

# CIVIL SOCIETY AND THE SEARCH FOR JUSTICE: the Tokyo women's tribunal

*What can international civil society do to further justice for victims and survivors of war crimes and crimes against humanity in cases where perpetrators will never be brought to trial? Is it time to look beyond official state and international organs? Initiatives from civil society can return dignity to survivors, empower ordinary people, educate the public and create lasting records where official justice has been denied.*

Tina Dolgopoi

Those working on the issue of sexual slavery committed by the Japanese military during the second world war have long been stunned by the failure of the international community to bring to trial those responsible for creating and implementing the 'comfort women' system. International norms – both treaty and customary law<sup>1</sup> – concerning war crimes, crimes against humanity, slavery and the trafficking in women and children were applicable, and could have been used to charge relevant military and government officials. For many of the women it has been a source of enduring pain and frustration that no criminal sanctions were ever imposed for the violations of their rights.

As it became increasingly obvious that the government of Japan would neither accept responsibility to fully and frankly disclose the involvement of military and government officials, nor apologise and offer reparations to the women, members of civil society decided to find a mechanism that would offer the women 'justice'. The groups working with the women were aware that more-than-strictly-legal justice was necessary. Although not articulated in these terms, implicit in their work is the recognition that justice is multifaceted – including the restoration of dignity and public acknowledgement of the harm inflicted.

## Organising from the grassroots

The Women's International War Crimes Tribunal for the Trial of Japanese Military Sexual Slavery (hereafter the Tokyo Women's Tribunal), held in Tokyo 8-10 December 2000, was the result of the combined hard work of NGOs, surviving 'comfort women' and committed individuals. Its main organizers – the Korean Council for Women Drafted into Military Sexual Slavery, the Asian Centre for Women's Human Rights (ASCENT), and the Violence Against Women in War Network (VAWW-NET Japan) – contacted individuals and groups throughout the Asia-Pacific region to ensure the widest possible representation. Teams of researchers from China, Indonesia, Japan, North Korea, South Korea, Taiwan and the Philippines worked tirelessly over a two-year period to gather

the evidence to be placed before the tribunal.

The need for an overarching legal framework was recognised early on. Two chief prosecutors, neither of them from a victimized country, were appointed. Four judges, individuals recognised internationally for their integrity and commitment to human rights and who had the requisite legal expertise, were selected to hear the evidence. During the preparations for the tribunal, the country teams and the chief prosecutors decided to rely on law that was in force in 1946. This was done to emphasise that the crimes could have been tried during the proceedings of the International Military Tribunal for the Far East.<sup>2</sup>

More than 75 survivors were present at the proceedings. Although some took to the witness stand to give evidence, many of the personal testimonies were recorded on video so the women would not have to recount the horrific details of their experiences before an audience of some 1,500 people. The women whose testimonies were videotaped were present at the tribunal; they swore an oath affirming the truth of their statements. The tribunal also took evidence from a number of expert witnesses on the organisation of the Japanese military; documents concerning the comfort system found in government archives; the structure of the wartime government including powers exercised by the emperor; the incidence and effect of trauma on victims of mass rape; and the applicable rules of international law applying at the close of the second world war. The national prosecution teams and the two chief prosecutors introduced several hundred pages of documentary evidence; two former Japanese soldiers agreed to tell of their involvement in, and experiences of, the 'comfort women system'.

## Learning from the judgement

The Tokyo Women's Tribunal made a significant contribution to the development of international law. It resulted in the compilation of a vast body of historical material and culminated in a judgement of over 200 pages that offers an excellent analysis of the development of international humanitarian law over the past 50 years.



In addition to setting out in vivid detail the devastating effects that confinement within the 'comfort system' had on women throughout the Asia-Pacific region, the judgement contains an overview of the development of the concept of crimes against humanity and the pre-Nuremberg and Tokyo precedents for considering rape as such a crime. It also analyses the handling of sex crimes by both the Nuremberg and Tokyo Tribunals. Furthermore, the judgement adopts and develops the concept of sexual slavery in accordance with the ideas emerging from the International Criminal Tribunal for the Former Yugoslavia (ICTY), in order to demonstrate that the definition given to the term 'slavery' within the *Elements of Crimes* annex in the statute of the International Criminal Court (ICC) is overly narrow.

Essentially, the ICC's *Elements of Crimes* focuses on the use of the person in a commercial exchange whereas the ICTY's judgement in *Kunarac* focuses on the status or condition of the person being enslaved. This distinction is crucial to victims. For them, the essence of being enslaved is the loss of control over their bodies. Slavery is an affront to human dignity precisely because it denies a person one of the essential elements of personhood: autonomy. To focus on the gain of the perpetrator is to overlook the very nature of the crime. It is to be hoped that the prosecutors and judges of the International Criminal Court will exercise due discretion when applying this particular article, and will look to general principles of international law when considering acts that fall within sexual slavery.

The Tokyo Women's Tribunal judgement may also prove useful for those wishing to influence the work of the Victim's Trust Fund set up under the Rome Statute. The latter draws from monies the International Criminal Court has ordered offenders to pay as well as voluntary donations; payments can be made directly to victims or to recognised organisations such as those administering humanitarian aid. In the past, reparations were based on the assumption that those affected by crimes – survivors and the families of victims – had suffered a specific harm rather than one with ongoing, long-term consequences. The Tokyo Women's Tribunal judgement has highlighted the necessity of con-

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sidering survivors' long-term needs, and may encourage the ICC Victim's Trust Fund to think carefully and creatively about the types of services that need to be supported and nurtured. It also may persuade the Fund to assist research partnerships between NGOs and academics focusing on the efficacy of particular services and the manner in which the long-term needs of survivors can be addressed.

### A broader justice

The efforts of international civil society in organising and bringing the Tokyo Women's Tribunal to fruition challenges the adequacy of the international community's response to the needs and rights of victims and survivors following mass atrocities. The tribunal poses a heretofore unasked but important question: what should the international community do to acknowledge the suffering of victims and survivors of war crimes and crimes against humanity in cases where the perpetrators will never be brought to trial? The inevitable limi-

tation of resources will mean that not all crimes within the jurisdiction of the International Criminal Court will in fact be brought to trial. Many countries lack the resources to conduct either trials or truth commissions.

The evidence placed before the tribunal demonstrated that the years of silence that surrounded the issue of the 'comfort system' left the women affected by that system wondering about their value as human beings. They had to live with the physical and psychological damage, while knowing that no one had ever been held accountable for what had happened to them. Whatever dignity has now been restored cannot take away from the years of shame, fear and regret that they have had to endure alone.

We cannot assume that the 'comfort women' will be the last group of survivors to feel this way. This leads to two fundamental questions. What obligation does the international community have

to those without access to mechanisms that will provide them with 'justice'? And, if we continue to do nothing, are we complicit in the continuing harm that will be experienced by the survivors? Perhaps it is time to look beyond official state and international organs for means of achieving justice, particularly in the documentation of events and the acknowledgement of victims and survivors. It may be that the significance of the Tokyo Women's Tribunal will be the message it sends to others that something can be done by ordinary people to encourage the healing of victims and to create lasting historical records of previously overlooked history. Having the entire set of documents placed before the tribunal digitized will allow scholars and other interested individuals to study, not only the comfort women system, but the birth and work of an international movement to further women's rights.

'Justice means constant revision of justice, expectation of a better justice.'<sup>3</sup> Through the efforts of civil society,

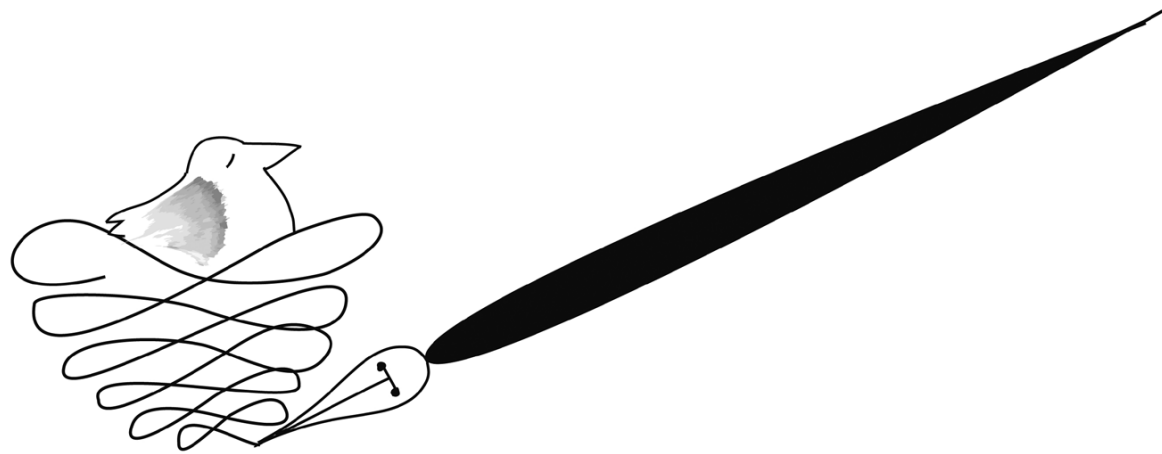
surviving comfort women have been accorded a form of justice. They have been empowered by their participation in the tribunal, and this in turn has enabled them to regain a sense of their dignity and worth. Civil society has ensured that the experiences of victims and survivors will not be forgotten; our understanding of the experiences of

women during armed conflict has been enriched by their courage in coming forward to tell their stories. <

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## Notes

1. Treaties bind those countries that have ratified them. Customary norms are formed when states act out of a belief that they are required to undertake a particular course of action by their international legal obligations. Treaty and customary law obligations can co-exist. For further information see *The International Court of Justice* (ICJ The Hague 2004).
2. See Judgement of the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery delivered in The Hague, December 2001, paragraphs 81-83. A copy of the judgement can be obtained from the website of the Violence Against Women in War Network - Japan website: [www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/judgement.html](http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/judgement.html)
3. Emmanuel Levinas as quoted in Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing 2000) pp.352-353.



nity, order and harmony were more important. Individual rights should thus be sacrificed to serve wider community interests and national economic development. Such statements, and the fact that until two years ago only five out of ten ASEAN member states had ratified both Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR), led observers to doubt the seriousness of Southeast Asian governments' commitment to human rights in any form.

While the argument of 'Asian values' has been misused by political leaders to serve political interests, it remains plausible that Asian governments have different priorities from western ones – on individual versus community rights, and civil versus social rights. This is born out by the ratification pattern of human rights treaties by European and Asian states. The former favour agreements that apply to individuals based on the Universal Declaration on Human Rights and both Covenants; many Asian states, on the other hand, show a priority for first protecting vulnerable groups such as women and children. All ASEAN member states, with the exception of Brunei Darussalam, are party to the UN Convention for Women (CEDAW) and the UN Convention on the Rights of the Child (CRC).

### Recent developments

Southeast Asia over the past five-six years has witnessed a deepening transition towards democratic practices and respect for citizens' rights. Leaders today are less inclined to invoke cultural relativism when discussing issues around human rights and their implementation. In the wake of the 1997-98 financial crisis, Malaysia, Thailand and Indonesia (re-)established national human rights commissions. In 2005 and 2006, Indonesia ratified both Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, while Thailand signed the two Protocols of the Rights of the Child.<sup>1</sup>

Civil society in Southeast Asia is active in promoting human rights. The Asian Commission on Human Rights, which drafted the 'Asian Human Rights Charter – a Peoples' Charter' in the 1990s, is one important initiative. Forum-Asia, a network of Asian human rights organisations that promotes, protects, educates and monitors all categories of human rights, is another. Also of note is the Asia-Europe Peoples' Forum, which takes place within the ASEM context. This platform for over 400 Asian and European NGOs is campaigning for inclusion in the ASEM Dialogue, where it wants to see discussion of democratisation. The existence of these groups points to a cautious but discernible trend towards more open discussion of

state affairs by NGOs, academics and business communities.

The greater institutionalisation of regional co-operation will likely further the protection of human rights in Southeast Asia. An 'Eminent Persons Group' is currently drafting recommendations for a legally binding ASEAN Charter. The Charter – which will endorse democratic institutions, human rights, transparency and good governance<sup>2</sup> – has yet to be finalised, but it could be a significant step towards the regional human rights treaty that ASEAN member states have been working on for some time.<sup>3</sup> An analogy is the inter-American system of human rights protection, where the Charter of the Organisation of American States became the basis for the American Convention on Human Rights of 1969.

### Future challenges

Human rights remain controversial in relations between Europe and Southeast Asia; fundamental differences of opinion remain on implementing 'universal' human rights within specific national contexts. How to deal with human rights violating states such as Myanmar remains a challenge for Southeast Asian governments. Should Myanmar's military government remain included in the system of regional co-operation, or should it be more openly criticised? Although ASEAN states still officially

maintain that the situation in Myanmar is an internal matter, under the surface there is growing impatience and more direct criticism; some argue that Myanmar has become a threat to regional stability.

The road ahead will be gradual and delicate. European partners need to acknowledge recent developments in Southeast Asia, and to encourage them rather than trying to speed things up through criticism and pressure. Europe needs to realize that its particular practice of democracy cannot be transplanted root and branch to Southeast Asia. The European states are now more homogenous in political stability and economic development than their Southeast Asian counterparts; the large

and politically empowered middle class in Europe did not emerge overnight.

Improvement in the protection of human rights in Southeast Asia will result from dynamics within the region itself, which will lead to a more sustainable and effective result than when lectured to by foreign (former colonial) powers. Respecting the Southeast Asian states and their way of dealing with issues is the right thing to do – without trying to control everything, the way we are used to. <

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[www.dissette.com](http://www.dissette.com)

## Notes

1. Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, 10 April 2006. [www.ohchr.org/english/bodies/docs/RatificationStatus.pdf](http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf)
2. Kuala Lumpur Declaration on the Establishment of the ASEAN Charter. Kuala Lumpur, 12 December 2005, paragraph 4.
3. Conclusions and Recommendations of the Workshop for the Establishment of an ASEAN Human Rights Mechanism: Kuala Lumpur, 20-22 June 1997.