematic rape, sexual slavery and slavery-like practices under armed conflict,' but she resigned her position in March 1997 before completing the full three years of the term, and fellow American acting committee member, Gay McDougall, was appointed in her place for remaining period. Prior to this, in 1989, Mr. Theo van Boven of the Netherlands had been appointed by the Sub-commission as special rapporteur on 'The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' and submitted his report to the Sub-commission.

At the 48th session of the Sub-commission in March 1996, a number of questions were raised by its members regarding the Asian Women's Fund, which was established with the initiative of the Japanese Government in 1995. There were opinions such as that was voiced by Chinese member, who commented that 'it is strange to impute a mistake of the state to the people,' but a majority described the measure as 'meaningful' (USA, UK, Romania, Cameroon, etc.), and the Norwegian Chairperson of the Sub-commission commented that 'this should be especially welcomed as a successful result of constructive co-operation between UN human rights bodies and Member States.

III. The Establishment and Activities of the Asian Women's Fund

Finally I would like to touch upon the activities of the Asian Women's Fund, which have received mixed reception within and outside Japan. In July 1995, based on a proposal from the 'Ruling Parties Project' in the previous year, which consisted MPs from Liberal Democratic Party, Social Democratic Party and 'Sokagakkai' Party, the cabinet of Prime Minister Murayama established the 'Asian Women's Fund,' and appointed former elder statesman Bunbei Hara as its president. The government established the Fund's budget at 4.8 billion yen for the first year operation to collect donations from the public. The main task of the Fund is to deliver money that has been donated by Japanese nationals in all

sectors of the society, to those women who suffered as former 'comfort women.' As of October 1997, the donation to the Fund were amounted more than 480 million yen. Since beginning in August 1996, 'Atonement Money' (¥2 million per person) from the Fund is being delivered to individual former 'comfort women.' To date (November 1997) the Asian Women's Fund received more than 100 applications from victims in the countries and regions concerned, and acted upon to deliver atonement money to more than 40 victims of the 'comfort women' system. (Among those women in the countries and regions concerned who have been identified as former 'comfort women,' those who received the Fund are those women who have expressed that if their individual wish to do so. In the case that those women who already passed away were surviving at the time the Fund was established in July 1995, the Atonement Money could be delivered to the relatives of the deceased.)

On the occasion that the victims receive the Atonement Money, the Letter of Apology from the Prime Minister of Japan is also delivered. (This letter is written in Japanese, and is accompanied by a translation in the local language.) The letter was signed by the Prime Minister Ryutaro Hashimoto in his official capacity as the head of the government, and expresses the sincere remorse.

In addition to the Atonement Money and the Prime Minister's Letter, the Japanese Government and the Asian Women's Fund are implementing the following projects:

(1) Medical and Welfare Support Project

The Japanese Government is providing national funds directly to the projects for medical treatments, home helpers, house repairs, and welfare, which are estimated more than ¥700 million.

(2) NGO Support Project

The Japanese Government, through the Asian Women's Fund, is supporting activities to ensure women's enjoyment of human rights, and this is know in English as the Women's Empowerment Project, and the government has set aside approximately ¥400 million a year from the national budget (1997 budget estimate) for this. 1996's accomplishments included commissioning a research report into international legislations to prohibit sexual exploitation of children (child prostitution), support to NGOs' activities, and hosting an International Forum on 'Women's Rights as Human Rights' in co-operation with the UN

Economic and Social Commission for Asia-pacific (ESCAP) and other organisations. The latter invited experts from around the region to address urgent human rights issues currently facing the Asia-pacific region such as domestic violence and trafficking in women. In November 1997 the Fund held the Manila Conference on Trafficking and Commercial Sexual Exploitation of Women and Children in co-operation with the Government of the Philippines. The Conference was a regional follow-up to the 1996 Stockholm World Congress.

(3) The Committee on Historical Materials on 'Comfort Women'

The Fund has established a special internal committee on historical materials on the 'comfort women' issue, and commissions researchers to collect such materials within and outside the country and make them available to the public for reference.

There has been strong opposition to the activities of the Asian Women's Fund from some of the support groups for former 'comfort women,' (although it is questionable just how faithfully these groups are conveying the wishes of the victims themselves). The reason given for this dissent is that this is not legal compensation based on an admission of violation of international law by the Japanese Government, but rather the simple fulfilment of moral responsibility. There are those campaigners who have said that 'money from the Asian Women's Fund is violating the 'comfort women' a second time' and who have actually blocked access of victims to the Fund. However, the victims do not have the luxury to wait for the conclusion of the legal battle, the timing of which nobody knows, nor can it be necessarily optimistic that the victims will be vindicated in their battle to win recourse through international law. It can be said that in order for victims to accept atonement, the perpetrator must display consciousness of responsibility and remorse, but is it not a question of dogma to say that this can only be done through legal compensation. Even if legal compensation is to be regarded as having the highest value, it should be understood by those NGOs and other supporters close to the victims that accepting the money or services offered by the Asian Women's Fund in no way contradicts that. On the other hand, it should be noted that the rash remarks of high ranking bureaucrats including the cabinet member, for instance, that 'comfort women' were those who voluntarily prostitution themselves for financial gain, do immeasurable harm to the integrity of the Fund's activities and the Government itself. I hope that the Japanese Government will continue to consider

legislation as a way of bringing this issue to a close, and will make more efforts to meet the victims half way.

NOTE:

Since this paper was completed, there have been four (4) court decisions involving 'comfort women' lawsuit in the Japanese court. They are as follows:

(1) Korean 'comfort women' case (April 1998, Yamaguchi District Court, Shimonoseki Branch) - The Court ordered the state (the Japanese Government) to pay ¥300,000 per plaintiff as compensation on the grounds that it neglected the obligation to cure plaintiffs' sufferings after it conducted investigation in 1993 and accepted the responsibility of the Japanese Imperial Army. Both parties appealed to the High Court. The majority of the Korean 'comfort women' filed their suit in Tokyo District Court which is still pending.

(2) Filipino 'comfort women' case (October 1998, Tokyo District Court) – The Court dismissed the plaintiffs' claim on the grounds that such claim is not justified under the international laws nor domestic laws. The plaintiffs appealed to the High Court.

(3) Dutch 'comfort women' case (October 1999, Tokyo District Court) – The same as the above (2).

(4) Korean-resident 'comfort women' case (October 1999) – The same as the above (2).

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Deliberation of the so-called Comfort Women Issue at the United Nations Sub-commission on Prevention of Discrimination and Protection of Minorities

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I. Introduction

Since around 1991, the issue of the so-called comfort women has been brought up to the attention of the United Nations because of advocacy by certain non-governmental organisations (NGOs)[1] concerned with human rights, particularly to that of the UN Commission on Human Rights and also of its subsidiary bodies, such as the Sub-commission on Prevention of Discrimination and Protection of Minorities (hereinafter called the Sub-commission. And this issue has in fact been deliberated by such bodies. This same edition of *Kokusai Jinken* also contains an article regarding the status of consideration of this issue by the Special Rapporteur on Violence against Women[2], Ms. Radhika Coomaraswamy, in her report to the Commission, by KAWADA Tsukasa, who was at that time Director of the Section for Human Rights and Refugees, International Cooperation Department, Ministry of Foreign Affairs. In this paper I would therefore give a summary concentrating only on the status of deliberations of the issue at the Sub-commission, which I attended as an alternative member and participated in the relevant discussions.

II. Overview of the Status of Deliberations up to 1995 (47th session of the Sub-commission)

[1] NGOs in consultative status with the UN Economic and Social Council (ECSOC) [see YAMASHITA Yasuko, in YOKOTA Yozo (ed.), '*Kokuren Kikô to Kojinto Dantai* ' (Individuals and Organizations and the UN System), in *Kokusai Kikô Ron* (Theory and Practice of International Organizations), (1992) pp.172-173] may attend meetings of the Human Rights Sub-commission as observers. There is a specific time limit (usually 10 minutes, but sometimes shorter) for their comments. Government representatives may also attend meetings as observers. The purpose of comments from these observers is to provide information to assist Sub-commission members in their deliberations. On occasion the media reports comments of observers as if they were official statements at the meetings of the Sub-commission, but formally, only the statements of the Sub-commission members and the resolutions should be considered as official.

[2] 'Violence against Women, its causes and consequences'

In recent years at the Sub-commission, a number of human rights NGOs have been making criticisms against the Japanese Government for its and the former military's involvement in the 'comfort women' cases during the Second World War, under agenda items agenda on violence against women in wartime, compensation for victims of human rights violations, contemporary forms of slavery, and so on. The NGOs have voiced to demand that the Government apologize the victims and compensate appropriately for their terrible physical and/or psychological suffering which still continues to date. At the Sub-commission, Japanese Government's representative attending as an observer, the same status as the NGOs', responded to this with expressions of 'sincere apology and remorse' for the sufferings of the victimized former 'comfort women,' but maintained a position that all matters of legal responsibility were settled by the San Francisco Peace Treaty and other relevant bilateral treaties.

Apart from these brought-up issues and with the explanation of the Government's position, there has never been a consideration of the 'comfort women' issue as a formal agenda for deliberation at the Sub-commission. Among the Sub-commission members there were those who commented off the record that it was questionable why the matters occurred more than 50 years ago, even before the UN was created, should now be discussed in the Sub-commission. However, amongst other members, there were those who expressed an opinion that so long as the victims still continued to suffer today, it would still be necessary to address the issue. Therefore, at the Sub-commission there was a general readiness of its members to listen to comments and views by NGOs and observers from governments, including the Japanese Government, as useful information.

In this context, at the 46th Session of the Sub-commission in 1994, following a series of demands from a group of NGOs for apologies and payment of compensation, the Japanese Government representative made a statement as follows: 'The Japanese Government offers its sincere remorse and apologies for the incurable wounds inflicted upon the former 'comfort women.' Although legal responsibility has already been settled by the San Francisco Peace Treaty and by other relevant treaties, the Government wishes to do whatever it can to address the concerns of the victims from a position of moral responsibility, and we are currently considering the most appropriate way of doing so.' This announcement was noted in particular by the Norwegian member, Mr. Asbjorn Eide, who

commented in essence as follows: 'The statment we have just heard is extremely important. In the world of today where so many violations of human rights occur, any such clear expression and forward-looking move by the responsible government to address this sort of problem would be welcomed, and it will become a model for other governments. The more important point is, however, the substance of what will be done and how quickly the action can be taken. Therefore, we would like to pay attention to what the Japanese Government will do hereafter.'

Subsequently, at the 47th Session of the Sub-commission in 1995, the Special Rapporteur on Violence against Women in Armed Conflict[3], the American member Ms. Linda Chavez, announced that 'having visited the Republic of Korea, the Philippines and Japan, and actually meeting former 'comfort women,' I discovered that all the women are now old and live in difficult circumstances with financial and health problems. Even if we leave the question of legal responsibility aside, is it not possible to get the Japanese Government to take action to address this issue on humanitarian grounds? The payment of $20,000 compensation offered by the American government to each American of Japanese descent who was forcibly incarcerated during W.W.II may be thought of as an example.' Furthermore, the Netherlands Special Rapporteur, Mr. Theo van Boven, in his general examination of compensation issues[4], asserted that legal responsibility was necessary in the case of the 'comfort women.'

In response, the representative of the Japanese Government announced that 'The Japanese Government is making serious efforts to address this problem, and to offer the victims our sincere apologies and remorse, and that in order to express atonement we will establish an 'Asian Women's Fund' and provide it with the administrative costs for work programme to carry out fundraising from among the public, and deliver this money to the former 'comfort women.' He continued to state that the Government decided to assume the Fund's operational costs.

[3] Officially; 'special rapporteur on systematic rape, sexual slavery and slavery-like practices during periods of armed conflict'
[4] 'The right to restitution, compensation and Rehabilitation for victims of gross violations of human rights and fundamental freedoms'

III. Deliberations at the 48th Session of the Sub-commission in 1996

The 48th Session of the Sub-commission was held in Geneva from 5 to 30 August 1996. The 'comfort women' issue was dealt with mostly under agenda item 11 on 'implementation of human rights of women' and also under item 15 on 'contemporary forms of slavery.' In relation to this issue, there were speeches made by representatives of five NGOs, four governments, and of more than ten members (and alternates). Below I would like to introduce a summary of their statements, and to thereby give an overview of how the 'comfort women' issue was deliberated at the Sub-commission.

Firstly, the Liberation, an NGO, criticized the Japanese Government, by saying that the failure to release its documentation of the W.W.II had made it difficult to research into the true facts, and demanded that the Government recognize its acts of violence against the 'comfort women' during the wartime as an international crime, and that it pay compensation to them , based on a legal ground, in line with the proposals of the Special Rapporteur Theo van Boven who was responsible for a study on compensation to victims for the gross violation of their human rights.

The World Council of Churches (WCC) welcomed the Japanese Government for its 'positive response'. However, it subsequently criticized the Government for lack of cooperation for the fact-finding, and for failure to admit its legal responsibility. After pointing out that there still remained a number of other problems yet to be addressed, the WCC expressed its position that what was being sought by the victims was to restore their dignity and not 'charity money' from a 'private fund.'

The International Commission of Jurists (ICJ) welcomed the progress that had been made, but since it did not mean the admission of the legal responsibility, suggested that the Government hold forums to discuss ways and means of resolving the legal aspects of the issue.

The International Reconciliation, another NGO, contended that the establishment of the 'private fund' by the Japanese Government was a way of evading the legal responsibility, and that therefore an overwhelming number of victims were critical of the 'private fund.'

The Government should thus accept the recommendations of the Coomaraswarmy Report, recognize the legal responsibility and pay a legal compensation to the former 'comfort women.'

The representative of IMADR, International Movement against All Forms of Discrimination and Racism, stated that to the 'comfort women' who were the sexual slaves of the former Japanese military, the state of Japan must pay an appropriate compensation for the purpose of fulfiling its legal responsibility, as was set out in the Coomaraswarmy Report. She also stated that since the 'atonement money' from the Asian Women's Fund was only for carrying out a moral responsibility, a number of former 'comfort women' were refusing to receive it, and that the Government should explain to them that accepting this money would not make them difficult to receive the state's legal compensation.

Next came the comments and opinions expressed by representatives of governments. Firstly, the Japanese Government representative orally presented a report on its activities during the past one year after the Asian Women's Fund was established, by saying that over 4 billion yen had been raised, as contribution from over 20,000 citizens in all sectors of the Japanese society, that the project to deliver an 'Atonement Money' of ¥2 million each to the victims had already begun in the Philippines, and that additionally ¥1.2 million to ¥3 million each to a victim will be added as a part of the health and welfare programme funded directly from the Government budget. The representative stated further that, on the occasion of the delivery of the money, a letter of Prime Minister Hashimoto expressing 'sincere apologies and remorse' was also being handed to each victim. Furthermore, it was explained that while the 'Atonement Money' was drawn from the fund donated by the public, the Fund's administrative and operational costs, as well as those for projects and programmes (including medical and welfare, and a variety of support projects for women victims of serious human rights violations) were met by the Government out of its budgetary resources.

The representative of the Government of the Republic of Korea said that, although its Government would not demand a state compensation from Japan, the latter Government should make efforts to reach an appropriate policy solution, which would resolve the issue to satisfy the victims and their various supporting organizations. The representative of the

Government of the Democratic People's Republic of Korea criticized Japan, by stating to the effect that the establishment of a 'private fund,' was an attempt to evade legal responsibility of the Japanese Government, and called for Japan to accept the legal responsibility, apologize, pay a state compensation to the victims, punish the perpetrators, and carry out investigation into the facts.

The representative of the Government of the Philippines simply stated that her Government had taken note of the letter of apology received from Prime Minister Hashimoto, which was extended to the victims at the ceremony to deliver the 'atonement money.'

The Sub-commission is composed of 26 members (and their alternates) who serve as experts in their personal capacity. It is needless to say that these experts are the central actors at the Sub-commission. Governments' and NGOs' representatives may be given an opportunity to speak on issues to their concern, but this is in the capacity as observers and for the purposes of providing relevant information and of expressing views and opinions. Accordingly, in order not to distract from the discussions by the expert members of the Sub-commission, for each agenda item there is a specific time limit for statements by observers (e.g. a maximum of 10 minutes for each NGO). In this sense the voices of the members of the Sub-commission are of most importance if one wishes to understand the state of deliberations at the Sub-commission on a particular issue. I will therefore introduce below the opinions of each of the members of the Sub-commission at its 48th session.

Firstly, in her statement introducing the report of the Working Group on Contemporary Forms of Slavery, its Chairperson-Rapporteur, an Moroccan expert, Ms. Halima Embarek Warzazi, touched on the issue of the 'comfort women' and stated that the establishment of the Asian Women's Fund did not evade any legal responsibility on the part of the Japanese Government, and that the contents of her report dealt with the standpoints of the Government of Japan, those of the Government of the Republic of Korea, as well as the relevant NGOs[5]. In her explanation about a draft resolution related to the agenda on "systematic rape and sexual slavery during periods of armed conflict," Ms. Gay McDougall, the American alternate member, referred briefly to the 'comfort women' issue, and stated

[5]The Report of the Working Group on Contemporary Forms of Slavery: E/CN. 4/Sub-commission. 2/1996/24: 19 July 1996, deals with the 'comfort women' issue for about half a page out of a total of 34 pages.

that she had taken note of the 'useful steps' taken recently in Japan. Mr. Marc Bossuyt, the Belgian member, stated that, whilst the Government of Japan had made positive efforts, the question of legal responsibility still remained, and that the 'private fund' could not be a state response to the issue.

Ms. Claire Palley, the member from the United Kingdom, expressed her appreciation to the Government of Japan for its progress made to date, but pointed out that the problem was in no way resolved. Furthermore she made a number of comments, which could be summarized as follows:

- The letter from Prime Minister Hashimoto was excellent;
- She had thought that the Asian Women's Fund was a façade in order to shirk the Government's legal responsibility, but had revised her opinion;
- Certainly, the money to be handed over to victims was not from the Government's budgetary resource, but the arrangement involving the general public as donors in the creation of the relevant fund had made it possible to educate the people of Japan about the issue, which should be welcomed;
- The stance of the Japanese Government was too legalistic, and NGOs' also tend to be extreme;
- Would it be possible for the Japanese Government to provide funds in a symbolic form to the Asian Women's Fund for rehabilitation of the victims?;
- Those who represented the victims should bear in mind that the victims were now aged, including those who were physically weak or already died, and should therefore arrange to allow the victims to accept the 'atonement money' from the Asian Women's Fund if they were in need of financial support.

Mr. Fan Guoxiang, the Chinese member, welcomed the way in which the Japanese Government had apologized and modestly taken note of criticism, but added that this sort of issue was not all only for the cases of the 'comfort women' but also for other cases related to the conduct of the Japanese military as a whole during W.W.II, and that, within this context, he was concerned about such instances as certain Japanese politicians' anachronimic statements, and also as the visits to the Yasukuni Shrine by Prime Ministers. He continued that it was strange for the Government to impute blame for a crime committed by the state to

the innocent general public.

This author was allowed to make an oral statement to the Sub-commission, as an alternate member in place of Dr. Ribot Hatano, the Japanese member. The gist of my statement was as follows: 'As a Japanese citizen I would like to offer my most sincere apologies for the sufferings of large numbers of Asian women who were treated in an inhumane way as sexual slaves for the Japanese military during W.W.II. While appreciating Mr. Fan's kind words that since the responsibility lay with the state, citizens were not responsible, I as a Japanese citizen felt, a strong sense of responsibility for the crimes committed by Japan in the past. That was the reason why I am determined to serve as the Chair (at that time) of the Advisory Committee of the Asian Women's Fund. The Asian Women's Fund was certainly never a perfect solution to the problem. However, we have to recognize that the Government of Japan had been coping positively with the issue in response to the outcomes of considerations by the Commission on Human Rights and by its Sub-commission. There is a pressing need to take immediate measures to alleviate the pain of sufferings of the victims, who were already elderly, and who were living in a difficult condition because of financial and/or health reasons. Therefore, I believe that the Asian Women's Fund was an attempt that would respond to such an urgent need. Solving the question of legal responsibility would undoubtedly need a considerable length of time, and I did not think that this alone would not be the best way to respond to the urgent needs of the victims. Moreover, the 'atonement money' from the Asian Women's Fund, which was meant to respond to the moral responsibility, did not carry any conditions on the side of the recipients, and could in no way harm any legal claims that certain victims would hereafter pursue against the Japanese Government (such as bringing or continuing lawsuits in the Japanese courts). I think that the current response of the Japanese Government did appear insufficient, but it was worth recognizing as an example of rare cases that had exhibited a constructive cooperation achieved between the United Nations body and a Member State in the field of human rights.

Mr. José Augusto Lingren Alves, the Brazilian member, said that he would welcome what could be achieved by the civil society in place of the Government, if and when the latter fail to achieve.

Mr. Osman El-Hajjé, the Lebanese member, referring to several oral statements of NGOs' representatives dealing with the 'comfort women' issue, stated, in a somewhat abstract expression, that the Sub-commission would need to avoid hearing duplicated or repeated statements.

Ms. Lucy Gwanmesia, the Cameroonian member, commented that 'the beautiful steps taken by the Japanese Government could be a model that should be followed by states in an attempt to relief victims in other cases of human rights violations.'

Mr. El-Hadji Guissé, the Senegalese member, expressed his reverence for the Japanese Government as saying that it took the courageous steps, including that of apology, with regard to human rights violations during the wartime.

Mr. Ioan Maxim from Romania commented that this issue had first been raised when he was serving as the chairperson of the Working Group on Contemporary Forms of Slavery, and that he had watched its developments with care and interest. He also stated that he had recognized a 'major progress', though not sufficient, to resolve the problem, and that, however, he would welcome the positive attitude of the Japanese Government.

In the tying-up of this series of statements, the Chairperson of the Sub-commission, Mr. Eide, said 'The progress made thus far on the 'comfort women' issue should be noted and welcomed as an achievement of constructive cooperation between the United Nations body and the government of a Member State. This was an exceptional statement by a chairperson, who normally would express no personal opinions about the deliberations.

IV. Conclusion

Over recent years, the 'comfort women' issue has been discussed by the Sub-commission under quite a few different agenda items. The role of human rights NGOs in having raised the issue should not be underestimated. Furthermore, we could not ignore the impact of the statements and comments made by Government representatives. Despite the difference in the members' stance and in the way of thinking, there existed a consensus on one point that effective measures should be taken to alleviate as much pain as possible of

the victims as 'comfort women' whose human rights had been seriously violated. The comments of the members of the Sub-commission all included the same constructive content.

If I were allowed to summarize the comments of the leading figures in the Sub-commission, its members, despite some individual differences in opinion or nuance, had in general evaluated the steps taken by the Japanese Government as 'positive.' It was also felt that the Asian Women's Fund was not enough in its capacity to respond to the legal responsibility or to receive governmental resources for effecting the atonement money. However, its activities should be welcomed as 'useful steps' to improve the situation of the victims who are presently elderly.

No doubt that the deliberations by the Sub-commission will be evaluated in various ways[6], but the Mainichi Shimbun newspaper, which had previously been much critical of the Japanese Government's policy on this issue, reported in an article in the morning edition of 23 August 1996: 'The draft resolution, whilst praising the establishment of the Asian Women's Fund and the delivering of funds to victims in the Philippines, requests further action based on the recommendations of the Special Rapporteur,' which coincided with the opinion of this author.

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6 As an example of an evaluation differing in some degree from this author, see Totsuka, 'Nihon ga Shiranai Sensô Sekinin: Kokuren .Senmon Kikan e no Kyôryoku wo Motomeru' ('War Responsibility that Japan doesn't know: Requesting Cooperation with United Nations specialized agencies'), in Hôgaku Seminar, No. 503, November 1996, pp. 26-29, and 'Jyûgun lianfu.Kyôsei Renkô Mondai: Kokuren Jinken Shô linkai no Shingi ('Wartime 'Comfort Women' Forced Labour; Deliberations at the United Nations Human Rights Sub-commission',) in Shûkan Horitsu Shimbun, 18 October 1996. Furthermore, this author has had various opportunities to exchange opinions on this issue with Atty. Totsuka in Geneva, and at one of these meetings he has stated that 'I can accept the Asian Women's Fund, but if it could be postponed a little longer there may be a possibility for legislation, and that the Fund cannot be the answer when such large numbers of victims reject it. Herein lies the major difference of opinion between Atty. Totsuka and this author, who believes that 'There is a pressing need to take immediate measures to ease the sufferings of the victims, who are now elderly, and many of whom live in difficult circumstances, both financial and in terms of their health, and the Asian Women's Fund is one such attempt to do just that. Solving the question of legal responsibility will undoubtedly take a considerable length of time, and I do not think that this is the best way to respond to the urgent needs of the former 'comfort women.' Moreover, receipt of the 'atonement money' from the Asian Women's Fund is meant to address moral responsibility and as such has no conditions attached to it, and will in no way harm any legal claims by the victims against the Japanese Government, (such as bringing or continuing a case in the Japanese courts). The current response of the Japanese Government is insufficient, but it is worthy of praise as an example of what can be achieved through the constructive cooperation on human rights issues by United Nations organs and its member governments.'

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Major Publications

BOOKS:

- International Society and Law - Conditions for Peace and Development, Assoc. for Promotion of Education through University of the Air, 1986 (in Japanese)
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CO-AUTHORED BOOKS:

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Asian Women's Fund

The Asian Women's Fund was established in July 1995 by prominent citizens who were concerned about continued suffering of the former "comfort women", victims by Japanese military during the World War Second, with the support of the Government of Japan. The primary aim of the Fund is to extend atonement and support to those victimized women. The victims have suffered in silence for so long and are now of an advanced age, and it is therefore the Fund's sincere wish to act urgently, in accordance with their needs, to alleviate their pain in whatever small way it can. At the same time, recognizing that prevailing attitudes of discrimination and violence against women is a part of the background to the suffering inflicted on the "comfort women". The second pillar of the work of the Fund is to actively address contemporary issues of violations against the dignity and rights of women.

The Fund's activities include:

- hosting international forums on contemporary issues on women;
- financial support to NGO projects addressing contemporary women's human issues;
- research and analysis into the causes and prevention of violence against women, and other contemporary women's human rights violations, and;
- training and development of new counseling approaches for women victims of violence and human rights violations.

For further information, or a list of publications, please contact the Fund at the address below, or visit its site on the world-wide web.

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