Disabled Colonial Veterans of the Imperial Japanese Forces and the Right to Receive Social Welfare Benefits from Japan

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To cope with the manpower shortage caused by the expansion of the war, known as the 'China Incident' (1931–1945) and eventually (from 1941) expanding into the 'Pacific War', Japan resorted to the recruitment of millions of Korean, Chinese, and Southeast Asian labourers, and, eventually, of soldiers and civilian auxiliaries[1] from its colonies Korea and Taiwan as well as from occupied Indonesia.

1. In the Service of the Imperial Forces

The manpower shortage in Japan, resulting from the war, was alleviated by Koreans not only in the labour market, but also in the armed forces. At first proceeding cautiously, Japan adopted a policy of voluntary enlistment into the armed services. In 1938 a small number (406 persons) were inducted under the Special Volunteer Enlistment System. To increase the number of recruits, quotas were allocated to prefectures, counties etc, down to the smallest hamlet, leading to the often forcible recruitment of Korean society's weakest elements, such as small tenants.[2]

A. Colonial Soldiers and Military Auxiliaries

Because of the insufficient results of this voluntary system, from 1941 onwards, recruitment was based on the 'National Requisition Ordinance'.[3]

In a next step, a draft system was announced in May 1942, and from late 1943 onwards Korean students were mobilised.[4] Eventually, the conscription system[5] was applied in Korea, with the first draft in April 1944 totalling 130,000 youths.[6]

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1 *Gunzoku.* The term comprised basically all persons employed by the military, other than soldiers, such as civil officials (*bunkan*), minor employees (*koin*), employees (*yônin*). The latter ones often were also referred to as military porters (*gunpu*) or workers (*kôin*). Kim SG, *'Taiheiyô gisei-sha izoku-kai kiiwaado'* (Keywords: Association of Victims of the Pacific War), in: Utsumi A (ed), *Sengo hoshô* (Wartime Compensation) (1994) at 72–75.

2 Tanaka H, *'Zainichi Kankoku Chôsen-jin no moto gunzoku'* (Former Korean Military Auxiliaries in Japan) in Sengo hoshô mondai renraku iin-kai (ed), *Chôsen shokumin-chi shihai to sengo hoshô* (Colonial Rule in Korea and Wartime Compensation) (1992) at 42–48.

3 *Kokumin chôyô-rei.*

4 Out of a total of 2,830 students, 2,034 were sent to the frontlines in January 1944. Students could only be recruited as volunteers, but again, only an insufficient number turned up. Thus, the Korean Governor-General declared that those who did not volunteer, were to be regarded as 'unpatriotic persons' (*hi-kokumin*), and sent to labour in mines. Takagi K, *'Gunjin gunzoku to kyôsei renkô'* (Soldiers, Military Auxiliaries, and Deportation) in Sengo hoshô mondai renraku iin-kai (ed), *Chôsen shokumin-chi shihai to sengo hoshô* (Colonial Rule in Korea and Wartime Compensation) (1992) at 21–26.

5 *chôhei-sei.*

6 Takagi, above n4 at 25; Lee C S, *Japan and Korea: The Political Dimension* (1985) at 13.

With the outbreak of the Pacific war, Taiwanese too were mobilised as soldiers and civilian auxiliaries, in 'South Dispatch Agricultural Patriotic Troops',[7] the 'Formosa Patriotic Groups'[8] and other units, as interpreters, prison camp guards and the like.[9]

From April 1942, the Army Special Volunteer System,[10] was enforced for Taiwan, from August 1943 the Navy Special Volunteer System,[11] and from September 1944 the conscription system.

The colonial soldiers were sent to the front-lines together with their Japanese comrades, often, though, in the first line. Auxiliaries in large numbers (32,249 as of September 1941) were sent by the Navy to the South Pacific for construction work, by the Army to China, were employed as transport unit members, or were sent to Japan and Manchuria.[12]

According to the Health and Welfare Ministry, a total of 207,183 Taiwanese (80,433 soldiers and 126,750 civilian auxiliaries) had served in the Imperial Japanese Forces, out of whom 30,306 (14.6 per cent) died. 209,279 Korean soldiers and 154,907 civilians had served in the Japanese military. 22,182 (9.2 per cent) did not survive the war.[13]

B. POW Guards

In May 1942, the Japanese Army Ministry passed the 'Outline on the Treatment of Prisoners-of-war',[14] upon which Korean and Taiwanese military personnel were

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7 *Nanpô haken nôgyô giyû-dan.*

8 *Takasago giyû-dan*; the Takasago are an ethnic minority group on Taiwan.

9 Yamamoto K, '*Taiwan-jin moto heishi hoka*' (Former Taiwanese Soldiers) in Utsumi A (ed), *Sengo hoshô* (Wartime Compensation) (1994) at 130–133.

10 *Rikugun tokubetsu shiganhei seido.*

11 *Kaigun tokubetsu shiganhei seido.*

12 Nihon Bengoshi Rengo-kai, *Nihon no sengo hoshô* (Japan's Wartime Compensation) (1994) at 72–73 gives details: between April 1941 and the end of the war, 154,907 Koreans were employed as *gunzoku*. According to material submitted to the 86th Imperial Diet, in September 1941, 32,249 Korean *gunzoku* were sent by the Navy to the South Pacific for construction work. 3,233 were sent by the Army to North China, and 1,320 were employed as transport unit members. Others were sent to Japan and Manchuria. Of these, 7,300 had died as of 1944. Between 1942 and 1944, 31,783 had been requisitioned based upon the *Kokumin chôyô-rei* and taken to Navy facilities within Japan proper and in the South Pacific. 3,323 worked as guards in PoW camps. For other figures see Lee, n6 at 19.

13 Figures vary according to different sources. For other numbers see eg, Utsumi A, '*Chôsen-jin BCkyû senpan*' (Korean Class BC War Criminals) in Sengo hoshô mondai renraku iin-kai (ed), *Chôsen shokumin-chi shihai to sengo hoshô* (Colonial Rule in Korea and Wartime Compensation) (1992) at 34–40; Yamamoto K, '*Kankoku Chôsen-jin BCkyû senpan*' (Korean Class BC War Criminals) in Utsumi A (ed), *Sengo hoshô* (Wartime Compensation) (1994) at 52–59, Kashiwaguma O, '*Taiwan senbotsu-sha izoku chôi-kin shikyû-hô seitei*' (Enactment of the Law Concerning the Implementation of Payments of Special Consolation Money etc) in (1987) 898 *Jurisuto* at 76–80; Hong SJ, 'Korean Forced Laborers' in The Executive Committee International Public Hearing (ed), *War Victimization and Japan* (1993) at 98–109; Tanaka, n2 at 44; Matsui S, '*Taiheiyô sensô gisei-sha izoku-kai*' (Association of Victims of the Pacific War) in Utsumi A (ed), *Sengo hoshô* (Wartime Compensation) (1994) at 28–29.

14 *Furyo shori yôryô.*

to be employed as guards in prisoner-of-war camps, partly due to a chronic labour shortage, partly for propaganda purposes.[15] By force and deceit, within a month, 3,223 Koreans were recruited, and in August sent to camps throughout the Asia-Pacific region.[16] Being the ones in daily close contact with the prisoners, and knowing nothing but the brutal discipline of the Japanese military, they became the object of the prisoners' hate and spite.[17]

Usually the camps were commanded by a Japanese officer and several subordinates, and 100 or more gunzoku were employed as guards or drivers, clerks or interpreters. Defeated Japan was well aware of the crimes that had been committed. On 20 August 1945, the following urgent telegram was thus sent by the head of the Tokyo POW camp:

> Personnel who have ill-treated POWs and internees or who are very much hated by them should at once be transferred elsewhere, or steps taken to conceal their whereabouts. Moreover, documents which it would not do to have fall into enemy hands should at all costs be destroyed after use.[18]

This message apparently was not forwarded to the Korean and Taiwanese guards.

After the war, 'BC' war criminals were tried and punished before military war crimes tribunals, held in 49 locations throughout what had been the Japanese 'Great East Asia Co-Prosperity Sphere'.[19] 'BC' meant that conventional war crimes such as murder of civilians, rape, maltreatment of prisoners, forcing prisoners to work under excessive conditions etc, had been committed.[20] In practice, these trials concerned mainly two categories of war crimes: atrocities by

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15 In late April 1942, Army Minister Tôjô Hideki announced: 'We will act so as to create in the peoples of East Asia, who have for many years been resigned to being no match for the white race, a feeling of trust towards Japan.' Utsumi A, 'Prisoners of War in the Pacific War: Japan's Policy', in: McCormack G & Nelson H, *The Burma-Thailand Railway: Memory and History* (1993) at 68–84.

16 The Korean civilian auxiliaries were given two months training resembling that given to Japanese army recruits. It was a spiritual education based on the Imperial Rescript to Soldiers and Sailors and the Combatants' Code. According to testimonies, not only did they receive no education on the Geneva Convention; they had never even heard of it. Utsumi A, *Chôsenjin BC-kyû senpan no kiroku* (Records of Korean Class B and C War Criminals) (1982).

17 Imamura T, '*Kankoku Chôsen-jin BCkyû senpan*' (Korean Class BC War Criminals) in Utsumi A (ed), *Sengo hoshô* (Wartime Compensation) (1994) at 52–59; Daws G, *Prisoners of the Japanese: PoWs of World War II in the Pacific* (1994) at 104, 214 cites the testimony of former American PoWs, who were aware of the position of the Koreans as the doormats of the Japanese. However, there are also testimonies that some of the Koreans were among the most brutal guards.

18 Utsumi, n15 at 77; *Kyokutô gunji saiban sokkiroku* (Shorthand Records of the Military Tribunal for the Far East) no.148; for a different translation see eg, Lord Russell of Liverpool, *The Knights of Bushido* (1958) at 84.

19 The US held five tribunals, Great Britain 11, the Netherlands 12, France one, Australia nine, the Chinese National Government ten and the Philippines one.

20 Unlike in Nuremberg, those who had been found guilty by the tribunals were not further distinguished into B and C.

the notorious Kempeitai (military police or secret service), and ill-treatment of the POWs. More than one-quarter of all guilty verdicts resulted from offences against prisoners.

The trials were focused on the lowest ranks of the Japanese system, particularly the Korean guards, thus increasing ground-level responsibility as actual power in the Japanese hierarchy diminished. The planners, politicians, engineers and officers almost entirely escaped responsibility.[21]

In vain did the Korean guards defend their actions with the argument that in the Japanese Army non-compliance with an order was unthinkable and severely punished – even with death – under the Army Penal Code. This defence was rejected by the military tribunals both in Nuremberg and Tokyo.[22]

In total, over 25,000 war crimes suspects had been arrested. 5,700 were found guilty, and 984 sentenced to death. 3,419 were sentenced to prison terms of various duration, 1,018 for life. The number of convicted included 148 Koreans and 173 Taiwanese. In the case of Koreans, 3 out of the 148 were soldiers, and 16 out of the remaining 145 had worked as interpreters on the Chinese mainland. The other 129 had been employed as prison camp guards. They were accused and tried for abuse of prisoners. 23 Koreans and 26 Taiwanese were sentenced to death.[23]

Prior to the coming into effect of the Peace Treaty with Japan on 28 April 1952, all Japanese war criminals who had been sentenced to prison terms by the various Allied tribunals, were sent to Sugamo prison in Tokyo, at the time under Allied control. Class A war criminals were kept here as well as BC criminals who were sent from all over Asia. With the coming into effect of the San Francisco Peace Treaty, Sugamo Prison and its 927 inmates – among them 29 Koreans – came

21 McCormack G, 'Apportioning the Blame: Australian trials for Railway Crimes' in McCormack G & Nelson H (eds), *The Burma-Thailand Railway: Memory and History* (1993) at 85–119 cites Awaya K, *Tôkyô saiban-ron* (On the Tokyo Trials) (1989) at 291. Another fact that is of interest in this context is a decree by Army Minister Shitamura of September 1945 (*Furyo toriatsukai kankei rengo-gun-soku kyûmon ni taisuru ôtô yôryo-tô ni kansuru kentatsu*), which stated in relation to torture of Allied PoWs that it should be explained that the guards had not been Japanese, but poorly qualified and trained Koreans and Taiwanese. Yamamoto, n13 at 57.

22 Article 57 chapter 4 of the war-time Japanese Army Penal Code (*Rikugun Keihô*, October 1908) dealt with 'Crimes of Disobedience', chapter 5 with 'Crimes of Riotous Intimidation' and chapter 6 with 'Crimes of Insult'. Utsumi Aiko's ('The Korean Guards on the Burma-Thailand Railway' in McCormack G & Nelson H (eds), *The Burma-Thailand Railway: Memory and History* (1993) at 127–139) additional defense that 'the Korean guards, who shared their lives with [the PoWs] ... were most saddened by the many deaths of prisoners ... But [having been] at the very lowest level of the army, they had no authority', seems a far-fetched attempt to exonerate the guards. The PoWs 'mistakenly' directed their hatred against the guards instead of the ones responsible: the emperor, the government. And there may have been beatings and torture, Utsumi concedes, but the Koreans did not know any better. Moreover, a *binta* (a brutal slap in the face) by a guard instead of a report to officers may have been an act of kindness. Her argument that the Allies were wrong to treat the Koreans and Taiwanese as Japanese, disregarding the issue of Japanese control of its colonies during the trials, cannot convince either, since they had been tried for individual acts committed, and not for being Japanese.

under Japanese administration. They soon got limited permission to go out, and by 1956 all class A criminals had been released; the last BC criminals, however, stayed imprisoned until May 1958.[24]

In June 1952, 29 Korean and one Taiwanese Sugamo inmates filed suit with the Tokyo District Court. Based on the Habeas Corpus Act[25] and Art.11 of the San Francisco Peace Treaty, they sought their release on the grounds of having lost their Japanese nationality. Their action was dismissed by the Japanese Supreme Court on 26 April 1954,[26] which argued that they had been Japanese nationals at the time of sentencing, and as such served their sentences until the enforcement of the Peace Treaty. According to Article 11 of the Peace Treaty, the Japanese Government had the duty to execute the sentences, and this duty was not influenced by loss or change of nationality after the enforcement of the Peace Treaty. In short that meant that the loss of Japanese nationality did not exert any influence on the execution of punishment, but was a decisive condition for the payment of wartime compensation. For when the Koreans and Taiwanese were eventually released and demanded the same compensation and assistance as was granted to Japanese war criminals, the Japanese Government rejected their application on the grounds that the Family Register Law[27] could not be applied to them. But neither could they return to their native countries, where they were despised as Japanese collaborators, while in Japan they were discriminated against as Koreans and as criminals.

Japanese and colonial war criminals were treated unequally in yet another way: almost all of the Korean and Taiwanese BC war criminals who had served their

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23 One should bear in mind that only 28 persons – all Japanese – were found guilty of class A war crimes, ie, conventional war crimes, crimes against peace, and crimes against humanity, and only 7 of them were executed. It is further noteworthy that only three out of a total of 116,294 Korean soldiers were convicted of war crimes. The overproportional share of Korean guards in the trials is further demonstrated in the following table:

Burma-Thailand Railway – related war crimes trials for offences against PoWs, Singapore (Koreans)

	Guilty	*Death Sentences*
Total number of trials	111 (33)	32 (9)
British and Australian trials only	64 (28)	16 (9)

For the construction of the railway connecting Kanchanaburi in Thailand and Thanbuzayat in Burma, a vital supply line for Japan's planned offensive against British-held India, about 65,000 Allied PoWs and an estimated 300,000 Southeast Asian labourers (so-called *rômusha*) were employed. When the 415 km long railway was completed on 16 October 1943, about 13,000 prisoners and an unknown number of *rômusha* – presumably in the tens of thousands – had perished. For details see – out of the vast literature on the subject – eg, McCormack G & Nelson H (eds), *The Burma-Thailand Railway: Memory and History* (1993); Waterford V, *Prisoners of the Japanese in World War II* (1994) at 236 with extensive bibliography.

24 For example, Yamamoto, n13 at 58.

25 *Jinshin hogo-hô*, Law No. 199/1948.

26 Minshû 8–4–848.

27 *Kosekihô*, Law No. 224/1947.

sentences in Sugamo prison, had been discharged only on probation and had to report regularly to the Japanese police; this was not the case with Japanese war criminals.[28]

While still in prison, the Koreans and Taiwanese had continued to negotiate with the Japanese Government. But after their release they found themselves without housing, employment, or money. Probation rules prevented them from leaving Japan. The Korean parolees organised themselves in the 'Association of Korean War Criminals'.[29] In 1955, temporary housing was provided, albeit insufficient for all of the persons affected. The following year, the Koreans specified their demands, which now included ¥5 million for each of the bereaved families of executed Korean BC war criminals, and ¥500 per day for each ex-convict. In 1957 the Government paid ¥50,000 to each of them as assistance to their livelihood, and the following year another ¥100,000 as 'condolence money'. Life, however, was still extremely hard for the former Korean guards, who had difficulties finding employment.[30]

As to compensation, then Prime Minister Hatoyama promised in April 1958 to 'handle the issue with good-will'. In March 1963, a draft was presented to the chief cabinet secretary, 'comprising the issue of remains, compensation and future support'. Nothing came of this.

After the conclusion of the Japan-Korea treaty package in June 1965, the Japanese Government took the view that all compensation-related issues had been completely and finally settled. The Association continued to demand compensation. By 1977, they asked for ¥50 million for each of the families of the executed, and ¥5,000 per day for each formerly imprisoned guard. In March 1991, the 'Association for the Support of Korean BC Class War Criminals who had been made Scapegoats for Japan's War-time Responsibility'[31] was founded, supporting the 'Association of Korean War Criminals'.

On 12 November 1991, seven Korean BC war criminals or their surviving families filed suit against the Japanese State with the Tokyo District Court, demanding state compensation. They argued that it contradicts 'reason' (jôri) that so far no compensation measures had been taken despite the fact they the Korean guards had to shoulder Japan's responsibility for the war, although they had done nothing but obey their superiors' orders.[32] The Tokyo District Court on 9 September 1996 rejected the plaintiffs' demands. The court ruled that the enormous war-related physical and financial suffering caused to Japanese

28 Imamura, n17 at 52–53; Yoshikawa A, *'Nihon-koku kenpô kara mita sengo hoshô mondai'* (The Problem of Wartime Compensation, as seen from a Constitutional Point of View) in Sengo hoshô kokusai fooramu jikkô iin-kai (ed), *Sengo hoshô jitsugen no tame ni* (For the Realisation of Wartime Compensation) (1994) at 96–103.

29 *Kankoku shusshin senpan-sha dôshin-kai*, 1983 renamed *Dôshinkai*; today their members include thirty former war criminals and twenty family. Yamamoto, n13 at 59.

30 In November 1960, the Association received financial support by private Japanese citizens and founded the *'Dôshin kôtsu'* Taxi company. Yamamoto, n13 at 52, 53.

31 Nihon no sensô sekinin o katagawari saserareta Kankoku Chôsen-jin BC-kyû senpan o saserareu kai.

citizens – including foreigners under Japanese occupation – was 'damage that citizens must endure equally' in case of emergencies such as war, and that compensation for such damage 'is not at all expected' under the current Constitution. All other demands were equally turned down, since, the ruling said, their admission would merely mean 'the court's expression of opinions' and it would be 'not proper and necessary for a direct and drastic solution of the dispute.' Nevertheless, the court thought it desirable to implement some kind of relief measures for the foreign veterans who worked for the Imperial Japanese Army 'based on international human rights agreements and from a humanitarian perspective.'[33]

2. *Social Welfare Benefits and Compensation*

Until the end of World War II, servicemen and officials, who were wounded or fell ill during the performance of their duties and who thus became disabled or died, received disability pensions under the 'Public Officials Pension Law'.[34] Bereaved families of fallen soldiers or auxiliaries received pensions or assistance under the 'Employees Assistance Ordinance'[35] or the 'Officials Assistance Ordinance'.[36] After the end of the war, all payments of pensions, assistance etc, to servicemen, quasi-servicemen, civilian auxiliaries and surviving families were discontinued by Supreme Commander of the Allied Powers (SCAP) – Decree No.68,[37] except for payments to seriously disabled veterans. SCAP regarded as undesirable the preservation of a system which favoured servicemen over general war victims. With the enactment of the 'Law Concerning a Partial Reform of the Public Officials Pension Law',[38] all servicemen, quasi-servicemen and auxiliaries lost their entitlement to pensions. Simultaneously the 'Soldiers Assistance Law'[39] and

32 They furthermore pointed out that their two-year period of contract as prison camp guards as well as the contract terms had not been observed by the Japanese state and thus demanded compensation for damages resulting from non-fulfilment of obligations as well as a written apology from the Japanese Government for the failure to compensate and for the violation of the plaintiffs' honour. Also, they sought the court to acknowledge the unlawfulness of the Japanese Government's negligence of enacting compensation legislation.

33 As to the postwar compensation legislation, the court stated: 'It cannot be denied that [these laws] have been enacted based on a humanitarian standpoint and the spirit of state compensation, but on the other hand, there also are problems related to the welfare policy of the state to which the objects belong.' And, the court explained, there can be no claims based on *jôri*. It was also ruled that all claims of Koreans had been completely and finally settled in the 1965 agreement, concluding that: 'There are reasonable grounds that the wartime compensation laws in nationality clauses exclude Koreans.' Regarding the demanded apology: 'There is no evidence that [the plaintiffs] had been innocent of the facts for which they had been tried, and that they had been punished by the state.' See for example Japan Times 10 September 1996 at 2; Asahi Shinbun 9 September 1996 (Evening edition) at 13.

34 *Onkyû-hô*, Law No.48/1923.

35 *Yônin fujo-rei*; Decree No.382/1918.

36 *Kôin fujo-rei*; Decree No.109/1928.

37 Onkyû-hô no tokurei ni kansuru ken.

38 *Onkyû-hô no ichibu o kaisei suru hôritsu*; Law No.31/1946.

39 *Gunji fujo-hô*; Law No.20/1937.

the 'Law Concerning the Safeguard Against Wartime Calamities'[40] were abolished. Furthermore, in 1951 the 'Employees Assistance Ordinance' and the 'Officials Assistance Ordinance' were repealed by the 'State Officials Accident Compensation Law'.[41] Previous recipients of assistance or compensation under the special laws now had to turn to general social welfare, based on the 'National Assistance Law'.[42]

The above measures, taken by the Allied Occupation Authorities as one step along the road to democratisation and demilitarisation, were repealed as soon as Japan regained sovereignty with the enforcement of the San Francisco Peace Treaty. On 30 April 1952, the 'Law Concerning the Assistance for War-Disabled and War-Bereaved Families etc'[43] was proclaimed, and on 1 August 1953 the 'Soldiers' Pension Law'[44] was revived. Thereafter, fourteen additional laws for the support of and assistance to former Japanese servicemen and bereaved families were enacted. The aim of these laws is stated in Article 1 of the Assistance Law:

> Based on the spirit of state compensation, this law aims at the assistance of persons, who as former servicemen or civilian auxiliaries etc, were wounded, fell ill or died while performing their duties, or of their families.

Entitled to claims based on this law are, according to Art. 2, servicemen, civilian personnel and quasi-personnel as well as 'all persons who stood in a special relation with the state, persons not yet repatriated and repatriates who had lost their foreign capital etc.' In short, persons who outside Japan proper in some form had contributed to Japan's war efforts.

In the course of time the laws have been revised repeatedly and the scope of application expanded.[45] However, except for the legislation regarding assistance for victims of the atomic bombs, all of these laws comprise provisions excluding from their application persons who do not have Japanese nationality or to whom the Japanese Family Register Law[46] does not apply. As a consequence, soldiers or auxiliaries who in the execution of their duty were injured or even killed, but had lost their Japanese nationality before 31 March 1952, cannot receive payments.

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40 *Senji saigai hogo-hô*; Law No.71/1942. Between the enactment of this law in 1942 and May 1946, 17.63 million Japanese civilians who had suffered damages from air raids, received compensation totalling ¥920 million. Tanaka H, *'Nihon wa sensô sekinin ni dô taishite kita ka'* (What are Japan's Views on War-time Responsibility?) (1994) 501 Sekai at 122–132.

41 *Kokka kômu-in saigai hoshô-hô*, Law No.191/1951.

42 *Seikatsu hogo-hô*; Law No.71/1946.

43 *Senshôbyôsha senbotsusha izoku-tô engo-hô*, Law No.127/1952.

44 *Onkyû-hô*, Law No. 153/1952.

45 In 1958, quasi-civilian auxiliaries became entitled to receive payments under this system. They are defined as persons who had been mobilised under the Mobilization Law (1938), the National Requisition Ordinance (1939), the Students' Labour Ordinance (1944) and the Women's Voluntary Labour Ordinance (1944). Furthermore, anti-aircraft defense personnel are included. Also, special benefits to war-widows, other surviving family and wifes of disabled were introduced.

46 *Koseki-hô*, Law No. 224/1947.

A. Colonial Veterans and Social Welfare

Koreans and Taiwanese, upon the coming into effect of the Peace Treaty, lost their Japanese nationality, and thus hold no entitlement under the above-mentioned laws. A number of former Korean soldiers and auxiliaries of the Imperial Japanese Forces, who resided in Japan, in 1952 formed the 'Association of War-Disabled Korean Veterans in Japan',[47] demanding to receive the same assistance as Japanese. In 1964 the Japanese Government replied that to be eligible for equal assistance, they had to be nationalised. The following year, 15 of the 17 members of the group acquired Japanese nationality.

In reply to an inquiry of a Member of the Upper House, whether compensation for disability for former Korean and Taiwanese servicemen was planned, on 9 April 1957, the Japanese Prime Minister declared that it was inappropriate to solve this issue by using the pension and assistance laws. It should rather be regarded as a problem between the governments concerned.[48] This option was closed by the 1965 normalization of Japanese-South Korean relations. Naturalisation then became virtually impossible.[49]

Ever since, the Japanese Government has held the view that all issues related to wartime compensation for South Koreans had been settled in the 1965 agreement. Regarding Taiwan, the issue was to become the object of further negotiations between the two nations after the conclusion of the Republic of China-Japan Peace Treaty. The latter's invalidation was a consequence of Japan's recognition of the People's Republic of China in 1972.

In April 1993, the Japanese Health and Welfare Ministry announced that all persons from the former colonies had lost their Japanese nationality on the day the Peace Treaty came into effect; according to the ministry, such a loss of nationality could not be regarded as unrelated to their own free will. Therefore it was a mistake to apply the assistance laws to naturalised persons. The condemnation of such conduct by the UN Human Rights Commission as in contravention of the International Covenant on Civil and Political Rights in October 1993 produced no

47 Moto Nihon-gun zainichi Kankoku-jin shôi gunjin-kai.

48 Hanrei Jihô 1505 (1994) 48.

49 Health and Welfare Notice No. 229 of 1962 stated: 'To persons from Taiwan, Korea etc, who gained Japanese nationality and to whom the Family Registration Law is applied ... the Assistance Law will be applied.' Thus their 'desire' to regain Japanese nationality was made a condition for the reception of assistance. However, this policy changed in case of Koreans with Circular Notice (Health and Welfare Ministry) No. 484 of 30 November 1966 after the conclusion of the package of agreements with South Korea. Today, Koreans cannot receive assistance under the Assistance Law, even if they have obtained Japanese nationality. In November 1966 the same Ministry issued another notification stating that to 'Koreans who were naturalised after the signing of the Japan-South Korea Treaty of 22 June 1965, the Assistance Law is not applied.' See Kim SG, *'Zainichi Kankoku Chôsen-jin shôi gunjin gunzoku'* (Disabled Korean Veterans in Japan) in Utsumi A (ed), *Sengo hoshô* (Wartime Compensation) (1994) at 72–75; Kaneko M, Staatsbürgerschaft versus Menschenrechte: Die Entschädigungsfrage in Japan (Nationality v Human Rights: Wartime Compensation in Japan), unpublished manuscript (on file with the author) (1996) at 5: Niwa M, *'Zainichi Kankoku Chôsen-jin no sengo hoshô'* (Wartime Compensation for Koreans in Japan) (1993) 18 Kikan seikyîu at 50.

effect.[50] Meanwhile, the Japanese Government as well as the judiciary explained war damages as caused in an emergency situation and to be born by the people as a whole. This argumentation is designed to deny assistance, while eventually acknowledging the Japanese nationality of Koreans and Taiwanese at the time. In later decisions, however, Koreans and Taiwanese were no longer regarded part of the Japanese people.

The following points also need to be considered: payments to Japanese veterans were graded according to the wartime ranking system. Although Article 9.1 (2) of the Public Officials Pension Law excluded from payments persons who were sentenced to capital punishment, lifetime imprisonment or three or more years of imprisonment, even those former servicemen and auxiliaries of the Imperial Forces, who had been tried and punished by postwar Allied military tribunals for war crimes, were included in the list of pension recipients after a reform of the Pension Law in 1953. Even though initially their payments had been somewhat reduced, they had again reached the general level by 1973. Japan's war criminals had been recognised as war victims.[51]

B. 'Humanitarian Solution': Compensation for Taiwanese

As to compensation for Taiwanese veterans, the problem came to public attention in Taiwan, when in December 1974 Formosan native Nakamura Kagao, was found on the Indonesian island of Morotai, where he had been in hiding, not knowing about the end of the Second World War. The Japanese Government paid him his remaining wages, evading the compensation issue.[52] Although a 1975 request by a disabled former Taiwanese civilian auxiliary to the Japanese Health and Welfare Ministry for the issue of a disabled person's card was met, compensation was denied. In June 1977, 14 disabled Taiwanese veterans and bereaved families filed suit with the Tokyo District Court against the Japanese Government, claiming the nationality clauses in the assistance laws violate Art.14 of the Japanese Constitution. The plaintiffs demanded ¥5 million each, arguing that the state has the duty to compensate injuries to former servicemen, who had been recruited under the prerequisite that in case of death or disability they would be compensated under the Pension Law. Furthermore, since the Japanese Constitution provides for the compensation of damage caused by actions of the state, and since the damage sustained by the plaintiffs had been special sacrifices exceeding the war damages

50 See below.

51 Tanaka, n2 at 39.

52 Born 1919, Nakamura (Taiwanese name Suriyon, Chinese name Li Guang-hui) died in 1979. In 1943, he had become a special volunteer in the Japanese Army. Almost thirty years after the end of the war he was found on Morotai. The Japanese Government only paid his remaining wages of ¥38,000 plus ¥3 million in repatriation assistance and therefore received harsh criticism from within Japan and abroad. In reaction to this the Japanese Government promoted Nakamura from the rank of a private (*ittôhei*) to that of a lance corporal (*heichô*) and paid ¥2 million in condolence money (*mimai-kin*). Japanese and Taiwanese citizens collected another ¥1.5 million. However, former Japanese soldier Yokoi, who had been discovered shortly before Nakamura, was paid ¥10 million, and Onoda, who fought his war in the Philippines for almost three decades, received ¥20 million; Asahi Shinbun 4 January 1975 at 3.

suffered by the general population, compensation must be made. The Tokyo District Court on 26 February 1982[53] dismissed the case as an issue which had to be settled diplomatically or by legislation. As to pensions, the court stated that since such payments are made from taxes paid by the Japanese people, it was reasonable to limit the objects of such payments to persons with Japanese citizenship. In the appeal before the Tokyo High Court[54] the plaintiffs argued that the Japanese Government's failure to pass special legislation for the Taiwanese was unconstitutional. The case was dismissed on 26 August 1985 with the court pointing to the 1952 agreement to settle claims by Taiwanese citizens against Japan through separate diplomatic measures: the nationality clause could not be considered an unreasonable differentiation at the time of the enactment of the law. Although the court acknowledged the impracticability of such a solution and the plaintiffs' exclusion both from Japanese as well as from Chinese (Peoples' Republic) assistance, it:

> in light of such a complicated international situation ... hesitate[d] to interpret the present situation, which had been caused by the application of the nationality clause, as a discrimination contravening the principle of equality before the law.

But the court explained:

> The plaintiffs are in similar circumstances to Japanese, but suffer extreme disadvantages ... it is expected that the government will overcome diplomatic, financial, political and legal problems and to clear away these disadvantages and increase international credibility.

On 28 April 1992, the Supreme Court dismissed the case as a purely legislative matter. The court explained that

> the exemption of persons residing in Taiwan from the application of the assistance- and pension laws is based on the assumption that their claims would be settled in bilateral negotiations. This assumption showed sufficient reasonable objectivity.[55]

However, already after the decision by the Tokyo District Court in 1982, parliamentary efforts to draft a bill had been accelerated. Debates in the Japanese Diet had begun in 1968, but only in June 1977 a combined 'Social Gathering for the Consideration of the Problem of Compensation for former Taiwanese Servicemen of Japan' had been formed by a number of representatives.[56] This group drafted an outline of a bill, according to which ¥3 million in 'consolation money' was to be paid to each person. Budget problems prevented the bill from being passed.

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53 Hanrei Jihô 1032 (1982) at 31; Hanrei Jihô 1422 (1992) at 91.

54 Hanrei Jihô 1163 (1985) at 41.

55 Saikô saibansho hanreishû: Minji 164–295. Justice Sonobe elaborated differently in a supplementary opinion: 'I acknowledge that the situation caused as an effect of the application of the nationality clause constitutes a discriminating treatment which contravenes the principle of equality before the law; but even I cannot show any concrete legal grounds of a legislation for ending this discrimination'. However, he added, the compensation issue is a problem of state policy and cannot be decided by the courts.

Beginning in March 1983, the 'Sectional Cabinet Meeting of the LDP's Political Affairs Research Committee'[57] endeavoured to get financial means and worked on a draft bill; in the 1985 budget ¥5 million, and in the 1986 budget about ¥20 million were eventually made available for research and inquiries.[58]

After the High Court decision, in 1987 and 1988 draft bills providing for condolence money for war-bereaved families and severely disabled Taiwanese veterans were submitted to the Japanese Diet, and eventually the 'Law concerning Consolation Money etc, for War-bereaved Families residing in Taiwan etc' was enacted.[59] Based upon this law the Japanese Government paid a lump-sum of ¥2 million as 'condolence money' to each of the forementioned persons out of the 1988 budget. Payments were made via the Japanese and Taiwanese Red Cross Societies. By the end of 1993, a total of about 29,000 persons had received payments. The Japanese Government, however, stressed that these measures did not mean the revocation of the assistance law's limitation to Japanese nationals, but, rather were 'special humanitarian measures'.[60]

3. *Legal Issues*

A. The Sok Case

Not willing to accept the contradictions in the treatment of colonial veterans, in 1992 two former Korean auxiliaries filed suit against the Japanese State, demanding the revocation of the State's decision denying disability pensions on grounds of nationality.[61] The Tokyo District Court on 15 July 1994[62] dismissed

56 *Taiwan-jin moto Nihon-hei no hoshô mondai o kangaeru kondan-kai*; in April 1980 the group was renamed in 'Social Gathering concerning the Problem of former Taiwanese Servicemen of Japan' (*Taiwan-jin moto Nihon-hei nado no mondai kondan-kai)* and in September 1987 in 'Social Gathering of Parliamentarians concerning the Problem of Taiwanese War Dead etc' *(Taiwan senbotsu-sha nado mondai giin kondan-kai.)* Kashiwaguma, n13 at 78.

57 Jimin-tô seimu chôsa-kai no naikaku bukai.

58 Kashiwaguma, n13 at 79.

59 *Taiwan jûmin de aru senbotsu-sha no izoku nado ni taisuru chôi-kin nado ni kansuru hôritsu*; Law No.105/1987; also: 'Law Concerning the Implementation of Payments of Special Consolation Money etc' (*Tokutei chôi-kin nado no shikyû no jisshi ni kansuru hôritsu*, Law No.31/1988.

60 The emphasis on the humanitarian aspect is further explained by the absence of diplomatic relations with Taiwan, Japan's fears of straining relations with Beijing, and a feared flood of claims by other war victims. See for example Nihon Bengoshi Rengo-kai, n12 at 162.

61 The plaintiffs, Sok Song-gi and Chin Sok-ii, South-Korean nationals residing in Japan, served during World War II as military personnel of the Imperial Japanese Navy. Both sustained severe injuries during fighting and became disabled. Sok on 28 January 1991 applied for disability pension under the Assistance Law, but was turned down on 7 June 1991 on the grounds that the Japanese Family Registration Law could not be applied to anyone who holds South Korean citizenship, because of the regulation in the Assistance Law's appendix paragraph 2. On 28 January 1991, Sok filed an objection against this decision according to the 'Law on the Inquiry into Administrative Complaints' (*Gyôsei fufuku shinsa-hô*; Law No.160 of 1962). Sok's objection was dismissed on 19 June 1992. Similarly, Chin's application of 2 April 1991 was dismissed on 4 October 191. His objection, filed on 11 November 1991, was turned down on 19 June 1992.

62 Hanrei Jihô 1505 (1994) at 48.

their claims that the rejection constituted a violation of the Japanese Constitution's principle of equality (Art.14) and several international human rights instruments. If the relevant provision should indeed have been valid, the court held, it had merely a temporary validity until a bilateral settlement of the problem of compensating Koreans etc, and thus was invalidated with the signing of the 'Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Co-Operation between Japan and the Republic of Korea' in 1965.[63]

The plaintiffs had further argued that the Japanese State's assertion on the 'temporariness' of the condition being only included in expectation of a bilateral solution of the problem did not constitute a reasonable and objective cause, since it is irrational to refer the compensation issue as an issue of life or death of war-disabled veterans, to a bilateral treatment at an uncertain time in the future. Rather, individuals who sustained injury during the war, hold compensation claims against the State, and the State to which they belong does not have the authority to waive such claims of its citizens. Thus appendix part II of the Assistance Law, which excludes non-Japanese from the law's application because of the non-applicability of the Family Register Law, is not rational, and therefore contravenes Art. 14 of the Japanese Constitution. Sok and Chin further argued that the Assistance Law, based on the idea of state compensation, provides for assistance to all persons who suffered injury while rendering services within their special relation to the Japanese State as servicemen. Nationality could not be considered an essential element to Korean veterans who rendered the same services as Japanese. The Japanese State as defendant in the Sok Case held that at the time of the law's enactment, no final decision had been made as to the nationality of Koreans and Taiwanese; appendix II was added to clarify the exclusion of Koreans and Taiwanese, since they were not subject to the Family Register Law. Further, the Japanese Government held that according to Article 2.2 (a) of the 1965 agreement, property, rights and interests of Koreans residing in Japan are exempted from the agreement and limited to such property, rights and interests, which in Article 2 (a) of the 'Minutes Regarding the Agreement' were defined as substantial rights as recognised under law to be of property value. By reverse interpretation of this provision all claims which do not concern substantial rights, such as the plaintiffs' claims, could according to Article 2.3 no longer be enforced.[64]

The Court explained that in Art. 2 of the San Francisco Peace Treaty souvereignty and independence of the former Japanese colonies Korea and Taiwan were acknowledged. Article 4 (a) of the Peace Treaty stated furthermore that the treatment of claims of the people of these territories was to be the subject of special arrangements between Japan and those territories' relevant authorities. In view of this, according to the Court, the wording 'temporarily' in the appendix to the Assistance Law as being of an indefinite length of time had not been chosen in a concrete expectation of certain circumstances in the near future, but rather such

63 10 JAIL (1966) at 284.
64 Hanrei Jihô 1505 (1994) at 51, 52.

legal limitations were valid until a reform of the relevant law or other related legislative measures.[65] The District Court also endorsed the State's argumentation of the family register clause having been included due to uncertainty over the nationality of Koreans and Taiwanese.[66]

In conformity with the Japanese Government and earlier decisions, the court saw in the 1965 agreement a final settlement of the matter and denied the necessity of dealing with the problem on the domestic plane, as it did not concern substantive rights in the sense of the agreement. For these reasons, the disputed provision was held not to be arbitrary, unwarranted discrimination as prohibited by Art. 14. A general compensation obligation of the state moreover did not exist for damages sustained in an extreme situation such as war, but rather all people had equally to bear the sacrifices and danger to life, health and property in a situation for better or worse of the nation. Compensation therefore was a legislative issue, demanding a political decision.[67]

Moreover, the Assistance Law clearly had been enacted on the basis of the spirit of state compensation, and one cannot deny that for one part it has also the aspect of assistance to the livelihood of servicemen, paramilitary etc, and their families. This kind of assistance is rendered as part of the responsibility of the state, to which a person belongs; this is today recognised throughout the world and practiced in this manner. The court did however not elaborate on the plaintiffs' argument of a violation of international human rights provisions, but briefly ruled out such contraventions due to the compatibility of the provision with the Japanese Constitution.

Still, the court pointed to the political nature of compensation measures for war sacrifices and injury to persons of other than Japanese nationality, and the apparent lack of legislation for Koreans such as the plaintiffs, who are excluded from assistance both in Japan and in Korea. The court, in view of the plaintiffs' 'extremely pitiful situation', reminded the Japanese Government and Parliament of its responsibility to deal with this issue under consideration of the process of previous diplomatic negotiations, future bilateral relations, changes in the international situation, and the social and economic situation in Japan.

The Tokyo High Court on 29 September 1998[68] dismissed the appeal lodged by Sok Song-gi and Chin Sok-il. The court supported the district court's ruling

65 Hanrei Jihô 1505 (1994) at 46–47.

66 To affirm this view, the court cited similar provisions in other legislation such as the 'Former Members of the House of Representatives Election Law' (*Kyû-shugi-in giin senkyo-hô;* Law No.47/1925), its reform (Law No.42/1945), and therein appendix para.IV; further the 'Former Members of the House of Councillors Election Law' (*Kyû-sangi-in giin senkyo-hô*; Law No.11/1947) appendix para IX, and also the 'Public Officers Election Law' (*Kôshoku senkyo-hô*; Law No.100/1950) appendix para 3 and the 'Local Government Law' (*Chihô jichi-hô*; Law No.67/1947) appendix para 20 I etc. Like the Assistance Law, all formentioned laws contain provisions which 'temporarily' exclude their application to persons who are not subjected to the 'Family Registration Law'.

67 In its reasoning, the court quoted Supreme Court decision 27 November 1968, in Minshû 22–12–2909.

68 Daily Yomiuri online 30 September 1998.

which had said that war-related compensation cases were difficult to judge because the issue was highly political. The ruling furthermore said that a law protecting the families of those killed or wounded in war, under which the granting of disability pensions is limited to those who have Japanese nationality, was not unreasonable. However, the presiding judge emphasised:

> The plaintiffs were former Japanese civilians attached to the Imperial Japanese Navy, and it would be appropriate to give them the same treatment as Japanese receive. It would be desirable to abolish or revise the nationality requirement in the law, or to give the case special administrative treatment.[69]

B. Issues of International Law

To ensure the livelihood of veterans and bereaved families, the Japanese Government since 1952 has enacted a total of sixteen laws for the assistance of war victims. However, all of these laws, except for the three hibakusha (victims of the atomic bombs) laws, include nationality or family register clauses, effectively excluding all non-Japanese from their application. Therefore, Korean and Taiwanese veterans of the Imperial Forces cannot receive payments under these laws, despite the fact that they had served like their Japanese counterparts – and as Japanese nationals.[70]

As has been demonstrated above, the Japanese judiciary has already excluded all claims by colonial veterans of the Imperial Japanese Forces under municipal law. The courts, however, completely ignored possible grounds for claims under international law.

(i) The International Covenant on Civil and Political Rights

Japan became a member of the United Nations in 1956, and as such has all the duties specified in Arts. 1.3, 55, 56 of the UN Charter,[71] which stipulates the protection of human rights as one of the most prominent duties of members of the international community of nations. These rights were explicitly codified in the Universal Declaration of Human Rights,[72] which forms the International Bill of

69 On 11 October 1995, the Osaka District Court dismissed a similar suit, finding 'reason' in the disputed provision in the expectation of a diplomatic settlement at the time of enactment. Nevertheless, the court directed the legislators to look into the problem and settle it under consideration of the social, financial, international and political relations with South Korea as well as the attitudes of the Japanese population. (Asahi Shinbun 12 December 1991 at 1). Two further suits were dimissed by the Otsu District Court on 17 November 1999 and the Tokyo District Court on 31 July 1998, respectively, on the same grounds (Asahi Shinbun 12 December 1991 at 1; Japan Times online 31 July 1998).

70 It is by no means unusual within the Japanese legal system that aliens are denied certain benefits. The Tokyo District Court named some examples for such legislation in its opinion in the above-mentioned Sok Case. In general, it is one of the main principles of the social welfare system that persons entitled to such claims under the system are limited to 'Japanese citizens residing in Japan', ie, tax payers. Some improvements, however, could be observed after Japan's aceession to the International Covenant on Civil and Political Rights in 1979 and to the 1951 Convention relating to the Status of Refugees in 1982.

71 Adopted 26 June 1945.

Human Rights together with the International Covenant on Civil and Political Rights (ICCPR)[73] and the International Covenant on Economic, Social, and Cultural Rights,[74] both of which entered into force in 1976. Japan on 21 June 1979 ratified both Covenants, which entered into force for Japan three months thereafter.

The ICCPR is of special relevance for the protection of international human rights. In it, all fundamental human rights are codified, whose protection is recognised by the international community as being of prime importance. All signatories have the duty to guarantee the rights enumerated in the Covenant and, if necessary, amend national judicial and administrative practice, if incompatible with the norms of the Convention.[75]

But although in principle every person present in a state party to the ICCPR possesses direct rights under this Convention, the Japanese courts are reluctant to apply its provisions. Rather, a tendency can be observed that the courts first of all examine violations of the Japanese Constitution, and, if constitutionality has been shown, automatically conclude that there is compatibility with the ICCPR.[76] This, some authors say,[77] constitutes a violation of the Convention's position as a self-executing treaty, and thus of a state's duty to apply it directly.

Japan submitted its initial report under the ICCPR (Art. 40) to the Human Rights Committee in October 1980.[78] In its 1986 report,[79] Japan stated that it was 'becoming increasingly aware of the importance of human rights.' Nevertheless, it was also admitted that many changes were taking place, but Japan still remained 'hampered ... by a number of deeply-rooted prejudices and practices.'

The reports show that the judiciary's view is shared and supported by the executive. In this report, it was stated, inter alia, concerning foreigners residing in Japan, that all rights guaranteed by the ICCPR in principle are valid for foreigners,

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72 Adopted 10 December 1948.

73 Adopted 16 December 1966.

74 Ibid.

75 Art. 2 reads: '1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant. 3 ....'

76 'To date, ... the Covenant has made little impression on the attitude of the Japanese judiciary .... Modern Japanese judges tend to hold an extremely broad view of administrative discretion and a rather limited view of their own authority to order change. This combination means that fundamental human rights as enforced by Japanese courts can be rendered 'merely illusory'. Repeta L, 'The International Covenant on Civil and Political Rights and Human Rights Law in Japan' (1987) 20 *Law in Japan* 1 at 1–33.

77 For example, Itô M, '*Kokusai jinken-hô to saiban-sho*' (International Human Rights and the Courts) (1995) 1 Kokusai jinken at 7–10.

78 UNDOC CCPR/C/SR.324 (1980).

79 UNDOC A/43/40 (1988).

unless they are explicitly provided only for Japanese nationals. Also, it was said, the prohibition of discrimination was already observed by Art. 14.1 of the Japanese Constitution.

Nevertheless there is mounting criticism that the family register and nationality clauses, which exclude Korean and Taiwanese veterans from social benefits, because of unequal treatment based on nationality, violate the ICCPR's prohibition of discrimination, even if they are compatible with Art. 14.1 of the Japanese Constitution.[80]

a. Prohibition of Discrimination

Art. 2.1 ICCPR guarantees 'the rights recognised in the present Covenant'. However, nowhere in the Convention can a provision be found which mentions a 'right to receive compensation' or a 'right to receive a pension'. Thus, it cannot be concluded that unequal treatment through discrimination in wartime compensation or pension payment is prohibited.

Therefore, the focus should be shifted to Art. 26 ICCPR, postulating equality before the law:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The rights protected in Art. 26 seem to go beyond the realm of Art. 2.1, and to create an independent 'prohibition of discrimination'.

Art. 26 obliges states not to adopt or maintain discriminatory legislative standards, thus guaranteeing 'equal protection of the law', and not to apply legislation in a discriminatory manner, thus ensuring 'equality before the law'. The guarantee of equal protection of the law secures de jure equality, so that the law itself dispenses rights and benefits to all equally.[81]

The ICCPR commentary[82] also points out that Art. 26 constitutes an independent right to equality, in addition to the accessory prohibition of discrimination in Art. 2. Thus, Art. 26 guarantees the equal treatment of all in the application of an existing law.

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80 Abe K, *'Engo-hô no kokuseki jôkô wa kokusai jinken kiyaku ni ihan suru'* (The Nationality Clause in the Assistance Law Violates the International Human Rights Covenant) (1992) 452 Hôgaku seminaa at 48–51.

81 Lord Lester of Herne Hill & Joseph S, 'Obligations of Non-Discrimination' in Harris D & Joseph S (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) at 563–595; Nowak M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) at 466.

82 Nowak M, *UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll* (U.N. Covenant on Civil and Political Rights and Optional Protocol) (1989) at 499.

The UN Human Rights Committee (UNHRC) has not exhaustively defined the 'rights and freedoms' upon which Article 26 has a potential impact. However, so far, no case of discrimination has been declared inadmissible because of a failure to raise a relevant 'right' or 'freedom'.

In General Comment 18,[83] the Committee stated that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

A differentiation is 'objective' if it has a legitimate aim; it is 'reasonable' if a reasonable relationship of proportionality exists between the means employed and the aim sought to be realised.[84] Unfortunately, the Committee to date has never explained in detail 'reasonableness' and 'objectivity' in general. Rarely does it analyse the two separately.

The fact that the Committee has confirmed breaches of the ICCPR in only a minority of Article 26 cases, shows the difficulty for authors to demonstrate that the laws and/or practices at issue are not 'reasonable and objective'.[85]

The UNHRC has demonstrated this for example in several cases on gender-based differentiations in the Dutch National (Unemployment) Insurance Law. Under this law, married women received unemployment benefits only under the condition that they could prove to be the sole breadwinner of their family. No such proof was asked of married men.

In its landmark decision of *Zwaan-de Vries v Netherlands,*[86] the Committee held that this denial of equal rights to married women as compared to married men constituted impermissible gender discrimination under Art. 26, even though the ICCPR guarantees no right to social security payments as such.

The Committee reasoned: the right to equal protection of the law 'prohibits discrimination in law or in practice, in any field regulated and protected by public authorities.' However, the Committee found that not every differentiation is discriminatory, but only such which is not based on reasonable and objective criteria. Differentiations in unemployment benefits based on gender cannot be considered reasonable, and therefore the persons affected had been discriminated against because of their sex.[87]

The Committee rejected the Dutch Government's argument that the principle of equality relates only to civil and political rights, and stressed that Article 26

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83 9 November 1989, in: Nowak, n81 at 868.

84 Lord Lester, n81 at 586 fn.174: see *Belgian Linguistic Case*, Series A No 6 (1968), para 10.

85 Other cases of relevance and interest: *Danning v The Netherlands* (180/1984) and *Sprenger v The Netherlands* (395/1990): marital status and social security rights. *Blom v Sweden* (191/1985) and *Lindgren v Sweden* (298–99/1988): preferential state treatment of public over private schools. *Oulajin & Kaiss v The Netherlands* (406, 426/1990): distinction between natural and foster children under child benefit act. *Cavalcanti Araujo-Jongen v The Netherlands* (418/1990): eligibility for retroactive unemployment benefits of now employed persons.

86 Communication No. 182 of 1984; also see *Broeks v Netherlands* (Communication No. 172 of 1984).

87 Nowak, n81 at 470, cites Communication Nos. 172, 182 of 1984 at § 12–15.

ICCPR is not a mere repetition of the guarantees laid down in Art. 2. The State Parties to the Covenant are not obliged to enact social welfare legislation, but if they do so, these laws must not contravene the principle of equality and the prohibition of discrimination fixed in Art. 26. Thus it is not primarily the legislature to whom it is directed, but the aim of this provision is to protect against arbitrariness by judges and administrative officials in the execution of legal statutes.[88]

Here, a parallel could be drawn to the issue of the Japanese wartime compensation laws, which themselves are not objects of the Covenant. But with the enactment of the assistance and pension laws, their compatibility with the provisions of the ICCPR can be reviewed.[89]

As has been shown above, the Covenant's provisons apply to all persons present in a signatory state, nationals as well as aliens, eg, Koreans or Taiwanese residing in Japan. However, Art. 26 does not demand absolutely equal treatment of nationals and foreigners in all aspects, and the Japanese Government, too, reserves for itself the right to limit the recognition of certain rights to its nationals.

(aa) Discrimination Because of Nationality

The Japanese Government argues that the ICCPR merely prohibits arbitrary, objectively irrational differentiations, and that the rationality of the nationality and family register clauses in the assistance and pension laws had been demonstrated in the judiciary's recognition of their constitutionality.[90]

Although 'nationality' is not among the list of bases upon which discrimination is specifically prohibited in Arts. 2 (1), or 26, most scholars in Japan conclude that discrimination based on 'nationality' is also prohibited, and that the rights set forth in both of the Covenants are applicable not only to Japanese nationals, but also to aliens, except for those rights which are formulated in such a way as to apply to nationals.[91]

According to the above-mentioned interpretations, an exemption of Koreans, Taiwanese or other non-Japanese does not automatically fall under the prohibition of discrimination (because of nationality), as long as the unequal treatment is based on 'reasonable and objective criteria'. The definition of such 'reasonable and

88 The findings of the Committee regarding the prohibition of discrimination in Art. 25, can be summarised as follows: Article 26 is not an accessory, but an independent right; the right to equal protection of the law obligates the legislature to refrain from any kind of discrimination in all laws; not every differentiation is a discrimination; a differentiation is discriminatory, if it is not based on reasonable and objective criteria; Nowak, n81 at 473.

89 Abe, n80 at 50.

90 Japanese State's defense in Sok case. Hanrei Jihô 1505 (1994) at 53.

91 Iwasaki, n79 at 138 fn. 38; different opinion: Kubo, '*Shakai hoshô ni taisuru kenri no kokusai-teki hoshô to naigaijin kintô taigû*' (International Protection of the Rights to Social Security and the Equal Treatment of Aliens and Nationals) (1980) 15 Kanagawa Hôgaku 1 at 223. Some scholars as well as the Japanese Government believe that 'nationality' falls under 'national origin', others believe that it falls under 'other status', while still others reach this conclusion from the general tenor of the Covenant.

objective criteria', ie, whether a differentiation in veterans' pensions because of nationality constitutes such, provides the key to the solution in the present issue.

Nationality or the applicability of the Family Registration Law could qualify as 'other status' under Art. 26.2.[92]

The Committee has not defined exactly when an 'other status' arises, preferring to develop its jurisprudence in this area on a case-by-case basis. Among the grounds that constitute an 'other status', in cases found to be admissible by the Committee, is nationality.[93]

(bb) The Gueye Case

One clue might be found in the Gueye case, in which the Human Rights Committee in April 1989 confirmed a violation of Article 26:

Until the independence of the former French colony of Senegal in 1960, Senegalese served in the French military. Initially, these men received the same payments under the soldiers pension law as former French servicemen, regardless of nationality. In 1974, the French Government introduced a differential pension system for colonial veterans, reducing their pensions as compared to those paid to former servicemen of French nationality. After a suit filed by 741 former Senegalese servicemen in a domestic court had been dismissed, the veterans appealed to the Human Rights Committee alleging human rights violations. The Committee, however, investigated upon its own discretion a likely contravention against the prohibition of discrimination in Article 26 of the ICCPR.[94]

The French Government reasoned as follows for the different treatment of the Senegalese:

(1) The Senegalese veterans are not French citizens. If they want to receive the same amount of pension as French soldiers, it is indispensible to acquire French citizenship. French nationality law grants persons who once had been French citizens, special conditions to regain it. Every year approximately 2,000 persons are naturalised based on this provision. Thus, former Senegalese servicemen can receive the same pension as French citizens by acquiring French citizenship.

(2) Identity and family relations of former servicemen living in Africa are difficult to ascertain, causing many cases of abuse of pension claims.

(3) The economic and social situation of retired servicemen in France is different from that of those living in the former colonies.

The Committee confirmed that the affected former servicemen reside in Senegal and thus in general are not subject to French jurisdiction. However, since they are recipients of French pension payments, they are subject to French law in

92 Nihon Bengoshi Rengokai, n12 at 374.

93 *Gueye et al v France* (196/1985); 'nationality' refers to one's administrative status as a certain state's citizen, whereas 'national origin' refers to one's ethnic background.

94 UN.Doc.A/44/40 at 189–195.

this respect. 'Nationality' is comprised in 'other status' mentioned in Article 26 ICCPR. Even in case of issues related to pensions it is not possible to evade the provisions of Article 26 ICCPR.[95]

As to the question whether the differentiation made by the French Government had been based on 'reasonable and objective criteria,' the Committee explained:

(1) Pensions are not being paid on grounds of nationality but because of 'services rendered in the past'. The Senegalese soldiers had been recruited under the same conditions as their French counterparts. Later they lost their French nationality and received that of Senegal. But a different treatment on the grounds of changes in nationality cannot be regarded as sufficiently justified, since both French and Senegalese servicemen rendered the same services. These form the basis of pension payments.

(2) The different economic and social circumstances in France and Senegal do not justify a differential treatment. This is evident if one considers that some former French servicemen reside in Senegal and on the other hand there are Senegalese veterans living in France.

(3) The fear of abuse of pension claims does not justify a different treatment. Administrative uncertainties in case of the identification of persons entitled to pension claims cannot justify differentiations according to nationality.

Because of the above-mentioned reasons, the Committee concluded that the different treatment of pension payments to French and Senegalese veterans is not based on 'reasonable and objective' grounds and therefore violates the prohibition of discrimination in Art. 26 ICCPR.

The exemption of Korean and Taiwanese veterans of the Imperial Japanese Forces from the application of the assistance laws is solely based on their nationality. But as the Committee pointed out in the above-described case, servicemen's pensions are not paid on grounds of nationality but because of 'services rendered in the past'. All persons who in the past rendered identical services have to receive the same pension, regardless of their nationality. Also, administrative uncertainties or economic differences do not justify differentiations. Thus, some Japanese jurists argue, the exception of persons from the former Japanese colonies clearly constitutes a violation Article 26.[96]

(cc) Comparison

A direct comparison of the two cases, however, seems doubtful.

In the case of the Senegalese the changes in the pension payments took place only after decades of equal treatment. In Japan, on the other hand, payments to persons with other than Japanese nationality had been denied from the outset. It has to be considered, however, that Koreans and Taiwanese cannot acquire Japanese citizenship under special and eased conditions and thus gain the

95 Ibid.

96 Abe, n80 at 51; Asahi Shinbun sengo hoshô mondai shuzai-han, *Sengo hoshô to wa nani ka* (What is Wartime Compensation?) (1994) at 73; Tanaka, n2 at 40.

necessary prerequisite for equal treatment under the assistance laws. Everybody who is familiar with the difficulties of naturalisation under Japanese law, will doubt a statement by the Japanese Ministry of Health and Welfare that the nationality clauses concerned aim at a promotion of naturalization.[97] It is furthermore questionable whether a loss of Japanese nationality, which is not based on one's own free will, can constitute a sufficient ground for differentiation, since it is generally believed that the loss of Japanese nationality as stated in the Assistance Law is a loss caused by one's own and free decision on naturalisation in another country.[98] Koreans and Taiwanese, however, lost their Japanese nationality through enforcement of the San Francisco Peace Treaty. But the Japanese Government holds that it 'is irrelevant whether the loss of nationality is based on [one's] own free will'.[99] Its explanations that the Peace Treaty had made the loss of the Japanese citizenship of Koreans inevitable, is not convincing, since no such provision can be found in the Peace Treaty.[100]

b. Settlement Through Bilateral Agreements?

A 'reasonable and objective' differentiation, however, could lie in the expectation of a settlement of claims of Koreans and Taiwanese through bilateral agreements.

The Japanese Government and judiciary frequently point out that the real meaning of the nationality clauses lies in the legislative aim to exclude payments under the relevant laws to Koreans and Taiwanese from the start. It is, to the present day, argued that at least the expression 'temporarily' in these provisions had been chosen in the expectation of a diplomatic settlement of the issue.

As regards Taiwan, the issue of fallen and disabled soldiers and auxiliaries of the Imperial Japanese Forces – together with other problems concerning claims – had been deferred by Article 3 of the Republic of China – Japan Peace Treaty of 1952 to special treatment at a later stage. Its realization, however, became impossible with the normalisation of Japan's relations with the People's Republic of China and the simultaneous termination of diplomatic relations with the RoC (Taiwan) in 1972. The Japanese Government regards the issue of wartime reparations for China as fully and finally settled because of Beijing's waiver of claims. Even though under a 1988 law, Taiwanese war veterans or bereaved families received ¥2 million each as compensation, it is an extremely small amount compared to the payments made to Japanese war victims. That this was not equal treatment was furthermore shown by the Human Rights Committee's exhortation to the Japanese Government in October 1993.[101]

As to the treatment of this matter between Japan and South Korea, the two nations' governments in 1965 concluded the 'Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Co-Operation between Japan and the Republic of Korea' and declared the complete and final settlement of all compensation-related issues. One might be able to establish a

97 Tanaka, n2 at 40; especially since the conditions of Koreans etc. for a naturalization differ from those for other nationalities; see Tanaka H, *Zainichi gaikoku-jin* (Aliens in Japan) (1993) at 63.

98 Tanaka, n2 at 39.

certain degree of 'reason' and 'objectivity' from the fact that out of the US $500 million, which had been paid by Japan to South Korea based on this agreement, the Seoul Government paid 300,000 Won (ca. ¥50,000) to the surviving families of Korean veterans of the Imperial Japanese Forces, who had died before the end of

99 Asahi Shinbun sengo hoshô mondai shuzai-han, n96 at 72. Before World War II, the Japanese Government set up a separate system of registration for Formosans, including former Chinese nationals who acquired Japanese nationality as an outcome of the Sino-Japanese War of 1894/95, their descendants, as well as Japanese or Koreans whose status was changed by marriage to or adoption by a Formosan. Ignoring international regulations on the cession of territory and changes in nationality in ceded territories, on 25 October 1945 China seized Formosa, and conferred Chinese nationality on Formosan residents. On 22 June 1946, China enacted the 'Law Concerning the Nationality of Overseas Formosans of Chinese Origin' (promulgated 22 June 1946), restoring Chinese nationality to Overseas Formosans retroactively from the time of the seizure of Formosa. (Tameike Y, 'On the Nationality of Formosans and Koreans' (1958) 2 JAIL at 55–65; Tabata S, '*Futatsu no Chûgoku-ton to Taiwan no kokusai-hô-teki chii*' (The Two-China Problem and the Status of Taiwan under International Law) (1956) 28 Hôritsu Jihô 10 at 40).
Japan, however, continued to treat Formosans as Japanese nationals, until the coming into effect of the Treaty of Peace with Japan in 1952. This treaty in Article 2 (b) provides that 'Japan renounces all right, title and claim to Formosa and the Pescadores', but does not expressly refer to the nationality of Formosans. Still, the Treaty may be rationally interpreted as supporting an implied agreement on nationality. The interpretation of the Treaty of Peace by the Japanese judicial administrative authorities was published in the so-called 'Circular Note Concerning Nationality and Family Registration Pursuant to the Coming into Force of the Treaty of Peace', issued by the Director of the Civil Affairs Bureau of the Ministry of Justice on 19 April 1962. (Civil Affairs A No.438).
Concerning the matters relating to Korea and Formosa, the Note states as follows:
(i) Korea and Formosa shall cease to be territories of Japan upon the coming into force of the Treaty of Peace, and thereby Koreans and Formosans including those residing in the mainland of Japan shall lose their Japanese nationality.
(ii) Persons of Korean or Formosan origin shall continue to retain Japanese nationality, without taking any special proceedings, if they have causes for registration in the official register of mainland Japan by marriage to or by adoption by a mainland Japanese, or by other acts continuing cause for change of legal status before the effective date of the Treaty of Peace.
(iii) Persons of mainland Japanese origin shall lose Japanese nationality on the coming into force of the Treaty of Peace, if they have causes for removal from the official register of mainland Japan by marriage to or adoption by a Korean or a Formosan, or by other acts constituting cause for change of legal status before the effective date of the Treaty of Peace. Tameike, above at 58; see also Tanaka H, '*Nihon to Taiwan Chôsen shihai to kokuseki mondai*' (Japan, Colonial Rule in Taiwan and Korea, and the Nationality Issue) (1975) 47 Hôritsu Jihô 4 at 85–97.
Similarly, Japan did not recognise the separation and independence of Korea from Japan until the Treaty of Peace became effective on 28 April 1952 (Article 2 (b)). Actually, Korea was withdrawn from the administration of Japan soon after the termination of World War II, and on 15 August 1948, the Government of the Republic of Korea, and on 8 September 1948, the Government of the Korean Democratic People's Republic declared Korea's independence. Notwithstanding the fact that both governments claimed to be the sovereign government of the whole of Korea, the United Nations agreed that Korea gained its complete independence before the signing of the Treaty of Peace, implying a change in nationality of Koreans. However, Japan insisted that it retained territorial sovereignty over Korea until the effective date of the Treaty of Peace; accordingly it treated all Koreans as Japanese nationals, albeit with a status different from ordinary Japanese.
In fact there are opinions that Koreans lost Japanese nationality with the independence of Korea. Yamashita T, '*Nikkan kankei no mondai-ten*' (Problems in Japanese-Korean Relations) (1957) Hôritsu Jihô Bessatsu, Nihon no kokusai-hô-teki chii at 120; Tameike, above at 64–65.

the war. If with these payments Koreans had received compensation similar to Japanese, it could be a justification of the current differentiations.[102]

However, a number of problematic points remain. For instance, Article 1 of the Agreement reads:

> To the Republic of Korea Japan shall (a) supply the products of Japan and the services of the Japanese people, [with a] total value [of] ... $300,000,000 in grants ... (b) extend long-term and low-interest credits up to ... $200,000,000 ... The above-mentioned supply and credits shall be such that will serve the economic development of the Republic of Korea.

An expression such as 'must be used for the compensation of claims of the Korean people' is nowhere to be found. And if one looks at it from the perspective of the process of negotiations leading to the conclusion of the Agreement, it seems not at all unlikely that Korea had waived all claims for economic assistance from Japan.[103]

Art. 2.1 provides:

> The Contracting Parties confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally.

This provision specifically mentions the rights of nationals. Tanida, Director-General of the Ministry of Foreign Affairs' Treaty Bureau at the time, explained that in the Agreement the Japanese and Korean Governments had merely waived their right of diplomatic protection. Property rights, on the other hand, he elaborated, had not automatically expired under the Agreement, but due to municipal legislative measures of the respective parties. Therefore, 'under political consideration of those individuals who suffer damages because of the Agreement special measures must be taken to provide relief.'[104]

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100 Tanaka H, '*Nihon no engo seisaku to gaikoku-jin sabetsu no kôzô – sengo hoshô to rekishi ninshiki o kangaeru*' (Japanese Assistance Policies and Discrimination of Aliens – Wartime Compensation and Perceptions of History) (1994) 452 Hôgaku seminaa at 38–42.

101 See Asahi Shinbun sengo hoshô mondai shuzai-han, n96 at 73.

102 Abe, n80 at 41.

103 Takasaki S, '*Nikkan kyôtei de hoshô mondai wa kaiketsu-zai ka*' (Has the Issue of Wartime Compensation been Settled in the Japan-South Korea Agreement?) in Sengo hoshô mondai renraku-kai (ed), *Chôsen shokumin-chi shihai to sengo hoshô* (Colonial Rule in Korea and Wartime Compensation) (1992) at 2–12.

104 Tanida H, '*Seikyû-ken mondai*' (Claims Issues) in *Nikkan jôyaku to kokunai-hô no kaiyaku* (1994).

After the Agreement was signed, the Korean government set up the above-mentioned system under local law to facilitate the claims of individual persons who deserved compensation.

On 17 December 1965, the 'Law Concerning Measures Concerning Property Rights of the Republic of Korea etc, in Compliance with the Enforcement of Art.2 of the Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Cooperation between Japan and the Republic of Korea' was enacted.[105]

Property, rights and interests under Art.2.3 of the treaty, which are property rights of the Korean State or its people, are stated in this law as having expired on 22 June 1965.

This might support the Japanese Government's argument of full and final settlement through this treaty. However, supporters of the Korean comfort women and other victims have argued that this settlement was only between the two states of Japan and Korea.

Also, Article 2.2 (a) of the Agreement states that the Agreement does not affect 'property, rights and interests of those nationals of one Contracting Party who have ever resided in the other country in the period between August 15, 1947 and the date of the signing of the present agreement (June 6, 1965)'. This is the case with Korean veterans residing in Japan. This group of people is covered neither by the above-mentioned Korean laws regarding the settlement of claims of Korean citizens against the Japanese State, nor by the Japanese assistance laws.

The victims' supporters further argue that the agreement was only one of economic cooperation and thus not dispositive of individual claims, pointing to the Preamble of the Settlement of Claims which provides:

> Japan and the Republic of Korea, [d]esiring to settle problem[s] concerning property of the two countries and their nationals and problem[s] concerning claims between the two countries and their nationals, and [d]esiring to promote the economic co-operation between them [h]ave agreed as follows ...[106]

Indeed, all of the provisions in the 1965 Agreement concern either the disposition of property or the regulation of commercial relations between the two countries, including the settlement of debts. Bearing in mind that one of the purposes behind the treaty was to create a foundation for future economic cooperation between the

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105 Law No.144/1965; *Zaisan oyobi seikyû-ken ni kansuru mondai no kaiketsu narabi-ni keizai kyôryoku ni kansuru Nihon-koku to Daikan Minkoku to no aida no kyôtei dai2jô no jisshi ni shitagau Daikan Minkoku-tô no zaisan-ken ni kansuru sochi ni kansuru hôritsu.*

106 Boling D, 'Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?' (1995) 32 *Columbia Journal of Transnational Law* 3 at 533–590; Park HY, 'Comfort Women from Korea: Japan's World War II Sex Slaves and the Legitimacy of their Claims for Reparations' (1993) 2 *Pacific Rim Law and Policy Journal* at 97–129. The argument is shared by the majority of Korean writers: see eg, IHF, *'Kankoku ni motomerareru aratana sengo hoshô undô'* (New Wartime Compensation Movements in South Korea) (1995) 484 Hôgaku seminaa at 15–18.

two countries, it is not odd that this should have been the main thrust of the treaty.[107]

Therefore, many believe that Art.2 of the 1965 Agreement merely means that Japan and South Korea had waived their respective rights of diplomatic protection, and thus individual claims had not been extinguished. This had been confirmed by the Director-General of the MOFA Treaty Bureau, Yagii, on 27 August 1991 before the Upper House Budget Committee.[108]

This argumentation demands further examination.

Despite the possibility of Art.2.1 including a waiver of all claims, this interpretation seems unlikely when bearing in mind the wording of Art. 2.2:

The provisions of the present Article shall not affect the following ... (a) Property, rights and interests of those nationals of the Contracting Party who have either resided in the other country in the period between August 15, 1947 and the date of the signing of the present Agreement.

Therefore it seems inappropriate to conclude from paragraph 1 that all compensation-related issues have been settled.[109]

However, the Japanese Government, in accordance with Art. 2.3, enacted domestic legislation ... to extinguish the 'property, rights and interests' of the Republic of Korea and its nationals under Japan's jurisdiction. In Parliamentary deliberations, the question whether claims of the Korean people still remain has been raised occasionally, as the above legislation extinguished only 'property, rights and interests', leaving claims alive. However, according to the definition given in the Agreed Minutes, all substantial legal rights were included in the term 'property, rights and interests', defined as 'all kinds of substantial rights which are recognised under law to be of property value.' The term 'claims' in the treaty is interpreted as the 'status' of being able to raise such claims. The victims' compensation claims being equivalent to claims in tort, it cannot be said that they have a property value. It is generally understood that claims in tort are not considered to be property until such time as a judgment is rendered.[110] Such a status cannot be included in the category of substantial legal rights. As long as the 'claims' were not recognised as existing rights, there was no need to extinguish them by domestic legislation. However, although the Korean Government cannot resort to the right of diplomatic protection, the people who have 'claims' can file a lawsuit seeking compensation for their claims which allegedly have substance to be compensated. Accordingly, the related lawsuits recently filed by Korean people in Japanese courts can be regarded as legally based upon this 'status' of each plaintiff.[111]

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107 Dolgopol U & Paranjape S, *Comfort Women: An Unfinished Ordeal* (ICJ Report) (1993) at 165.

108 Shimizu M, '*Tokushû sengo hoshô mondai e no shiza – hoshô ni seii o shimesu doitsu ni manabe – towareru Nihon-jin no dôhi-shin*' (Special Issue on the Reparations Issue – Learn from Germany, Showing Sincerity Regarding Reparations – the Questionable Morale of the Japanese) Ekonomisuto (28 September 1993) at 58–51.

109 Takasaki, n103 at 2–3.

110 Dolgopol n107 at 63.

It must furthermore be pointed out that during negotiations the Korean representatives presented to Japan an outline of claims. The list included bullion transferred to Japan between 1909 and 1945, savings deposited at post offices in Korea by Korean workers, savings taken by Japanese nationals from banks in Korea and monies transferred to Korea from 1945 onwards, property in Japan possessed by 'juristic persons' which had their main office in Korea, debts claimed by Koreans against the Government of Japan or Japanese nationals in terms of negotiable instruments, currencies, unpaid salaries of drafted Korean workers, and the property of the Tokyo office of the Governor-General of Korea.[112]

According to Japanese protocols, at the time of the conclusion of the Agreement, Japan and South Korea had agreed that Article 2.1 comprised all issues brought up by the Korean side during negotiations in the 'Outline of Korean demands against Japan'.[113] Thus, no further demands could be made based on this Outline.[114]

The notes taken by the Korean side confirm this interpretation:[115]

> In light of the contents of the issues regarding property and claims on our side, which have expired based upon the provisions regarding the settlement of problems related to claims and property, all issues stated in point No.8 of the "Outline of Korean demands against Japan" have been settled and therefore ... all ... kinds of claims which Korean nationals hold against the Japanese State and its nationals have been settled completely and finally.

Bearing this in mind it seems to be a fact that both the Japanese as well as the South Korean Government had regarded the compensation issue as settled.[116]

On the other hand, the Korean list of claims indicates that the present issue of social welfare benefits to Korean veterans was not considered during the negotiations.[117]

Thus, a diplomatic settlement has not been undertaken to the present day, and therefore this omission for decades since the enactment of the laws can be regarded as unequal treatment in the sense of Art. 26 ICCPR.

One more point needs to be considered. It is generally believed that Article 26 ICCPR necessitates positive measures for the protection from discrimination,

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111 Itô T, 'Japan's Settlement of the Post-World War II Reparations and Claims' (1994) 37 JAIL at 38–71; Dolgopol, n107 at 63.

112 Oda S, 'The Normalization of Relations between Japan and the Republic of Korea' (1967) 61 AJIL at 45–56.

113 Kankoku no tainichi seikyû yôko.

114 Agreed Minutes on the Agreement on the Settlement of Problem[s] Concerning Property and Claims and on the Economic Co-Operation between Japan and the Republic of Korea, *Zaisan oyobi seikyû-ken ni mansuru mondai no kaiketsu narabi ni keizai kyôryoku ni kansuru Nihon-koku to Daikan Minkoku to no aida no kyôtei ni tsuite gôi sareta gijiroku* No.2 (g).

115 Commentary on the Treaty and Agreements between the Republic of Korea and Japan, *Daikan Minkoku to Nihon-koku-kan no yôyaku oyobi kyôtei kaisetsu.*

116 Takasaki, n103 at 3–4.

117 Dolgopol, n107 at 164.

especially in cases where some groups of persons in the State Parties are traditionally subjected to extremely severe discrimination or if they are exposed to specific discriminations by private parties. This without doubt is the case with Koreans in Japan.[118]

In conclusion it can be argued that the nationality and family register provisions in the Japanese assistance and pension laws constitute a violation of Art. 26 ICCPR.

(ii) The ICCPR and Japanese Municipal Law

Besides inter-state complaints, the 1966 First Optional Protocol[119] provides for the possibility of individual complaints to the Human Rights Committee in respect of personal violations of human rights. As its name suggests, this procedure is entirely optional and, as of 1 January 1999, 95 of the parties to the Covenant had signed the Protocol; Japan is not a signatory to the Optional Protocol, thus ruling out direct complaints by the colonial veterans to the Human Rights Committee.

Nevertheless, if Japan recognises the ICCPR as having upon ratification become part of her municipal law as a so-called self-executing treaty,[120] the Korean and Taiwanese veterans concerned could claim compensation or pension payments before Japanese domestic courts, for an incompatibility of national laws with the ICCPR must lead to the former's revision or nullification.

Today, Japanese scholars and the government have adopted the notion of 'self-executing' treaties and recognise the distinction between 'self-executing' and 'non-self-executing' treaties. The courts, on the other hand, tend to interpret and apply treaties immediately, without examining whether they are 'directly applicable'. In some cases the courts denied the 'direct applicability' of treaties, but they have seldom articulated the reasons for such conclusions.[121]

The majority of legal scholars assumes, since the present Constitution is based on the principle of internationalism – as expressed in its preamble – that international treaties ratified by Japan as well as customary norms bind the Japanese legislature. As a consequence thereof, the predominant view in Japan[122] holds that even constitutional law must be subordinate. This interpretation is supported by the fact that Art. 98.1[123] does not mention international treaties.[124]

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118 Nowak, n81 at 509. For details on the situation of Koreans living in Japan see in general Eckert CJ, *Korea Old and New: A History* (1990); Gohl G, *Die koreanische Minderheit in Japan als Fall einer 'politisch-ethnischen' Minderheitengruppe* (The Korean Minority in Japan as a Case of a Political-Ethical Minority) (1976); Mitchell R E, *The Korean Minority in Japan* (1967).

119 Adopted 16 December 1966.

120 Iwasawa Y, 'Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law' (1986) 8 *Human Rights Quarterly* 1 at 131–164; Takano Y, *Kokusai shakai ni okeru jinken* (Human Rights in the International Society) (1977) at 337. The Japanese Government expressed a similar view before the Human Rights Committee (UNDOC CCPR/C/SR.324 (1981) at 3). Japanese courts so far have assumed *sub silentio* the direct applicability of certain articles of the Covenant.

121 Iwasawa, n120 at 135.

The phrase that treaties 'shall be faithfully observed' in Article 98.2 implies that they are higher than ordinary statutes.[125] The Japanese representative to the Human Rights Committee stated Japan's position in its 1981 report, saying that 'treaties are deemed to have a higher status than domestic law ...'[126] Indeed, the Japanese government seems to distinguish three kinds of treaties and takes the position that some treaties prevail over the Constitution while others do not: treaties which represent 'established laws of nations' and treaties which concern 'matters of vital importance to the destiny of a nation such as a surrender document or a peace treaty' prevail over the Constitution, while the Constitution prevails over 'bilateral political or economic treaties.'[127]

Clearly, the ICCPR has the status of a self-executing treaty in Japan, with a rank higher than even the Constitution, and therefore can serve as a basis of pension or compensation claims by colonial veterans before Japanese courts.

4. *Conclusion*

The discrimination against colonial veterans of the Imperial Japanese Forces under the Japanese social welfare system constitutes a violation of Article 26 ICCPR; and the courts' practice hitherto to avoid an examination of the ICCPR by pointing to the Japanese Constitution, seems wrong. The courts' repeated admonitions to the Government in Tokyo to resolve the problem as a political issue, however, demonstrates that the judiciary, traditionally reluctant to decide against the State, is fully aware of the dimensions of the problem. However, at present there is no prospect of alleviation of the plight of Japan's colonial veterans.

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122 Miyazawa T, *Verfassungsrecht* (Constitutional Law) (1986) at 287; Oda H, *Japanese Law* (1992) at 52–53; Iwasawa, n120 at 135 n 14; Nagase F, *Kokusai-hô no kaisetsu* (A Commentary on International Law) (1993) at 5. See also Art. 98.2 Japanese Constitution: 'The treaties concluded by Japan and established laws of nations shall be faithfully observed.' There is a growing opinion, however, which gives the Constitution superiority over international law. Proponents of the treaty supremacy theory also look to Article 81, which does not specifically include treaties as objects of judicial review. They argue that the Article is meant to exclude treaties as objects of judicial review, and that this in turn indicates that treaties occupy a higher status than the Constitution. Satô, n127 at 175–176.

123 Art. 98.1 reads: 'This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript of other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.'

124 Iwasawa, n120 at 136 n 24; Hashimoto, *Nihonkoku Kenpô* (The Constitution of Japan) (1980) at 665–666; Takano, n111 at 207–209.

125 Iwasawa, n120 at 136 n 21; Kiyomiya, *Kenpô I* (Constitution I) (1979) at 449; Takano Y, *Kenpô to jôyaku* (Constitution and Treaties) (1960) at 209–213.

126 UNDOC CCPR/C/SR.324 (1981) at 2

127 Iwasawa, n120 at 136 n 27; Yamanouchi K, *Seifu no Kenpô kaishaku* (The Government's Interpretation of the Constitution) (1965) at 247–248.