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A New Forum for Comfort Women: Fighting Japan in United States Federal Court

Maki Arakawa†

I. INTRODUCTION

The dwindling number of living former comfort women—survivors of the approximately 200,000 women forcibly and repeatedly raped to satisfy the sexual needs of the Japanese military during World War II (WWII)—continue their over fifty year wait for justice. The Japanese government continues to stonewall numerous requests made by former comfort women, international and domestic organizations, foreign governments, the International Labor Organization, the United Nations, and the Japanese Bar Association to redress the grievances of the former comfort women for physical and emotional suffering resulting from service at the comfort stations.

† J.D. candidate, Boalt Hall School of Law, University of California at Berkeley. The author wishes to thank Dawn Ceizler and Dana Hirschenbaum, and the members of the BERKELEY WOMEN'S LAW JOURNAL, for their invaluable editing assistance and hard work.

1. The term "comfort women" is a translation of lanfu, the official Japanese term used during World War II. The term was used to describe women sent to provide "comfort" to soldiers at "comfort stations" and rape camps which the Japanese government instituted during World War II. Such women were sexual slaves and war-rape victims. See Karen Parker & Jennifer F. Chew, Compensation for Japan's World War II War-Rape Victims, 17 HASTINGS INT'L & COMP. L. REV. 497, 498 n.2 (1994).

2. Estimates for the total number of military sexual slaves serving the Japanese army range from 100,000 to 300,000, with 200,000 appearing to be the current consensus. See Chin-sung Chung, An Overview of the Colonial and Socio-Economic Background of Japanese Military Sex Slavery in Korea, 1 MUAE 204, 212 n.3 (1995); see also Parker & Chew, supra note 1, at 498 n.3 (noting that former Japanese Prime Minister Miyazawa admitted to the 200,000 figure); George Hicks, The Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War 19 (1995) (providing an estimate of 139,000 comfort women). These rough estimates are calculated by taking the total number of soldiers and dividing by the approximate ratio of soldier to comfort, an estimate ranging from a low of 20:1 to a high of 100:1. Chung, supra, at 212 n.3; Hicks, supra, at 18-19. The number of total Japanese troops was approximately 7,000,000. See Chung, supra, at 212 n.3.


Recently, women's groups have been putting pressure on the Japanese government to admit its culpability in relation to the comfort station system. For example, on December 12, 2000, the Women's International War Crimes Tribunal staged a mock trial to send a strong symbolic and political message to the Japanese government. The tribunal found the Japanese Government and former government officials, including former Emperor Hirohito and wartime Prime Minister Hideki Tojo, "guilty" of the war crimes committed by the Japanese army, including the enslavement of comfort women. However, the Japanese government refuses to be shamed into accepting moral or legal responsibility for the atrocities committed against former comfort women. The government has made little effort to redress harms suffered by the comfort women. Japan has refused to prosecute surviving war criminals, provide official compensation, or officially acknowledge legal accountability.

Because Japan will not acknowledge the harm it caused, former comfort women have begun to actively pursue remedies. The comfort women have filed eight lawsuits in Japanese courts since 1991. Unfortunately, none have resulted in damage awards for injuries suffered. The Japanese government has succeeded in avoiding liability for the claims of individual comfort women by relying on 1) strong technical legal arguments based on the uncertain state of international law prior to the end of WWII and 2) procedural grounds, such as the statute of limitations.

Due to the lack of success in hostile Japanese courts, a group of fifteen former comfort women filed a class action lawsuit on September 18, 2000 in the United States District Court for the District of Columbia.

6. Id.
8. Id. In 1995, the Japanese government established the Asian Women's Fund which would pay out "consolation money" to comfort women derived from donations made by Japanese private citizens and corporations. See infra section II.
under the Alien Torts Claim Act (ATCA). This suit follows in the footsteps of several successful suits brought in the United States by victims of human rights abuses, including two cases finding Bosnian-Serb leader Radovan Karadzic liable for war crimes including genocide, torture, forced prostitution, and rape. Those cases returned verdicts amounting to $745 million and $4.5 billion respectively. While juries and judges in the United States may apply international law in a more progressive manner than Japanese courts, it seems unlikely that the comfort women plaintiffs will prevail in the United States forum because of the difficulties of suing a sovereign state under the Foreign Sovereign Immunities Act (FSIA), as well as unfavorable case law interpreting the FSIA by the D.C. Circuit. This piece will provide an overview of the lawsuit, its merits, and its potential problems. Section II will discuss the historical and political background of the WWII comfort women system. Section III will analyze the legal arguments for imposing liability on the Japanese government under international law. Finally, Section IV will examine the procedural requirements for obtaining jurisdiction under the ATCA and the FSIA in the D.C. District Court and assess the possibility of a favorable outcome in the pending lawsuit.

13. 28 U.S.C. § 1350. The Alien Torts Claim Act provides United States district courts with original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Id.


15. Id.

16. 28 U.S.C. §§ 1602, 1603, 1605. The FSIA confers a broad grant of immunity or sovereign status and provides the enumerated conditions under which a foreign sovereign is denied immunity, thereby transferring questions of sovereign immunity from the executive to the judicial branch. Stephen J. Leacock, The Joy of Access to the Zone of Inhibition: Republic of Argentina v. Weltover, Inc. and the Commercial Activity Exception Under the Foreign Sovereign Immunities Act of 1976, 5 MINN. J. GLOBAL TRADE 81, 88 (1996). The FSIA codified the restrictive view of sovereign immunity which removes the immunity of sovereigns when they engage in commercial activity. See id.

17. Princz v. Germany, 26 F.3d 1166, 1176 (D.C. Cir. 1995). In Princz, the court held that the FSIA precluded the victim of Holocaust slave labor camps from obtaining jurisdiction to sue the government of Germany.

18. The plaintiffs in this case may face other important legal obstacles that are not addressed in this article, including the forum non conveniens doctrine, the act of state doctrine, and the political question doctrine. Forum non conveniens is a common law doctrine that permits a court to decline to exercise jurisdiction even where it has personal and subject matter jurisdiction over a case so long as an "alternative adequate forum would be substantially more convenient." GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 289, 295 (1996). An alternative forum may be more convenient due to the location of evidence and witnesses, and "appropriate" if, for example, there is a strong local interest of a state in having the case adjudicated in its forum. Id. The act of state doctrine prevents United States courts from judging the validity of acts of sovereigns within their own territory. Id. at 685. The political question doctrine bars courts from adjudicating cases which raise separation of powers concerns or are beyond the expertise of the judiciary. Id. at 702.
II. BACKGROUND

A. The Japanese Comfort Women System During WWII

Beginning in 1931 in Shanghai, the Japanese government set up comfort stations in “all corners of the Empire,” including China, Manchuria, Taiwan, Borneo, Rabaul, Ryuku, the Philippines, Singapore, Burma, Indonesia, Malaya, Japan, and Korea. The Japanese government devised the comfort women system in order to 1) prevent the antagonization of local populations by preventing soldiers from uncontrollably raping local women, 2) preserve the strength of its troops by controlling the spread of venereal disease, 3) increase the fighting strength of the Japanese soldiers, 4) raise morale and provide leisure and recreation for soldiers, as a reward for fulfilling their patriotic duties, 5) protect national honor, and 6) ensure the well-being of the soldiers.


Yuki Tanaka, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II 94-95 (1996); Parker & Chew, supra note 1, at 303 (stating that the primary impetus for the comfort women system was to reduce the large number of rapes committed by Japanese troops in China); Kazuko Watanabe, Militarism, Colonialism and the Trafficking of Women: “Comfort Women” Forced into Sexual Labor for Japanese Soldiers, 26 BULL. OF CONCERNED ASIAN SCHOLARS No. 4, at 14 (“[T]he recruiting of Korean women as prostitutes was gradually institutionalized to arouse soldiers’ fighting spirit, provide them with an outlet for frustration and fear fostered by hierarchical military life, and ostensibly to prevent random rapes.”).

JAPAN’S POLICY, supra note 19, at 14 (noting “need to prevent loss of troop strength by venereal and other diseases” as a reason for the development of comfort stations); Chung, supra note 2, at 209.

Hicks, supra note 2, at 32-33 (describing how many Japanese superstitiously believed that sex before battle would bring good luck).

See Lisa Go, “An Unbroken History of Japan’s Sex Slaves,” (Internet reprint ASA-News (the International Communication Project Newsletter), Apr. 1994), available at ftp://csf.colorado.edu/ipe/Geographic_Archive/asia/women/Japanese_Sex_Slaves.txt (last visited Mar. 9, 2001) (stating that “the Japanese army directly managed the comfort stations under its recreation division” initially until it delegated this duty to private entrepreneurs when faced with political criticism and quoting WWII military doctor Dr. Tetsuo Aso’s statement in his report Methods of Preventing Venereal Disease that “[t]he women are a ‘royal gift’ from the Emperor to the Imperial Army”). Watanabe draws analogies between Japanese businessmen of today and the Japanese soldiers during the war in that both were rewarded with prostitutes for risking their lives, for work and for the emperor on the battleground, respectively. Watanabe, supra note 20, at 14.
tional security from espionage,24 and 6) raise revenue from taxing the comfort stations.25

Although approximately eighty percent of the comfort women were from Korea,26 there were also Taiwanese, Japanese, Chinese, Southeast Asian, and European women.27 The fact that the majority of comfort women were non-Japanese may suggest that racial and ethnic attitudes informed the comfort women system.28 The Japanese believed that their own women should be “bearing good Japanese children who would grow up to be loyal subjects of the emperor.”29 Moreover, there is some evidence that a racial hierarchy existed, affecting treatment, conditions, and prices; Japanese and Europeans were at the top, followed by Koreans, Chinese, and Southeast Asians at the bottom.30

The Japanese government, in collaboration with the military, was involved in recruiting and transporting the comfort women.31 The government initially relied on volunteers, such as former prostitutes who would work for money, and later began to “recruit” young women.32 The government also recruited Korean women under general mobilization directives, which were part of the labor draft for factory work in war indus-

24. See TANAKA, supra note 20, at 96; see also Hicks, supra note 2, at 68.
26. Keith Howard, Introduction, in TRUE STORIES, supra note 25, at v; Hicks, supra note 2, at 66; David Boling, Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Escapes International Legal Responsibility?, 32 COLUM. J. TRANSNAT'L L. 533, 541-42 (1993). There is some evidence that Korean women were deliberately chosen in part to avoid violation of international law, since Korea was a colony at the time. TANAKA, supra note 20, at 97. After the Japanese Ministry of Home Affairs had specifically issued orders to prefectural governors prohibiting the use of women under the age of 21 as prostitutes to avoid liability under international law, Japanese officials looked to “young unmarried women in the colonies and occupied territories ... as a [lawful] resource.” Id. The extreme poverty of Korea made the practice of selling daughters into prostitution and other work away from home more common. See Chung, supra note 2, at 210-11.
27. Parker & Chew, supra note 1, at 498.
28. Chung, supra note 2, at 211.
29. TANAKA, supra note 20, at 97. Japanese comfort women enjoyed safer conditions and better treatment because they were limited to servicing only higher-ranking officers, whereas Korean and other non-Japanese comfort women were sent to the frontlines of battle and were required to service the rank and file. See Hicks, supra note 2, at 66-67; Go, supra note 23.
30. Although evidence is inconclusive regarding the entire system, the treatment and pricing of the comfort women appears to have followed this racial hierarchy in at least some of the regions: ¥2 for Japanese, ¥1.50 for Koreans, and ¥1 for Chinese (the Toyama and Manila regions). Hicks, supra note 2, at 88-89.
31. It is difficult to determine the extent of government involvement due to the concealment or destruction of evidence by the Japanese government. Yvonne Park Hsu, “Comfort Women” from Korea: Japan’s World War II Sex Slaves and the Legitimacy of Their Claims for Reparations, 2 PAC. RIM L. & POL’y J. 97, 101 (1993) (“On August 14, 1945, when Japan realized that it would inevitably have to surrender, the Japanese Minister of War issued an order to every Army headquarters to immediately destroy all confidential documents.”); TANAKA, supra note 20, at 97-99.
32. COOMARASWAMY REPORT, supra note 19, at ¶ 28. Such “recruitment” was accomplished through paying private agents, as “middle men,” or by requesting local governments and village heads to round up women. Parker & Chew, supra note 1, at 505.
tries. Finally, the military, with the help of local government or police, conducted slave raids of local populations where the women were threatened with physical harm to themselves or their family members. Most of the non-Japanese comfort women were extremely young and from poor, uneducated, and rural families. The girls were systematically recruited under the pretext of high-paying wage labor or simply abducted and transported to comfort stations.

Once collected, the comfort women were transported to stations on the front lines via army ships, railroads, trucks, and occasionally in army planes. Additionally, in 1942 the Minister of Foreign Affairs ordered his staff to issue military travel documents for the comfort women, so that they would no longer require passports.

After being taken to the comfort stations, the young women soon realized they were not in fact recruited for honest work. The military viewed and treated the women as military supplies. Within the comfort stations, the women were repeatedly raped to satisfy the sexual needs of the Japanese soldiers. Many women report having “serviced” an average of twenty to thirty men per day. Many of the surviving comfort women bear visible scars and permanent marks from the physical torture and beatings they suffered as a result of attempting to resist rape or escape from the comfort stations.

While some of the comfort stations were operated by private entrepreneurs, the government maintained control of all comfort stations through strict regulations. The state imposed an explicit set of rules which were posted in comfort stations. It issued business permits to entrepreneurs and required them to submit monthly reports, pay a business

33. COOMARASWAMY REPORT, supra note 19, at ¶ 29; HICKS, supra note 2, at 20. The mobilization programs were initially voluntary, but in 1941 the Japanese government enacted legislation requiring women between the ages of fourteen and twenty to participate in the National Labor Service Corps for at least thirty days. Ustinia Dolgopol, Women’s Voices, Women’s Pain, 17.1 HUMAN RIGHTS Q. 127, 130 (1995).

34. Chung, supra note 2, at 206; HICKS, supra note 2, at 55-57.

35. Chung, supra note 2, at 210-11; COOMARASWAMY REPORT, supra note 19, at ¶ 30.

36. PARKER & CHEW, supra note 1, at 505.

37. TANAKA, supra note 20, at 98.

38. Id.; Ching Sung Chung, Korean Women Drafted for Military Sexual Slavery by Japan, in TRUE STORIES, supra note 25, at 11, 19 (writing that both the comfort women and the mobilizers required travel permits issued by the military).

39. See HICKS, supra note 2, at 83 (stating that the comfort women were recorded on military transport lists as units of “munitions”).

40. Chung, supra note 2, at 212 n.3.

41. Id.

42. PARKER & CHEW, supra note 1, at 508-10.

43. Id. at 504 ("[A]ll facilities followed written regulations created by the Japanese Army."). George Hicks provides examples of the regulations from comfort stations in Shanghai, Okinawa, and Manila. HICKS, supra note 2, at 83-90.

44. HICKS, supra note 2, at 98 (featuring a photograph of the regulations posted in a Shanghai comfort station which was taken by a former military doctor).
tax, and request permission to close or suspend any brothel business.\textsuperscript{45} Moreover, the Japanese government expressly provided health and medical services for all comfort stations.\textsuperscript{46} The services included compulsory medical exams for the comfort women, treatment of venereal diseases and pregnancy, and the provision of condoms.\textsuperscript{47} In addition, the Japanese government often provided security for comfort stations to prevent the escape of comfort women and the unauthorized entry of any nonmilitary or paramilitary men.\textsuperscript{48}

Of the thousands of women who were forced into this prolonged military prostitution, only a handful are able to speak of their encounters today because fewer than thirty percent are estimated to be alive.\textsuperscript{49} Most of the women did not survive the poor conditions at the comfort stations.\textsuperscript{50} More died at the end of the war when Japanese soldiers forced them to kill themselves along with the troops, intentionally mass murdered them, or simply abandoned them in remote and dangerous areas with no means of returning to their homelands.\textsuperscript{51} Low quality medical treatment, the violence of soldiers, and the dangers of being close to battle all contributed to numerous deaths both during and after the war.\textsuperscript{52} After the war, those women who survived and returned home continued to suffer.\textsuperscript{53} Many women committed suicide out of shame after returning home and facing ostracism from their families and communities.\textsuperscript{54} Many others have simply died of old age.\textsuperscript{55} Those who survive continue to suffer from severe physical and emotional difficulties including sterility, health problems associated with sexually transmitted diseases contracted in the comfort stations, insomnia, nervous breakdowns, psychological trauma, and shame.\textsuperscript{56}

\textsuperscript{45} Chung, supra note 2, at 210 (specifying that the operator of a comfort station must be a Japanese national, which included Koreans and Taiwanese with business experience); see also Hicks, supra note 2, at 89.

\textsuperscript{46} Hicks, supra note 2, at 93-4; Tanaka, supra note 20, at 96 (stating that in 1942 alone, the Japanese government sent 32.1 million condoms to units outside of Japan).

\textsuperscript{47} Id.

\textsuperscript{48} Pak Sunae, Hostage to My Past, in TRUE STORIES, supra note 25, at 158, 163.

\textsuperscript{49} Boling, supra note 26, at 542. As of February 1993, there were 103 surviving former comfort women in South Korea and 123 in North Korea. Chin Kim & Stanley S. Kim, Tortured Justice: The Case of the Japanese Imperial Military Sex Slaves, 16 UCLA PAC. BASIN L.J. 263, 267 (citing Hyunah Yang, Revisiting the Issue of Korean “Military Comfort Women”: The Question of Truth and Positionality, in THE COMFORT WOMEN: COLONIALISM, WAR AND SEX 68 (Chungmoo Choi ed., 1997)).

\textsuperscript{50} COOMARASWAMY REPORT, supra note 19, at ¶¶ 32, 37-38.

\textsuperscript{51} Hicks, supra note 2, at 153-58.

\textsuperscript{52} Id.

\textsuperscript{53} Id. at 162-66.

\textsuperscript{54} See Dolgopol, supra note 33, at 137.

\textsuperscript{55} Parker & Chew, supra note 1, at 499 (estimating in 1994 that only 2,000 of the original 200,000 comfort women probably continue to survive and were between 65 and 85 years in age); Hicks, supra note 2, at 19.

\textsuperscript{56} Watanabe, supra note 20, at 14; Hicks, supra note 2, at 165; Dolgopol, supra note 33, at 137.
B. The Japanese Government's Response to the Comfort Women Issue

The Japanese government initially denied any military or state involvement in the comfort stations and characterized them as privately-run brothels staffed by voluntary prostitutes. Despite demands made by a Diet member and non-governmental organizations in 1990 to make disclosures regarding and appropriate reparations to the comfort women, the Japanese government continued to deny responsibility. In November 1991, it asserted in a televised statement that evidence of forceful drafting of comfort women was insufficient to warrant further investigation. In December 1991, after a lawsuit was filed by three Korean comfort women against the Japanese government and a formal request was made by the South Korean government to conduct an investigation into the matter, the Japanese government finally initiated an investigation.

In January 1992, shortly after the lawsuit was filed, Professor Yoshiaki Yoshimi of Chuo University discovered and released documents from the Defense Library conclusively proving Japan's direct role in maintaining a large network of comfort houses. The documents include classified correspondence between troops stationed in China in 1938 and the War Ministry regarding the need for comfort houses. On the same day that the key extracts from these documents were published, Chief Cabinet Secretary Koichi Kato, on behalf of the Japanese government, apologized for the first time for the military's involvement in the comfort women system. However, the government refused to acknowledge the coercive character of the system and would not pay damages to the women on these grounds. It further contended that military prostitution.

59. Id.
60. Id.
62. WCCW, supra note 58.
63. Id.
64. Hicks, supra note 2, at 205-06; see also Documents on "Comfort Women" Found in Defense Agency Library, UNITED PRESS INT'L, BC CYCLE, Jan. 11, 1992, LEXIS, Nexis Library.
65. See Hicks, supra note 2, at 205-06.
66. Japan Apologizes For Forcing Women To Serve As Prostitutes, UNITED PRESS INT'L, BC CYCLE, Jan. 13, 1992; see also Hicks, supra note 2, at 206; Edward Neillan, Japan Regrets Era of Forced Prostitution, WASHINGTON TIMES, Jan. 14, 1992, LEXIS, Nexis Library (quoting Chief Cabinet Secretary Koichi Kato's statement at a news conference that Japan "cannot deny the fact that the military was involved, although at this point we are still not certain to what extent . . . [w]e recognize [that the comfort women's] grievances . . . go beyond legal theories or contracts between the two countries").
67. See Hicks, supra note 2, at 206 (noting Japan's contention that there was no evidence of "direct drafting" of the comfort women by the Japanese government); Teruki Ueno, No Coercion in Wartime Prostitution Proved. Japan, THE REUTER LIBRARY REPORT, July 6, 1992, LEXIS, Nexis Library; WCCW, supra note 58.
did not constitute a war crime. The Japanese government also refused to pay restitution on the basis that any reparations claims had already been settled conclusively under the 1965 San Francisco Peace Treaty and subsequent bilateral treaties.

On July 5, 1992, due to mounting pressure from neighboring countries, Japan reversed its earlier position and admitted that the military had recruited for and managed the brothels. It simultaneously released 127 documents detailing how the stations were run and confirming the government's involvement. Claiming concern over the women's privacy, the government ruled out conducting a hearing where some former comfort women could testify, despite the increased number of women willing to come out publicly. However, on August 4, 1992, the Japanese government issued a report acknowledging that the women were coerced into becoming military prostitutes by the Japanese government. The report stated that as the need for women increased, the recruiters used deceitful measures and intimidation, and "there were even cases where administrative personnel directly took part in recruitment." However, the government maintained that, pursuant to normalization agreements with Asian nations after the war in which all rights to compensation were extinguished, it did not bear legal responsibility.

The government's reluctance to acknowledge its responsibility has continued despite optimistic expectations that a socialist prime minister might change the policy. Japanese Prime Minister Murayama announced the first version of a compromise plan for the payment of money to former comfort women on August 31, 1994. This private fund does not include direct reparation or individual compensation for

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68. Id.
69. HICKS, supra note 2, at 169-72; Neilan, supra note 66. Under the San Francisco Peace Treaty and subsequent settlement agreements, Korea received $300 million in cash and $200 million in loans from Japan in return for settling all property rights, interests, and claims between the two contracting parties and their nationals. Hsu, supra note 31, at 98, 102 n.36 (1993) (citing Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Cooperation Between Japan and the Republic of Korea, June 22, 1965, Japan-Korea, art. 1, § 1, 583 U.N.T.S. 258 [hereinafter Japan-Korea Agreement]).
71. See COOMARASWAMY REPORT, supra note 19, at ¶ 128.
72. Sanger, supra note 70.
74. Id.
75. Id.
76. The Socialist Party had taken a more critical view of Japan's war record than other political groups, especially the Liberal Democratic Party which had dominated Japanese politics during the previous thirty years. Cameron W. Barr, Japan's Leader Unveils Atonement Plan for WWII, CHRISTIAN SCIENCE MONITOR, Sept. 1, 1994, WL, Westnews; Naomi Hirakawa, Cold Comfort, JAPAN TIMES WKLY. INT'L EDITION, July 31-Aug. 6, 1995, LEXIS, Nexis Library; Eugene Moosa, Korean 'Comfort Women' Sue Japan, SEATTLE TIMES, Dec. 6, 1991, WL, Westnews.
77. Barr, supra note 76; WCCW, supra note 58.
comfort women, but rather stresses research and inter-Asian exchange programs. However, as the fiftieth anniversary of the end of World War II approached, Prime Minister Murayama offered “profound apologies” to the comfort women who “suffered emotional and physical wounds that can never be closed.” On July 19, 1995, the government officially established the Asian Women’s Fund to “undertake disbursement to each . . . former wartime ‘comfort woman’ as an expression of Japanese people’s atonement” and “to address current [women’s] issues such as the eradication of violence against women.” This Fund would pay “consolation money” to comfort women derived from donations made by Japanese private citizens and corporations. Government funds would cover only the administrative costs of launching and running the private fund and for the victims’ housing, medical care, and welfare costs. Such a political scheme allowed the government to appear morally responsible and sympathetic to the comfort women’s cause while avoiding any official legal responsibility for the past abuses committed by its officials. Many former comfort women denounced the fund and refused to accept such charity-like payments because of the failure of the government to assume official responsibility.

III. SUBSTANTIVE LEGAL LIABILITY OF THE JAPANESE GOVERNMENT

While the Japanese government has made repeated public apologies and set up a symbolic private atonement fund, it has steadfastly refused to accept legal culpability for the comfort women system. The Japanese government denies legal liability based on four main arguments: 1) the uncertain state of international human rights law during WWII and the principle against applying such laws retroactively; 2) the inability of individuals to be compensated under international law; 3) the prior settlement

78. Barr, supra note 76.
80. JAPAN’S POLICY, supra note 19, at 18.
81. Id.
83. Kim & Kim, supra note 49, at 269.
84. Id.; Sakamaki, supra note 82, at 26. Comfort women organizations have characterized the Fund as a “second rape” of the survivors with the temptation of cash payments. Chunghee Sarah Soh, Human Rights and Humanity: The Case of the “Comfort Women,” Institute for Korean-American Studies (ICAS) Lectures, No. 98-1204-CSSb, University of Pennsylvania (Dec. 4, 1998), available at http://www.dvol.com/~users/icas/lectures/cssl998.html. Professor Soh claims that the freedom of the individual victims to elect whether or not to accept payments from the Fund has been compromised by political pressure from their governments and domestic comfort women organization leaders in certain countries, such as South Korea, Taiwan, and Indonesia. Id.
85. See Section II infra.
of claims by post-war bilateral treaties; and 4) the passage of more than fifty years, rendering the complaints of the comfort women time-barred.86

A. Sources of Prevailing International Law

International law poses a significant challenge for the plaintiffs. International law was not codified until after WWII, several years after the establishment of the comfort women stations in 1931.87 Consequently, the plaintiffs' claims may be challenged as an invalid ex post application of international law.88 The comfort women plaintiffs allege that the government of Japan committed war crimes and crimes against humanity, offenses which are codified in the charters to the International Military Tribunals executed following World War II.89

International law derives from three primary sources which in roughly hierarchical order are treaties, custom, and general principles of law recognized by well-developed domestic legal systems.90 International treaties include all express agreements between states and may be termed convention, charter, declaration, accord, regulation, or provision.91 Customary international law refers to the general practice of states.92 Such law is only binding with the consent of the involved states since either state can override customary law by entering and ratifying a treaty to the contrary.93 However, if the parties to a treaty consistently ignore it, then it is replaced by a new rule of customary law which will conflict with the earlier treaty.94 This means that treaties and custom are of generally "equal authority," since the most recent prevails, as long as it is not more general in nature.95 General principles constitute subordinate sources of international law since they serve to fill in gaps in treaties and customary

86. COOMARASWAMY REPORT, supra note 19, at ¶¶ 96, 103-106, 109, 124; Parker & Chew, supra note 1, at 537-40.
87. See Parker & Chew, supra note 1, at 513 (stating that prior to World War II, few treaties codified human rights norms).
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
Customary international law or treaty law becomes binding on all states only when it is so universally accepted that it has attained the status of *jus cogens* norms. A *jus cogens* norm is a peremptory norm that is "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." As such, theoretically, *jus cogens* norms enjoy the highest authority in international law and are binding on all states, even in the absence of their consent to be bound.

In order to circumvent Japan's defense related to the *ex post* application of laws, former comfort women have looked to laws in existence prior to the institution of the comfort women system. They have argued in previous Japanese litigation that the comfort women system violated the Hague Convention of 1907, to which Japan was a signatory, which prohibited rape and enforced prostitution during armed conflict. Article 46 of the Hague Convention provides, with regard to civilians in occupied territories, that "family honor and rights... must be respected." Comfort women plaintiffs in prior lawsuits and commentators have interpreted the phrase "family honor and rights" broadly to encompass the right of women within families to be protected from sexual violation, including rape and enforced prostitution. They have also argued that Article 27 of the 1949 Geneva Convention reinforces this interpretation by codifying existing customary international law relating to civilians' human rights during war. Article 27 explicitly states that women shall receive special protection "against any attack on their honour, in par-

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96. *Id.* at 48 (stating that general principles may derive from either international or national law).
97. *Siderman de Blake*, 965 F.2d at 714; *MALANČUK*, *supra* note 90, at 57-58.
100. See, *e.g.*, Boling, *supra* note 26, at 558 (describing the arguments made by the Filipina comfort women).
101. *McDOUGALL REPORT* 1, *supra* note 3, app. at ¶ 17. The Hague Conventions were first applied after World War I in the Vienna Convention, where Germany was found guilty of war crimes including rape. *Parker & Chew, supra* note 1, at 516.
103. Hsu, *supra* note 31, at 111 (noting that the Geneva Convention was merely an extension of pre-existing international law and served as a supplement to the relevant articles concerning civilian protection in the Hague Regulations); *McDOUGALL REPORT* 1, *supra* note 3, app. at ¶ 17; Boling, *supra* note 26, at 558.
ticular against rape, enforced prostitution, or any form of indecent assault.\footnote{104}

The Japanese government has refuted the "family honour" construction of the Hague Convention as overly broad.\footnote{105} Japan argues that the Hague Convention does not explicitly prohibit rape during armed conflict.\footnote{106} It argues that the phrase can mean that the family unit should be respected during war by ensuring family members are not separated from each other.\footnote{107} Under this restrictive reading, the Japanese government would be peripherally liable for its act of forced recruitment of comfort women.\footnote{108} None of the subsequent rapes would be encompassed by this provision.\footnote{109}

The plaintiffs also allege that Japan's widespread and systematic enslavement of women violated recognized crimes against humanity, as codified in the Charters to the post-World War II International Military Tribunals.\footnote{110} The relevant crimes against humanity include "enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war . . ."\footnote{111} They further argue that slavery had attained \textit{jus cogens} status prior to World War II and thus is binding on all states.\footnote{112}

Japan was a signatory to the International Conventions for the Suppression of the White Slave Traffic and the Suppression of the Traffic in Women and Children, in 1910 and 1921 respectively.\footnote{113} Such documents "criminalized the procuring of women or girls abroad for immoral purposes" and required parties to prosecute such violations.\footnote{114} However, Article 14 of the 1921 Suppression Convention provided a safe harbor which excluded overseas possessions, protectorates, or territories under any of the signatories' sovereignty or authority.\footnote{115} This safe harbor would immunize Japan from liability for its sexual enslavement of women in its colonies of Korea and Taiwan, but not from violations occurring in areas that were not colonies or territories at the time, such as the Philip-

\begin{footnotes}
\footnotetext[104]{Hsu, \textit{supra} note 31, at 111 (quoting from \textit{Documents on the Laws of War} 43-44 (Adam Roberts and Richard Guelff eds., 1982)).}
\footnotetext[105]{McDOUGALL REPORT I, \textit{supra} note 3, app. at ¶ 28.}
\footnotetext[106]{Id.}
\footnotetext[107]{Boling, \textit{supra} note 26, at 562.}
\footnotetext[108]{Id.}
\footnotetext[109]{Id.}
\footnotetext[110]{The plaintiffs are referring specifically to the Nuremberg Charter and Control Council Law No. 10 and the Charter of the International Military Tribunal for the Far East in Tokyo. McDOUGALL REPORT I, \textit{supra} note 3, app. at ¶¶ 19-20.}
\footnotetext[111]{Id.}
\footnotetext[112]{Parker & Chew, \textit{supra} note 1, at 521; McDOUGALL REPORT I, \textit{supra} note 3, app. at ¶ 13 (stating that slavery was the first human right to be recognized as customary international law and \textit{jus cogens}).}
\footnotetext[113]{Boling, \textit{supra} note 26, at 573.}
\footnotetext[114]{Id.}
\footnotetext[115]{Id.}
\end{footnotes}
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One commentator has suggested that since the colonial safe harbor provision only applies to acts occurring within the colonies' geographical boundaries, claims of Korean and Taiwanese comfort women who were forced to serve in comfort stations located outside of their homelands would not be excepted from coverage. Japan would therefore still be subject to liability under the Suppression Convention, presuming that sexual slavery falls within the definition of forced or compulsory labor. However, if the comfort women system were determined to have violated jus cogens norms, then any treaties in violation of such norms would be automatically invalid.

B. Right to Individual Compensation Under International Law

Japan asserts that, even if the comfort women system is found to violate international law, there is no individual right to compensation for such a violation. Despite Japan's contention that only states are subjects of international law, various sources of pre-WWII international law provide that individuals may make claims against states for international law violations. For example, Article 3 of the Hague Convention of 1907 explicitly states that a belligerent party found to violate its provisions shall be liable to pay compensation. The Treaty of Versailles in 1919 provided that individuals could bring claims against Germany after the First World War. In the Chorzow Factory case of 1927, the Permanent Court of International Justice held that states must pay individuals compensation where the individual could not be restored to his or her prior status, i.e., the status before the international law violation took place. Additionally, international attempts were made in 1929 to codify the elements of compensation in connection with state responsibility under international law. In connection with these attempts, Japan proposed that states be held liable for both intentional and negligent conduct. States generally agreed not to assist their citizens in collecting

116. Id. at 573-74. Gay McDougall contends that this waiver does not apply to China because the 1951 peace treaty specifically states that China is entitled to benefits under article 14 (a)(2) but does not state that China is subject to the waiver provision of article 14(b). McDougall Report 1, supra note 3, app. at ¶ 61.
117. Boling, supra note 26, at 574. Slavery was defined in the 1926 Slavery Convention as "the status of a person over whom any or all of the powers attaching to the right of ownership are exercised." McDougall Report 1, supra note 3, app. at ¶ 14 (citations omitted).
118. See Parker & Chew, supra note 1, at 520-22; Boling, supra note 26, at 575.
119. See id.; Parker & Chew, supra note 1, at 525.
120. McDougall Report 1, supra note 3, app. at ¶ 45.
121. McDougall Report 1, supra note 3, app. at ¶ 45.
122. See id., Parker & Chew, supra note 1, at 525.
123. McDougall Report 1, supra note 3, app. at ¶ 45.
125. Id. at 526.
from foreign governments until channels of private action were exhausted.\textsuperscript{126} If the United States court adopts this line of reasoning, the government of Japan will have to compensate the comfort women for their injuries since it is impossible to restore the comfort women to the position they were in before being sexually enslaved.

C. Effect of Post-War Treaties on Individual Claims

The Japanese government has maintained that, even if individual claims to compensation arise under international law, such rights have been extinguished by post-war settlement treaties.\textsuperscript{127} This argument is not applicable to comfort women from countries such as China, North Korea, and Taiwan, which were not signatories to either the San Francisco Peace Treaty\textsuperscript{128} between the Allied countries and Japan or a separate bilateral Settlement of Claims agreement with Japan.\textsuperscript{129} Additionally, the text of the agreements and related documents do not indicate the intent to extinguish human rights claims by individuals in those countries.\textsuperscript{130}

Article 2, section 1 of the 1965 Korea-Japan Agreement on the Settlement of Claims states: “The Contracting Parties confirm that problem [sic] 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 . . . is settled completely and finally.”\textsuperscript{131} The Korea-Japan Agreement more closely resembles an agreement between two governments “designed . . . mainly to promote economic cooperation” rather than to settle claims of individuals from the two countries.\textsuperscript{132} Japan promised to give Korea a grant and loans in order “to settle problem[s] concerning property . . . and claims . . . of the two countries and their nationals, and . . . to promote the economic cooperation between them.”\textsuperscript{133} Also, in stark contrast to the post-war agreements with the Allied Powers, the agreement does not contain an explicit provision addressing claims of individuals.\textsuperscript{134} In addi-

\textsuperscript{126} Id.
\textsuperscript{127} JAPAN'S POLICY, supra note 19, at 9.
\textsuperscript{129} Parker & Chew, supra note 1, at 537.
\textsuperscript{130} MCDougall Report II, supra note 4, at ¶¶ 58-60.
\textsuperscript{131} Japan-Korea Agreement, supra note 69, at art. 2, § 1 (emphasis added). The Japan-Korea Agreement is important because it affects a large number of comfort women and it indicates a resolution of Korea’s and Japan’s conflicts. See Boling, supra note 26, at 566-67.
\textsuperscript{132} Hsu, supra note 31, at 102.
\textsuperscript{133} Japan-Korea Agreement, supra note 69, at Preamble.
\textsuperscript{134} Hsu, supra note 31, at 103. For example, “the Greece-Japan Agreement, the Great Britain-Japan Agreement and the Canada-Japan Agreement provided compensation ‘for personal injury or death which arose before the existence of a state of war . . . for which the Government of Japan [is] responsible according to international law.’” Id. (quoting from Agreement Between the Royal Government of Greece and the Government of Japan Regarding Settlement of Certain
tion, the documents Korea presented outlining its claims during the negotiations of the agreement with Japan demonstrate that the scope of the claims covered by such agreement were intended to be limited to property and economic issues, excluding personal injuries resulting from international law violations committed by Japan. Consequently, the claims of Korean comfort women are not nullified by the post-war Korea-Japan agreement.

Unfortunately, women from Indonesia and the Philippines, which were signatories to the San Francisco Peace Treaty, face potentially broader waiver language:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

United Nations Special Rapporteur Gay McDougall argues that the distinction in the text between “reparations” and “other claims” indicates “that the waiver does not apply to compensation of the Allied Powers’ nationals” since “the only reparations contemplated in the waiver are those of the Allied nations themselves.” Under this interpretation, only claims qualifying as something other than reparations claims, such as unpaid compensation and property claims, would be barred. In addition, even if the Treaty is construed as waiving individual human rights claims, Article 26 of the Treaty contains a provision which entitles all signatories to terms equivalent to any “greater advantages” obtained by a non-signatory for a “peace settlement of war claims settlement” with Japan. China, a non-party to the San Francisco Treaty, made a peace and war claims settlement agreement in 1972 with Japan in which China did not waive its nationals’ rights to bring individual war claims against Japan. That
agreement conferred greater advantages on China than on the signatories to the San Francisco Treaty. Therefore, Article 26’s "most favored nations" clause would grant comfort women from other signatory countries (including Indonesia and the Philippines) the right to sue Japan for war crimes as well.

Finally, many have argued that states do not have the legal right under international law to extinguish the individual claims of their nationals for international law abuses. Under international law, a subsequent treaty cannot trump a claim based on a violation of *jus cogens* norms. In addition, the plaintiffs may propose arguments contesting the conscionability of the bilateral treaties with Japan. They may also argue that Japan has considerably more resources now than at the end of the war when the Allied Powers determined the extent of Japan’s wartime reparations.

D. Statute of Limitations

The Japanese government claims that the plaintiffs are time-barred from bringing their claims in federal court. It argues that the statute of limitations has run since it has been over fifty years since the alleged acts. However, strong arguments exist for legal or equitable tolling of the statute of limitations in this case. The plaintiffs argue that the statute of limitations is tolled by the 1968 Convention for the Non-Applicability of a Statute of Limitations for War Crimes and Crimes Against Humanity. Although neither Japan nor the United States has ratified this convention, it may have gained the status of customary international law. Plaintiffs also assert that, due to the concealment and misrepresentation of vital evidentiary information concerning the mili-

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141. *Id.*
142. *Id.*
143. *See id.* at 4-5; Parker & Chew, *supra* note 1, at 538-39.
145. Hsu, *supra* note 31, at 101-06; Boling, *supra* note 26, at 567 ("The [bilateral] agreements manifest a lack of bargaining power on the part of the formerly occupied Asian nations, and this fact, coupled with the absence of individual reparations in the final settlement, leads [Hsu] to the conclusion that the Korean-Japan Agreement cannot be deemed 'final and complete'.")
146. Article 14(b) of the San Francisco Treaty states that "it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations." San Francisco Peace Treaty, * supra* note 128, at art. 14(b).
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In 2000, the Japanese government began to consider providing monetary compensation to comfort women. The statute of limitations should be equitably tolled. Moreover, the policy rationale behind imposing a time bar does not apply to this case. The main purpose behind a statute of limitations is "diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh." Since the plaintiffs did not unduly delay in bringing suit, the evidence is very compelling, and the defendant has admitted to the alleged conduct, none of these reasons are applicable. In addition, if Japan violated *jus cogens* norms, the statute of limitations would not apply.

IV. JURISDICTIONAL REQUIREMENTS FOR SUING JAPAN IN UNITED STATES COURT: ALIEN TORTS CLAIM ACT AND FOREIGN SOVEREIGN IMMUNITIES ACT

The comfort women are seeking to redress injuries caused by the Japanese government through a civil suit filed against the Japanese government in the United States District Court for the District of Columbia. Their cause of action arises under the ATCA. The ATCA states that "district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATCA was

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151. Complaint, supra note 12, at ¶¶ 37-42.
153. See Complaint, supra note 12, at ¶ 39; Parker & Chew, supra note 1, at 539-40.
154. Boling, supra note 26, at 575-76.
155. Under 28 U.S.C. § 1391(f)(4), actions against a foreign government may be brought in the District Court for the District of Columbia unless a "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated" in another judicial district pursuant to § 1391(f)(1), a suit in admiralty is brought under § 1605(b) pursuant to § 1391(f)(2), or a suit is brought against an agency or instrumentality of a foreign state pursuant to § 1391(f)(3). Since the claims in this suit do not fall under any of the enumerated exceptions, the District of Columbia is a proper venue for the plaintiffs in this suit.
156. 28 U.S.C. § 1350. The plaintiffs also assert jurisdiction based on the federal question doctrine under 28 U.S.C. § 1331, in that the Japanese government's violation of international law is enforceable in federal courts under federal common law. Complaint, supra note 12, at ¶ 4. However, this article will not discuss this second cause of action since courts have often ignored such actions when finding that § 1350 applies. See Filartiga v. Pena-Irala, 630 F.2d 876, 888 n.22 (2d Cir. 1980) ("We recognize that our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331. We prefer, however, to rest our decision upon the Alien Tort Statute, in light of that provision's close coincidence with the jurisdictional facts presented in this case."). See also Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1996) which held it unnecessary to determine whether causes of action for violations of international law "arise under" the laws of the United States for purposes of jurisdiction under § 1331. This case was remanded by the Second Circuit for damages and has thus far involved various decisions on discovery motions, class-certification and de-certification motions. See Doe v. Karadzic, 93 Civ. 0878, 2000 U.S. Dist. LEXIS 8108, at *1-2 (S.D.N.Y. June 13, 2000).
originally part of the Judiciary Act of 1789.158 It lay dormant as an obscure statute until it was revived in 1980 in Filartiga v. Pena-Irala.159 In Filartiga, the Second Circuit held that since “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties . . . whenever an alleged torturer is found and served with process by an alien within our borders, section 1350 provides federal jurisdiction.”160 Under Filartiga, the ATCA confers federal subject-matter jurisdiction where 1) an alien sues, 2) for a tort, 3) committed in violation of the law of nations.161 The Second and Ninth Circuits have subsequently upheld the holding in Filartiga.162 While the U.S. Supreme Court has not addressed this issue, foreign victims of human rights abuses can sue their perpetrators in United States district courts in the Second and Ninth Circuits so long as the alleged conduct constitutes a tort that violates the law or principles that command “the general assent of civilized nations.”163

Two judges on a divided D.C. Circuit panel limited Filartiga’s conferral of jurisdiction based on either the political question doctrine or the fact that section 1350 is merely a jurisdictional grant that does not give rise to a private cause of action.164 However, a subsequent district court ruling has limited this holding based on the lack of consensus and the evolution of international law since 1984.165

158. Filartiga 630 F.2d at 878 (2d Cir. 1980).
159. Id. at 876.
160. Id. at 878, 887-90 (finding jurisdiction proper under the ATCA where a citizen of the Republic of Paraguay charged a government official with the torture and slaying of the plaintiff’s son in Paraguay).
161. Id. at 887.
162. See In re Estate of Ferdinand Marcos v. Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994). The court held that a suit by aliens against the former President of the Philippines for torture, summary execution, and disappearance is within the jurisdictional grant of the ATCA. Id. Since this decision was issued, there have been numerous proceedings to determine damages and then to enforce judgment, which is currently pending. A jury awarded plaintiff class $1.2 billion in exemplary damages in February 1994, and $766 million in compensatory damages in January 1995. See Hilao v. Estate of Marcos, 103 F.3d 767, 772 (9th Cir. 1996). The judgment includes an injunction restraining the estate from “transferring, or otherwise conveying any funds or assets held on behalf of or for the benefit of the Estate pending satisfaction of the judgment.” Credit Suisse v. U.S. Dist. Court for the Cent. Dist. of Cal., 130 F.3d 1342, 1343 (9th Cir. 1997).
163. Filartiga, 630 F.2d at 881; Marcos, 25 F.3d at 1475-76 (“We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350, creates a cause of action for violations of specific universal and obligatory international human rights standards which ‘confer[] fundamental rights upon all people vis-à-vis their own governments.’”) (quoting Filartiga, 630 F.2d at 885-87).
164. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823, 811 (D.C. Cir. 1984). In Tel-Oren, plaintiffs, who were American, Belgian, and Israeli citizens, sued Libya under the ATCA and § 1331 for the torture and murder of family members during a terrorist attack on a civilian bus in Israel. The divided court dismissed the suit for lack of subject-matter jurisdiction. Judge Edwards followed the Filartiga interpretation of the ATCA, but found that the court in this case did not have jurisdiction under the ATCA because the Palestine Liberation Organization (“PLO”) terrorists’ acts did not constitute official torture in violation of international law since the PLO is not a recognized state. Id. at 788-796.
165. Doe v. Islamic Salvation Front (FIS), 993 F. Supp. 3, 8 (D.C. Cir. 1998). The court declined to follow Judge Edwards’ finding that the law of nations required state action to impose liability for acts of torture. Id. The court held that it had subject-matter jurisdiction under the ATCA over an
In the case at issue, presuming that the comfort women system violated existing principles of the law of nations, the court will probably grant jurisdiction for the plaintiffs' action against Japan under the ATCA. If the court does so, however, Japan may attempt to rely on the doctrine of sovereign immunity to prevent the court from deciding the case. In *Schooner Exchange v. McFaddon*, the U.S. Supreme Court, based on customary international practice, granted foreign sovereigns (including their agents and instrumentalities) common law immunity from suits in United States courts. While the sovereign immunity of a state could once be denied only on the basis of express waiver or consent, under current law it is evaluated under a restrictive theory. Such a theory shields the actions of sovereign states related to their sovereign or public acts, but does not shield them expressly with respect to purely commercial or private acts. The "Tate Letter," from Acting Legal Adviser of the State Department to Acting Attorney General in 1952, announced the restrictive theory as United States policy.

The 1976 FSIA codified the restrictive theory, thereby delegating all determinations of foreign immunity from the executive branch to the judiciary for civil actions against foreign states or their agents and instrumentalities. The FSIA also provides a "comprehensive statutory sys-
tem" relating to issues of foreign state immunity and procedure. If one of the enumerated exceptions applies, however, the district courts are simultaneously conferred with both subject matter and personal jurisdiction over any nonjury civil action against a foreign state.

In Argentine Republic v. Amerada Hess Shipping Corp., the U.S. Supreme Court held "that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state" in United States courts. Consequently, a federal court lacks subject-matter jurisdiction over a suit against a foreign sovereign-state unless one of the specifically enumerated exceptions to foreign sovereign immunity (contained in 28 U.S.C. §§ 1602 and 1605) applies to the claim.

The comfort women plaintiffs assert that the government of Japan is not protected by foreign sovereign immunity based on two of the enumerated exceptions: 1) the §1605(a)(1) waiver exception and 2) the §1605(a)(2) commercial activity exception. The complaint specifically alleges:

The actions of the Japanese government in establishing and maintaining the system of sexual slavery from 1932 to 1945 violated jus cogens norms of international law, and are not subject to the defense of sovereign immunity . . . In addition, the planning, establishment, and operation of a network of "comfort houses" is a commercial activity that is not subject to sovereign immunity.

Under §1605(a)(1), a foreign sovereign is denied immunity from the jurisdiction of United States courts "in any case in which the foreign state has waived its immunity either explicitly or by implication." The two main arguments advanced by a minority view in support of the implied waiver are: 1) the eminent status of jus cogens trumps sovereign immunity doctrine which is only a matter of "grace and comity" or customary international law, and 2) a violation of jus cogens automatically limits

175. See Born, supra note 18, at 211.
178. 488 U.S. 428, 439 (1989). In Amerada Hess, the Supreme Court determined that plaintiff Librarian corporations were barred under the Foreign Sovereign Immunities Act from suing Argentina in United States courts under the alien tort statute for destruction of an oil tanker on the high seas in violation of international law. Id. at 431.
179. Id. at 443; Siderman de Blake, 965 F.2d at 706, 718-19 (holding that a violation of jus cogens norms does not confer jurisdiction under the FSIA in the absence of meeting any enumerated exceptions of the FSIA).
180. See Complaint, supra note 12, at ¶ 5.
181. Id. at ¶ 23.
the sovereign immunity of states to the extent that they adhere to the rules of the international community.\textsuperscript{183}

While these arguments have been accepted by some courts,\textsuperscript{184} they have been expressly rejected by the courts of appeal that have considered the issue thus far.\textsuperscript{185} The D.C. Circuit found the \textit{jus cogens} theory of implied waiver to be incompatible with the intentionality requirement implicit in \textsection{1605(a)(1)} based on the language and legislative history of the statute.\textsuperscript{186} The Ninth Circuit concluded that an express Congressional act is required to overrule previous case law to except from sovereign immunity violations of \textit{jus cogens} norms committed outside the United States by a sovereign.\textsuperscript{187} Consequently, unless the comfort women plaintiffs are able to persuade the district court to overturn prior authority or convince Congress to enact legislative amendments to the FSIA, it is unlikely they will be able to prevail on this \textit{jus cogens} theory of implied waiver.\textsuperscript{188}

The other available exception to sovereign immunity is the commercial activity exception under \textsection{1605(a)(2)}. That section provides federal jurisdiction over foreign states in cases where:

\begin{itemize}
  \item [1] the action is based upon a commercial activity carried on in the United States by the foreign state; or
  \item [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
  \item [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.\textsuperscript{189}
\end{itemize}

The alleged conduct by the state must be commercial in nature and must have a jurisdictional nexus with the United States. Section 1603(d) defines "commercial activity" as:

\begin{quote}

184. \textit{See}, e.g., Amerada Hess v. Argentine Republic, 830 F.2d 421, 426 (2d Cir. 1987) (finding that Congress' enactment of the FSIA was not meant to eliminate "existing remedies in United States courts for violations of international law" by foreign states under the ATCA), rev'd by 488 U.S. 428 (1989) (barring plaintiffs from suing Argentina in U.S. courts under the alien tort statute for destruction of an oil tanker on the high seas in violation of international law under the Foreign Sovereign Immunities Act); Von Dardel v. USSR, 623 F. Supp. 246, 253-54 (D.D.C. 1985), vacated and dismissed by 736 F. Supp. 1 (D.D.C. 1990) (holding that in enacting the FSIA, Congress did not intend to extend immunity to clear violations of universally recognized principles of international law).


186. \textit{Princz}, 26 F.3d at 1174 (citing cases where courts tend to not find waiver without strong evidence of intent and noting that all of the examples of implied waiver in the legislative history "arise either from the foreign states' agreement ... or from its filing a responsive pleading without raising the defense of immunity").

187. \textit{Siderman de Blake}, 965 F.2d at 719.

188. However, it may be possible for the plaintiffs to defeat Japan's claim of sovereign immunity by relying on its acquiescence to the terms of "unconditional surrender" after the war. \textit{See} Potsdam Declaration, July 26, 1945, \textit{Pub. Papers} 71, 73 (1946) ("[F]or the first time justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."

\end{quote}
Either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.\textsuperscript{190}

If a private actor could engage in the activity, it is commercial in nature.\textsuperscript{191}

Whether or not the comfort women system constitutes "commercial activity" under the FSIA is complicated because the system has both private and public characteristics. The comfort women system can be characterized as "commercial" because it entailed the selling of a service in exchange for money in transactions resulting in profit. Although the motivations behind the comfort system may have been more political (national defense) than economic,\textsuperscript{192} this is irrelevant to the legal inquiry under §1603(d). Thus, the nature of the activity may be characterized as similar to a privately managed and owned brothel. As discussed above in Section II, comfort stations charged the customers (soldiers) money, the government taxed proceeds, commercial middlemen often recruited women to staff the brothels, and the army issued business permits to entrepreneurs who owned the comfort stations.\textsuperscript{193} Conversely, however, the Japanese government could characterize the comfort women system as an integral part of centralized military strategy. Moreover, the Japanese government could also maintain that the comfort women system involved the taking of prisoners, which private actors cannot do.\textsuperscript{194}

In determining whether the comfort women system satisfies the two-part commercial activity test, it is illustrative to examine the arguments made in another case brought by a victim of WWII war crimes against a sovereign state under the ATCA in the D.C. Circuit. In Princz v. Germany, a Holocaust victim sued the German government for the injuries he suffered as a slave laborer in the Nazi concentration camps.\textsuperscript{195}

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\textsuperscript{190} 28 U.S.C. § 1603(d) (2000).
\textsuperscript{192} See supra notes 20-21, 24 and accompanying text citing prevention of rape of local women, preservation of troops' strength by minimizing venereal disease, and prevention of espionage as possible political noneconomic justifications for the comfort station system.
\textsuperscript{193} See Chung, supra note 2, at 210. Such characteristics make the comfort women system very similar in nature to the licensed prostitution system in Japan which was heavily regulated by the government but run by private brothel-keepers until it was abolished in 1957. See Hicks, supra note 2, at 27-28; Watanabe, supra note 20, at 7.
\textsuperscript{194} Note however that this argument would undercut any claim that Japan did not commit war crimes or violate human rights norms. See Section III infra.
\textsuperscript{195} Princz v. F.R.G., 26 F.3d 1166, 1177 (D.C. Cir. 1995), appeal dismissed sub nom. per stipulation, Princz v. BASF Group, No. 92-0644, 1995 U.S. Dist. LEXIS 22104 (D.D.C. Sept. 18, 1995). Plaintiff's subsequent motion to amend the complaint to include companies that were allegedly successors to those involved in the slave labor during the war and his motion to dismiss Germany as a party to the suit "until such time as the United States Supreme Court or the United States Congress takes such action as is necessary to confer jurisdiction on this Court to hear Mr. Princz's complaint against the Federal Republic of Germany" were granted by the court. Princz
\end{flushright}
plaintiff argued that the government's leasing of his labor for profit to private companies constituted commercial activity and that such activity overseas had a "direct effect" in the United States because his labor assisted the Nazi war effort against the United States during the war. Alternatively, he argued relief was proper because his continued suffering in the United States after the war was a direct effect of his forced labor experiences. The German government countered that the activity was not commercial because "private parties do not take or hold prisoners" and the Nazis' enslavement had "no impact" in the United States.

While the D.C. Circuit found the issue regarding the commercial nature of the underlying conduct to be a close one, it did not consider that issue because it determined the activity in question did not have a "direct effect in the United States." Under Weltover v. Argentina, "jurisdiction may not be predicated on purely trivial effects in the United States" and "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity." The Princz court found too many intervening independent events attenuated the effect of the concentration camps on the war effort in the United States. The court reasoned that the immediate consequences of the plaintiff's enslavement were felt in the countries of Poland and Germany, where he was enslaved, rather than in the United States. In addition, the plaintiff did not return to the United States until after he had recuperated in a military hospital and had spent time looking for relatives and attending to his family's property in Czechoslovakia. Moreover, the court stated that the lingering effects of a personal injury by themselves can never be sufficient to satisfy the direct effect requirement of the FSIA. Allowing jurisdiction premised on such injuries would undermine the Congressional purpose behind the commercial activity exception of the Act. Since the alleged activity therefore did not have a "direct effect" in the United States, it did not satisfy the jurisdictional nexus test, and the court found leasing of the


196. Princz, 26 F.3d at 1172.
197. Id.
198. Id.
199. Id. at 1172-73.
200. 504 U.S. at 618 (quoting Weltover v. Argentina, 941 F.2d 145, 152 (2d Cir. 1991) (emphasis in original)).
201. Princz, 26 F.3d at 1173.
202. Id. at 1172.
203. Id. at 1172-73. In support of this analysis, the court cites Martin v. Republic of South Africa, 836 F.2d 91, 95 (2d Cir. 1987), in which the Second Circuit held there was no direct effect where the South African government allegedly caused permanent disability to an American citizen because he was prevented from returning to the United States for more than a year.
204. Princz, 26 F.3d at 1173.
205. Id.
plaintiff's labor by the Nazi government to fall outside the commercial activity exception under the FSIA. 206

Under Princz, the comfort women plaintiffs have a strong argument that the planning, establishment, and the operation of a network of comfort stations is a commercial activity. The enforced prostitution more closely resembles commercial activity because troops purchased tickets with cash which were exchanged for services 207 and because the government was essentially acting as a pimp in procuring the women and running the stations. 208 It is also unlikely that the Japanese government would raise the taking of prisoners argument asserted by the German government since the Japanese government has denied characterizations of the comfort women system as "slavery." 209

However, since Princz governs this case, the comfort women plaintiffs will probably not be able to satisfy the "direct effect in the United States" prong of the commercial activity exception. Even if a class member lived in the United States immediately after the war, 210 such lingering suffering will probably not suffice under Princz. The contribution of the comfort women to the Japanese war effort has no greater impact on the United States than the slave labor in the Nazi concentration camps. 211

Although the "direct effect" argument is likely to fail, it may be possible to successfully make an argument under §1605(a)(2)'s exception based on activities occurring within the United States. 212 When the United States and Allied troops occupied Japan and its colonies, many of the comfort women were forced to continue servicing the occupation troops. 213 The comfort women plaintiffs may argue that the comfort system activity during the occupation occurred "in the United States" since that part of Japan was occupied by the United States government when the troops were serviced. 214 They may also argue that such activity was

206. The court also rejected the argument that Germany used United States banking systems to administer reparation payments to Holocaust victims since it was not an "immediate consequence" of the enslavement of Mr. Princz and others. Id. at 1172.
208. Go, supra note 23 (discussing government's active role in procuring women for comfort stations).
209. See McDougall REPORT I, supra note 3, app. at ¶ 4.
211. Whereas Mr. Princz argued that his work in the factories went toward the war effort against the American and Allied powers, the comfort women must assert that their sexual servicing of the soldiers caused the soldiers to fight better (e.g., renewed their fighting spirit) against the Allied armies, including the Americans in the Pacific theatre. Such an argument would prove their activities had an effect on the United States. See Hicks, supra note 2, at 32-35.
212. 28 U.S.C. § 1605(a)(2)
213. Hicks, supra note 2, at 159-60.
214. See Siderman de Blake, 965 F.2d at 709-10 (holding that evidence that Argentina solicits guests for the Hotel Gran Corona, and presumably accepts payments for such reservations in the United
"in connection with commercial activity of the foreign state elsewhere," since most of the customers of the comfort stations were United States (or other Allied) soldiers after Japan's surrender. However, this argument is tenuous since it is unclear that a country that is occupied by the United States (and allied troops) counts as "in the United States" under the FSIA, especially since "occurring in the United States" has not been found to extend to activities occurring in United States embassies abroad.

Even if the plaintiffs can convince the court to pierce the sovereign veil under either the implied waiver or commercial activity exceptions to the FSIA, they face the prospect that the FSIA may not be applicable to the case at all, and Japan would be held absolutely immune for its actions occurring in the 1930s-40s. The Princz court addressed but never answered this question concerning foreign sovereign immunity. Specifically, the court questioned whether the FSIA applied retroactively to events before its enactment in 1976. Since neither the U.S. Supreme Court nor the D.C. Circuit had considered the retroactive application of the FSIA, the court first examined a line of federal case law that had found the FSIA inapplicable to acts before the Tate letter of 1952. The court determined that if the FSIA did not apply retroactively, the notion of foreign sovereign immunity at the time of the acts would apply. This would mean that the view of absolute sovereign immunity before 1952 would apply to the comfort station system and the government of Japan would be held absolutely immune from jurisdiction in United States courts.

V. CONCLUSION

Although hailed as providing a "legal forum for the world," especially against human rights abuses, the ATCA falls short when such abuses are committed by a foreign government. Even though the United Nations Special Rapporteurs have encouraged the comfort women to vigorously pursue lawsuits in the United States under the ATCA, the comfort women plaintiffs face the apparently insurmountable obstacle of Japan's

States (resulting in numerous Americans staying at the Hotel), satisfies the test of activities occurring in the United States directly relating to "commercial activity of the foreign state elsewhere").

215. Id.
217. See Princz, 26 F.3d at 1169.
218. Princz, 26 F.3d at 1169-1171.
219. Id. at 1170. These courts seemed to base the 1952 cut-off on the notion of unfairly prejudicing the antecedent rights of foreign sovereigns. See id.
220. Id. at 1169.
221. See Amon, supra note 12, at A1.
foreign sovereign immunity. Given the outcome in *Princz*, United States courts will not likely grant jurisdiction to adjudicate such claims.

Even if the plaintiffs obtain jurisdiction under the FSIA, they must also face an uncertain legal basis for Japan’s liability under existing international law, which was in an undeveloped state at the time of WW II. In addition, the plaintiffs would have to certify the class despite differences in treatment at each comfort station, different locations of forced service, and different native countries. Consequently, the comfort women face a steep uphill judicial battle in United States federal court.

However, if jurisdiction is granted, such a high-profile lawsuit may place enough political pressure on the Japanese government to force it to compensate the surviving former comfort women. For example, after the resolution of the *Princz* case, despite the plaintiff’s failure, the German government finally agreed to compensate him and other American citizens who were enslaved during the Holocaust through a confidential agreement with the United States.\(^2\) The German government paid $2.1 million to Mr. Princz and ten other Holocaust survivors in a settlement.\(^2\) This was due to the threat of prolonged litigation, Congressional action which would have enabled the litigation to proceed, and negative publicity arising from the litigation.\(^2\) Finally, plaintiffs have obtained favorable settlements against the Swiss banks and German corporations relating to their confiscated assets and slave labor during wartime.\(^2\) Either settlement or legislative action similar to that undertaken by the German government would be a victory for the comfort women.

The comfort women may be the most encouraged by the recent Kajima Corporation agreement to establish a $4.6 million fund for victims of the notorious Camp Hanaoka, a mining town which conducted forced labor operations resulting in the death of 418 Chinese men during World War II.\(^2\) This landmark agreement marks the first time that a Japanese corporation has broken ranks and agreed to accept responsibility for injuries it caused to forced laborers employed during the war. Hopefully, the remaining comfort women will also be compensated for injuries inflicted by the Japanese government as a result of their lawsuit, regardless of its success in the courts.

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222. See McDougall Report II, supra note 4, at ¶ 78.
224. See id.
225. McDougall Report II, supra note 4, at ¶ 78.