

Comments on the legal significance of the evidence and its possible legal implications under international law and human rights law

Pyoungkeun Kang
Professor
Korea University School of Law

I. Introduction

The “Remembering the ‘Comfort Women’” as a Teacher's Guide and Source Set (hereinafter referred to as the Guide) is an excellent material in English to show that the 'Comfort Women' system was systematically organized and administered by the Japanese military before and during the World War II.

For the present, the Japanese government asserts that it has not been involved with the administration of the 'Comfort Women' system. It emphatically stressed its position at the international arena where the eighth periodic reports of Japan was reviewed at United Nations Committee on the Elimination of Discrimination against Women in February 2016.

According to the Guide, the Japanese military recruited women in deceitful or sometimes forceful manner, and transported them to the comfort women stations near its military units. The Japanese military used them as comfort women, contrary to the conditions originally suggested at the time of recruitment. The Guide clearly shows that the Japanese government was involved through its military in the establishment, operation, and control of comfort women stations.

In the international community of mainly states, international law is a rule of conduct for states and international organizations. Individuals were regarded as goods or properties up until the inception of the United Nations ("the UN") in 1945. For quite some time only the state has enjoyed rights under international law. Since the middle of the 20th century, the UN and other international organizations are now operating, but the activities of these international organizations are regulated by the member states, so they cannot exercise their rights beyond the extent of powers conferred by the member states. Even in the UN, its principal organs have no choice but to reflect the will of the member states.

International law applies to the relations of the states among themselves. States make treaties which are formed in documents with provisions governing their behaviors, or form customary international law by conducting practices in a certain direction and giving these practices a legal meaning.

The actions of certain states may be explained under international law. In order to grasp the legal implications of conducts of Japan through its military with regard to the comfort women, it is necessary to find evidences for each of those conducts by Japan as to the comfort women. The Guide as a resource material for teachers includes the English translation of various official documents produced by the Japanese military and authorities during the period of Japanese occupation of the Korean peninsula. The Guide is a good record of acts of Japan in the international community before and during the World War II in particular with regard the women from the Korean peninsula with sufficient international legal significance.

There was a time in the international community when states thought they could do anything regardless of the purpose of their actions unless they are prohibited by international law. In other words, since there were not so many rules and regulations of international law in the international community, they thought that any action could be taken unless prohibited by international law that exists in the form of treaty or customary international law.

Since the international community is not a centralized society, there is no authorities to regulate the behavior of states. In this respect, as shown in the Guide, Japan must have thought it could recruit women and transfer them to its various occupied territories, and treat them as sex slaves at comfort women stations for strategic purposes of expanding its territory unless prohibited by international law at that time.

In fact, for quite a long time, it is not uncommon for one state to protest another state's systematic planning and implementation of strategic operations in the name of international law. It was not until the late 19th century and the early 20th century that states began to regulate the way how the states make war. They gathered at the Hague, the Netherlands, in 1899 and in 1907 and promised to settle disputes peacefully, and promised not to harm civilians during the war.

Although the 'comfort women' system was not explicitly prohibited from being attached to the army on the battlefield, operating comfort women stations using civilians in the vicinity of fighting military units was not permitted under international war which regulated wars at that time. However, there were many cases of violating international law of war on the grounds of national interests, and the international community was not able to prevent and punish such activities. Obviously, the military comfort women system was one such example. Japan regarded it as essential national interests to expand its new territory or to

protect the territory obtained through the use of force, and to achieve this purpose, recruiting women or operating comfort women stations was a legitimate exercise of its sovereign power. These actions were heavily condemned by the Nuremburg War Criminal Tribunal, which was established after the World War II.

Under the current international law, they are considered serious breaches of peremptory norms of general international law. In carrying out these activities, Japan insisted that it was for the peace and well-being of the so-called 'Greater East Asia Co-Prosperity Sphere'. The Guide shows how the women suffered as victims of state-centered thinking that the international community did not properly control in the 1930s and 1940s.

II. The significance of the Guide under international human rights law

As mentioned above, in the 1930s and 1940s, when the documents in the Guide were written, the norms of the international law were not clear enough to prohibit the Japanese military from operating comfort women stations. At the time, there were norms that prevented individual workers from being forced to work, but it was not clear whether comfort women's sexual slavery was banned from being carried out as a national strategic or military project. Nevertheless, the general principles of law recognized by the civilized nations were considered to fill the gap of legal lacuna which was enshrined in the provisions of Article 38 of the Statute of the Permanent Court of International Justice.

According to the Guide, the Japanese military conscripted Korean, Chinese, Indonesian, Filipino, Dutch, and even indigenous people of the South Pacific Islands as sex slaves at comfort women stations, but these comfort women victims kept silent about their past for quite some time. Only after the 1990s, the comfort women sex slaves broke their long silence and claimed to be victims, and began to claim Japan's responsibility for those atrocities.

It was the NGOs around the World that listened to the voices of these victims. Responding to these victims' claims, parliaments in some states, and even regional international organizations including the European Union, have adopted resolutions to support the claims of comfort women victims and urge Japan to take necessary steps to redress the victims. Several UN human rights monitoring bodies have commissioned special reporters to make in-depth research on the issue of comfort women system and adopted reports that agree with the position of victims of comfort women. In 2005, the UN General Assembly adopted a resolution of 'Basic Principles and Guidelines on the Right to Remedy and Compensation for Victims of Serious Violations of International Human Rights Law and Serious Violations of

International Human Rights Law'.

For more than 30 years, a number of civic groups have been supporting the victims of comfort women, and based on the records of comfort women victims, requested the Japanese government to provide reparations to those victims. The victims of comfort women were the result of the Japanese invasion on the Korean peninsula, the Sino-Japanese War, and the Pacific War. Other than the comfort women victims, there were civilians who were killed for no reasons, those who were conscripted during the war and were injured but were excluded from aid from the Japanese government because they were not Japanese citizens. There were also those who were mobilized for forced labor during the Pacific war and were forcibly deported to Hiroshima and Nagasaki during the war where they became victims of the atomic bombing, and others who were forcibly deported to the Sakhalin area and were unable to return to their hometowns.

The significance of the Guide is very important because it records the human sufferings of war conducted in the name of national interests. Based on the Guides, a lesson was learned that war should not occur again in the international community, and it can be seen that when a war occurs, it causes too severe suffering for individual civilians. Under the current international human rights law("IHRL"), it is not easy to condemn the wrongdoing states and to make them to provide reparations to the victims.

For example, when Japanese military comfort women victims were residents of the Korean peninsula, Japan claimed that they had been its own nationals under international law at the time. Japanese government insisted that its subjects at that time also acted as comfort women. Japanese government insisted that many women voluntarily worked as prostitutes for soldiers near military units, and that the Japanese military had provided convenience for those women moving to comfort women stations, and that the operation of comfort women stations were not prohibited under international law at that time. Furthermore, the Japanese government argue that the expression of 'sexual slavery' is wrong because the alleged comfort women victims were not related to war. The position of Japan is grounded on the wrong assumption that the Korean peninsula was an integral part of the territory of the Empire of Japan, and the Republic of Korea was a newly created state under the San Francisco Peace Treaty in 1951. The Japanese government claims that the Korean peninsula was in legal sense an integral part of Japanese territory until April 28, 1952, when the San Francisco Peace Treaty of 1951 entered into force.

In particular, with regard to the victims of the comfort women from the Korean

peninsula, Japan insisted that all the claims from them had been resolved completely and finally through the Agreement on the Settlement of Claims and the Economic Cooperation between the Republic of Korea and Japan signed and entered into force in 1965 ("the 1965 Agreement") when the Republic of Korea and Japan normalized their relations. Japan's strong position is that Korean victims of the comfort women of the Japanese military should turn to the Korean government for reparations to their sufferings, and they should not demand recovery from Japan.

After the end of the World War II, the international community deeply reflected on the atrocities that took place during World War II, and established various norms to prevent and punish such acts so that they shall not be repeated again. A number of human rights treaties were adopted under the auspices of the UN. Apart from the UN, human rights courts and tribunals were established in Europe, the Americas, and Africa to protect human rights and take measures to recover damages to human rights victims.

Currently, it is only in Asia that there is no such human rights court. In Asia, states have different opinions about the concept of 'human rights', so they cannot agree to create an international courts or tribunals of human rights that can deal with issues of human rights. According to the provisions of the UN Charter, even the principal organs of the UN are not allowed to intervene into the domestic matters of UN member states. According to Article 55 and Article 56 of the UN Charter, however, UN member states are pledged to protect human rights, and, if a state violates the human rights of its own citizens, human rights victims may initiate individual petition procedures in accordance with the UN human rights treaties. Of course, in order for individuals who are victims of human rights to use these systems, the state that has violated human rights must have agreed to follow the system. In practice, UN organs such as Security Council or Human Rights Council are deeply involved in condemning the actions of UN member states for human rights violations, and, if possible, economic sanctions may be taken at the initiatives of the Security Council under the Chapter 7 of the UN Charter.

III. The Guide and the Reparations for the 'Comfort Women' Victims

Under the current international law, there is no system in which individual victims can directly raise civil claims against a wrongdoing state for serious breaches of peremptory norms of international law. Of course, it can be made if the states are willing, but there are few states that want to stand as defendants in the legal proceedings where individual victims claim damages for human rights violations. The victims have no choice but to rely on diplomatic negotiations of their home

states. At present, it is not easy to find a state to espouse the claims of the victims. Even the victim's home state tries not to exercise its right of diplomatic protection against the perpetrator in consideration of diplomatic relations with the latter. This is also the case in Europe, the Americas, and Africa where the human rights courts or tribunals have been established.

In the end, the victims would use the existing domestic court systems to vindicate their claims, but there are very few cases where the victim's claims have been accepted. Over the past few decades, victims of 'comfort women' have filed lawsuits in various courts in Japan, without success. As a last resort, the victims of 'comfort women' initiated legal proceedings against Japan in the courts of the Republic of Korea.

On January 8, 2021, a division of the first instance of the Seoul Central District Court accepted the claims of the 12 individual victims of the Japanese military 'Comfort Women', denying for the first time the state immunity to Japan. On April 22, 2021, another division of the first instance of the Seoul Central District Court rejected those claims of the 20 victims of the Japanese military 'Comfort Women', where the same issues of sovereign immunity were involved, but the conclusion was the opposite.

In February 2012, the International Court of Justice ("the ICJ") decided that Italy violated the customary rules on state immunity when the courts in Italy refused state immunity for Germany in civil actions raised by the victims of forced labor during the World War II. The ICJ rejected the submission by Italy that the sovereign immunity should be denied in case of serious violations of human rights, opining that, according to the established state practice, states have not exercised jurisdiction over foreign sovereign states.

As to the assertion that the sovereign immunity should be denied for activities that violate the peremptory norms of international law developed after the World War II, the ICJ decided that the violation of jus cogens norms is a matter of substantive law and the rules of state immunity is one of procedural law, and that those two concepts do not conflict with each other. According to the ICJ, just because Germany has admitted that it has violated the peremptory norms of general international law, it does not mean that Germany cannot enjoy sovereign immunity before Italian courts.

It may be a daunting task to avoid the judgements of the ICJ because it is considered the most authoritative judicial organ in explaining the current international law. It is the position of the ICJ that the development of international

law reflects the needs of the international community. Although the ICJ stated that rules on state immunity were established, this judgment could change in the future.

One of the ways to change it may be that sovereign states should agree to the exception of the state immunity for the serious breaches of jus cogens. However, this idea may be impracticable because it is very difficult for more than 200 states in the international community to agree with the exception where the state immunity should be denied for the serious breaches of jus cogens norms.

Another way to change the attitudes of the ICJ as to the denial of state immunity for the serious breach of jus cogens is to continue accumulating the state practice of denial of sovereign immunity for serious breaches of jus cogens. Court rulings to this effect can now be found in Italy and Greece. The courts of the Republic of Korea could also help accumulate state practices in this matter.

IV. Japanese military 'comfort women' in comparison to the Holocaust victims

The Guide is meaningful in that members of the international community should 'remember' the suffering of the comfort women victims, and to educate future generations so that the same mistakes are not repeated in the future. The future of mankind is desperate when states performing important activities in the international community do not 'remember' the suffering of these victims.

The Holocaust is remembered as one of the serious violations of human rights where more than 6 million Jews in Europe were severely affected during the World War II. The Holocaust committed by the Nazi Party of Germany was not only for its own people, but also in the regions occupied by Germany during the World War II. The genocide of Jews during the World War II led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 after the inception of the UN. The genocide of a national, ethnical, racial or religious group is now defined and punished by current international law as an international crime. Germany has acknowledged such human rights violations and has taken various measures to compensate victims, but, in the 2012 judgement, ICJ did not find whether Germany is legally obligated to compensate victims subject to forced labor during the World War II.

Until now, Japan has not acknowledged the existence of legal obligations towards the victims of Japanese military comfort women system. The Japanese government has denied the accusations that Japanese military was deeply involved in the recruitment and transfer of comfort women and the operation of comfort women

stations. Japan avoids the redress of comfort women victims because it does not acknowledge legal responsibility for those victims.

The comfort women issue was very serious in Korea-Japan relations. As a result of several diplomatic negotiations between the Republic of Korea and Japan for the victims of comfort women, there was a joint statement by the Korean and Japanese foreign ministers on December 28, 2015. Apparently, the two states seem to have agreed to acknowledge and remedy the victims of comfort women. In a report submitted to the UN monitoring body of human rights in January 2016, Japan alleged that there was no evidence showing that any Japanese state organ was involved in the matters of 'comfort women'. This allegation violates the object and purpose of the joint statement of the Minister of Foreign Affairs of Republic of Korea and Japan on December 28, 2015. It is Japan's position that it had never invaded the Korean peninsula, and the Japanese Empire's domination over the Korean peninsula was not occupation, but was the administration of the Korean peninsula that was annexed to Japan in 1910.

It is the same that Germany and Japan, the defeated states of World War II, denied legal responsibility for victims of the Holocaust and other atrocities in connection with the conduct of war, and victims of Japanese military comfort women, respectively. What is different, unlike Japan, Germany does not deny the fact of the Holocaust itself and other atrocities in clear violation of international law, and makes a lot of efforts to redress victims at the national level, but Japan denies the comfort women system itself and denies that the Japanese military was involved in it.

V. Concluding Remarks

Under the current international law, victims whose human rights have been seriously violated cannot directly claim against the perpetrating state, so the victim has no choice but to rely on the diplomatic protection of the victim's home state or the goodwill of the perpetrator. The important question is whether the international community will ignore the demands of these victims or whether it will create an appropriate system for redressing them. Although it is difficult for states to find a way of redressing the victims in the statist international community, it is them who should listen to the voices of the victims and provide appropriate remedies for them.

Still, a number of women are being victimized in armed conflicts at home and abroad. Human trafficking for satisfying demands of members of organized and armed groups are taking place in Central Asia, Middle East, Africa, as well as in

South Asia. Therefore, it is necessary to establish and enforce international law to protect women victims of armed conflict and to provide remedies for them.

Either the UN, or states interested in the protection of human rights for women in the event of armed conflicts, should lead to the conclusion of multilateral treaties or to develop state practices necessary for developing general international law. Of course, the Republic of Korea should actively participate in this work. Just as the Genocide Convention was adopted in a very short time due to the Holocaust during World War II, all efforts should be made to prevent and punish various atrocities against women in the context of armed conflicts, and to prepare a remedial system to provide reparation to these victims.

Since the practice of each member of the current international community is very important to the development of general international law or customary international law, it is very important for adjudicatory bodies to make a decision that reflects the voices of the victims of comfort women or women victims in the context of armed conflicts. The rulings made by judges who are heavily influenced under the statist vision of international community must offer a solution in the form of state-centered bilateral diplomacy. It has been 10 years since the Constitutional Court of the Republic of Korea encouraged in 2011 the Korean government to actively exercise its right of diplomatic protection in relation to the reparation for victims of comfort women. There have been various efforts in the meantime, but the recent judgment on April 22, 2021 of the Central District Court in Seoul, South Korea, rejected the claims of the victims of Japanese military comfort women for the reasons of state immunity.

In this ruling like other judgements made in the domestic courts of Japan where the women victims were treated as others, the social and legal discourses over the past 30 years have been excluded. The judges reflected the mind-set of the statist approach prevailing in the current international legal order. Therefore, we must not neglect our efforts to inform would-be lawyers of the reality of the victims of comfort women before and during the World War II.

Under the international law, the state plays a major role in developing and implementing international law. International organizations including the UN have to rely on what states have agreed on. Whether international law is in the form of treaties or customary law, individuals or civil societies cannot play a leading role in forming international law as much as the states. In the end, civil societies have to move states and international governmental organizations that are leading the development of international law and make them to take measures to redress victims of the Japanese military comfort women.

In this regard, the Guide will be able to provide correct information to high school students and teachers in California, USA who will be leading the future generations in the United States. Even if there is no way to remedy the victims of Japanese military comfort women right now, and even if they cannot achieve what they want in their lives due to their old age and to the reluctance of the perpetrating state, the task of finding records on Japanese comfort women and compiling them in digital format for spreading correct informations easily accessible and available for those young generations and the general public. It is our responsibility to remember 'the grandmas' through these activities and to prevent similar illegal activities from occurring in the name of national interests or corporate interests.