

**Mandates of the Working Group on the issue of discrimination against women in law and in practice; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence**

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Excellency,

We have the honour to address you in our capacities as Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, pursuant to Human Rights Council resolutions 23/7, 25/2, 25/13, and 27/3.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the agreement reached between your Excellency's Government and the Government of Japan on 28 December 2015 on the issues related to the so-called "comfort women"**.

According to the information received:

On 28 December 2015, the Governments of Japan and of the RoK officially announced that they reached an agreement on issues related to the so-called "comfort women" during bilateral Foreign Ministers meetings that were held in Seoul, RoK. "Comfort women" is an expression commonly used in reference to women and girls who were subjected to sexual slavery prior and during the World War II, especially by the Japanese imperial military.

According to the non-official translation of the document, the agreement reached between the Governments of Japan and of the RoK includes the following:

- (i) The Prime Minister of Japan recognized the Japanese military authorities' involvement in "the issue of comfort women" and that "the Government of Japan is painfully aware of responsibilities from this perspective";
- (ii) The Prime Minister of Japan apologized and expressed remorse to all the women and girls who underwent "immeasurable and painful experiences" and suffered "incurable physical and psychological wounds" as "comfort women";
- (iii) The provision of a one-time contribution of one billion yen (equivalent of 8,3 million US dollars) to a fund to carry out joint Japanese and Korean projects, including a foundation to be established by the RoK, with the aim to recover "the honour, dignity and healing of psychological wounds of all former comfort women."
- (iv) Both governments agreed that the issue is resolved "finally and irreversibly".
- (v) The Governments of Japan and of the RoK made a commitment to refrain from accusing or criticizing each other regarding the issue of "comfort women" in the international community, including at the United Nations.
- (vi) The Government of the RoK agreed to strive to address the issue of a statue located in front of the Japanese Embassy in Seoul, representing a symbol of "comfort women", "in an appropriate manner through taking measures such as consulting with related organizations about possible ways of addressing the issue."

On 28 December 2015, a telephone call between the Prime Minister of Japan, Mr. Shinzo Abe, and Ms. Park Geun-hye, President of the RoK took place. Reportedly during this phone call the Prime Minister acknowledged the Japanese imperial military authorities' involvement in the practice of the "comfort women". It is also reported that the Prime Minister said that he is "painfully aware of [the] responsibilities" of the Japanese Government. The Prime Minister reportedly expressed "anew his most sincere apologies and remorse to all the women who underwent immeasurable and painful experiences and suffered incurable physical and psychological wounds as comfort women".

It is reported that neither the Government of Japan nor the Government of the RoK held consultations with the forty-six women survivors from the RoK or the organizations supporting their cause in preparations of this agreement.

It is further reported that the South Korean Government subsequently sent a letter to the forty-six women survivors in order to inform them about the above-mentioned agreement. The letter reportedly reads that "the Government of Japan recognized the historical fact of the Japanese military involvement for the first

time” and that the Japanese Government expressed its “responsibility” as well as its apologies and remorse to South Korean victims and citizens. It also mentioned that a foundation funded by Japan will be established to support victims.

While a political agreement between the Governments of Japan and of the RoK is of critical importance to initiate a process that aims at addressing violations of victims’ rights, such agreement must comply with international human rights norms and standards and uphold the rights of the women and girls victims of sexual slavery to the truth, to justice, to reparation and the guarantees of non-recurrence of these crimes. In this regard, below you will find our preliminary observations on the main elements of what is known about the agreement. These are offered in the spirit of a constructive dialogue with your Excellency’s Government which we will be happy to further pursue.

### **Apology and acknowledgment of responsibility**

We acknowledge the important statement provided by the Prime Minister of Japan who recognized the Japanese imperial military authorities’ involvement in the practice of the “comfort women” and who expressed he was “painfully aware of responsibilities” of the Japanese Government. We also acknowledge the important statement of the Prime Minister of Japan who apologized and expressed remorse to all the women and girls who underwent “immeasurable and painful experiences” and suffered “incurable physical and psychological wound” as “comfort women”.

While acknowledging the importance of this statement, we would like to recall that almost without fail, one of the first demands of women victims is to obtain recognition of the fact that they have been harmed and that their rights have been violated, to receive an unequivocal apology from the Japanese Government and to have the right to effective remedies for such violations.

Like all other transitional justice measures, apologies have significantly more reconciliatory power when they are part of a comprehensive policy than as stand-alone, isolated initiatives; the links between the apologies and other measures help deflect the charge that they are ‘cheap’ in the sense that they are nothing more than words. The importance of linking apologies to other redress measures is a point which will be addressed below. Similarly, as other transitional justice measures, it is easy to get apologies wrong.

Although the conditions of success of an apology can be quite complicated, and in most cases include the performance of, precisely, the other measures with which an apology is linked when conceived as a part of a comprehensive transitional justice policy, the essential elements of an apology can be stated quite simply: they are an acknowledgment of responsibility plus an expression of regret.

Even though the essential elements of an apology can be stated easily, it does not mean that they are easily satisfied, either singly, or even less, jointly. While apologies are

also contextually sensitive and their success depends on their ability to bridge sensitivities between issuers and recipients effectively –not an easy task when significant cultural differences between the parties exist, it is still possible to state some general presumptions: the more addressees perceive reluctance on the part of issuer to move from an admission of generic to specifiable wrongs, the more difficult it will be for addressees to see the apology as legitimate. The women victims, who are the main addressees of the apology, suffered bodily harm. Thus, the unwillingness of issuer to speak about what was inflicted on the victims will, under most circumstances, seem to them as unjustified reticence borne out of squeamishness, or, more likely, out of a desire to ‘get off easily.’

By the same token, the more addressees have reasons to suspect that the expression of regret is nothing more than a generic ‘this should not have happened,’ or an expression of solidarity, the more they will doubt the legitimacy of the apology.

Finally, the fact that these conditions need to be satisfied jointly is not irrelevant: the issuer of an apology is called to acknowledge responsibility for perpetrating specifiable harms, and to express regret (not mere solidarity) for *its* role in perpetration of *these harms*. In short, apologies ultimately involve much more than saying ‘bad things happened, they should not have happened,’ even if coupled with an admission that the fact that these bad things happened made some people suffer. How much more than this needs to be spelled out in a text depends largely on circumstances, but in all cases, it is largely up to issuer to satisfy the legitimate expectations of victims.

If the preceding are considerations about the semantics of apologies, in the domain of human rights violations, “[it] is important but not sufficient to acknowledge the victims’ suffering and their capacity to endure ... It is ... fundamental to acknowledge that the victims have been wronged, which is possible only by appealing to norms. What is indispensable, and what transitional justice measures seek to accomplish, is to recognize that the victim is the holder of rights. This entails not only the right to seek for avenues of redress that can assuage suffering but also to restore the victim’s rights that were so brutally violated and affirm her standing as someone who is entitled to make claims, on the basis of rights, and not simply as a matter of empathy, or any other type of consideration” (A/HRC/21/46; para. 29).

The report of the telephone call which took place on 28 December 2015 between the Prime Minister of Japan and the President of the RoK contains some significant elements, particularly against the backdrop of the long back-and-forth between the two nations over this issue, especially, some recent concerns about what was taken to be manifestations of an inclination to deny responsibility. There is no question that there is a lot in the statements made about the agreement that seems to suggest some progress compared to where the discussion was just recently. There are however, some areas of concern.

In particular, we would like to recall that surviving women victims of the “comfort women” system have claimed for decades an official and unequivocal apology

and the recognition of the full responsibility of the then Japanese Government, in particular the imperial military, in the commission of gross human rights violations. Their claims are legitimate. Surviving women victims of crimes of sexual slavery hold the right to receive an official acknowledgement that goes beyond the statement of the Prime Minister of Japan; a statement that reveals a genuine admission of past wrongdoing, that would recognise the women victims as right-holders whose rights were brutally violated by the State institutions and that international norms and standards apply granting them the right to truth, to justice, to reparation and providing guarantees that such violations will not be repeated.

The most significant interlocution for an apology of the sort at issue here is not a private conversation between political leaders. It is rather a public offer to victims, mainly a conversation *with them*. Acts of apology then usually rest on antecedent willingness to listen to the claims of those that have been aggrieved.

In addition, the above-mentioned agreement, that is bilateral by nature, only seems to address the Japanese or South Korean women victims. An official apology should also include an express acknowledgment of the violations committed under the system of “comfort women” against women and girls from other countries.

### **Recognition calls for participation**

Since one of the main points of apologies, as of other measures to deal with the past is to offer recognition to victims, and since recognition is not something that can simply be foisted on people, we are concerned that an issue of this sort can be considered as “resolved finally and irreversibly”, as the agreement puts it. The terms of recognition offered by the apology have to be acceptable to those they are trying to recognize, meaning the surviving victims.

We recall the critical importance of the meaningful participation of women victims and their representatives in relation to transitional justice measures, such as reparation, truth seeking, memorialization, justice, among others, that directly affect their rights as victims and right-holders. We would like to stress that victims’ participation can help improve the reach and completeness of these initiatives, enhance their comprehensiveness, better determine the types of violations that need to be redressed, improve the fit between benefits and expectations and, in general, secure the meaningfulness of symbolic and material benefits alike.

Therefore, we are seriously concerned by the allegations that indicate that in the preparation of the above-mentioned agreement, the surviving women victims or the organisations that represent them had not been consulted, informed or heard. The lack of consultation would certainly undermine the effectiveness of any effort made in relation to this issue. As long as the women victims remain unheard, their expectations will remain unsatisfied, the claims unattended and wounds wide open.

## **Trust and the Affirmation of Norms**

The other relevant goal that transitional justice measures pursue is to restore trust in situations in which basic norms have been massively and systematically breached. Transitional justice measures can be trust-inducing precisely because they are means for the affirmation of norms. Thus, the aim of re-establishing trust, both guides and constraints the ways in which this goal can be achieved: one cannot regain trust by adopting means that undermine trustworthiness. Similarly, this goal constrains other goals that may be pursued at the same time, through the same means. Thus, an apology that is offered as an expedient way of achieving other goals opens itself up for questions about its sincerity and legitimacy. The instrumental use of an apology is unlikely to produce trust. The report of the conversation between the Prime Minister and the President appears to be more concerned with the settlement of a legal dispute than with the recognition and the affirmation of binding norms.

In most cases in which an apology is offered there is an underlying interest in the continuation or the reestablishment of a relationship, but not of any kind or by whatever means. The underlying interest is in the continuation of a relationship based on trust. However, this means that the apology (and the other measures that go along with it) in order to demonstrate, through action, that the apology is not mere words, cannot be taken as an expedient measure for ‘turning the page’ and quickly moving on, as if the events that give origin to the apology had not happened or were of small consequence. Rather, the apology, and the other measures that should go along with it, in order to redress past violations (ideally, justice, truth, reparations, and guarantees of non-recurrence, regarding which there are independent legal obligations) are meant to signal that the party that issues the apology deserves now to be trusted precisely because of the willingness to countenance and assume ownership and responsibility for the past wrongs.

In this respect, the request from the Government of Japan and the willingness of the Government of the RoK to remove a memorial statue built in front of Japan’s embassy in Seoul and commemorating not only the historical issue and legacy of the “comfort women” but also symbolizing the survivors’ long search for justice, raises serious concerns. It contrasts with efforts to preserve sites of memory all over the world, to memorialize in diverse ways those events that give rise to a ‘duty to remember’ which can be framed as an obligation to remember everything that cannot be expected to forget. The lack of interest in the on-going recognition which is suggested by the insistence by the Government of Japan to remove the statue also contrasts with the inclusion of a fund to conduct research and educational projects, including curricular programs in the law adopted by the United States establishing the reparations program for the internment of Japanese American citizens during World War II, and with the efforts of countries like Germany and others, some of them through the establishment of truth commissions which have made concerted efforts to engage in public and on-going reflection about difficult pasts.

Furthermore, we would like to stress the importance and the potential that education has as a powerful tool for non-recurrence of serious violations. In particular, the teaching of history is of significant relevance. It has the potential to train citizens in habits of analysis and critical reasoning. Historical facts should not be manipulated to serve political and ideological aims through the propagation of one-sided narratives and textbooks should not be used to silence the truth about past events.

### **Adequate reparation**

We acknowledge the significance of the pledge of Japan to provide a one-time contribution of one billion yen (8,3 million \$) to a fund to carry out joint Japanese and South Korean projects, including a foundation established by the RoK, with the aim to recover “the honour, dignity and healing of psychological wounds of all former comfort women”. We wish to recall that collective reparations can complement individual reparations but cannot be considered as substitutes for individual reparations, including in the context of conflict-related sexual violence. For the past decades, survivors have constantly asked the Japanese Government for an individual compensation through public funds rather than a welfare- or benevolence-type of assistance based on socio-economic needs. This economic compensation cannot be acceptable without an unequivocal apology and official recognition of State responsibility in the system of “comfort women”.

Finally, we would like to express serious concern at the distress in which this agreement had left the surviving victims of the system of so-called “comfort women”, in particular, by considering this agreement as the “final and irreversible” resolution of the issue. We are also concerned that both Governments have agreed to refrain from discussing about a human rights violation at the international level, including at the United Nations. We urge both Governments to take all necessary measures to ensure that any measure taken to address the violations committed by the State in relation to the so-called “comfort women” comply with international human rights norms and standards. Considering the very advanced age of the few surviving victims, who are dwindling in numbers, these measures are a matter of urgency.

Considering the particular nature of these violations, including forms of sexual slavery and gender-based violence, impunity and lack of measure aiming at granting access to justice, truth and adequate reparation, fails the obligation of the State to act with due diligence to prevent, investigate and punish all forms of discrimination and violence against women and girls.

In connection with the above, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

In order to clarify the abovementioned aspects of the agreement between your Excellency's Government and the Government of Japan and its consequences, we would be grateful if you could address the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information regarding the legal status of the agreement made between the RoK and Japan and how this agreement will be enforced in law and in practice.
3. Please provide detailed information on the actions that will be taken to ensure that the measures taken to address the human rights violations committed by the State in relation to the so-called "comfort women" comply with international human rights norms and standards, as indicated in the present communication.
4. Please provide detailed information on the measures taken to ensure the meaningful participation of the women victims and the associations representing them in the preparation, drafting and adoption of the above-mentioned agreement.
5. Please provide information about when and how the South Korean Government intends to establish the foundation mentioned in the agreement. Please also provide detailed information about the creation of future projects aimed at "recovering the honour and dignity and healing the psychological wounds of all former comfort women", in light of international human rights standards.
6. Please provide information on how the South Korean Government intends to address the issue of the statue located in front of the Japanese Embassy in Seoul.
7. Please provide any information on steps to be taken to address the concerns mentioned in the present communication.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

It is our intention to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the implications of this agreement. The press release will indicate that we have been in contact with your Excellency's Government to clarify the issue/s in question.

We would like to inform your Excellency's Government that we have addressed a communication with similar content to the Government of Japan.



Please accept, Excellency, the assurances of our highest consideration.

Eleonora Zielinska  
Chairperson-Rapporteur of the Working Group on the issue of discrimination against  
women in law and in practice

David Kaye  
Special Rapporteur on the promotion and protection of the right to freedom of opinion  
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Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-  
recurrence

## **Annex**

### **Reference to international human rights law**

In connection with the above allegations and concerns, we would like to refer your Excellency's Government to article 8 of the Universal Declaration of Human Rights, article 2 paragraph 3 of the International Covenant on Civil and Political Rights, articles 1, 14 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, as well as article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court to which your Excellency's Government is a party. These legal provisions all provide for a right to a remedy for victims of serious human rights violations, including gender-related violence and sexual violence. Indeed, we would like to highlight that sexual violence, including sexual slavery, has been recognized as a crime against humanity (article 7), a war crime (article 8) and a serious violation of international human rights law under the Rome Statute of the International Criminal Court.

In relation to the right to truth, we wish to recall that the right to truth should be understood as directly connected to the right to access information, as established by the right to freedom of opinion and expression, under article 19 of the ICCPR. The right to truth has also commonly been related to the right of victims and their relatives to demand investigations and information as a first step in achieving justice. As international jurisprudence has evolved, it has become evident that the right to truth has also a clear, collective dimension. There is a shared interest in the clarification of human rights violations and in the dissemination of information on the context in which they occurred, especially so as to re-establish trust in State institutions and to ensure non-repetition of the violations. The realization of the right to truth, at both the individual and the collective levels, requires access to and, often, also the dissemination of information on human rights violations, as indicated by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/68/362). Please also refer to the reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (A/HRC/24/42 and A/HRC/21/46).

In this context, we would like to highlight General Recommendation 30 from the Committee on the Elimination of Discrimination against Women (CEDAW Committee), which states that States parties have obligations under the CEDAW to prevent, investigate and punish trafficking and sexual and gender-based violence, reinforced by international criminal law, pursuant to which enslavement in the course of trafficking in women and girls, rape, sexual slavery, as well as enforced prostitution may constitute a war crime, a crime against humanity or an act of torture, or constitute an act of genocide (paragraph 23). In paragraph 19 of General Recommendation, the Committee states that in all crisis situations, including in non-international or international armed conflict, as

well as foreign occupation, women's rights are guaranteed by an international law regime that consists of complementary protections under the Convention and international humanitarian, refugee and criminal law. Paragraph 21 also recalls that under international humanitarian law, women under occupation are entitled to general protections as well as protection against rape, forced prostitution or any other form of indecent assault. The Committee also reiterated that States parties' obligations require them to ensure women's right to a remedy, which encompasses the right to adequate and effective reparations for violations of their rights under the Convention, and mentioned that assessing the gender dimension of the harm suffered is essential to ensure that women are provided with adequate, effective and prompt reparations for violations suffered during conflict, regardless of whether remedies are ordered by national or international courts or by administrative reparation programmes (paragraph 79). In light of the recommendations made by the CEDAW Committee in its General Recommendation 30, we would like to recall that the participation and consultation of women victims of conflict-related sexual violence should be ensured in the design, implementation, monitoring of transitional justice mechanisms so as to guarantee that their experience of the conflict is included, their particular needs and priorities are met and all violations suffered are addressed. States parties should as well ensure women's participation in the design of all reparation programmes (paragraph 81 (e)).

We would like to further refer to the CEDAW Committee's General Recommendation 33 on access to justice, which specifies that State parties have to ensure that the non-judicial remedies, such as public apologies, public memorials and guarantees of non-repetition granted by truth, justice and reconciliation commissions are not used as substitutes for investigations into and prosecutions of perpetrators, reject amnesties for gender-based human rights violations such as sexual violence against women and reject statutory limitation for prosecution of such human rights violations (paragraph 19 (f)).

We would like to further recall that the CEDAW Committee considers that "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men" as stated in its General Recommendation n°19 on violence against women.

The UN Security Council called on Member States in its Resolution 2122 (2013) to comply with their relevant obligations to end to impunity and to thoroughly investigate and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law (paragraph 12).

We wish also to refer your Excellency's Government to the Guidance Note of the Secretary General on Reparations for Conflict-Related Sexual Violence (2014), which mentions that the right to remedy and reparation of all victims, including those of conflict-related sexual violence, should be fulfilled without discrimination on the basis of sex. The Guidance Note highlights key principles for States to provide adequate reparations for victims of conflict-related sexual violence, including that "individual and collective reparations should complement and reinforce each other" (principle 3) and a

“meaningful participation and consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparations should be ensured” (principle 6).

Furthermore, we would like to highlight that under the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, States have the international obligation to investigate human rights violations as well as to take action against those allegedly responsible in accordance to international legal standards.

We would like to refer your Excellency’s Government to the report of Special Rapporteur on violence against women, its causes and consequences on “reparations for women subjected to violence” (A/HRC/14/22), in which she referred to the issue of the so-called “comfort women” and stressed that “ survivors have come forward to.....asking for an official apology and reparation. Survivors have rejected financial aid gestures as inadequate and reiterated their desire for a formal apology and individual compensation through public funds rather than a welfare- or benevolence-type of assistance based on socio-economic needs. As victims of sexual crimes, they do not want to receive economic compensation without an official apology and official recognition of State responsibility” and noted that “women-centered processes of reparations require participation of women in the process of shaping, implementing, monitoring and evaluating reparations programmes; design of a reparations procedure that renders it accessible to all women and girls”. She also recommended that “reparations for women cannot be just about returning them to the situation in which they were found before the individual instance of violence, but instead should strive to have a transformative potential. This implies that reparations should aspire, to the extent possible, to subvert instead of reinforce pre-existing patterns of crosscutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities that may be at the root cause of the violence that women experience before, during and after the conflict. Complex schemes of reparations, such as those that provide a variety of types of benefits, can better address the needs of female beneficiaries in terms of transformative potential, both on a practical material level and in terms of their self-confidence and esteem. Measures of symbolic recognition can also be crucial. They can simultaneously address both the recognition of victims and the dismantling of patriarchal understandings that give meaning to the violations.” (paras. 32, 71& 85)