

Subject: Re: Tokyo Tribunal: State responsibility

Date: Mon, 28 Aug 2000 16:25:36 +0800

From: Indai Sajor <ascent@csi.com.ph>

To: koalisip@uninet.net.id, apiknet@centrin.net.id, lbhikt@cbn.net.id,
JZTO7515@nifty.ne.jp, yhworl@tke.att.ne.jp, IZCO3241@niftyserve.or.jp,
lawerjang@hanmail.net, shcho@cc.sungshin.ac.kr, chrkim@pusan.ac.kr,
twr95@msu.hinet.net

CC: tina.dolgopol@finders.edu.au

Dear members of the prosecution team,

I sent this letter to your respective organization focal point, but just to make sure I am resending it again to all of you for your perusal. I know that we are all very busy with our indictments but be reminded of our deadlines as the chief prosecutors wish to have it earlier so they can study it before the meeting. I have also sent this to Pyongyang by fax. Please send them to me at the latest next week.

My warm personal regards, Indai

Dear Indai, I have put together some issues/thoughts on the area of state responsibility. My recollection is that I was to send the document to you for distribution to the various country teams. I have put my email on the document if people want to get in touch with me and noted my impending absence from 21 to 30 August. I am heading to Tasmania to give a workshop on the empowerment of women for peace.

I have attached the document and also put it into the body of this email just in case.

I hope things went well in Colombo.

All the best, Tina

Document re state responsibility:

Dear Colleagues,

I thoroughly enjoyed our interchanges in Manila and look forward to seeing you all again in Taipei. No doubt you have been working long hours to prepare for our next meeting. Prior to our departure from Manila I was asked to provide a brief overview of some of the issues that will form part of our case with respect to state responsibility, that is the responsibility of the government to make restitution and to prosecute war criminals.

You will recall that we agreed to accept the Korean idea that each country's document be labelled indictment and application for other relief. The issues outlined below are to be addressed in the section of the document entitled application.

Below I have set out my understanding of the legal issues we want the judges to address. I am doing this as a basis for our discussions at the Taipei meeting. Please feel free to add, subtract or disagree with what I am putting forward. To make it easier to follow my line of reasoning I have set out the issues in a numbered format. The numbers are of no significance in terms of the importance of the issues. Connected to the legal points are issues of evidence. By and large the evidence that will go to prove criminal responsibility of the individual defendants will also establish many of the aspects of state responsibility. I have noted some matters of evidence that we will have to keep in mind.

1. International criminal law applies to individuals. Thus far the international community has not been willing to accept the idea that a government can be charged with criminal offences. Although the International Law Commission in its Draft Articles on State Responsibility

uses the phrase international crime and lists aggression, colonial domination and serious breaches affecting the safeguarding of the human person and the preservation of the environment as crimes, it does not go so far as to suggest that a government could be charged as a criminal defendant. The Statute for the International Criminal Court makes individuals liable for criminal offences. It does not allow for criminal charges to be brought against governments.

2. The generally accepted view is that a state owes obligations to the international community and that it can commit acts that are wrongful as against the international community. Obligations to the international community include observing treaty obligations, norms of customary law and rules of jus cogens. The commission of such wrongful acts places a responsibility on the state to take acts redressing these violations. Redress can take the form of satisfaction (public pronouncement that an action is wrongful), reparations, compensation and an apology.

3. States are responsible for the acts of its organs or of individuals that can be attributed to the state. Acts carried out in furtherance of government policy will be attributed to the state.

a. The same evidence that we will use to establish criminal liability on the part of high ranking government and military officials will be used to demonstrate that the acts of taking women, maintaining brothels and permitting the rape and sexual slavery of women is attributable to the government of Japan.

b. In those countries where women were held in garrisons, there should be no difficulty in establishing state responsibility as the taking of women was done by military officials. Also the continued holding of the women and their treatment demonstrates that this is not a sudden spontaneous act of criminal behaviour by individuals (soldiers running amok when it appears this is spontaneous normally can not be used to establish state responsibility).

c. The taking of women by small groups of soldiers is more problematic, but I think can also be successfully attributed to the government of Japan. As government policy made it clear that women could be taken and could be treated as sexual slaves, it would have been apparent to those in charge that individual soldiers would believe it their right to take women and hold them. The failure of the government to charge and try soldiers for such conduct indicates an acceptance of this behaviour.

i. If any of the cases to be presented to the Tribunal fall within this last category, then the country and international prosecutors will have to ensure that they connect the behaviour of the soldiers to government policy. It will be important to demonstrate to the court that we are aware of the different legal issues.

3. International law determines which acts are wrongful. A state may not by its own internal law declare acts that are wrongful under international law to be lawful. The prohibition against slavery was a norm of jus cogens prior to WW II. Rape, sexual slavery, murder and torture were all war crimes in the period proceeding the war. We should refer to the Treaty of San Francisco in which Japan accepted the judgement of the Tokyo Tribunal.

4. The concept of state responsibility is not new. Work was undertaken by the League of Nations to elaborate principles of state responsibility. Further the negotiations leading to the Genocide Convention which took place immediately after World War II included discussions about the civil responsibility of states for violations of treaty obligations, as opposed to the criminal responsibility of individuals for committing acts of genocide.

5. We will face the same problem that Japanese lawyers have faced in the cases brought in the courts of Japan with respect to the standing of individuals to bring claims or lawsuits to rectify breaches of international obligations. Most commentators on international law continue to indicate that it is the state of the individual's nationality that has legal standing internationally to complain of the breach and to seek satisfaction, reparations or compensation. I have highlighted the word internationally for a reason. These principles of international law assume that there is a domestic remedy available to individuals and that they will only need recourse to the assistance of their government if there is no effective remedy available to them. Please see point 7a below. It could be argued that for many of the women there was not a state able to protect

their interests. (I realise that this argument needs to be developed further. We want to ensure that we have arguments to support a view that the type of claims being made by the Comfort Women can not be waived nor be subjected to a domestic statute of limitations.)

6. A state can be made responsible for the acts of the judiciary if there has been a failure to enact legislation that would allow the judiciary to give effect to international law, particularly treaty obligations. We will need to provide a summary of the reasoning given by the Japanese courts in their decisions denying the claims of the Comfort Women (and the one case where someone succeeded) in order to demonstrate that there is no effective remedy available within Japan because of the government's failure to bring domestic law into line with international law.

7. Connected to above is the responsibility of the Allies for the failure of the Comfort Women to receive acknowledgment for the crimes committed against them and to obtain any form of satisfaction or restitution. Claims tribunals could have been created. Alternatively Japan could have been asked to set up legislative measures for compensation in the same fashion as Germany.

a. Do we want to note that the issues may have been made more difficult by the transitions to independence. This would have meant the Allies had less incentive to pursue these issues. Also in countries such as Indonesia where there were independence struggles, it would have been difficult for Indonesian officials to focus on negotiations for reparations and compensation. Similarly the conflict on the Korean peninsula would have made it difficult for comprehensive negotiations about these issues to take place.

b. As a number of commentators have pointed to the role of the United States in limiting Japan's liability to pay compensation, we may want to refer to this in our legal arguments with respect to the Allies.

8. There is a second argument with respect to the ongoing nature of Japan's violations. The failure to make redress when called upon to do so by the international community (we need the text of the resolutions adopted by the Commission and Subcommission) is an affront to the international community. This failure to bring the law of Japan into line with international law is in and of itself a breach of its international obligations. The specific impact of this violation is the denial of an effective remedy and the continuation of discrimination against women.

9. The South Korean representatives at our Manila meeting noted that they may want to argue that the governments of Korea, the Philippines, Indonesia, Taiwan and China are also responsible for not pursuing these issues in a meaningful way. Presumably we would want to argue that this failure was an outgrowth of discriminatory attitudes toward women. This also raises the question of whether or not we want to address the various treaties that were concluded with Japan. The Japanese government has raised legal arguments about the comprehensive nature of these reparations treaties in its documents. If we do discuss this issue, I think our arguments should focus on some matters of policy, such as the relative political power of the negotiating parties in the international arena (this would again raise the issue of the role of the US and perhaps other countries), and the status of women which would have made it unlikely that the horrific acts committed against the Comfort women would have been raised by their governments.

10. I have one suggestion to make with respect to our legal arguments. We are holding a People's Tribunal and I think we should be willing to highlight this fact in our arguments. It is true that states have not pursued the rights of the Comfort Women. However we are representative of our peoples. Self determination, the right to development and other international law concepts are connected to the idea that ultimate sovereignty resides in the people. Effectively we would be arguing that we are seeking redress as the Peoples of the region or the world and that our standing to raise these issues is at least the equivalent of a state's ability to do so. I realise this is a novel argument, but we should not see ourselves as shackled by traditional legal arguments. The holding of this Tribunal is a major achievement and we should claim a status for ourselves.

11. A separate aspect of state responsibility is the obligation to bring domestic criminal prosecutions. There is an expectation that governments

will charge those responsible for war crimes, crimes against humanity and more recently genocide.

I will be away from my office from 21 to 30 August. If anyone wishes to email me with questions or comments (tina.dolgopol@flinders.edu.au) please feel free to do so as of 31 August.

Good luck, Tina

Attachment Converted: "c:\Weudora\attach\Notes re state responsibility.doc"

Asian Centre for Women's Human Rights (ASCENT)
Suite 306, MJB Building
220 Tomas Morato, Quezon City
Tel. No.: (632) 926-4386/ (632) 410-1512
Telefax No.: (632) 928-4973
